EUROPEAN
RESTRUCTURING SCHEMES

Snapshot on the status of implementation of the EU Restructuring Directive in selected Member States and the new English scheme

Introduction

All 27 EU Member States must implement the EU Directive on Restructuring and Insolvency of 20 June 2019 (EUR 2019/1023, "**Directive**") by 17 July 2021. The purpose of the Directive is to reduce differences between Member States regarding the range of the procedures available to debtors in financial difficulties in order to restructure their business. Some Member States do not have any dedicated restructuring tools or have procedures that allow the restructuring of businesses but only at a relatively late stage. In other Member States, restructuring is possible at an earlier stage but the procedures available are very formal or not as effective as they could be.

The Directive was also in part a reaction to the forum shopping phenomenon observed with continental European companies in a financial crisis to restructure their debt under an English scheme of arrangement. The scheme of arrangement, which is not an insolvency process, offers the possibility to implement a debt restructuring on the basis of a majority decision by the creditors. Under these rules, a single "hold-out" creditor is unable to block a reasonable restructuring plan if the majority of creditors approves it. Many European countries did not offer such a valuable possibility outside of an insolvency procedure. In many cases, insolvencies are value-destructive and lower the prospects of recovery for creditors.

For these reasons, the Directive made it mandatory for EU Member States to offer a "preventive restructuring framework" ("**Framework**") for companies in a financially distressed situation when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the company. Distressed companies should be given the possibility to restructure their debt under the protection of individual enforcement actions on the basis of the majority of the creditors' decisions. Moreover, according to the Directive, new financing, interim financing and other restructuring-related transactions should be protected against avoidance actions in case the restructuring fails and the companies still file for insolvency.

However, as is characteristic for directives, the EU Member States have some leeway in their implementation decisions. Some European countries went ahead and their "national schemes of arrangement" have already entered into force. Below we provide a high-level summary of the current status of the Directive implementation process in key jurisdictions. Where relevant at this stage, we compared the various schemes in an overview table, including the English scheme of arrangement rules, which have also been modified as a reaction.

For further information, please contact the partners involved in this publication. A list can be found at the end of this newsletter.

Status in selected European countries

BELGIUM

Belgium has not yet implemented the Directive into Belgian law. A working group is currently preparing a proposal for such implementation. Based on the information in our possession, it does not seem feasible to have such proposal finalized and voted on by the Belgian legislator by 17 July 2021. As such, we understand that Belgium seeks to avail itself of the provision in the Directive that allows for an extension of the implementation period by one year.

As the working group has not yet submitted a formal proposal to the Chamber of Representatives, it remains to be seen which approach the Belgian legislator will opt for. For example, will it opt for a minimalist approach, aligning as much as possible with the current legislation and implementing only the mandatory provisions of the Directive? Or will it opt for a more comprehensive review of existing laws? Based on informal feedback from members of the working group, we understand that the Belgian legislator is in any case likely to make an exception for SMEs so that they are subject to a simpler regime.

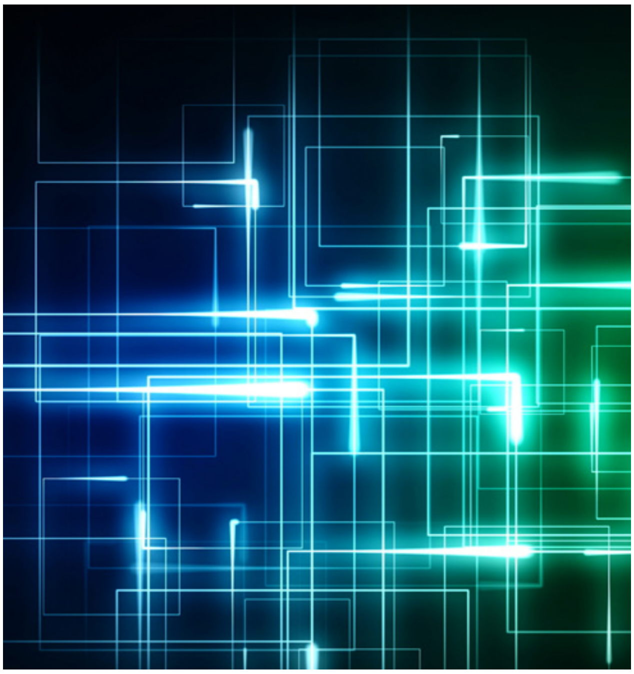
That being said, the current Belgian legislative framework is already largely in line with the main objectives of the Directive. Indeed, Belgian law currently provides for three judicial reorganization procedures intended to safeguard the continuity of part or all of the assets or activities of the enterprise. The most popular of these procedures is the reorganization by collective agreement. The initiative for commencing this (public) procedure belongs to the debtor. In principle, the debtor remains in possession during the procedure. The debtor benefits from a moratorium in the period between the opening of the procedure by the court and the ratification by the court of the reorganization plan. The debtor will prepare a reorganization plan, setting out the measures proposed by the debtor to redress its business (including typically substantial debt write-offs). This plan must then be approved by a double majority of creditors. The reorganization plan will be approved in case of a positive vote by a double 50% + one majority by (i) the headcount of creditors affected by the reorganization plan and (ii) the principal amounts of their claims. If such approval is obtained and subject to court ratification, unsecured minority dissenting creditors will be bound by the reorganization plan.

