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Business Rescue in Insolvency Law – Setting the Scene

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1. Shifting centuries - Shifting focus

1. This is a background sketch to the ELI Project 'Rescue of Business in Insolvency Law.

In Europe, during the last two decades of the last century, liquidation of the business was (in the absence of some informal solution) nearly the only option for financially distressed companies in many EU Member States. The goal of liquidation is not survival of the business, as under such a liquidation or winding-up regime the related assets are typically sold piecemeal. The proceeds (money) received are distributed to creditors according to the ranking of their claims. This one-sided approach to corporate distress is clearly reflected in the EU Insolvency Regulation of 2002, which, for instance, allows the opening of secondary proceedings, which must be winding-up proceedings. The one-sidedness of the aforementioned approach is also indicated by the chosen name for the responsible insolvency office holder in either main or secondary insolvency proceedings: 'liquidator'. In 2005, a non-EU academic scholar, still observed: 'Compared to U.S. bankruptcy laws, many countries' laws read like penal codes'.[1]

2. In the first decade of the 21st century, however, many European countries have come to understand that the existing legal framework does not meet the challenge:

'… to achieve economic results that are potentially better than those that might be achieved under liquidation, by preserving and potentially improving the company's business through rationalisation'.[2]

Substantial revisions have taken place in countries like Germany (1999 and 2012)), England (Enterprise Act 2002), Poland and Romania in 2003 (and 2006), Spain in 2004 (and 2013), France in 2006 (and 2014), Belgium in 2010 (and 2013) and quite recently in countries such as Denmark, Portugal, Italy, Greece and Spain, whilst in

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[1] See Natalie Martin, 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation', in: 28 Boston College International & Comparative Law Review 2005, p. 46.

[2] Rebecca Parry, Introduction, in: Katarzyna Gromek Broc and Rebecca Parry (eds.), Corporate Rescue. An Overview of Recent Developments from Selected Countries in Europe, The Hague / London / New York: Kluwer Law International, 2004, p. 2.

some countries legislative changes are underway (the Netherlands, since 2011).[3] Although even more recent insolvency laws in several European countries continue to show substantial differences in underlying policy considerations, in structure and in content of these new enacted laws, in most of these jurisdictions there is an openess towards corporate rescue procedures, as an alternative to liquidation procedures. I will get back to this observation later.

3. Furthermore, in many of these countries the USA's Chapter 11 procedure has served as a model for legislators. Generally, these legislations are based on the principle of a composition or an arrangement concluded between the insolvent debtor and his creditors, which is binding upon a (given percentage) on a dissenting minority of creditors (sometimes referred to as 'cram-down'). A characteristic feature of these types of proceedings, aiming at reorganisation of the debtor's business, is the fact that attempts to restructure or reorganise enterprises can only be initiated by the debtor himself (or at least not against his will). The traditional 'post-mortem autopsy' approach (liquidation; winding-up), slowly, is supplemented by instruments that allow for 'real time action'. Domestic laws nowadays contain several proceedings which reflect the different kind of debtors (with different capital structures) that may need to have recourse to a formal procedure to resolve financial distress. Quite rightly it has recently been observed that in most Member States insolvency laws have been modernised:

'… to fit with the new economic context: beside traditional collective insolvency proceedings decided by the court on the basis of the debtor's insolvency, new schemes applicable to a group of main creditors (for example banks, public bodies) at a pre-insolvency stage are regarded as being more efficient for the purposes of business continuation and preservation of jobs.'[4]

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[3] See e.g. Otto E. Fonseca Lobo (ed.), World Insolvency Systems: A Comparative Study, Sweet & Maxwell, 2009; Christopher Mallon (ed.), The Restructuring Review, London: Law Business Research, 3rd ed., 2013.

[4] See page 1 of the Terms of Reference for the EU Group of Experts on Cross-border Insolvency (http://ec.europa.eu/justice/newsroom/contracts/files/2012_expert-group-insolvency/terms_of_reference_group_insolvency_en.pdf). See in this respect also Bob Wessels, 'Europe Deserves A New Approach To Insolvency Proceedings', in: A. Bruyneel et al., Bicentenaire du Code de Commerce – Tweehonderd jaar Wetboek van Koophandel, uitg. Larcier, Brussel, 2007, 267ff; Cornelia J. Doliwa,

