STUDY
for the JURI committee

The Commission Insolvency Proposal and its Impact on the Protection of Creditors

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STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee compares the preventive insolvency restructuring regimes of various Member States and sets forth the scope of the Commission proposal for a draft Directive of 22 November 2016, the transposition of such proposal and policy recommendations in connection therewith.

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LIST OF ABBREVIATIONS

CVA	Company Voluntary Arrangements
CDS	Credit Default Swap
COMI	Center Of Main Interest
EIR	European Insolvency Regulation
InsO	(German) Insolvency Code
LBO	Leveraged Buyout
RL	(Polish) Restructuring Laws
SA	Sauvegarde Accélérée (accelerated safeguard procedure) – SA proceedings
SFA	Sauvegarde Financière Accélérée (accelerated financial safeguard procedure) –SFA proceedings
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

On 22 November 2016, the European Commission proposed 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 (the "**Proposal**")[1].

The purpose of this study is to:

- provide a brief overview of the situation in Europe with a focus on preventive restructuring frameworks in France, Germany, UK, Spain, Poland and Italy;
- clarify the scope of the preventive restructuring frameworks set forth in the Proposal;
- clarify the application of the recast Regulation (EU) no. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (the "EIR")[2]
- highlight various issues of concerned creditors under the Proposal and the necessary amendments of the restructuring frameworks in some Member States;
- put forward policy recommendations to the legislator with respect to the implementation of the Proposal by Member States and to improve further legal certainty and fairness towards creditors.

Major findings

An overview of the preventive insolvency restructuring proceedings of the various Member States show that there are:

Some Member States having extensive experience with specific preventive restructuring proceedings falling within the scope the Proposal; this is the case of France, UK, Italy and Spain; Poland has just enacted its new restructuring law and the Netherlands are contemplating introducing new preventive restructuring proceedings this year;

Some Member States have not yet enacted specific preventive restructuring proceedings but promote debtor in possession debt restructuring within regular insolvency proceedings the opening of which can be requested by the debtor in case of imminent insolvency: Germany, Finland, Sweden, France;

The solvent UK scheme of arrangement has been successfully used for complex financial restructuring cases including groups of companies. It provides for an interesting restructuring model that is however limited to a simple cram-down mechanism within each class of creditors (no cross-class cram-down available); there is a double majority in number representing three quarter in value of the debt; the court involvement is rather limited to the supervision of the class formation and the fairness of the restructuring plan (without necessarily applying the concept of the best interest test); there is no possibility to

1 COM (2016) 723 final.

2 OJ L 141/19, 5.6.2015.

request an individual stay of enforcement actions (with respect to a single dissenting creditor or a group of dissenting creditors); there are no specific provision available to favour new or interim financing; the law does not provide for the appointment of a practitioner in the field of restructuring.

French law provides for an interesting solvent two-stage model which is conceptually closer to the Proposal and provides for more extensive restructuring tools than the scheme of arrangement. In practice it has proven to be very efficient (there is 70 percent success rate). During the first phase, confidential conciliation procedure is available to favour a consensual debt restructuring agreement the involvement of a practitioner in the field of restructuring is mandatory and has proven its great efficiency ; the law provides for deterrent mechanisms to protect the debtor against aggressive dissenting minority creditors (possibility to request an individual stay in the form of grace periods, stay of opening of insolvency proceedings and the neutralization of ipso facto clauses). In addition to this, French law also provides for safe harbour provisions to favour new financing, the court involvement is very limited to check the fairness of the restructuring agreement. The second phase consists in the conversion of conciliation into a short and simplified insolvency procedure (accelerated financial safeguard), thus, enabling a cram down of one third of the value of financial creditors (including bond holders and also eventually of main trade creditors through the opening of accelerated safeguard procedure). The opening of the second stage triggers an automatic stay of all concerned creditors and a more thorough Court investment: at the beginning the Court must verify that there is a likelihood that the restructuring plan would be adopted by the required majority and like in the scheme of arrangement the plan must be fair. The French model can be improved through the introduction of class of creditors eventually combined with a cross class cram down mechanism (as provided for in the Proposal).

Major policy recommendations

This study recommends the following ideas of improvement for the Proposal:

The first issue that needs to be addressed is the clarification of the Scope of the Proposal. Each member state should make available at least one preventive restructuration procedure or combination of several procedures, as provided for in the Proposal but the Member States should not be obliged to modify the existing insolvency laws that can be opened in case of imminent insolvency like safeguard in French law provided that a preventive restructuring framework is available.

The Proposal should be more flexible for the transposition of the Member States, at least on one point; the appointment of a practitioner is the field of restructuring procedure could be mandatory (like the conciliator in French law).

The importance of the automatic stay should be lowered down because the duration of 12 months seems much too long. The solvent scheme of arrangement and the French conciliation proceedings have proven that a successful restructuring framework does not necessarily require any general stay. However, an individual stay could be helpful to neutralize, for the duration of the procedure, dissenting minority creditors like in French conciliation. An automatic should only be granted if the Court is satisfied that there is a reasonable chance for the debt restructuring to be successful.

The reference to the liquidation value to determine the protection of minority creditors in a cram down situation is not used in the scheme of arrangement nor in French accelerated safeguard procedure but only in regular German insolvency proceedings. A more flexible fairness test would appear sufficient to guarantee the protection of minority creditors; a

more complex going concern evaluation would be reserved to more complex cases involving cross class cram down of equity holders.

A new section should be added to the Proposal in order to deal with preventive debt restructuring of group of companies

1. OVERVIEW

The Proposal is based upon (i) existing legislation of preventive restructuring frameworks in some Member States and (ii) some provisions of US Chapter 11 proceedings. Set forth below are the existing preventive restructuring regimes under French, German, English[3], Spanish, Polish and Italian law.[4]

1.1. French Law

1.1.1. Introduction

France's experience in preventive restructuring frameworks dates back to 1984, when the *règlement amiable*, the predecessor of conciliation, was introduced into French law. Since then, jurisprudence and several legislative reforms have shaped the legal landscape.

French law provides for several preventive restructuring proceedings in favour of a debtor that is not insolvent. These are *mandat ad hoc*, conciliation and safeguard proceedings; but only conciliation, in combination with accelerated (financial) safeguard proceedings as a possible closing variant in a two-stage scenario, falls within the scope of the Proposal[5]. As more fully explained in Chapter III below, *mandat ad hoc* and safeguard proceedings (*procédure de sauvegarde*) do not fall within the scope of the Proposal.

Conciliation proceedings are intended to facilitate negotiations between the debtor and its main (financial) creditors, with a view to reaching a consensual restructuring agreement, thus avoiding the opening of ordinary collective insolvency proceedings. Conciliation has proven to be very attractive and efficient. In case of financial difficulties of mid-sized enterprises, debtors now, as a matter of course, request the opening of conciliation proceedings. In 2015, 1.000 such proceedings were opened in France, constituting an increase of 72% compared with 2011. Even more interestingly, the success rate of these proceedings was approximately 70%.[6]

During conciliation proceedings, only a **stay of individual enforcement action** can be ordered by a court in the form of a so-called "grace period". No general moratorium or cram-down mechanism against minority creditors is available. This can be achieved through the conversion of conciliation into accelerated (financial) safeguard proceedings. In this respect, the restructuring of Thomson (Technicolor), a publicly listed company in Paris and New York, is the landmark case.

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[3] English law has been retained in this study since the Proposal could enter into force prior to Brexit. In addition, the scheme of arrangement remains an interesting example to be studied for comparison purposes that will be used as a model by Dutch legislator.

[4] In Finland, the restructuring of the Enterprise Act of 2007 does not provide for any preventive restructuring proceedings. Insolvency proceedings can be opened at the request of a debtor in case of imminent insolvency. The Dutch legislator is contemplating introducing this year pre-insolvency preventive restructuring proceedings similar to scheme of arrangement and Chapter 11 proceedings. The situation is comparable in Sweden where insolvency proceedings can be opened in case of imminent insolvency. The criterion of "likelihood of insolvency" constitutes a lower threshold than its current Swedish equivalent.

[5] R. Dammann/M. Boché-Robinet, Transposition du projet de directive du 22 novembre 2016 sur l'harmonisation des procédures de restructuration préventive en Europe : une chance à saisir pour la France, D. 2017 (in preparation).

[6] See the report dated 1 July 2016 of the *Haut Comité Juridique de la Place Financière de Paris* (*HCJP*) on insolvency proceedings, p. 7, www.hcjp.fr.

In 2009, Thomson (Technocolor) had negotiated with its main financial creditors a debt restructuring plan, including a debt equity swap, to reduce its €2.7 billion of debt, but found it impossible to reach a consensual agreement with all financial creditors. A group of deeply subordinated minority bondholders, who were clearly out of the money, opposed the plan and tried to force Thomson to buy back their bonds at a very high price that was completely unjustified from an economic point of view.[7] To overcome their resistance and to cram-down the owners of credit default swap instruments ("**CDS**"), Thomson requested the commercial court of Nanterre to open "pre-packaged" safeguard proceedings. The opening of such an innovative "fast track" safeguard procedure was viewed by the stock market as a positive signal to resolve the financial difficulties of the group, and the stock price rose. It took 10 weeks to successfully implement the pre-packaged safeguard plan.[8]

French legislators drew the lessons from the Thomson case and introduced into French law, in October 2010, accelerated financial safeguard proceedings (*sauvegarde financière accélérée* - SFA proceedings) as a cram-down closing mechanism for a conciliation procedure to implement a "pre-packaged" safeguard plan[9]. Such "fast track" safeguard proceedings allow a debtor to rapidly implement a restructuring plan without affecting the position of its non-financial creditors. Only financial creditors are involved in this proceeding and impacted by the restructuring plan.

By the ordinance of 12 March 2014, the French legislator introduced the accelerated safeguard proceeding (*sauvegarde accélérée* - SA proceedings) as a new closing variant for conciliation, which allows to cram-down all creditors, except employees, and not only financial creditors.[10]

The SFA/SA proceedings have a "deterrent effect" on minority creditors. Since they know that their hold-up value is rather limited thanks to the introduction of this "fast track" closing mechanism, in practice they prefer to negotiate some limited advantages within the framework of a consensual conciliation agreement, rather than being crammed down in SFA/SA proceedings. Consequently, the legal landscape of preventive restructuring proceedings is still dominated by conciliation proceedings.