By way of recent development, a Belgian law adopted on 21 March 2021 introduced among others a new non-public pre-pack reorganisation. This new pre-pack reorganisation is a court-authorized and court-supervised preparatory negotiation phase which (if successful) subsequently leads to the opening of a full judicial reorganisation process. For more information on this topic, we refer to our client alert available for consultation **here**.

ENGLAND & WALES

The UK left the EU on 31 October 2019, in advance of the 2021 deadline for the implementation of the Directive into national law. The EU-UK Trade and Cooperation Agreement made no provision for the continued recognition of, or co-operation in, insolvency and restructuring proceedings.

However, independent of the Directive, the Corporate Insolvency and Governance Act 2020 came into force on 26 June 2020. It introduced a new restructuring plan procedure amongst its package of permanent measures. Directors faced with financial distress can now weigh up the new restructuring plan, or the existing 'tried and tested' scheme of arrangement. Both processes require members and creditors to be grouped into classes based on their rights. The classes then vote on whether to accept the proposed plan or scheme, and in each case final approval (or sanction) rests with the court. For a restructuring plan to be approved, 75% in value of the creditors or voting members within each class must approve the plan (although there is provision for cross-class cram-down where the plan is not approved by each class (see below)). In a scheme of arrangement, the scheme must also be approved by a majority in number of creditors, although this test does not apply to a restructuring

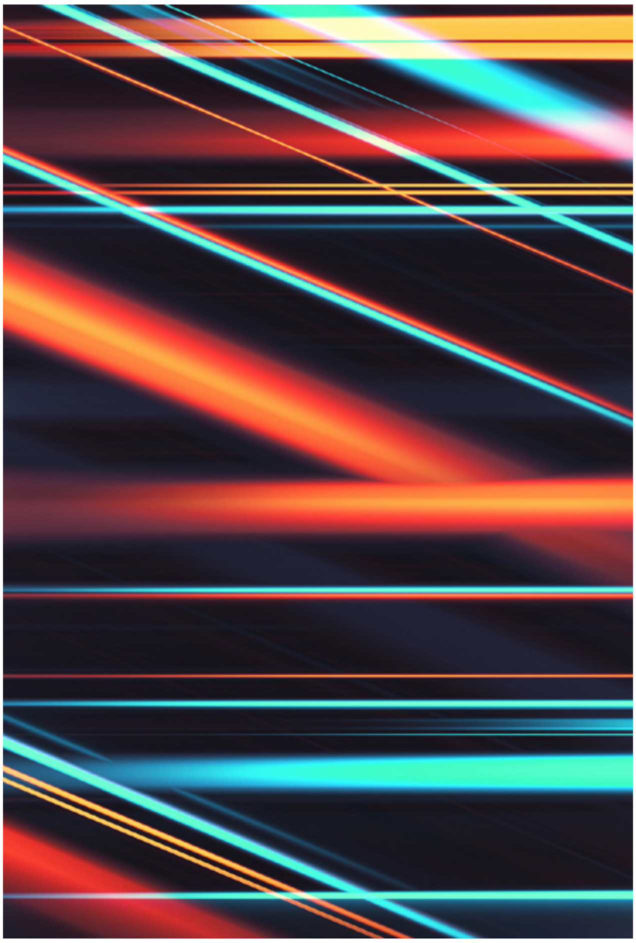


plan. To date, much of the developed jurisprudence around schemes of arrangement has been drawn upon by the courts in relation to the restructuring plan.

To be eligible for a restructuring plan, a company must have (i) encountered, or be likely to encounter, financial difficulties affecting its ability to carry on business as a going concern; and (ii) the purpose of the proposed plan must be to eliminate, reduce, prevent or mitigate the effect of those financial difficulties. It is not necessary for the company to be insolvent to be eligible. The plan can be used by both English and foreign companies, although in the latter case the company must also have a sufficient connection with England & Wales.

A key feature of the restructuring plan is cross-class cram-down. Cross-class cram-down allows a company to apply to the court to approve a restructuring plan, even where there are dissenting classes of creditors or members that voted against the plan. In these circumstances the court can approve such a plan, provided it is satisfied with the following:

1. If the plan is sanctioned, no members of the dissenting classes would be any worse off than they would be in the event of a relevant alternative.



2. At least one class of creditors or members that would receive a payment or have a genuine economic interest in the company in the event of a relevant alternative has voted in favor of the plan.

The relevant alternative is defined as whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned by the court. The court has a wide discretion to consider what the relevant alternative would be.

FRANCE

The Directive has not yet been implemented into French law. Such implementation must be done by ordinance by the end of May of this year, in accordance with the empowerment given to the French government by the Law of 22 May 2019 known as "PACTE" Law.