2. Chapter 11 U.S. Bankruptcy Code under the magnifying glass

4. Most remarkably, the USA Chapter 11 proceeding is being criticised more and more in the US in recent years. There is a consensus, on the other side of the Atlantic ocean, that the time has come to study whether Chapter 11 is in need of reform. The basic model of Chapter 11 was introduced in 1978. Since the U.S. Bankruptcy Code's enactment, however, there has been a marked increase in the use of secured credit, placing secured debt at all levels of the capital structure. Chapter 11 assumes the presence of asset value above the secured debt (such that value breaks at some point below the entitlements of secured creditors), but asset value is often not present in many of today's Chapter 11 cases. The debt and capital structures of most debtor companies are more complex, with multiple levels of secured and unsecured debt, often governed by equally complex inter-creditor agreements. Also, the market in the USA has changed. It is acknowledged that the growth of distressed debt markets and claims trading introduced another factor, which was absent when the 1978 Code was enacted. The nature of businesses has also changed: Chapter 11 was developed in an era when the biggest employers were manufacturers with domestic operations. Today, many of the biggest employers are service companies. Many of the remaining American manufacturers are less dependent on hard assets, and more dependent on contracts and intellectual property as principal assets. The U.S. Bankruptcy Code does not clearly provide for the treatment of such assets and affected counterparties. And of course, debtors are much more often multinational companies than 30+ years ago, with the means of production and other operations offshore, constituting international law and choice of law implications. Today's 'debtor' may be a group of related, often interdependent, corporate entities. For instance in *Chrysler*, the 'debtor' was a group of some 25 companies. And finally, the original intention of Chapter 11, being the rehabilitation of businesses, and the preservation of jobs and tax bases at the state, local and federal level, is eroded. In the reality of daily life, the emphasis is

Die geplante Insolvenz. Unternemenssanierung mittels Prepackaged Plan und Eigenverwaltung, Diss. Berlin, Nomos, 2011.

‘maximisation of value’ as an equal, sometimes competing or even exclusive goal, e.g. by using ‘fire sales’ in the meaning of Section 363 of the U.S. Bankruptcy Code.

5. All these developments have called in the USA for a fresh assessment of the purposes and goals of a U.S. restructuring regime, which is undertaken by a special Commission of the American Bankruptcy Institute (ABI).[5] The ambitions of the Commission are anything but small:
‘… the study of the need for comprehensive chapter 11 reform, by which we mean consideration of starting from scratch and re-inventing the statute.’

6. By looking at the substantive topics identified, one gets a good sense of the topics that are under further study and discussion:

1. Financing Chapter 11;
2. Governance and Supervision of Chapter 11 Cases and Companies;
3. Multiple Enterprise Cases/Issues;
4. Financial Contracts, Derivatives and safe Harbours;
5. Executory Contracts and Leases;
6. Administrative Claim Expansion, Critical Vendors and Other Pressures on Liquidity; Creation and / or Preservation of reorganization Capital;
7. Labor and Benefit Issues;
8. Avoidance Powers;
9. Sales of Substantially All of the Debtor’s Assets, Including Going-Concern Sales;
10. Plan Issues: Procedure and Structure;
11. Plan Issues: Distributional Issues;
12. Bankruptcy Remote Entities, Bankruptcy-Proofing and Public Policy;
13. The Role of Valuation in Chapter 11.

7. In 2013 the ABI Commission has established a Working Group on Comparative Law with the task to address questions raised by the Commission and the other

[5] ABI is the organisation of choice to undertake such an effort. It has some 13,000 members coming from all parts of the legal world. The ABI Commission itself is composed of some twenty members. It is co-chaired by Bob Keach and Albert Togut, whilst prof. Michelle Harner (University of Maryland) serves as the primary investigator.

Advisory Committees regarding how particular issues are addressed in several countries, where the country's approach may be relevant to the Chapter 11 model. The countries identified include e.g. Australia, Canada, China and Japan. The participating European countries are Austria, Belgium, France, Germany, Italy, the Netherlands and Spain.[6]

3. European Union: Rapidly changing political landscape

8. In Europe, the start of the second decennium of this century has shown a dramatic increase of political attention for matters of insolvency. I am referring to the following.

3.1. Revision EU Insolvency Regulation

9. On 12 December 2012, the European Commission published its proposal for a Regulation amending the EU Insolvency Regulation (COM(2012)744). This Regulation was enacted 10 years earlier, in 2002. The Commission has detected five main shortcomings of the Insolvency Regulation in the current economic climate, the first one being the 'scope' of the Insolvency Regulation. The Regulation should, in the future, have a wider application:

'The proposal extends the scope of the Regulation by revising the definition of insolvency proceedings to include hybrid and pre-insolvency proceedings as well as debt discharge proceedings and other insolvency proceedings for natural persons that currently do not fit the definition.'[7]

[6] The Working Group on Comparative Law is coordinated by Dr. Rolef de Weijs (University of Amsterdam) and myself as Chair. In each of the countries mentioned two or three persons have been selected and invited to assist in the work of the Working Group. These are all experienced scholars or practitioners, well known for their scholarly work and/or their reputation in practice. See: Bob Wessels and Rolef de Weijs, 'Revision of the iconic U.S. Chapter 11: its global importance and global feed back', in: International Insolvency Law Review (forthcoming).