1.1.2. Conciliation proceedings

a. Opening of proceedings

Conciliation proceedings are available upon the sole initiative of debtors, which (i) are not cash flow insolvent, or have been cash flow insolvent for less than 45 days and (ii) face actual or foreseeable legal, economic or financial difficulties.

The opening of conciliation proceedings commences with the mandatory appointment of a conciliator by the president of the competent court. He is generally chosen from the

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[7] See. R. Dammann, Umsetzung des EU-Richtlinienvorschlags vom 22.11.2016

[8] See R. Dammann/G. Podeur, Sauvegarde financière expresse : vers une consécration du « prépack à la française », D. 2010,. A. Lienhard after Art. L. 628-1. See also R. Dammann/G. Podeur, Pre-arranged sauvegarde for Thomson, Global Turnaround April 2010 ; R. Dammann et G. Podeur, Affaire Thomson-Technicolor : le clap de fin, BJE März/April 2012, Eclairage, p. 78.

[9] The law no. 2010-1249 dated 22 October 2010. See R. Dammann/S. Schneider, La sauvegarde financière accélérée – analyse et perspectives d'avenir, D. 2011, 1429 ; M. Menjucq, Adoption de la « sauvegarde financière accélérée » : consécration du « prepackaged plan » en droit français, RPC nov./déc. 2010.6 ; G. Couturier, Les créanciers et la sauvegarde financière de l'entreprise en difficulté, BJS 2010, 683 ; F.-X. Lucas, Le plan de sauvegarde apprêté ou le prepacked plan à la française, Cah. dr. entr. 2009/5, 35.

[10] Ord. no 2014-326, ratified by the law no. 2016-1547 of 18 Nov. 2016.

register of insolvency practitioners (*administrateurs judiciaires/mandataires judiciaires*), but the debtor may suggest the name of any person it would like to see appointed; this suggestion is usually followed by the president of the court.

When the debtor has already benefited from the opening of conciliation proceedings, it is not able to file for another consecutive conciliation proceeding for at least three months following termination of the earlier proceeding.

b. Debtor in possession

Conciliation proceedings are strictly confidential. The existence of the proceedings is revealed by the conciliator to the main (financial) creditors who are invited to join in the negotiations. The conciliator does not interfere in the management of the company. The directors remain in place and in complete control of the assets and the day-to-day operations of the business of the debtor. The conciliator is authorised by the local court and his or her role is to help the debtor in its negotiations; he or she will have significant experience of companies facing financial difficulties. In particular, the conciliator is able to explain to the creditors that they have an interest in finding a consensual solution with the debtor by describing the potential consequences of insolvency proceedings if an agreement is not found. The conciliator informs the president of the court of the evolution of the situation on a regular and confidential basis.

c. Duration of the procedure

The conciliator can only be appointed for a maximum period of four months; this may be extended, but subject to the total duration of the conciliation proceedings not exceeding five months.

d. Stay of individual enforcement actions

The opening of conciliation proceedings does not trigger any (general) stay of payment, nor does it impose any restriction on the rights of creditors to take legal enforcement actions against the debtor to recover their claims.

Yet, in practice, creditors participating in the negotiations usually refrain from doing so for the duration of the conciliation, especially as, pursuant to article 1343-5 of the French civil code, the debtor may ask the court to defer or otherwise reschedule the payment obligations over a maximum period of up to two years ("grace period"). In this respect, pursuant to article L. 611-7 of the French commercial code, the president of the court in which conciliation proceedings opened has jurisdiction to order such a grace period if, during the conciliation proceeding, a creditor initiates proceedings against the debtor or gives the debtor formal notice to pay. The president of the court will take his or her decision upon the recommendation of the conciliator.

As a creditor cannot contract out of grace periods, debtors can in practice use the right to request grace periods as a tool to encourage creditors to find an agreement on debt restructurings within conciliation proceedings. Since 1 July 2014, such grace period can be imposed by the president of the court even after the conciliation proceedings (during the time the conciliation agreement is executed) to creditors who refused to participate in such agreement.

French law does not provide for the possibility for the debtor to request a general stay covering all creditors. Such a possibility existed until the reform of 2005, but was not used in practice for the following reasons: conciliation proceedings are confidential, and such confidentiality would necessarily cease to exist in case the court would order a general

stay. In such a case, the debtor must publicly acknowledge his or her financial difficulties without being able to present to its trade creditors (which are not concerned with the proceedings) a viable restructuring plan, thus worsening its financial difficulties. In other words, requesting a general stay at an early stage of the preventive restructuring proceedings would be counterproductive, destroying the confidence of the stakeholders in the ability of the debtor to turn around its business.

A general stay of individual enforcement actions is provided for in case of the conversion of conciliation proceedings into SFA/SA proceedings upon the sole request of the debtor to cram-down minority creditors (as more fully explained below).

e. Consequences of the opening of conciliation proceedings

The obligation for the debtor to file for insolvency is suspended for the period of the conciliation proceedings.

During the duration of the conciliation proceedings, creditors are prevented from requesting the opening of (involuntary) insolvency proceedings (*redressement judiciaire, liquidation judiciaire*).

In practice, creditors participating in the debt restructuring discussions normally agree on a moratorium or a standstill agreement under the aegis of the conciliator. During the conciliation period, the debtor is supposed to pay the debts becoming due and payable arising out of the ordinary course of business towards its unaffected creditors (which do not participate in the negotiations or are not subject to a grace period).

The ordinance dated 12 March 2014 provides for the invalidation of contractual provisions triggering consequences that are detrimental to the debtor on the sole ground that conciliation proceedings have been opened; for instance, this will apply to acceleration clauses which are based on the opening of such proceedings.

These protective measures, together with the possibility to request a grace period, has proven efficient to enable the debtor, with the assistance of the conciliator, to negotiate a consensual debt restructuring agreement with its main (financial) creditors.

f. Restructuring plan

If an agreement is reached amongst the debtor and its main (financial) creditors participating in the negotiations, the conciliation agreement may either be acknowledged by an order of the president of the court ("*constat*") upon the request of any party, or approved by a formal judgment of the court ("*homologation*").

In case of approval (*homologation*) of the conciliation agreement, the Tribunal must find that (i) the debtor is not cash flow insolvent or the conciliation agreement puts an end to the debtors' cash flow insolvency, (ii) the agreement effectively ensures that the company will survive as a going concern and (iii) does not unduly (indirectly) affect the rights of third parties.

The agreement does not infringe upon the rights of those creditors who are not a party to the conciliation agreement, save for the possibility of the debtor to request a grace period. While the mere acknowledgement of the conciliation agreement keeps the conciliation proceedings confidential, its approval renders the existence of the conciliation proceedings and the conciliation agreement public. However, the content of the agreement remains confidential except for any new guarantees, priority ranking and the amount of any "new money". While such loss of confidentiality may appear a drawback to approval of the agreement, it also implies that the debtor has successfully addressed its difficulties and restructured and is not insolvent (or is no longer insolvent).

In case of a breach of the conciliation agreement, any party to the agreement can petition the court for its termination. The commencement of a subsequent collective proceeding automatically puts an end to the conciliation agreement, in which case the creditors will recover their claims and security interests in full, but keep those amounts previously paid to them.

g. Protection of new financing

Approval of the conciliation agreement provides some comfort to the parties thereto in that, if a collective proceeding is subsequently opened:

(i) creditors lending new money and/or suppliers making trade credit available to the distressed debtor (other than shareholders providing new equity) will benefit from a priority of payment over all pre-petition and post-petition claims (except certain employment claims and post-filing legal costs) (so-called "new money privilege"); and

(ii) in the event of subsequent judicial rehabilitation or liquidation proceedings, the insolvency date cannot be set by the court at a date earlier than that of the formal judgment approving the conciliation agreement (except in the case of fraud). Consequently, no legal act or payment made on or before the decision homologating the conciliation agreement can be challenged and set aside **("safe harbour" principle).**

The priority of payment of creditors who provide new money, goods or services designed to ensure the continuation of the business of the distressed company has been reinforced with the ordinance dated 12 March 2014. Pre-reform, the priority was granted only to creditors that injected cash at the time of the court-confirmed conciliation agreement. The reform extends the priority to any creditor that injects new money during the conciliation proceedings, provided that such proceedings lead to the court-approved conciliation agreement.

The reform also gives additional protection to new money creditors when subsequent insolvency proceedings are opened. In cases where there are subsequent safeguard proceedings or judicial reorganisation proceedings, those newly contracted debts cannot be rescheduled within a court-imposed plan of reorganisation. In addition, since the reform of 18 November 2016, a rescheduling and write-off of their claims can no longer be imposed upon them within a plan of reorganisation which has been approved by a two thirds majority of a creditors committee.

1.1.3. Closing variants of conciliation proceedings: accelerated safeguard proceedings or accelerated financial safeguard proceedings

SFA/SA proceedings are subcategories of ordinary safeguard proceedings. They are not stand-alone proceedings, but can only be opened by the debtor as a "conversion" of pending conciliation proceedings. The maximum duration for a SFA proceeding is one month, renewable once. SA proceedings may last a maximum of three months.

In order to file for a SFA/SA proceedings, a company must (i) have opened a conciliation proceeding, (ii) not be cash flow insolvent or have been insolvent for less than 45 days before their request for conciliation proceedings, and (iii) face financial difficulties which it finds itself unable to overcome, (iv) have its accounts regularly certified by a statutory auditor or certified public accountant, and (v) have either (x) total assets in its balance sheet of at least €25 million, or (y) total assets in its balance sheet of at least €10 million when such company controls another company which has more than 150 employees or has a turnover greater than €20 million or has total assets in its balance sheet of at least €25 million.

In addition, when the debtor files for SFA/SA proceeding, the debtor must (i) have prepared a draft plan in the context of the conciliation proceeding, which aims at protecting its operations in the long term, and (ii) demonstrate to the court that such plan is likely to receive the support of a sufficiently large number of concerned creditors (*i.e.*, financial creditors in SFA proceedings and all creditors, except employees, in SA proceedings).

Features of SFA/SA proceedings are the same as in traditional safeguard proceedings save in certain respects. For instance, the draft restructuring plan proposed in the context of a SFA/SA proceeding may provide for, and sometimes impose, rescheduling debt, debt write-offs or debt-equity swaps under the same conditions as in safeguard proceedings.

For the purpose of SFA/SA proceedings, the conciliator is appointed judicial administrator and the court in which the conciliation proceeding opened has jurisdiction for the SFA/SA proceedings.