In 2019, a major consultation phase of all French insolvency practitioners was organized by the French Ministry of Justice pertaining to the orientations and goals to be given to the implementation of the Directive. On the basis of this consultation, the French Ministry of Justice has issued a preliminary draft ordinance on the implementation of the Directive. A preliminary draft reform of the French security law in the part relating to the French insolvency proceedings has also been prepared.

The preliminary draft ordinance has been re-submitted for public consultation until the end of February 2021. Although we don't have a clear vision on the definitive provisions at this point, we already have an idea of the main features of the implementation of the Directive into French law.

Some emergency measures that have been implemented by ordinances during 2020 (Ord. No. 2020-341, 27 March 2020; Ord. No. 2020-595, 20 May 2020, known as COVID-19 Ordinances) in the context of the health crisis will be included in the forthcoming implementation of the Directive. Accordingly, the recourse to the French safeguard proceedings will be more flexible: a "post-money" privilege will be created in safeguard and judicial reorganization proceedings and the scope of application of the simplified judicial liquidation will be extended.

Most importantly, the core element of the draft ordinance is the substitution of creditors' committees by creditors' classes. The introduction of this new concept of creditors' classes in French law by the Directive will require taking into consideration the nature of the claims rather than the capacity of the creditors. At a minimum, there would be two classes of creditors (secured or unsecured). The creditors will have a significant power to vote on the safeguard and reorganization plans. This new power raises questions as to the criteria for control of the plans by the French Courts. Indeed, the control is based on the respect of the best interests of the creditors, a new notion introduced by the Directive. In the draft ordinance, the choice has been made for an assessment in concreto, the judicial representative being responsible for distributing the creditors among the classes, who will be able to file an appeal against such decision before the courts. Finally, it will be possible to override dissenting creditors by a majority of creditors.

GERMANY

Germany has implemented the Directive and the Framework into German law with a new act called "*Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen*" ("**StaRUG**"), which came into effect on 1 January 2021.

The measures of the Framework can be preceded by a so-called "restructuring moderation," which was not prescribed in the Directive and which is a fully consensual process without the possibility of majority decisions or the ordering of a moratorium. The great benefit of a restructuring moderation, which can be initiated by every debtor facing economic or financial difficulties, is the possibility of making a restructuring settlement between the debtor and its stakeholders "insolvency-proof" (i.e., protection of envisaged restructuring measures from insolvency claw-back and "lender liability").

With respect to the actual Framework, a debtor is only entitled to enter it if they are in a situation of imminent illiquidity, but not yet actually illiquid or (technically) over-indebted. In essence, the Framework is a very flexible toolkit consisting of a menu of (court) measures out of which a debtor, who is at all times in charge and control of the whole process (debtor-in-possession), can choose. Further, there is in general no supervision of the debtor by the restructuring court or a restructuring professional. However, on application of the debtor and in very sensitive cases (e.g., if the consumer's claims are involved) the court can appoint a restructuring advisor, which will support and supervise the debtor. Further, there is generally no direct involvement of the shareholders in the process.

In order to guarantee a "smooth" process, the restructuring court may on the application of the debtor also order an enforcement stop (moratorium). Additionally, the StaRUG provides for some restrictions regarding the termination of executory contracts by a creditor based on the mere reason that the debtor has initiated a restructuring under the Framework.

The core element of the Framework is the "restructuring plan." This is a type of agreement between the debtor and its stakeholders, which, under certain conditions, does not require the consent of all parties to the agreement if it is approved by the court. Under German law the plan **can** affect: claims against the debtor, collateral on assets belonging to the debtor, ownership in the company (shareholding right and the shareholding itself), inter-creditor agreements, guarantee claims against subsidiaries or collateral on assets of a subsidiary ("upstream security"). The plan may also provide for a sale of the debtor (asset/share deal) as a whole. But the plan **cannot** affect the claims of employees (neither salaries nor pension claims). Further, there is no option to change or terminate executory contracts.

To be accepted, the plan needs to be approved by each group whereby an approval of 75% of the represented claims in each group is sufficient (meaning that a 24.9% minority within each group can be overruled; "intra-group cram-down"). However, provided that the creditors are treated fairly compared to their likely recovery and rank in an alternative insolvency, the court can also overrule an entire group which refuses the plan ("cross-class cram-down").

The voting on the restructuring plan can but does not necessarily have to take place in court. In any event, the restructuring court must confirm the plan if the measures provided therein shall come into binding effect. Under a confirmed plan, new financings will also be largely protected against insolvency claw back and "lender liability" risks.

ITALY

Italy has not yet implemented the Directive. In January 2021, Italy requested a one-year extension of the deadline from the European Commission to do so, in accordance with Article 34(2) of the Directive. Indeed, the Italian law empowering the government to implement the European directives issued in 2019 and 2020 — including EU Directive 2019/1023 — has not yet entered into force.