[7] In addition to 'Scope', the other improvements relate to Jurisdiction, Secondary proceedings, Publicity of proceedings and lodgments of claims, and, Groups of companies. See http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm.

10. In the Explanatory Memorandum, the European Commission notes as its view that the Insolvency Regulation is generally considered to operate successfully in facilitating cross-border insolvency proceedings within the European Union, but that the consultation of stakeholders and legal and empirical studies commissioned by the Commission revealed a range of problems in the application of the Regulation in practice, moreover:

'… the Regulation does not sufficiently reflect current EU priorities and national practices in insolvency law, in particular in promoting the rescue of enterprises in difficulties.'

Therefore, in addition to the overall objective of the revision of the Insolvency Regulation to improve the efficiency of the European framework for resolving cross-border insolvency cases, the presented improvements are set in a policy context amending the Insolvency Regulation:

'… in view of ensuring a smooth functioning of the internal market and its resilience in economic crises. This objective links in with the EU's current political priorities to promote economic recovery and sustainable growth, a higher investment rate and the preservation of employment, as set out in the Europe 2020 strategy. The revision of the Regulation will contribute to ensuring a smooth development and the survival of businesses, as stated in the Small Business Act [COM2008)394].'

11. Presently – early September 2014 – the Insolvency Regulation is the subject of a large review process. The final text of the new Insolvency Regulation is expected to be ready at the end of 2014.[8]

3.2. Renewed policy: enable financially distressed enterprises to survive

12. The revision is also one of the key actions listed in the Single Market Act II[9], within which Key action 7 ('Modernise EU insolvency rules to facilitate the survival of

[8] On 6 June 2014 the Ministers in the Council have agreed on a general approach (see MEMO/14/397 and http://bobwessels.nl/2014/06/2014-06-doc11-ministers-of-justice-council-on-amendments-european-commission-to-eu-insolvency-regulation) and expressed that the EU Insolvency Regulation is expected to be adopted by the end of the year.

businesses and present a second chance for entrepreneurs'), includes the following text:

'Businesses operating in Europe benefit from an overall positive business environment, which the EU is further improving through its better regulation agenda. But more can be done. Europe needs modern insolvency laws that help basically sound companies to survive, encourage entrepreneurs to take reasonable risks and permit creditors to lend on more favourable terms. A modern insolvency law allows entrepreneurs to get a second chance and ensures speedy procedures of high quality in the interest of both debtors and creditors. We thus need to establish conditions for the EU-wide recognition of national insolvency and debt-discharge schemes, which enable financially distressed enterprises to become again competitive participants in the economy. We need to ensure simple and efficient insolvency proceedings, whenever there are assets or debts in several Member States. … However, we need to go further. At present, there is in many Member States little tolerance for failure and current rules do not allow honest innovators to fail 'quickly and cheaply'. We need to set up the route towards measures and incentives for Member States to take away the stigma of failure associated with insolvency and to reduce overly long debt discharge periods. We also need to consider how the efficiency of national insolvency laws can be further improved with a view to creating a level playing field for companies, entrepreneurs and private persons within the internal market.'[10]

I return to this subject shortly below.

[9] http://ec.europa.eu/internal_market/smact/index_en.htm

[10] See http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf. See Communication, dated 12 December 2012, re 'A New Approach to Business Failure and Insolvency' [COM(2012) 743]: http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm.

4. In Europe: Rescue on The Rise

4.1. Differences in national insolvency laws

13. The Insolvency Regulation is an instrument of a private international law. It tries to overcome the huge differences in the national laws of the Member States. Recital 11 in the present text of the Regulation provides:

'(11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different …'.

14. On a global level, it has been recognised that with all national insolvency systems having so many differences, these

'… hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximisation of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment. '

This view forms the foundation for the creation of the UNCITRAL Model Law on Cross-border Insolvency.[11] This Model Law, presently, is applied in over twenty countries, including Japan, Australia, USA, and in Europe: UK, Poland, Romania and Greece.

[11] See its Guide to Enactment (2013), nr. 5.