Regarding the lodging of claims, the situation depends on whether or not creditors have participated in the conciliation proceedings. Creditors that participated are deemed to have lodged their claims within the SFA/SA proceedings; however, they may update the amount of their claim. Creditors that did not participate shall lodge their claims as they would in safeguard proceedings.

The adoption of the safeguard plan and the cram-down of minority creditors is implemented in accordance with the provisions of ordinary safeguard proceedings. In this respect, French law does not provide for the creation of separate classes of creditors which reflect objective class formation criteria (secured, unsecured and subordinated creditors) but rather distinguishes between three creditors' committees. The first committee will comprise the credit institutions and assimilated institutions and entities that have granted credit or advances to the debtor) as well as their successive assignees. The second committee will comprise the suppliers of goods and services of the debtor that hold a claim representing more than 3% of the total amount of the claims held by all the suppliers. If the debtor had issued bonds and/or notes, a "third committee" will be created for all bondholders and noteholders (*assemblée unique des obligataires*") which shall approve the plan once voted on by the first two committees.

The debtor has great flexibility in drafting its safeguard plan. In particular, the safeguard plan may include rescheduling or write-offs of debt, debt-for-equity swaps, and the partial closure or disposal of the business and operations. Debt held against the members of the committees can be rescheduled over a period longer than ten years, and there is no requirement that the debt be reduced by a certain amount within a certain period. The plan may also treat differently creditors within the same committee if the objective economic situation so requires. The plan submitted to the committees must also take into account inter-creditor subordination agreements entered into prior to the opening of the proceedings; however, it is unclear whether the plan needs to satisfy all the provisions of such inter-creditor agreements.

Once the debtor has drafted the safeguard plan and before it submits it to the court, the plan is proposed to the creditors' committees. Within each committee, approval is achieved by a majority of two thirds in value of the claims held by the creditors present who voted on the plan. Dissenting creditors are bound by the decision of that two thirds majority.

The ordinance dated 12 March 2014 also provides that in the creditors' committees (and also in the bondholders' general assembly if there is one), creditors that are parties to subordination agreements or agreements relating to the exercise of their voting rights, or that benefit from an agreement whereby a third party shall pay all or part of the debt, must provide this information to the administrator. It is then for the administrator to determine their voting rights. In the event of a disagreement as to the voting rights, the administrator

or the relevant creditor may start emergency proceedings to obtain a decision from the president of the court. Once a plan is approved by the committees of creditors, it is submitted to the bondholders' committee for approval. Approval at the bondholders' committee requires the same majority of two thirds in value of the bonds and notes held by the persons present at the vote.

Only financial creditors defined as members of the committee of credit institutions (or similar types of entity) and of the committee of bond and noteholders are involved in SFA proceedings. Unlike safeguard proceedings, no committee of suppliers is created. The other creditors, which are not financial creditors (including public creditors, such as the tax or social security administration and suppliers) are not directly impacted by SFA proceedings. Their debt is not automatically stayed and continues to be due and payable according to their contractual or legal terms.

Within SA proceedings, the committee of principal suppliers is also created. But creditors that do not belong to any committee are consulted individually on the plan.

After approval of the plan by the creditors (within committees and/or individually), the court will sanction the safeguard plan if it finds that the plan sufficiently protects the interests of all creditors (fairness test without any specific criteria). Once the court has sanctioned the plan, all creditors (including dissenting members of a committee) are bound by the plan. If creditors refuse to approve a plan, the court cannot impose on them a reduction of their claims. However, the court can impose on dissenting creditors (even tax authorities) a rescheduling or deferral of payment of their claims for a maximum period of 10 years.

These rules, which are not in line with the proposal, have been criticised in French doctrine.[11] In particular, French law does not provide for any cross-committee cram-down mechanism, thus giving subordinated bond and noteholders a veto power that is not justified from an economic point of view. In addition, there is no efficient instrument available to cram-down equity holders, which (unreasonably) prevents the adoption or implementation of a restructuring plan which would restore the viability of the business.

1.2. English Law

In English law, the preventive restructuring framework is composed of two different proceedings: Company Voluntary Arrangements ("**CVA**") and Scheme of Arrangement.

1.2.1. Company Voluntary Arrangements (CVA)

A CVA might take the form of a preventive debt restructuring plan or may simply be used to facilitate a distribution to creditors. The objective of such arrangements is to bind dissenting creditors to the proposals.

The Insolvency Act 2000 introduced, amongst other things, a new regime for CVAs of small companies which are eligible for a moratorium period of up to three months when a CVA is proposed by its directors. A small company is one which currently satisfies at least two of the following three requirements: turnover of not more than £6.5 million; assets of not more than £3.26 million; and less than 50 employees. During the moratorium, amongst

[11] See R. Dammann/G. Podeur, Le rééquilibrage des pouvoirs du profit des créanciers résultant de l'ordonnance du 12 March 2014, D. 2014, p. 752 ; R. Dammann/F.-X. Lucas, Le nouveau dispositif de dilution ou d'éviction de l'associé qui ne finance pas le plan de redressement de la société, BJS Oct. 2015, p. 521; R. Dammann/F.-X. Lucas, Faut-il déjà réformer la réforme du 12 mars 2014 ? BJE May 2014 p. 143.

other things, security cannot be enforced, and proceedings cannot be commenced or continued against the company or its property, except with the consent of the court. Again, the effect of this moratorium is to allow a company time to formulate a proposal so that it can come to an arrangement with its creditors.

The proposal cannot affect the rights of secured creditors to enforce their security without the concurrence of the creditors concerned, which effectively gives the secured creditors a veto on an arrangement if it affects their rights. A meeting may not approve a proposal under which a preferential debt of the company is to be paid otherwise than in priority to non-preferential debts, unless the preferential creditor consents to such a change in priority. In order for the proposal to be approved, more than one half (in value) of the shareholders and more than three quarters in value of the creditors must vote in favour of the CVA. (It should be noted, however, that if the decisions of the creditors and the shareholders differ, the decision of the creditors will prevail subject to the right of a member to apply to the court.)

1.2.2. Scheme of Arrangements

Scheme of Arrangements is not an insolvency procedure but a mechanism contained in Part 26, Section 895-901, of the Companies Act 2006, which allows the court to sanction a "compromise or arrangement" that has been agreed between the relevant class or classes of creditors or members and the company. Thus, a scheme of arrangement is basically a cram-down mechanism within each class of creditors, with rather limited court involvement. It does not provide for a cross-class cram-down or offer the possibility to a debtor of requesting a stay of individual enforcement actions, or a general moratorium. The scheme does not favour any new financing or interim financing through safe harbour provisions. Finally, the scheme does not provide for the appointment of an insolvency practitioner in the field of restructuring (conciliator, mediator, and supervisor.)

It is necessary to produce scheme documentation which includes the scheme's rules and a short explanation setting out in simple terms to all creditors why the scheme is required and detailing its commercial effects. An application is made to a court for permission to call meetings of creditors. The scheme documentation is then sent to creditors who are called to vote on the scheme at a specially convened meeting.

A scheme of arrangement binds members or creditors within a class, including unknown creditors who fall within a class of creditors. The power of the majority to bind a minority in the class operates regardless of any contractual restrictions (*e.g.* requirements for amendments and variations set out in the loan document which governed the debt being compromised). For the scheme to be approved, there needs to be a majority in number, representing three quarters in value of the debt, in each class of those voting for the scheme.

A scheme of arrangement requires the sanction of the court to summon a meeting or meetings of the relevant class or classes of creditors or members and is also required to sanction the scheme itself. Assuming the scheme has been approved by the requisite majority of creditors at the meetings, in exercising its powers of sanction, the court will want to see: (i) that the creditors were fairly represented by those who attended the meeting, and that the majority of relevant creditors are acting in good faith and are not simply coercing the minority in order to promote their own interests, and (ii) that the arrangement is such that an intelligent and honest person who may be affected by the scheme might reasonably approve. However, the court will not dwell on the substance of the commercial terms of the arrangement since, if it has been approved by a majority of creditors, as in such case, the scheme is assumed to be a good deal for the creditors generally.

The overall timing of a scheme implementation will depend on the length of commercial negotiations and complexities of the restructuring but, normally, there is a period of five to seven weeks between scheme documents being posted to creditors and the scheme becoming effective.

During the past ten years, schemes of arrangement have been used with great success to implement complex high-value restructurings, including for foreign companies such as Metrovacesa (a Spanish entity), *Telecolumbus* in 2010, *Rodenstock GmbH* in 2011[12] Apcoa Parking Holding GmbH case in 2014[13] and CBR Fashion in 2016 (German entities)[14], the *Magyar Telecom BV* case in 2013 (Dutch entity) [15] and cross-border cases like Codere SA (a listed Spanish company with subsidiaries in Latin America, Italy, Spain and Luxembourg) in 2015.

1.3. German Law

1.3.1. Introduction

The German Insolvency Code (*Insolvenzordnung - InsO*) entered into force on 1 January 1999 and was significantly changed in 2012 ("Reform Act") with the aim of facilitating the restructuring of operative companies, especially by the introduction of protection scheme proceedings (*Schutzschirmverfahren* – "Protective Shield Procedure").

Generally, the Insolvency Code foresees that a court-appointed insolvency administrator decides on how to restructure or liquidate the insolvent company. However, the Insolvency Code also provides comprehensive rules regarding the implementation of an insolvency plan ("*Insolvenzplan*") through which the company as such can be reorganised if this seems feasible ("Insolvency Plan Proceedings") and allows for the management of the distressed company to continue to manage the company if certain requirements are satisfied ("*Eigenverwaltung*" – "Self Administration Proceedings"). Under certain conditions, the debtor can file for a Protective Shield Procedure and thereby pave the way for an Insolvency Plan/Self Administration Proceedings.

A peculiarity of German insolvency proceedings is the chronological division into firstly, the so-called preliminary insolvency proceedings ("*vorläufiges Insolvenzverfahren*" – "Preliminary Proceedings"); and secondly, the (main) insolvency proceedings which are initiated by the court order for the opening of insolvency proceedings. It is important to understand that the Protective Shield Procedure is not a stand-alone preventive restructuring proceeding but rather the first stage of ordinary Preliminary Proceedings. The purpose of such proceedings is to allow the insolvency court to gather all the information necessary to determine if the prerequisites (i.e. a reason for insolvency and the existence of sufficient assets to cover the costs of the proceedings) are met. In general, the filing of a petition, and thus the beginning of preliminary proceedings does not affect the legal relationship between the creditors and the debtor by triggering a moratorium. In practice, the insolvency court will, however, take measures to protect the debtor's estate against any adverse change in the debtor's position until the decision with respect to the petition has been taken. The insolvency court usually orders those measures immediately after the

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12 EWHC 1104 (CH).