Nonetheless, it is worth noting that the Legislative Decree no. 14 dated 12 January 2019 ("**Insolvency Code**") further amended the Legislative Decree no. 147 dated 26 October 2020, which deeply reformed Italian bankruptcy law by taking into account EU Regulation No. 848/2015, Commission Recommendation No. 2014/135 and the UNCITRAL principles on insolvency, thus providing for a legal framework already partially consistent with the Directive.

The Insolvency Code, in fact, is based on a forward-looking approach whose fundamental goal is to ensure the recovery of distressed businesses at an early stage. The

new provisions aim at highlighting as soon as possible the symptoms of a business crisis through the creation of an early warning mechanism, in order to press the management of a company to promptly intervene in case of a crisis. To this purpose, specific crisis composition bodies (Organismi di composizione della crisi d'impresa or OCRI) will be set up at local Chambers of Commerce. So, as soon as the crisis signals identified by the new provisions are detected, the company control bodies and the statutory auditors shall be responsible for reporting them first of all to the managing body and then, should this managing body fail to take appropriate actions in that respect, to the competent OCRI. The Italian National Institute for Social Security and the Italian Tax Authorities shall also have similar obligations in case a debtor reaches certain thresholds of indebtedness as to the respective liabilities. Upon receipt of the report or the request by the debtor, the OCRI will schedule the debtor's audition and will identify the necessary measures to face the crisis, imposing a deadline on the debtor to comply with said measures. Should the debtor not appear at the audition or breach the imposed measures, the OCRI will inform the bodies that addressed the report and the public prosecutor. These organizations will then be entitled to request the insolvency of the debtor. Otherwise, should the debtor request to start the procedure of assisted resolution of the crisis, a maximum three-month term will be granted in order to find possible solutions to overcome the crisis (possibly extendable for additional three months). If this deadline expires without the debtor having reached an agreement with the creditors involved and in a situation of persistent crisis, the OCRI will invite the debtor to apply, within 30 days, for one of the insolvency procedures provided for by the Insolvency Code (liquidation, composition with creditors or restructuring agreement).

Except for a few minor provisions applicable as from 16 March 2019 (e.g., the introduction of a special register, to be kept by the Ministry of Justice, including the names of all entities qualified to be appointed by the competent courts as trustees, liquidators or commissioners in insolvency procedures; the introduction of specific amendments to the Civil Code, in order to increase the liability of the company's managing body, who has the duty to give a proper structure to the company in such a way to avoid the crisis or anyway to promptly intervene in case of crisis, as well as a specific duty to protect the company's assets), the Insolvency Code — which was originally expected to enter into force on 15 August 2020 — will enter into force on **1 September 2021**.

Before the entry into force of the Insolvency Code, the necessary amendments will be introduced to align the new provisions with the Directive. We cannot exclude, however, that the entry into force of the Insolvency Code will be further postponed, also considering that, as indicated, Italy has requested from the European Commission an extension until 17 July 2022 to implement the Directive.

LUXEMBOURG

Luxembourg has not yet implemented the Directive and the Framework into its national law. The draft Bill No. 6539 ("**Bill**") on business preservation and modernization of bankruptcy law is still in the legislative process.

The *Conseil d'Etat's* assessment of 2019 is in favor of an implementation of the Directive within this Bill even though it appears to us that the current version of the draft introduces new restructuring legal instruments requiring modification to comply with the Directive, especially its prevention component.

The Bill's purpose is to modernize restructuring existing options in Luxembourg and the extrajudicial reorganization procedures of the Bill aim (i) to detect the future insolvency of businesses and (ii) to craft short term solvency solutions for businesses through the creation of two organisms: the *Cellule d'évaluation des entreprises en difficultés*, which would be responsible for assessing the appropriateness of bankruptcy assignments initiated by the creditors, and the *Comité de conjoncture* ("**Committee**"), which intervenes not only upstream but also on demand:

- The Committee administration would be in charge of gathering economic and financial data collected by other public institutions (e.g., unpaid taxes, economic layoffs, etc.) and monitoring the situation of debtors in difficulty in order to promote the continuity of their activities and ensure the protection of creditors' rights.
- This gathering process would, if applicable with verified difficulties, be completed by the information provided by the debtor upon the Committee's administration request. With the same intention as the Directive, the mechanism would allow for debtors to be alerted and would prompt them to restructure at an early stage in order to avoid insolvency.

The Bill plans to allow the Committee to request from the Minister of Economy the nomination of a company conciliator ("**Conciliator**"), whose mission is to facilitate the reorganization of the company's assets in a preventive proceeding as well as in a judicial one.

The Conciliator's mission would thus not be terminated by the opening of a judicial reorganization procedure pursued by any person interested (including the debtor)

but would lead to a duplication of the procedure's organs with the nomination of one or more *mandataire de justice* ("**Court Officer(s)**"). The Court Officer's mission would be determined in the decision of nomination, which would allow to lead the debtor either of the following:

- the conclusion of an out-of-court settlement
- an agreement of the creditors on a reorganization plan
- the transfer under the authority of a court decision, to one or more third parties, of all or part of the company's assets or activities

The provisions of the Bill seem in accordance with the obligations established under the Directive to ensure debtors who access preventive restructuring measures retain full or at least partial control over their assets and the day-to-day management of their business but also benefit of the stay of individual enforcement actions in case of a restructuring plan with their creditors.