15. Since 2011 the book of rules for European insolvency law turns to a next page: harmonisation of insolvency law, to reduce some of the differences (acknowledged in the text of the Regulation extracted above) that presently exist in the substantive insolvency laws of Member States. Harmonisation by the way has been a term that until then was carefully avoided in insolvency circles.[12]

4.2. Growing towards an aligned approach to business rescue

16. On 15 November 2011 the European Parliament (EP) approved a 'Motion for a European Parliament resolution with recommendations to the Commission on insolvency proceedings in the context of EU company law'. In its motion the EP requests the Commission to submit to Parliament one or more legislative proposals:
'… relating to an EU corporate insolvency framework, following the detailed recommendations set out in the Annex hereto, in order to ensure a level playing field, based on a profound analysis of all viable alternatives.'[13]
These harmonisation-proposals have been the object of a different study.[14] Although 'harmonisation' sounded new, actually many EU countries' national laws share several tendencies in renewing their national rescue legislations. And '…[t]he pace of insolvency law reform has been fast and even, at times, relentless.'[15]

17. In a 2012 study, University of Heidelberg professor Andreas Pieckenbrock compares insolvency laws of England, Italy, France, Belgium, Germany and Austria.

[12] 'The H-word is out!' I observed in: Bob Wessels, 'Harmonization of Insolvency Law in Europe', in: European Company Law 8, issue 1 (2011), 27ff.

[13] See Motion for a European Parliament resolution with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI). See http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0355&format=XML&language=EN.

[14] See Ian F. Fletcher and Bob Wessels, Harmonisation of Insolvency Law in Europe, Reports presented to the *Nederlandse Vereniging voor Burgerlijk Recht* (Netherlands Association of Civil Law), Deventer: Kluwer 2012. We summarised our findings and presented our conclusions in a final chapter, which is separately published, see http://bobwessels.nl/wordpress/?attachment_id=2409.

[15] See Catherine Bridge, 'Insolvency – a second chance? Why modern insolvency laws seek to promote business rescue', in: Law in transition 2013, 28ff, mentioning (non-EU) changes in insolvency laws over the last five years in Albania, Kazakhstan, Moldava, Russia, Serbia and Ukraine.

He concludes that there are several common tendencies in these rescue proceedings:

1. Early recourse – Sometimes there is an earlier moment of starting a rescue process, for instance in the French *Sauvegarde*: the debtor must encounter problems that he can not solve, which is earlier than the traditional moment that the debtor can not pay its financial obligations when they are due;

2. Debtor in possession – The board is not fully replaced by the insolvency administrator; in certain proceedings the board stays in control of the business, what we call 'debtor-in-possession';

3. Stay – In these countries one finds a moratorium or a stay either automatic like in the *Sauvegarde* or at request (for instance the *concordato preventivo* or *réorganisation judiciare*);

4. Protecting fresh money – There are special provisions to protect fresh money available for the company while trying to work itself out of its misery;

5. Debt for equity swap – The possibility of a debt for equity swap, i.e. the conversion of a creditors claim into shares in the capital of the company.

6. Binding disapproving creditors – Generally, as Pieckenbrock explains, such a rescue is based on the principle of a composition or an arrangement concluded between the insolvent debtor and his creditors. Such a rescue plan is binding for those creditors who voted in favour of the plan, but is also binding – as indicated earlier – upon a (given percentage) of a dissenting minority of creditors or a watering down ('bail-in') for *altgesellschafter* (i.e. existing shareholders).[16]

18. In April 2014 INSOL Europe published a Study on a New Approach to Business Failure and Insolvency – Comparative legal analysis of the Member States' relevant provisions and practices. The reporters (University of Milan professor Stefania Bariatti and Robert van Galen) have studied 28 EU Member States. It is interesting to

[16] Andreas Pieckenbrock, *Das ESUG – fit für Europa?*, NZI 22/2012, 906ff. By the same author the theme has been presented in a broader context with focus on Germany, as a continuous work in progress, see Andreas Pieckenbrock, *Das Insolvenzrecht zu Beginn des 21. Jahrhunderts: ein Dauerbaustelle*, in: Werner Ebke, Christopher Seagon, Michael Blatz (eds.), Solvenz – Insolvenz – Resolvenz, Baden-Baden: Nomos 2013, 79ff.

note that generally professor Piekenbrock's characteristics are available in new or renewed recovery proceedings in nearly all member states.[17]

4.3. EU's response: New approach to business failure and insolvency

19. On 12 December 2012, the European Commission responded to the harmonisation-challenge of the European Parliament and stated a new policy, named 'A new European Approach to Business Failure and Insolvency'. Via a public consultation, opened in July 2013, the European Commission seeks to identify the issues on which the new European approach to business failure and insolvency should focus:

'… so as to develop a rescue and recovery culture across the Member States'.