13 EWCH 3849.

14 See Sax/Ponseck/Swierczok, Ein vorinsolvenzliches Restrukturierungsverfahren für europäische Unternehmen, BB 2017, BB 2017, 323.

15 EWHC 3800 (CH).

filing; these orders include either self-administration supported by a custodian ("*Sachwalter*") or the appointment of a preliminary insolvency administrator.

Consequently, under German law there are no regulated preventive reorganisation proceedings available outside of a formal insolvency process.

1.3.2. Protective Shield Procedure

The Protective Shield Procedure can only be initiated by an order of the insolvency court if (i) a debtor files a petition for the opening of insolvency proceedings on the grounds of impending illiquidity or over-indebtedness ("balance sheet test"); and (ii) also applies for the institution of Self-Administration Proceedings. The debtor must enclose with the insolvency petition a restructuring certificate, provided by a tax adviser, accountant or lawyer with experience in insolvency matters or a person with comparable qualifications, confirming (i) the imminent illiquidity or over-indebtedness; (ii) the absence of illiquidity (*i.e.* debtor is not yet cash flow insolvent, "*zahlungsunfähig*"); and (ii) that the intended restructuring does not manifestly lack a prospect of success.

Within the Protective Shield Procedure, the debtor will be granted a certain period of time, not exceeding three months, to work out the details of an insolvency plan. The competent insolvency court will also appoint a preliminary creditors' trustee ("*vorläufiger Sachwalter*"). When appointing the trustee, the court may only deviate from the debtor's proposal if the candidate is not sufficiently qualified for this position.

The Protective Shield Procedure provides protection during the period granted for the preparation of the insolvency plan. The debtor can develop an insolvency plan without risking the proceedings being disturbed by individual enforcement measures. Additionally, upon the debtor's application the court can decide that the debtor can create preferential claims against the insolvency estate which generally have to be satisfied in full. This may provide comfort to creditors, existing suppliers and potential new contractual partners with the result that new investments can be made which promote the process of restructuring. Within insolvency plan proceedings, a creditor group objecting to the insolvency plan, which, in an out-of-court scenario would require an unanimous decision of the creditors, can be crammed down. In order to provide for the successful development of an insolvency plan during the short period of the Protective Shield Procedure, the collaboration of at least 51% of the major creditors is required.

Preliminary Proceedings and the Protective Shield Procedure end when a court order initiating the commencement of the main insolvency proceedings is released. The preliminary insolvency administrator ("*Insolvenzverwalter*") or insolvency trustee will generally be appointed to continue its engagement throughout the main insolvency proceedings.

According to a study of the Boston Consulting Group[16], which examined all insolvency proceedings taking place in the first two years of the reforms in 2012, there were only some 100 Protective Shield Proceedings out of a total of some 20,000 insolvency proceedings in the previous two years, *i.e.* only 0.5%. The "typical" entity using Protective Shield Proceedings is rather large; it has an annual turnover of at least € 15 million and a minimum of 150 employees. There is no information currently available on the particular sectors affected by those proceedings. According to the Boston Consulting Group study, the tendency of using the Protective Shield Procedure has been stagnating since the third quarter of 2013.

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16 Moldenhauer/Herrmann/Wolf/Drescher, Zwei Jahre ESUG - Hype weicht Realität, March 2014.

1.4. Spanish Law

1.4.1. Introduction

The Spanish Bankruptcy Act, as enacted in 2003, did not provide for any preventive restructuring proceedings. It unified all existing bankruptcy proceedings in a single bankruptcy procedure ("*concurso de acreedores*") which, however, may end up in two different ways: (i) with a reorganisation plan ("*convenio*"), or (ii) with a liquidation of the debtors assets ("*liquidacion*"). A debtor is entitled to apply for insolvency proceedings to be commenced when it expects that it will become insolvent. In this sense, insolvency proceedings are available as a type of legal protection that the debtor may request in order to avoid the attachment of its assets by its creditors.

After two important Spanish companies (*La Seda* and *Metrovacesa*) went to the UK restructure their debts, the Spanish legislator decided to amend the Bankruptcy Act in order to introduce a preventive restructuring framework.

1.4.2. Article 5 *bis* Moratorium procedure

In 2009, the Spanish legislator introduced the so-called article 5 *bis* Moratorium procedure into the Spanish Insolvency Act (which was then modified in 2014). The debtor may request the bankruptcy court to grand a four-month general moratorium triggering the suspension of all enforcement actions generally, in order to allow the discussion of an advanced proposal for arrangement or a refinancing agreement. After the expiration of the moratorium, the debtor is required to file the application for the declaration of insolvency if no restructuring agreement has been concluded that resolves its insolvency issues.

1.4.3. Additional Provision 4 scheme proceedings

The article 5 *bis* Moratorium does not provide for any cram-down mechanism. This is precisely the objective of the Additional Provision 4 scheme proceedings, introduced into Spanish law in 2011 and since modified in 2014. These are stand-alone preventive restructuring proceedings that can be combined with the article 5 bis Moratorium procedure, if so requested by the debtor.

Under the Additional Provision 4 scheme proceedings, the Court can homologate the restructuring agreement entered into by a majority of unsecured creditors representing at least 60% of the unsecured liabilities to cram-down a minority of unsecured creditors to impose a debt rescheduling or debt-to-profit participating loans swaps (PPLs) of up to five years. The majority increases to 65% in the case of secured liabilities. If the restructuring agreement provides for a postponement or debt-to-profit participating loans swaps (PPLs) for more than five years up to 10 years, or a (partial) write-off of unsecured claims, the majority increases to 75% of the amount of the unsecured claims. In the case of secured claims, the majority then increased to 80% of the secured liabilities.

This restructuring agreement needs to be homologated by the bankruptcy Court. The homologation of the court provides for a claw-back protection in the case of the opening of subsequent bankruptcy proceedings. Dissenting minority creditors can only challenge the agreement on the grounds of lack of majority or disproportionate sacrifice. No appeal is available.

Finally, article 71 bis of the Spanish Bankruptcy law provides for a claw-back shield for an out-of-court protected refinancing agreement executed in a public deed that has been approved by a qualified majority of creditors (three fifths). Such a refinancing agreement can no longer be challenged in the case of the opening of subsequent bankruptcy proceedings.

1.5. Polish Law

1.5.1. Introduction

The new Polish restructuring laws ("**RL**") of 15 May 2015 come into force on 1 January 2016. It implemented a significant reform of the Polish insolvency law, comprising the introduction of new restructuring procedures and allowing the restructuring of a debtor's undertaking and preventing its bankruptcy, as well as major amendments to the Bankruptcy and Recovery Law of 28 February 2003 in order to streamline the "classic" bankruptcy proceedings. It also reduced unnecessary formalities and expedited liquidation, and implemented substantive changes (such as redefining bankruptcy tests, removing the priority of tax and social insurance claims, implementing procedures facilitating pre-packs, extending hardening periods and improving protection against fraudulent conveyances, etc.).

1.5.2. Four new restructuring proceedings

The RL has introduced four new types of restructuring procedure which aim to avoid the bankruptcy of insolvent or distressed businesses by allowing them to restructure by way of an arrangement with their creditors.

Restructuring proceedings may be initiated by a debtor (subject to certain exceptions) who is insolvent or is threatened by insolvency within a short period of time. Under the Restructuring Law, "being threatened with insolvency" means an economic situation of the debtor which gives rise to the threat that it will not be able to settle its due and payable liabilities in the "short term".

The information on the opening of such proceedings shall be published in the same way as in the case of Bankruptcy proceedings.

Restructuring proceedings are initiated with a view to concluding an arrangement (composition) with all of the creditors whose claims are, by operation of law, covered by the arrangement, once the consent of the required majority has been obtained.

There are four types of restructuring proceedings:

(i) approval of arrangement proceedings ("*postępowanie o zatwierdzenie układu*");

(ii) accelerated arrangement proceedings ("*przyspieszone postępowanie układowe*");

(iii) "standard" arrangement proceedings ("*postępowanie układowe*"); and

(iv) reorganisation proceedings ("*postępowanie sanacyjne*").

Approvals of arrangement proceedings are the most informal. These proceedings can be kept confidential in the initial phase when the debtor negotiates with creditors and collects their votes on a negotiated arrangement. As soon as the request for approval of that arrangement is submitted to the court, a publicity requirement will apply (Art. 222(3) RL requires a public announcement of the request). The opening of the proceedings occurs at the moment when the court issues a decision on approval of the arrangement. The debtor remains in possession. In the subsequent phase, after the issuance of the decision on approval of arrangement but before the moment this decision becomes final, the arrangement supervisor ("*nadzorca układu*") supervises the administration of the debtor's affairs (Art. 224 RL)[17]. In addition, amongst other things, the licensed supervisor (i)

[17] This limitation of the debtor's powers amounts to a "partial divestment" of the debtor in the meaning of Art. 1(1) of the Insolvency Regulation no. 1346/2000.

prepares a restructuring plan, (ii) cooperates with the debtor in preparing the arrangement proposals, (iii) assists the debtor in collecting the votes of the creditors in an efficient, legitimate way, so safeguarding creditors' rights, and (iv) lodges the report with an opinion on the feasibility of the arrangement. During this phase, the debtors are protected by a stay of enforcement proceedings against them (Art. 224(2) in conjunction with Art. 259 RL).

Accelerated arrangement proceedings are designed for a debtor who intends to reorganise his or her business under court supervision but in an unplanned way. The proceedings are not permitted, if more than 15 % of the sum of claims against the debtor entitled to take part in voting at creditors' meeting are contested by the debtor (Art. 3(3) RL). The opening of proceedings amounts to a partial divestment of the debtor, since the court decision to open the proceedings entails an appointment of the court supervisor ("*nadzorca sa?dowy*") that limits the powers of the debtor to administer his or her affairs (Art. 233(1.2) in conjunction with Art. 39 RL). The debtor is protected by stay of enforcement proceedings at the opening of accelerated arrangement proceedings (Art. 259 RL).