THE NETHERLANDS

The Netherlands has introduced a new instrument in its insolvency legisation: the Dutch scheme (in the "*Wet Homologatie Onderhands Akkoord*", or WHOA). The WHOA came into effect on 1 January 2021.

Both the debtor and a creditor or shareholder can initiate the Dutch scheme. The debtor can deposit a scheme declaration with the court and then prepare (on its own or with the assistance of a court appointed restructuring expert) a composition plan. The creditor or shareholder can request the court to appoint a restructuring expert who shall then prepare a plan. A liquidity test applies: a debtor must on a reasonable basis assess that it cannot continue to pay its debts as they fall due (i.e., the debtor can use a Dutch scheme when it is still able to service its debts, whilst foreseeing that it cannot avoid insolvency in the future without restructuring of debts).

The Dutch scheme offers a very flexible toolkit, with very little court involvement (ratification only) or much more court involvement (including protective measures), depending on the measures sought. The debtor stays in full control of its assets (debtor in possession). The court can appoint a restructuring expert at the debtor's request or at the request of any creditor or shareholder. If a debtor wants to initiate Dutch scheme proceedings, shareholder approval is not required. Shareholders are involved to the extent that their rights are impacted.

A specific feature of the Dutch scheme is that there are two types of scheme: a public and a private scheme. Debtors may elect which type of process they prefer. The public scheme process will be registered in certain public (insolvency) registers and court hearings are public, whilst private schemes' processes are only known to the parties that are directly involved in them with court hearings being held behind closed doors and no registration in public (insolvency) registers. The regimes for jurisdiction of the Dutch courts and for recognition of the two types of schemes differ, so this requires a careful assessment at an early stage.

The Dutch scheme offers various types of protection to ensure a smooth process when preparing the plan. The court may, for example, order a moratorium/stay of enforcement. Moreover, *ipso facto* clauses in contracts are set aside and bankruptcy or suspension of payment proceedings are stayed. Finally, the WHOA also offers fresh money protection.

The core element of the Dutch scheme is the plan. The plan may only impact the rights of a single group of creditors, or alternatively it may impact the rights of multiple groups of creditors and/or the rights of shareholders. The plan essentially is nothing but an agreement between the debtor and the parties whose rights are impacted by the plan. Rights of employees cannot be impacted by the Dutch scheme.

We note that there is limited recourse (against the debtor) for third parties such as guarantors or third parties acting as sureties, or third parties that have offered their own assets as security for claims of creditors towards the debtor, in case they pay those creditors. Should the third parties be affiliates of the debtor, their guarantees or sureties can be restructured as part of the plan subject to certain strict conditions being met.

Onerous ongoing contracts that the debtor is a party to may be amended or terminated as part of the plan. The debtor may request its contractual counterparty to voluntarily accept an amendment of the contract terms or a full or partial termination of the contract (with the damages claim of the contractual counterparty becoming part of the plan). Should the contractual counterparty accept the proposal, the court will have to confirm upon ratification of the plan. Should the contractual counterparty refuse to accept the debtor's proposal, the court may terminate the contract upon ratification of the plan (also, the damages claim of the contractual counterparty should be part of the plan).

The classes of creditors and shareholders (whose rights are impacted by the plan) are eligible to vote on the plan. The debtor or the restructuring expert may decide on the voting process (though certain formalities have to be met to ensure that the parties that will vote can make an informed decision). The voting thresholds are two-thirds of the total amount of debt held by creditors that participate in the vote in a certain class, or two-thirds of issued capital for shareholders.

As a starting point, the plan can be ratified by the court (to bind dissenting creditors and/or shareholders) if all classes voted in favor (applying the voting thresholds). A cram-down may then be applied within a class. The 'best interest of the creditors test' has to be met then (triggering rejection of the request for ratification of the plan if the test is not met).

Alternatively, a plan may be ratified by the court to bind dissenting creditors and/or shareholders if at least one class of creditors that is 'in the money' (i.e., a class of creditors that would receive payment in case of bankruptcy of the debtor) voted in favor of the plan. A cross-class cram-down or cross-class cram-up are possible. The court must reject the request for ratification in case of cross-class cram-down (among others) if certain specific tests are not met ('absolute priority rule' and 'best interest of the creditors test'). We note that additional grounds for refusal of ratification apply in case of cross-class cram-down.

Upon ratification, all parties whose rights are impacted by the plan are bound by it. Appeal against the ratification decision of the court is not possible.

POLAND

Poland has not implemented the Directive into Polish law yet. According to our knowledge, Poland has notified the European Commission of the need to benefit from an extension of the implementation period beyond 17 July 2021. Nevertheless, the current Polish legislative framework is already in line with some main objectives of the Directive.