Arrangement proceedings are proceedings designed for a debtor who contests more than 15% of the sum of claims against him or her entitled to take part in voting at creditors' meeting. In these proceedings, the debtor may be partially divested not only from the moment of the opening of proceedings (by the appointment of "*nadzorca sa?dowy*" – Art. 271 in conjunction with Art. 233(1.2) RL), but also during the earlier phase, *i.e.* prior to the opening of proceedings, by a way of preservation measures; for example, by appointment of a temporary court supervisor – "*tymczasowy nadzorca sa?dowy*" (Art. 268 RL). The creditors' meeting decision to accept the arrangement is possible only after the court confirms the list of claims during the course of court proceedings. The debtors are protected by stay of enforcement proceedings against them at the opening of arrangement proceedings, but can also be protected earlier by a way of preservation measures (Art. 268(2), (3) RL and Art. 278 RL).

Reorganisation proceedings ("*postępowanie sanacyjne*") are intended for debtors who, for various reasons, could not conclude an arrangement with creditors under the other types of restructuring proceedings (regardless of the sum of the disputed receivables). These are proceedings which enable the most comprehensive restructuring of the business of a debtor. As a rule, the debtor is totally divested (by appointment of an administrator – "*zarza?dca*"), although in certain circumstances he or she may remain partially in control of his or her affairs (Art. 288 RL). Even prior to the opening of proceedings the court may appoint a temporary court supervisor – "*tymczasowy nadzorca sa?dowy*" or a temporary administrator – "*tymczasowy zarza?dca*" (Art. 286 RL). The administrator will be able to use certain instruments which are characteristic of bankruptcy proceedings, such as the possibility to reduce employment on the terms that apply in bankruptcy proceedings or the right to "cherry-pick" executory contracts. The list of claims is prepared and confirmed during the course of court proceedings. Part of a debtor's assets can be liquidated and employment as well as some type of business contracts may be reorganised as it is normally practised only in bankruptcy proceedings. The debtor is protected by stay of enforcement proceedings against him or her at the opening of reorganisation proceedings, but can also be protected earlier by a way of preservation measures (Art. 286 RL).

The new law introduces instruments increasing the creditor's influence on the conduct of the proceedings, while, at the same time, limiting the role of the court and judge-commissioner. For instance, creditors will be able to effectively seek the appointment of a creditors' committee and, upon their application, the judge-commissioner will be obliged to appoint one.

Restructuring cases will be handled by commercial divisions of district courts. If there are conflicting petitions for bankruptcy and for restructuring, the court will withhold the bankruptcy petition and the restructuring petition will be considered first (and if the restructuring petition is accepted, it will not be possible to declare bankruptcy as long as restructuring proceedings are pending). In exceptional cases, if the withholding of the bankruptcy petition were to be contrary to the interest of all creditors, the bankruptcy court may decide to consider both petitions at the same time.

Many aspects of the new Polish pre-insolvency restructuring proceedings have not been tested in practice. Moreover, the results of this legislation have not been yet summarised, and the question of whether it has fulfilled its purpose remains open.

1.6. Italian law

1.6.1. Introduction

Since the financial crisis, the Italian market has witnessed widespread use of pre-insolvency proceedings, which were introduced by the law of 17 March 2005. In the past, enterprises have sometimes taken advantage of gaps in the legislation and tended to over-use them. In particular, this has been the case with pre-packaged arrangements ("*Concordato Preventivo*") pursuant to article 160 of the Italian Bankruptcy Act. These recurring technical problems and inefficiencies were highlighted to the legislature, resulting in considerable improvements having since been made to the Italian Bankruptcy Act, as well as continued amendments since. The latest reform was implemented by the Law Decree of 27 June 2015.

The Italian parliament is currently discussing yet another reform, which touches upon the full regulation of insolvency and bankruptcy proceedings and aims at simplifying, rationalizing and increasing the speed and the efficiency of the existing procedures.

1.6.2. Concordato Preventivo

Under the pre-bankruptcy creditors' composition ("*Concordato Preventivo*"), a restructuring plan needs to be approved by a majority of the voting creditors. To the extent that the creditors are divided into different classes, the pre-bankruptcy creditors' composition petition must be upheld by the majority of the classes of the voting creditors. Secured creditors with priority rights, pledges or mortgages which the pre-bankruptcy creditors' composition petition provides for their full satisfaction, do not have the right to vote if they do not give up their priority/seniority. Voting must be expressed in writing.

Unsecured creditors must receive at least a payment of 20% of their claims. Secured creditors with priority rights, pledges or mortgage must be no worse off than in winding-up proceedings (taking into consideration the market value of the goods or rights in question as estimated by a qualified appraiser).

The debtor can apply to the court to commence the *Concordato Preventivo* before the plan itself has been fully formulated (so called "*concordato in bianco*"). The court will allow a moratorium for a duration of 60 to 120 days to allow for the drafting of the restructuring plan and the filing of the necessary documents. But this is subject to reporting requirements regarding the management of the business and further activities outlined in the plan. The debtor must comply with these reporting obligations by providing monthly reports, and the debtors will be under the supervision of a judicial commissioner. This new procedure is regulated under article 161(6) of the Italian Bankruptcy Act.

After filing pre-bankruptcy creditors' composition petition, if authorised by the court, the debtor can carry on its operations and, in the case of a subsequent declaration of bankruptcy, authorised payments and transactions made in this context will be exempt from claw-back.

Since the 2015 reform, pursuant to the new article 163 *bis* of the Italian Bankruptcy Act, If the pre-bankruptcy creditors' composition proposal includes a proposed purchase of the debtor’s assets or business, or any part thereof, the court can order that the sale of these assets or business is subject to competing offers ("*offerte concorrenti*") in accordance with court-approved bidding and auction procedures.

In addition to that, new article 163 of Italian Bankruptcy Act provides that creditors holding in aggregate at least 10 percent of the unsecured claims against the debtor shown in the debtors' financial statements can present a composition proposal concurrent with that presented by the debtor. Concurrent proposals for composition plans are admissible if the composition plan presented by the debtor does not ensure payment of at least 40% of the total sum owed to unsecured creditors in the case of pre-bankruptcy composition, or 30% of such sum in case of pre-bankruptcy composition with business continuity ("*concordato con continuità"*).

1.6.3. Debt restructuring arrangement under Article 182 bis of the Italian Bankruptcy Act ("*Accordi di Ristructturazione dei Debiti*")

Article 182 *bis* of Italian Bankruptcy law provides for another mechanism of debt restructuring that is increasingly used in practice, the so-called "*Accordi di Ristrutturazione dei Debiti*" (Debt Restructuring Arrangement), whereby an entity can enter into a composition with creditors (which is binding on all the creditors of such entity) provided that:

(a) the Debt Restructuring Arrangement is agreed by creditors representing at least 60% of its debts;

(b) the feasibility of the Debt Restructuring Arrangement and the suitability of such arrangements to ensure repayment of those creditors who did not agree with such Arrangements is confirmed by an independent expert (who must meet the requirements provided by article 67(d) of the Bankruptcy Act); and

(c) after the filing of the restructuring agreement there is a 60-day stay. In the recent reforms, changes were made to the provision according to which the stay on enforcement and precautionary measures may be extended to the negotiations phase for the period of 60 days preceding the filing of the Debt Restructuring Arrangement. The Legislative Decree no. 78/2010 further specifies that the court will also prohibit the granting of new security, unless these have been agreed.

Furthermore, in accordance with the Law Decree no. 83/2012, the plan must provide for the full payment of those creditors who are not party to the Debt Restructuring Arrangement within 120 days from its validation by the court, when the relevant debt is overdue by that date or within 120 days from the due date when the due date falls after the date of validation of the same agreement by the court.

Within 30 days from the issue of the Debt Restructuring Arrangement, the creditors and any other interested person can challenge it. The court, after deciding on the challenges, homologates the Debt Restructuring Arrangement with an order.

Pursuant to article 182 *ter* of the Italian Bankruptcy Act (as modified by Legislative Decree 196/2007 and by Legislative Decree n. 78/2010), it is possible to file a fiscal arrangement not only together with a Pre-Bankruptcy Composition with creditors, but also together with

a Debt Restructuring Arrangement. The fiscal arrangement enables the debtor to pay his fiscal debts partially and periodically.

Furthermore, pursuant to article 182 *ter* of the Italian Bankruptcy Act as introduced by Law Decree no. 78/2010 (which became effective on 31 July 2010), "stability" measures have been adopted by the Italian Government, including a number of significant provisions in the context of rescue procedures, as follows:

(a) super-senior financing: provisions have been introduced which allow lenders that provide rescue or interim financing to a distressed company in Italy to acquire priority over the existing creditors of the company, but only to the extent the financing is provided in the context of either:

(i) a debt restructuring arrangement under Article 182 *bis* of the Italian Bankruptcy Act; or

(ii) a Pre-bankruptcy creditors' composition; and

(b) equitisation risk: the rules on equitable subordination[18] are not applicable in the case of shareholders' loans granted in the context of the above-mentioned restructuring procedures but only up to an amount equal to 80% of the amount of the relevant shareholders' loan(s).

In addition, with the 2012 reform, new provisions have been adopted regarding financing activities in the context of a Debt Restructuring Arrangement:

(i) Article 182 *quater* of the Italian Bankruptcy Act states that financing granted by the new shareholders is payable in priority as to 100% of that amount;

(ii) Article 182 *quinquies* of the Italian Bankruptcy Act allows so-called interim financing so that debtors applying for a Creditors' Composition or for a Debt Restructuring Arrangement can ask for final court approval to enter into interim finance arrangements if an independent expert confirms the best interest of creditors. Law Decree 83/2015 has recently amended this provision whereby a debtor can now ask the court to be authorised to receive interim financing or to continue to use existing credit lines which will acquire legal priority in the credit ranking. Such authorisation can be granted provided that the financing is required to meet urgent operational needs, or the absence of the financing would cause irreparable and imminent harm to the business; and

(iii) Article 182 *sexies* of the Italian Bankruptcy Act provides that, pending a Creditors' Composition Proceeding or Debt Restructuring Arrangement, neither the rules on the obligation to reduce share capital nor the rules on the dissolution of the company due to reduction or loss of capital shall apply.

The legal framework above has been recently completed by Law Decree 83/2015, which introduced the new article 182 *septies* of the Italian Bankruptcy Act pursuant to which a new form of Debt Restructuring Arrangement has been created for companies having more than half of their total existing indebtedness with banks and financial intermediaries.

Pursuant to this new form of Debt Restructuring Arrangement, a company which has (i) debts towards financial intermediaries and/or banks in an amount not less than half of the overall indebtedness; and (ii) applied for the approval of a Debt Restructuring Arrangement

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[18] Articles 2497 and 2467 of the Italian Civil Code contemplate that shareholders'/intercompany loans granted to an "undercapitalised" company within the same group may be subordinated by operation of law to all other debts of such company, if granted at a time when, taking into consideration also the business carried out by the company: (i) the company's indebtedness was excessively high compared with shareholders' equity, or (ii) the company's financial situation was such that a contribution from shareholders would have been reasonable under the circumstances.

under article 182 *bis* of the Italian Bankruptcy Act, can request that the effects of such Debt Restructuring Arrangement be extended also to those financial creditors who have not given their approval.

Such an extension can occur, *inter alia*, if and to the extent (i) financial creditors that have approved the Debt Restructuring Arrangement represent at least 75% of the overall existing indebtedness; (ii) all creditors belonging to the same class of creditors have been informed of the start of negotiations with creditors and were able to participate in the negotiations; (iii) the plan imposed on the financial creditors represents the best alternative for them, ensuring that they will receive under the plan at least as much as they would under any other realistic alternative.

The court will validate the Debt Restructuring Arrangement after it has ascertained that the negotiations were held in good faith and the relevant conditions were met.

Lastly, Law Decree 83/2015 also reviewed the regime applicable to standstill agreements entered into between the debtor and one or more financial creditors. Indeed, if and to the extent the standstill agreement has been approved by more than 75% of the existing creditors, then its effects will be extended also to those financial intermediaries who did not approve the agreement in the first place. The standstill or similar agreement cannot, in any circumstance, impose new obligations on the non-approving creditors or require them to carry out addition obligations.

1.6.4. *Evaluation of the 2015 Reform*

The 2015 reform has been welcomed with favour. According to a report issued by Banca d'Italia, "*as a whole, the reform has substantially improved the legal framework for early intervention in cases of firms in distress, promoting early action in case of crisis and making restructuring more likely. It should also provide better protection to creditors in case of difficulties of the borrowers, as foreclosure procedures are expected to become speedier and less costly, with forced sales improved by extra-judicial and more market oriented mechanisms*".

2. SCOPE

According to the Explanatory Memorandum, increased convergence of preventive restructuring procedures at EU level should:

- encourage the timely restructuring of viable companies in financial distress;
- increase the recovery rates for creditors;
- avoid the opening of unnecessary insolvency proceedings and liquidation of viable companies;
- avoid unnecessary job losses;
- prevent the build-up of non-performing loans in cyclical downturns;
- facilitate cross-border restructurings;
- facilitate greater legal certainty for cross-border investors.

In order to achieve these objectives, Article 1(1) of the Proposal "*lays down rules on: (a) preventive restructuring procedures available for debtors in financial difficulty when there is a likelihood of Insolvency*". In this respect, article 4(2) of the Proposal makes clear that "[p]*reventive restructuring frameworks may consist of one or more procedures or measures*."

In addition, the Proposal makes a distinction between preventive restructuring procedures which are subject to the Proposal and insolvency proceedings which remain outside the scope of the preventive restructuring framework set forth in the Proposal.[19] In this respect, the definition of insolvency procedure in article 2(1) is referring to the Eurofood decision of the ECJ under the EIR no. 1346/2000[20], *i.e.* "*'insolvency procedure' means a collective insolvency procedure which entails a partial or total divestment of the debtor and the appointment of a liquidator*".

Finally, the European Commission is reassuring: "*The objective is not to interfere with what works well, but to establish a common EU-wide framework to ensure effective restructuring* [...]"

This being recalled, the question arises whether *all* national proceedings that can be opened in the likelihood of insolvency *must* fall within the scope of the Proposal and, consequently, would need to be adjusted accordingly. *A contrario*, all proceedings that could be opened even if the debtor is insolvent would be excluded from the scope of the Proposal.

Such an interpretation of the scope of the Proposal does not make sense. For example, French case law had created in the early-1990s the so-called *mandat ad hoc* proceedings which have been confirmed by the legislator in article L. 611-3 of the French commercial code: the president of the court can appoint, at the request of the debtor, a mediator, a so-called *mandataire ad hoc*. His or her mission is not limited in time, and is subject to the discretion of the president of the court. This confidential mediation procedure is used to assist the company with solving its difficulties without being cash flow insolvent (*e.g.* negotiation of a debt restructuring; implementation of a severance plan; closing of a

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[19] Arg. art. 1 of the Proposal.

[20] See P. Mankowski, NZI Beilage 1/2017, p. 17. CJCE, 2 May 2006, aff. C-341/04, *Eurofood*, ECLI:EU:C:2006:281, concl. AG G. Jacobs, 27 Sep. 2005, D. 2006, p. 1286 obs. A. Lienhard, p. 1752 note R. Dammann and p. 2250 obs. F.-X. Lucas/P.-M. Le Corre.

working site, etc.). In practice, *mandat ad hoc* proceedings are often used in complex debt restructurings, as a preliminary stage to prepare for the opening of conciliation proceedings (which are limited to a maximum duration of five months). Although *mandat ad hoc* proceedings could be qualified as being part of the French preventive restructuring framework "toolbox", they do not fall within the scope of the Proposal.

Poland recently introduced four different restructuring proceedings in order to address a great variety of restructuring scenarios. Italian and Spanish laws follow the same approach. This does not mean that all these proceedings must comply with the mandatory provisions of the Proposal. They are part of the national preventive restructuring framework that may consist of one or more procedures. Globally, these procedures, or a combination of them fall within the scope of the Proposal but they need not to be amended, provided that at least one of the proceedings (or a combination of one or more proceedings) does comply with the mandatory features set forth in the Proposal.

In addition, the fact that some of these preventive proceedings can be opened if the debtor is insolvent does not exclude them from the scope of the Proposal. The term "likelihood of insolvency" is rather broad[21], not comparable with the concept of threatening insolvency[22] and, in any event, is not defined in the Proposal.[23] The four new Polish proceedings, as well as the French conciliation, can be opened if the debtor is already insolvent. From a technical point of view, (financial) creditors can very easily remedy such situation by granting a standstill or a moratorium. The criterion of insolvency has lost its relevance in deciding which type of proceeding best fits a given situation. In other words, what is important is that the debtor continues to pay its debts in the ordinary course of business towards a large number of creditors (in particular trade creditors, employees, landlords and the like) and that the debtor can avoid the opening of *ordinary* insolvency proceedings with a high degree of court involvement and the classical features of collective insolvency proceedings (divestment of the debtor, lodgment of claims, appointment of a liquidator, automatic general stay, voidance actions etc). What is important in the world of preventive restructuring proceedings is the predominantly contractual character of the proceedings[24], which may be combined with majority rules, the cram-down principle and the possibility of granting an individual stay on enforcement in order to favour the conclusion of a restructuring agreement with limited court intervention (supervision) to protect minority creditors and third parties.

What of ordinary insolvency proceedings that can be opened at the request of the debtor in the case of threatened insolvency? This is the case for safeguard in France, but also for the ordinary "unique" insolvency proceedings in Germany and Spain. Obviously, these ordinary insolvency proceedings are not comprised in the scope of the Proposal which differentiates between preventive restructuring framework/proceedings and insolvency proceedings. With respect to safeguard, in *Bank Handlowy*[25], the ECJ has ruled that these proceedings are "classical" insolvency proceedings in the sense of the EIR before its recasting, and to which

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[21] Madaus, , p. 11.

[22] Paulus, NZI Beilage 1/2017, 5 (6) ; Jacobi, ZInsO 1/2/2017, 1 (5).

[23] R. Dammann/M. Boché-Robinet, D. 2017 (in preparation).

[24] S. Madaus, Restrukturierungsverfahren mit Insolvenzprinzipien und Insolvenzverfahren mit Restrukturierungsziel? Eine Betrachtung der Grundannahmen des Insolvenz- und Restrukturierungsrechts, FS Wimmer 2017 (in preparation).

[25] CJUE, 22 Nov. 2012, aff. C-116/11, ECLI:EU:C:2012:739, D. 2010, AJ, p. 321 obs. A. Lienhard, p. 1585, obs. P. Courbe/F. Jault-Seseke, and p. 2323, obs. L. d'Avout/S. Bollée, D. 2011, p. 498, note R. Dammann/D. Carole-Brisson.

the Proposal is referring.[26] The same reasoning would obviously apply in the unique German and Spanish insolvency proceedings that can be opened in case of threatened insolvency. The objective of the Proposal is to harmonise EU law to provide for each debtor the opportunity to request in each Member State the opening of preventive restructuring frameworks. These would consist of one or more procedures, having the features set forth in the Proposal, but not to prohibit the existence of alternative restructuring proceedings that do not comply with all provisions set forth in the Proposal. In other words, the Proposal is **not** designed to put an end to the variety of restructuring proceedings that exist in the Member States in the case of the likelihood of insolvency as shown above and have them replaced by a *unique* preventive restructuring procedure.

Should pre-insolvency proceedings be limited to financial debt restructuring? In some Member States, there exist special preventive restructuring proceedings for financial creditors (*e.g*. SFA in France[27], or the sub-category of Debt Restructuring Arrangement under the new article 182 *septies* of the Italian Bankruptcy Act). As a matter of fact, most restructuring cases in the UK scheme of arrangement and the French conciliation only concern financial creditors. But the Proposal did not follow such a narrow approach, which would have been counterproductive, at least in some cases.

[26] R. Dammann/M. Boché-Robinet, D. 2017 (in preparation).

[27] R. Dammann/M. Boché-Robinet, D. 2017 (in preparation).

3. RESPECTIVE SCOPE OF THE EIR AND THE PROPOSAL

The EIR does not harmonise material national insolvency law contrary to the Proposal. Consequently, at first sight, the respective scope of the EIR that is directly applicable and the Proposal is, by construction, totally different. The Proposal does not contain any conflict of jurisdiction provision. It is designed to harmonise the *lex fori concursus* of the various Member States once the directive has been transposed.