The Polish Restructuring Law provides for four types of restructuring proceedings: proceedings for approval of an arrangement, accelerated arrangement proceedings, standard arrangement proceedings and remedial proceedings. Moreover, in 2020 Poland introduced a special anti-COVID-19 legislation, the so-called the Anti-Crisis Shield 4.0, which enacts a new simplified restructuring procedure (being a modified type of the proceedings for approval of the arrangement; "**Polish Scheme of Arrangement**" or "**Polish Scheme**"). The main objective of the Polish Scheme of Arrangement is to save the debtor from having to declare bankruptcy by allowing it to restructure under a restructuring arrangement with its creditors. The restructuring opportunity is available to debtors who are insolvent or threatened with insolvency.

The Polish Scheme takes place largely out of court and starts at the debtor's request by an announcement published in the Official Gazette. The debtor, prior the opening of the procedure, is obliged to select a restructuring practitioner itself; agree with them on the terms of cooperation and appoint them to the position; set up an arrangement date (in general, the Polish Scheme affects debts that arose prior to that date); and draft an initial restructuring proposal for creditors, a list of recognized debts and a list of disputed debts.

According to the Polish Scheme, the debtor remains in possession and keeps exercising the management of its assets in the ordinary course of business. The restructuring practitioner's consent, however, is required for the debtor to engage in activities exceeding the ordinary course of business. Moreover, the restructuring practitioner, among others, oversees the debtor; can inspect the debtor's enterprise and actions regarding its assets; draws up a restructuring plan; prepares (together with the debtor) final restructuring proposal for creditors, list of debts and list of contested debts; and provides creditors with information about the debtor's financial situation and prospects for executing the restructuring arrangement.

The terms of restructuring the debtor's liabilities shall be the same for all creditors, whereas if voting on the arrangement is carried out in creditors' groups, they shall be generally the same for creditors in the same group, unless a creditor explicitly agrees to less favorable terms. A type of cross-class cram-down mechanism is applicable. Importantly, according to the Polish Scheme, the debtor may also force secured creditors to be bound by the restructuring arrangement (in case the arrangement proposal provides full satisfaction of the secured creditor or at a degree not less than the expected satisfaction from the enforcement of collateral).

Under the Polish Scheme, the restructuring arrangement with creditors is concluded by way of the debtor collecting creditors' votes independently or on the creditors' meeting held by a restructuring practitioner, both without the restructuring court's participation. However, for the restructuring arrangement to be valid and binding against creditors, the procedure must end with the approval of the arrangement by the restructuring court.

The process of voting and applying to the restructuring court should be completed within four months. If this deadline expires, the Polish Scheme will be discontinued. The restructuring court shall issue a decision in relation to the approval of the arrangement within two weeks from the date of filing the application (this is, however, non-binding, instructional deadline only).

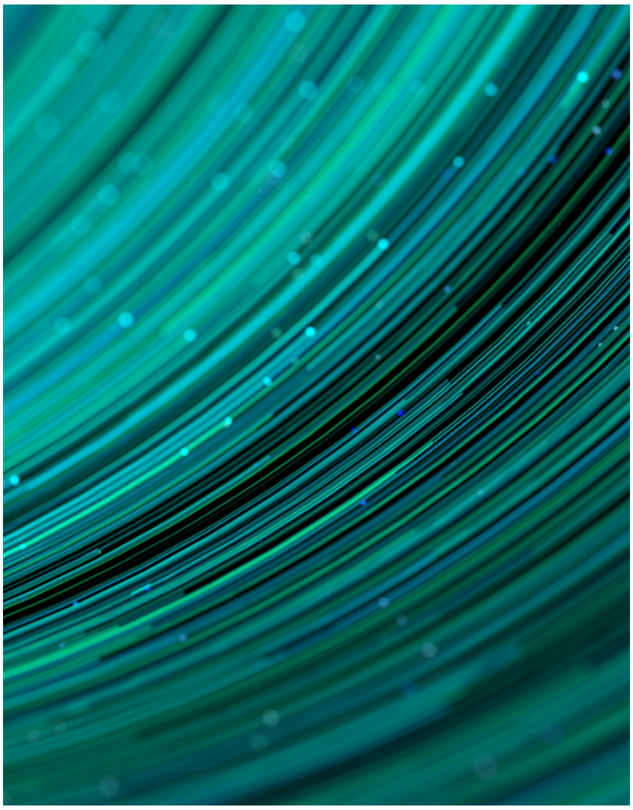
During the procedure of the Polish Scheme, the debtor generally enjoys a moratorium from an individual bailiff's enforcement actions taken by both non-secured and secured creditors. Moreover, the opening of the Polish Scheme also triggers a number of other consequences, in particular there are certain limitations on the admissibility of offsetting creditors' claims and there are restrictions in favor of the debtor on the admissibility of terminating agreements concerning real estate leases and rentals, credits, leasing, property insurance, bank account, surety, as well as agreements covering licenses granted to the debtor and guarantees or letters of credit.