Whereas no. 18 of the Proposal envisages the possibility that "*informal*" (*i.e.* confidential) preventive restructuring proceedings fall within its scope "*as long as the rights of third parties are not affected*", the EIR expressly excludes confidential insolvency proceedings.[28] Consequently, French conciliation proceedings remain excluded from the scope of the EIR, but such proceedings fall within the scope of the Proposal. The scheme of arrangement is another example of such discrepancy. It is included in the scope of the Proposal but excluded from the scope of the EIR. Consequently, as demonstrated in the case of the scheme of arrangement, forum shopping continues to be common practice. Consequently, the jurisdictional requirements for English courts are much lower than the threshold required for insolvency proceedings in the EIR. Schemes are not dependent upon the companies having either a centre of main interest (COMI) or their establishment in England and Wales. For schemes, the threshold for jurisdiction is that the overseas company has a sufficient connection with England and Wales. The reverse of the coin is that schemes do not benefit from automatic recognition under the EIR. Schemes have been successfully applied to companies across a number of European jurisdictions as explained above. Following Brexit, the recognition of schemes is likely to be governed by private international law of the various Member States.[29]

However, most preventive restructuring proceedings under the Proposal should fall within the scope of the EIR and therefore be listed in Annex A. This is because of article 1(1) c) of the EIR, which refers to reorganisation proceedings where "*a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors* ?...?". This is clearly the case of the French SFA/SA and Spanish moratorium proceedings. The German *Schutzschirmverfahren* is also included in the EIR since it is part of the interim proceedings under German law.

[28] Whereas 13 of the EIR.

[29] See for Germany, S. Sax/A. Swierczok, Die Anerkennung des englischen Scheme of Arrangement in Deutschland post Brexit, ZIP 2017, 601-607; S. Sax/A. Swierczok, The Recognition of an English Scheme of Arrangement in Germany Post Brexit: The Same but Different? ICR 2016.

4. TRANSPOSITION OF THE PROPOSAL

4.1. French Law

4.1.1. Introduction

As explained above, the combination of conciliation proceedings with the closing option of SFA/SA proceedings falls within the scope of the Proposal.

The necessary amendments of French law seems to be rather limited, and concern (i) the appointment of a practitioner in the field of restructuring under article 5(2) of the Proposal; (ii) the stay of individual enforcement actions under article 6 of the Proposal; (iii) the introduction of classes of creditors into French SFA/SA (and, most likely, ordinary safeguard proceedings as a matter of consistency); (iv) the confirmation of restructuring plans, including cram-down and cross-class cram-down pursuant to articles 10 et seq. of the Proposal; (v) the protection for interim financing under article 16 of the Proposal; and (vi) appeals.[30]

4.1.2. Appointment of a practitioner in the field of restructuring

Pursuant to article 5 of the Proposal, the appointment of a practitioner in the field of restructuring shall not be mandatory in every case. Member State may require such an appointment where the debtor is granted a general stay of individual enforcement actions or where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance with article 11.

In the French system, the appointment of a conciliator is a key measure in conciliation proceedings. The same applies for the administrator in SFA/SA proceedings. As explained below, we would recommend providing more flexibility for the Member States.

4.1.3. Stay of individual enforcement actions

The Proposal provides for the possibility to grant a stay of individual enforcement actions, the duration of which is limited to four months. An extension or a new stay may be granted under certain circumstances, with a maximum of 12 months. The French system is more straightforward and, in general terms, complies with the Proposal. During the conciliation proceedings, which can last a maximum of five months, the debtor may request a grace period under article 1343-5 of the French civil law for a maximum duration of two years. This is not a specific provision of French insolvency law. Article 611-7 of the French commercial court merely stipulates a special jurisdiction in favour of the Tribunal having opened the conciliation proceedings. The grace period is an equitable measure that is granted by the Tribunal taking into consideration the interests of the debtor *and* of the creditor. It may be necessary to provide for a special provision enabling a creditor to request the judge to reconsider the grace period measure during the fifth month of the conciliation proceeding.

There is a general stay in the case of conversion of the conciliation into SFA/SA proceedings. Upon the opening of such proceedings, the debtor must demonstrate that it is likely that the restructuring agreement will be sanctioned by a qualified two thirds majority of claims of concerned creditors. Consequently, the conditions for an extension or renewal pursuant to article 6(5) of the Proposal are met.

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30 See R. Dammann/M. Boché-Robinet, D. 2017 (in preparation).

4.1.4. Classes of creditors

The introduction of classes of creditors will require substantial changes to the French safeguard law. The present system of creditors' committees is incompatible with the Proposal, and has been criticised for some time. The transposition of the Directive will provide the French government with the opportunity to adapt French law to best international practice.

4.1.5. Confirmation of restructuring plans

The cram-down does exist in French law with a two thirds majority of the total amount of claims in each creditor's committee. As more fully discussed below, some commentators have questioned the relevance of the referral to the underlying liquidation value of the "best interest test".

French law must introduce the concept of cross-class cram-down together with the absolute priority rule.

The possibility to cram-down equity holders within SFA/SA proceedings may give rise to debate, but the Proposal provides for a balanced approach, as discussed below.

That being said, in practice, these new rules will provide more guidance in the negotiations of a consensual restructuring than would a concrete application through SFA/SA proceedings, which are likely to remain rather exceptional.

4.1.6. Protection for interim financing

French conciliation proceedings provide for safe harbour provisions with respect to new financing, since the protection against avoidance actions, in the case of the opening of subsequent insolvency proceedings, as well as the new money privilege, is conditional upon the signing of the restructuring agreement, which needs to be sanctioned by the court. Consequently, interim financing under article 16 of the Proposal is not legally protected. The same problem arises with respect to financings that are granted in favour of a debtor after the opening of SFA/SA proceedings if these proceedings are not successfully completed by a court sanctioned restructuring plan. Notwithstanding, in practice, the risks incurred appear to be rather remote, since such financings would have been granted transparently in favour of a debtor that should not be insolvent. The liquidator in subsequent insolvency proceedings would have to prove that the debtor was, in reality, insolvent at the time of the interim financing, which would appear quite difficult.

4.1.7. Appeals

Article 15(4) of the Proposal provide for the possibility to (a) set aside the restructuring plan or (b) confirm the plan and grant monetary compensation to dissenting creditors, payable by the debtor or by the creditors who voted in favour of the plan.

In this respect, French law only provides for a dissenting minority creditor to set aside the plans rather than obtaining damages. The French legislators should transpose the Proposal.

4.2. German Law

4.2.1. Introduction

The publication of the Proposal has triggered lots of discussions in German doctrine.[31] The German Protective Shield Procedure ("*Schutzschirmverfahren*") does not constitute an autonomous preventive restructuring procedure in the sense of the Proposal. It is conceived as a preliminary first step for a debtor to prepare for Insolvency Plan Proceedings ("*Planverfahren*") within Self Administration Proceedings ("*Eigenverwaltung*"), which is part of the unified German insolvency proceedings. Thus, the implementation of the Proposal would trigger the creation of new preventive restructuring proceedings which would, of course, integrate some provisions of the German *Planverfahren*.

From a historical perspective, discussion on the introduction of an autonomous preventive restructuring proceeding has already taken place, in 2010. The question was raised as to whether it was necessary to introduce such a procedure inspired by the English scheme of arrangement, or the French model of conciliation/safeguard proceedings.[32] However, the German legislators opted for the *ESUG*-law to enhance the effectiveness of *Planverfahren* and *Eigenverwaltung*. This legislative choice must be reassessed. What are the concerns?

4.2.2. The concerns

Some commentators have voiced concerns that the introduction of a new preventive restructuring procedure would create "unfair competition" and a change in the paradigm of the unified insolvency procedure that had proved rather efficient in the past.[33] On the contrary, some commentators believe that the introduction of such a new restructuring procedure would enrich the toolbox available to resolve financial difficulties at an early stage, so avoiding the opening of insolvency proceedings.[34]

4.2.3. Possible solution

In order to address these concerns, the *Gravenbrucher Kreis*, the main association of German insolvency practitioners, advocates limiting the preventive restructuring proceedings to financial creditors.[35] Such an approach corresponds to the application of the scheme of arrangement in the UK. In the same vein, most conciliation proceedings are

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[31] NZI Sonderbeilage 1/2017, Taugliche Sanierungsvorgaben aus Brüssel? Mit Beiträgen von Riggert, Flöther, Paulus, Cranshaw, Fritz, Seagon, Mankowski, Haghani, Pluta, Specovius, v. Wilcken, Spahlinger, Hoegen, Naumann, Piekenbrock, Zipperer, Schluck-Amend, Göpfert, Brune, Westpfahl u. Kahlert; Sax/Ponseck/Swierczok, Ein vorinsolvenzliches Restrukturierungsverfahren für europäische Unternehmen, BB 2017, 323-329; Madaus, p. 28; Thole, ZIP 2017, 101-112; Klupsch/Schulz, EuZW 2017, 85; Mock, NZI 2016, 977; Berger, ZInsO 50/2016, 2413; Albrecht, ZInsO 50/2016, 2415; Rauscher/Leichtle/Mucha/Schäffer/Wagner, ZInsO 50/2016, 2420; Jacobi, ZInsO 1/2/2017; Blankenburg, ZInsO 6/2017, 241; Eidenmüller, Contracting for a European Insolvency Regime Law Working Paper N° 341/2017; Frind/Pollmächer, ZInsO 2016, 1290; Goetker/Schlulz, ZIP 2016, 2095; Vallender, Beilage zu ZIP 22/2016; M. Balz, Insolvency Proceedings and Preventive Frameworks, Workshop IWF Vienna, 2017; R. Dammann, Umsetzung des Richtlinienvorschlags vom 22.11.2016: Vorschläge zur Einführung eines präventiven Restrukturierungsverfahrens, FS Wimmer (in preparation).

[32] BJM-colloquium in Berlin in 2010, Paulus, NZI Beilage 1/2017, 5 (6) unter Hinweis auf Paulus, WM 2010, 1337. See also R. Dammann, WM 2010, 1342 and R. Dammann, Die Erfolgsrezepte französischer vorinsolvenzlicher Sanierungsverfahren, NZI 9/2009, 502.

[33] Paulus, Ziele und EU-rechtliche Rahmenbedingungen, NZI Beilage 1/2017, 5-7.

[34] R. Dammann, FS Wimmer (in preparation). For the discussion see Madaus, p. 28.

[35] Gravenburger Kreis Vorinsolvenzliches Sanierungsverfahren in Deutschland, 14 jan. 2017. V. Flöther, NZI Beilage 1/2017, 4, 5 ; Thole, ZIP 2017, 101 (107) ; Vallender, Beilage zu ZIP 22/2016, 82, 85.

financially driven. That being said, in some cases, it was necessary to include trade creditors in the discussions. Consequently, the option to limit the scope of such preventive proceedings to financial creditors would appear unnecessarily restrictive. A comparative approach confirms this analysis. The laws of the Member States that are analysed in this study do not support a conclusion that the scope of the preventive restructuring tools should have limited to financial creditors only. However, some Member States have created special procedures to increase the efficiency of the available toolbox. "One size fits all" is not a good option. In other words, let the restructuring market decide what is needed and what should be used. An efficient procedure will see off inefficient procedures.