The Polish Scheme provides conditions that must be met in order to protect a new financing, interim financing and some other restructuring-related transactions prescribed by the law against avoidance actions in case the restructuring fails and the debtor files for bankruptcy.

The Polish Scheme will be available to debtors by the end of June 2021, but legislative work is already pending in the Polish parliament to implement the modified version of Polish Scheme into the restructuring law with effect on 1 July 2021.

SPAIN

Spain has not implemented the Directive for now. Although the implementation period ends on 17 July 2021, there is no news in this regard from the Spanish Congress of Deputies (*Congreso de los Diputados*).



Despite the foregoing, the Spanish insolvency legislation was amended in relatively recent years to introduce the pre-insolvency regimes referred in the Directive. The Spanish Insolvency Act (*Ley Concursal*) has been in force since 2003 and has been amended several times (in 2009, 2011, 2013, 2014, 2015 and 2020) for the purposes of, among others, introducing new rules and tools to become more flexible and to provide for broader options for creditors and debtors to reach pre-insolvency arrangements.

The amendment of the Spanish Insolvency Act approved in 2014 introduced a new mechanism: the pre-insolvency filing, known as the "5 bis communication" (given that this mechanism was initially included in article 5 bis of the Insolvency Act; it is currently contemplated in articles 583 and following of the Recast Text of the Insolvency Act, which entered into force in September 2020), which consists of notifying the court on the start of negotiations with creditors to reach an "anticipated" composition agreement or an out-of-court refinancing agreement (which may be subject to court homologation and thus protected from claw-back within further insolvency proceedings; extension of the agreement to non-signing creditors holding financial claims may be also ordered by the court). Once filed, the company has a period of three months to reach the referred agreements with its relevant creditors and, if not reached, it has one additional month to file for insolvency before the court (unless it is not insolvent by such time).

A company must file a petition for insolvency within two months after it becomes aware, or should have become aware, of its insolvency. This two-month period does not apply when the pre-insolvency communication has been filed, so this mechanism gives some additional margin to Spanish companies and it prevents the commencement of certain enforcement actions over assets which are necessary for the company's business. In the meantime, the management powers of the company over its assets or its business remain unaffected.

The latest amendment of the Spanish Insolvency Act, in May 2020, by means of which the Recast Text of the Insolvency Act (*Texto Refundido de la Ley Concursal*) has been approved, which entered into force in September 2020, has included some amendments to simplify certain processes, clarify some legal provisions and restructured the sections and articles included therein. Unfortunetaly, this latest reform has not included the amendments required to implement the Directive.

Overview table for England and EU countries where new schemes have been implemented

	England	Germany	The Netherlands	Spain
Optional fully consensual pre-Framework mediation (yes or no)	Yes	Yes	No, not as part of the Dutch scheme. Either an agreement/plan is fully consensual (removing need for ratification to bind dissenting creditors) OR it is not consensual (then ratification/Dutch scheme is required).	Yes
Entry criteria	The company must have: ▪ (for the restructuring plan) encountered, or be likely to encounter, financial difficulties that are affecting its ability to carry on business as a going concern ▪ a sufficient connection to England and Wales	Imminent illiquidity required; debtor must not be illiquid/over-indebted.	Imminent illiquidity required; debtor must not be illiquid already (i.e., debtor can pay debts now, but in the future insolvency cannot be avoided without debt restructuring).	Imminent or current insolvency (i.e. illiquidity).
Debtor in possession/ involvement of restructuring professional	Debtor remains in charge.	▪ Debtor remains in charge. ▪ Involvement of court appointed restructuring professional only on application of the debtor or in very sensitive cases (e.g., consumer claims are involved).	▪ Debtor remains in charge ▪ Involvement of court-appointed professional possible on application of the debtor or any creditor/shareholder or works council	▪ Debtor remains in charge ▪ In order to have a court approved restructuring plan, a viability plan shall be submitted with the court. This plan is usually prepared by financial and restructuring experts
Shift of fiduciary duties	No	No	No	No
Involvement of shareholder	No direct involvement; however, modification of equity/shareholder rights possible.	No direct involvement; however, modification of equity/shareholder rights by restructuring plan possible.	No prior approval of shareholder required to initiate Dutch scheme proceedings; no direct involvement unless the rights of the shareholder(s) are impacted by the plan (i.e., modification of equity/shareholder rights by the restructuring plan is possible).	No direct involvement; however, modification of equity/shareholder rights by restructuring plan possible, given that it can contemplate debt-to-equity conversion and financial claims held by shareholders may be also affected.
Measures protecting the debtor during the process (moratorium)	No automatic stay/ moratorium. The restructuring plan or scheme process can be combined with an English law administration procedure or the separate moratorium procedure under Part A1 of the Insolvency Act 1986 (although this moratorium procedure only applies to certain eligible companies) and the debtor can then get the benefit of a moratorium.	Moratorium/stay of enforcement acts possible on application.	Court may order moratorium/stay of enforcement on application.	Moratorium/stay of enforcement acts apply if the debtor files a pre-insolvency notice with the court. Protection lasts a maximum of four months from the filing of the notice if the filing for insolvency is not filed before this four-month period has elapsed.