The second concern is the triggering event of "likelihood of insolvency", which is arguably much broader that the concept of threatened insolvency under German law.[36] Thus, the question arises as to whether such a broad concept could give rise to abuse, since a debtor could easily obtain a general stay of at least four months to escape or to fend off its creditors. However, as indicated by Stephan Madaus, the triggering event is not the problem.[37]

In reality, as demonstrated in the French conciliation and English scheme of arrangement, the triggering event is very broad; generally, the earlier the better increases the chances of success of the debt restructuring. The real problem lies with the legal consequences of the opening of proceedings. Neither in the scheme of arrangement, nor in the conciliation, is there an automatic stay. In other words, there is no involuntary infringement of the contractual rights. *Pacta sunt servada* remains the principle, and the contractual approach dominates the scene. Under English law there is no interference at all in the first stage of the proceedings. It is only at the cram-down stage, when the restructuring plan is imposed upon dissenting minority creditors, that there is an infringement into contractual rights which is counterbalanced by the fairness opinion given by the court sanctioning the scheme.

Under French law, the debtor has two tools available to deal with dissenting minority creditors who do not want to negotiate but rather try to exercise their hold-up (nuisance) value. The debtor may request a grace period of up to two years and the creditor, as a matter of law, is precluded from filing for involuntary insolvency during that period. At the second stage of the procedure, either there is a consensual deal or the debtor can demonstrate overwhelming support to justify the opening of SFA/SA proceeding to cram down dissenting minority creditors.[38] In practice, the number of SFA/SA proceedings is rather limited. The deterrent value is factored into the negotiations to promote and facilitate the conclusion of a consensual deal.

Consequently, this two-stage model would appear perfectly compatible with the general philosophy of German insolvency law. Short (confidential) pre-insolvency proceedings could be combined with a simplified *Planverfahren* used as a cram-down mechanism, including equity holders. Further, the introduction of safe harbour provisions to favour new and interim financing should not raise any serious objections.

There is one last important point to be discussed: the role of the practitioner in the field of restructuring. In the UK scheme of arrangement model, that is dominated by specialised lawyers, and there is no need for any independent court appointed mediator/conciliator to facilitate the discussions. The restructuring plan is negotiated amongst the stakeholders.

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[36] Vgl. Paulus, NZI Beilage 1/2017, 5 (6); Jacobi, ZInsO 1/2/2017, 1 (5). Sax/Ponseck/Swierczok, BB 2017, 323 (325). The same is true for Swedish law.

[37] K. Madaus, p. 11.

[38] R. Dammann, *op. cit.,* FS Wimmer (in preparation).

Court involvement is limited to appreciating the reasonableness of the class formation and the plan. There is no second judgment on the financial and economic merits of the plan that has been approved by a double-qualified majority; such broad support of the plan is supposed to reflect the best interest of the creditors.[39] There is no need to verify the enterprise as a going concern or its liquidation value. The scheme is not an insolvency proceeding. By contrast, SFA/SA are (semi-)collective insolvency proceedings, where the judge is supposed to protect the economic interests of dissenting minority creditors and, in the future, dissenting equity holder interests as well.

Consequently, there is room for the appointment of a practitioner in the field of restructuring who would be in charge of the preparations for the conversion of the proceedings into SFA/SA proceedings in France and simplified *Planverfahren* in Germany.

[39] See M. Balz, *op. cit.*

5. POLICY RECOMMENDATIONS

5.1. The distinction between insolvency and preventive restructuring proceedings

Insolvency proceedings are collective proceedings addressing the problem of the scarcity of assets compared to the amount of debts. This is the so-called "common pool" problem which is characteristic of traditional bankruptcy. The opening of collective proceedings concerns all creditors since it triggers a general stay. It also entails a divestment of the debtor and the appointment of a liquidator in charge of the estate's administration. The liquidator has the mission to sell the assets of the estate and to distribute the proceeds to the creditors in accordance with their ranking.

By contrast, preventive proceedings focus primarily on contractual debt restructuring. They aim at preserving the business and enabling the debtor who remains in possession to continue its activities and to reimburse its debts at a later stage. Typically, these proceedings only concern a limited number of financial creditors, *e.g.*, loans granted by senior and junior lenders, bond or note holders etc.

The stay of individual enforcement actions is absent in solvent English scheme of arrangement. The debtor is supposed to pay its operational debts. The scheme of arrangement relies on creditors' self-interest in embarking on negotiations and deciding on a plan acceptance. Creditors' rights are only affected at the end of the proceedings, when minority creditors are crammed down.

The French two-stage model does not focus on the automatic stay either. Conciliation proceedings are confidential and consensual. The general stay of individual enforcement actions existed under French law, but was never used in practice. It was viewed as being counterproductive, and was eventually abrogated in 2005. The main financial creditors must ensure that the debtor continue to pay its operational costs and expenses (trade creditors, employees etc.). Otherwise there is a risk that the business loses its value. Businesses are fragile.

The conversion of the conciliation into SFA/SA proceedings triggers an automatic stay but the opening of these proceedings is perceived by the business community as a tool allowing the quick implementation of the restructuring plan. As a matter of fact, the debtor can communicate to all stakeholders the terms of the restructuring proposal that has already been accepted by a qualified majority of creditors. The opening of SFA/SA proceedings enables to debtor to cram-down minority creditors. It provides legal certainty for the outcome of the proceedings rather than opening Pandora’s Box.

Consequently, the preventive restructuring frameworks must (i) focus on the preservation of the business, (ii) favour new financing, (iii) provide for deterrent tools to avoid disruption of the negotiations by isolated dissenting creditors and finally (iv) provide for un efficient cram-down mechanism against minority creditors and other equity stakeholders that are out of money.

5.2. Scope of the Proposal

The Proposal makes a distinction between preventive restructuring frameworks and insolvency proceedings. Yet, it is not clear that the Proposal is only meant to harmonise preventive restructuring proceedings. This point requires clarification. Each Member State should make available a framework of preventive restructuring proceedings; the Proposal should not be applicable and interfere with ordinary national insolvency proceedings most of which can be opened at the request of the debtor in case of imminent insolvency (like

safeguard in France and other ordinary insolvency proceedings in Germany, Spain, Italy, Finland etc.).

5.3. Appointment of a practitioner in the field of restructuring

The Proposal takes the view that the appointment of a practitioner in the field of restructuring is only possible where the debtor is granted a general stay or where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down.

This approach seems to be too restrictive. Flexibility should be granted to Member States providing for the appointment of such a practitioner to assist the debtor in the negotiations with its creditors. The French conciliation model is very successful and relies upon the appointment of the conciliator at the beginning of the procedure. There is no compelling reason why such model should be changed.

5.4. Stay of creditor enforcement actions

Insolvency proceedings typically provide for a general automatic stay. This is the case of Chapter 11 proceedings in the US as well as for the French safeguard or the German unique insolvency proceedings. These proceedings can be opened in case of imminent insolvency. This criterion must be verified by the judge opening the proceedings since the automatic stay constitutes a very important infringement of creditors' rights. US courts have equitable powers to immediately dismiss cases brought frivolously or in "bad faith".

By contrast, a general stay of enforcement actions is not required and would be counterproductive in most preventive restructuring proceedings: the debtor is solvent and would like to restructure certain categories of debts, *e.g.* financial debts, without affecting its trade creditors, employees etc. On the other hand, an individual stay of enforcement actions as a deterrent measure has proved being very useful.

A review of the various legislations of the Member States seems to indicate that a general or partial stay should be rather short not exceeding six months. However, complex debt restructuring may require more time. The only solution to this problem would be the solvent scheme of arrangement approach or the French two-stage model combining conciliation with SFA/SA closing procedure.

5.5. The best interest test

In case of cram-down of minority creditors within a class of creditors, the judge must be satisfied that the dissenting creditors receive a better treatment under the restructuring plan than in liquidation proceedings. This concept, that is called the "best interest test", comes from US Chapter 11 proceedings. The rationale behind this criterion is to avoid liquidation of the company. Consequently, it makes sense to use this criterion in ordinary insolvency proceedings where the company would be liquidated if no rescue plan is adopted. However, such a concept would appear unnecessary in preventive restructuring proceedings where the debtor is continuing its business activities.

A fairness test would appear to be sufficient to protect the minority creditors' interest. This is the solution adopted in the scheme of arrangement and in the SFA/SA proceedings. Such approach would simplify most restructuring cases avoiding unnecessary costly complications[40].

[40] See M. Balz, *op. cit.*

The situation is different in case of inter-class cram-down where a restructuring plan is adopted by the court despite the vote of one or several classes of creditors. In such a scenario, the Proposal provides for several protection mechanisms. The plan must be proposed by the debtor and must comply with the absolute priority rule. The Court must be satisfied that the dissenting creditors will receive a better treatment under the plan than in case of liquidation. But the value of the company must be established on the basis of a going concern valuation and not a liquidation value. Translating this rule from the US Chapter 11 is recommended, provided that it is applied within simplified insolvency proceedings only.

5.6. Group of companies

The Proposal could include appropriate language to coordinate the negotiations at group level and to allow, as an option for the Member States, the restructuring agreement to be binding upon guarantors.

This is a very important point in practice, in particular in cross-border cases. The UK scheme of arrangement has proven to be an efficient tool in this respect. For example, the Apcoa group was composed of eight companies operating in five different jurisdictions. The debts of the whole group were successfully restructured in eight parallel schemes of arrangement proceedings[41].

The same applies for French conciliation. In practice, the debts of the group of companies are often the same or interlinked trough up-stream or downstream guarantees. In case of a LBO financing, it may very well happen, that the debts of the holding and the operational companies need to be restructured. In this respect, the French Saur restructuring provides a compelling example, leading to the simultaneous homologation of the restructuring agreements for the various companies of the group within parallel conciliation proceedings.[42]

[41] Re Apcoa Holdings GmbH [2014] EWHC 1867 and 3849.

[42] R. Dammann/G. Podeur, Saur: le "lender-led", modèle de restructuration pour les LBO en difficulté? Option Finance, Déc. 2013; R. Dammann/V. Bleicher, The lessons to be learned from the SAU lender-led restructuring, Global Turn Around, Oct. 2013; R. Dammann/G. Lebreton, Restructuration SAUR: La conversion de créances en capital dans le cadre d'un *lender led*, BJE Nov. 2013, p. 697.

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