	England	Germany	The Netherlands	Spain
Court involvement	Yes, a two-stage court hearing process with oversight and with ultimate discretion for approval by the court.	Yes; however, the scope and intensity of court involvement depends on measure.	Yes (ratification of plan is required to bind dissenting creditors/shareholders); otherwise flexible/ depending on measures sought. No appeal against ratification judgment. Specialized judges.	Yes, if the debtor or creditors holding financial claims request the homologation of the restructuring agreement.
Position of guarantors/group companies	Schemes and restructuring plans can be implemented by guarantor companies to benefit underlying debtors.	Modification of intragroup collateral is possible.	Modification of group guarantees/sureties possible if certain conditions are met.	The court can impose the modification of financial claims held by group companies provided that the relevant majority thresholds are met. Guarantors continue to be liable vis-à-vis creditors who have not expressly signed the restructuring agreement.
M&A processes within the framework	Yes	Yes (asset and share deal possible)	Yes (asset and share deal possible)	Yes (asset and share deal possible)
Impact on collateral	Yes	Yes	Yes	Yes, provided that the restructuring agreement is entered into with secured creditors. If certain majorities are reached (65% or 80% of the secured financial claims, depending on the content of the restructuring agreement), collateral held by dissenting or non-participating secured creditors holding financial claims would also be affected by the measures agreed under the restructuring agreement, provided that the court homologates it.

	England	Germany	The Netherlands	Spain
Impact on executory contracts (possibility to terminate ongoing agreements?)	Restrictions on ipso facto provisions apply under CIGA 2020 if a company becomes subject to a relevant insolvency procedure. This includes the restructuring plan procedure but not the scheme of arrangement procedure.	No	Yes (onerous contracts). Debtor may request the contractual counterparty for restatement of the contract terms or partial or full termination. If the other party accepts, the court will have to confirm when ratifying the plan (compensating damages of the other party as part of the plan). However, should the other party not agree, the court may terminate the contract upon ratification of the plan with compensation for the other part. *Ipso facto* clauses are put aside.	No (unless the relevant creditor expressly accepts the termination)
Voting thresholds	▪ 75% in value of the creditors or voting members within each class ▪ (schemes only) a majority in number voting and present	75% per class of claims.	Two-thirds of total amount of debt held by creditors that participate in the vote in a certain class. Two-thirds of issued capital for shareholders.	▪ 51% of the financial claims in order to have the restructuring agreement protected from claw-back within later insolvency proceedings ▪ 60% or 75% of the financial claims in order to extend the agreement to dissenting or non-participating financial creditors ▪ 65% or 80% of the secured financial claims (calculated in accordance with the value of the security as per the applicable valuation criteria) in order to extend the agreement to dissenting or non-participating secured financial creditors
Cross-class cram-down	Yes (restructuring plan only)	Yes	Yes	No. Only creditors holding financial claims can be crammed down if the restructuring agreement is homologated by the court. In order to have the secured creditors holding financial claims affected, the relevant majorities of secured creditors signing the restructuring agreement shall be reached.

	England	Germany	The Netherlands	Spain
Requirement of ratification of the plan	Yes, must be sanctioned by the court before becoming effective.	Optional; however, binding effect on dissenting parties only if plan is sanctioned by the court.	Yes (unless plan is accepted based on full consensus by all parties impacted by it). Ratification is required to bind dissenting creditors/ shareholders.	Optional; however, binding effect on dissenting creditors holding financial claims takes place only if plan is sanctioned by the court.
Safe harbor (claw-back protection, fresh money, lender liability)	Yes, if part of a plan sanctioned by the court.	Yes, if part of a plan sanctioned by the court.	Yes, protective measures can be ordered by the court: **(i)** substantive and procedural issues can be decided by the court prior to ratification of the plan **(ii)** stay of bankruptcy and suspension of payments proceedings **(iii)** fresh money protection (effectively removing possible claw back risk) **(iv)** appointment of restructuring expert or monitor by the court	Yes, if part of a plan sanctioned by the court. Otherwise, claw-back may apply only if the restructuring agreement has been entered into by creditors representing at least three-fifths of the total debts of the debtor.
Execution/ recognition	The European Regulation on Insolvency Proceedings does not automatically apply.	Yes, based on the European Insolvency or Judgement Regulation.	Yes, **public schemes** are recognized automatically in EU Member States except Denmark on the basis of the EU Insolvency Regulation (recast). **Private schemes** have to be recognized based on eq. UNCITRAL Model law or other local mechanisms governed by conflicts of laws rules of jurisdiction where recognition is sought (it is likely that Brussels I recast regulation does not apply). Recognizing public schemes in Denmark or outside of EU also has to occur on this basis.	Yes, based on European Insolvency or Judgement Regulation

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For a full overview of Restructuring & Insolvency experts in your jurisdiction, please see here.

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