It is stated that many European restructuring frameworks

'… are still inflexible, costly and value destructive'.[18]

Using the outcomes of this public consultation the European Commission presented on 12 March 2014 its Recommendation on a 'New Approach to Business Failure and Insolvency'. The Recommendation has 20 recitals and 36 recommendations.[19]

[17] For instance: debtor in possession proceedings (in certain cases supervised by an insolvency practitioner appointed by the court), a rescue plan in which creditors, sometimes even secured creditors, can be crammed down provided a certain qualified majority is reached, the ability to order a stay of the enforcement of claims, the possibility of attracting new loans, although these reporters have generally found that no super-priority was granted to new financing. The study is available via www.insol-europe.org. For an eyewitness account of the machinations behind tendering for and successfully delivering a report to the European Commission: Michael Tierhoff, 'Love me tender: How a project rocked INSOL Europe', eurofenix Spring 2014, 16ff. Harmonising continental European insolvency law therefore seems much less illusory as some 10 years ago, observes Eric Dirix, *Het insolventierecht anno 2014,* in: H. Braekmans, E. Dirix, M.E. Storme, B. Tilleman en M. Vanmeenen (eds.), Curatoren en vereffenaars: actuele ontwikkelingen III, Antwerpen – Cambridge: Intersentia 2014, 3ff, at 7.

[18] See Impact Assessment ('Impact Assessment 2014' or 'IA 2014') accompanying the document Commission Recommendation on a 'New Approach to Business Failure and Insolvency', 12.3.2014, SWD(2014) 61 final, 2.

[19] For the text, see http://ec.europa.eu/justice/newsroom/civil/news/140312_en.htm. For an overview, see Stephan Madaus, The EU Recommendation on Business Rescue – Only Another Statement or a Cause for Legislative Action Across Europe?, in: 27 Insolvency Intelligence 2014, no. 6, 81ff.

5. Recommendation of 12 March 2014 on a 'New Approach to Business Failure and Insolvency'

5.1. Major objects

20. Let's look at the Recommendation more closely. It has two major objects. First of all to:

'… ensure that viable enterprises in financial difficulties, wherever they are located in the Union, have access to national insolvency frameworks which enable them to restructure at an early stage with a view to preventing their insolvency, and therefore maximise the total value to creditors, employees, owners and the economy as a whole. The Recommendation also aims at giving honest bankrupt entrepreneurs a second chance across the Union.' (recital (1))

In order to achieve these aims, the Commission deemed it necessary to:

'… encourage greater coherence between the national insolvency frameworks in order to reduce divergences and inefficiencies which hamper the early restructuring of viable companies in financial difficulties and the possibility of a second chance for honest entrepreneurs, and thereby lower the cost of restructuring for both debtors and creditors. Greater coherence and increased efficiency in those national insolvency rules would maximise the returns to all types of creditors and investors and encourage cross-border investment. Greater coherence would also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union.' (recital (11))

5.2. Introducing minimum standards on preventive restructuring frameworks

21. The Recommendation seeks to reach these goals by encouraging Member States to put in place

'… a framework that enables the efficient restructuring of viable enterprises in financial difficulty and give honest entrepreneurs a second chance' (R1).[20]

The Recommendation provides for 'minimum standards' on 'preventive restructuring frameworks' (R3(a)) to be implemented in all Member States.

22. Through promoting adherence to these standards throughout the Union, the Commission's hopes are three of a kind:
1.*For national insolvency systems* - to improve the existing means for resolving distress in viable enterprises (R5) and encourage coherence in initiatives or reviews of 'corporate rescue framework' in all Member States (R10);
2. *For businesses (debtors)* - to improve access to credit (R4), encourage investment (R8) and to smoothen '… the adjustment for over-indebted firms, minimizing the economic and social costs involved in their deleveraging process' (R12); and
3. *For creditors* - to improve mechanisms for resolving financial distress efficiently, with reduced delays and costs and limited court formalities ('… to where they are necessary and proportionate in order to safeguard the interests of creditors and other interested parties likely to be affected') (R17).

5.3. Six Core Principles

23. Oxford associate professor Kristin van Zwieten has analysed the Recommendation in greater detail with as a result that she concludes that there are six core principles on which the minimum standards of the Commission's recommendations for a preventive restructuring framework are based.[21] I will follow her analysis below. These principles apply to any debtor ('… any natural or legal person in financial difficulties when there is a likelihood of insolvency'; R5(a)),

[20] Recommendations 30-33 relate to a second chance for honest entrepreneurs. These are not discussed here. 'R' stands for Recommendation.
[21] Kristin van Zwieten, 'Restructuring law: recommendations from the European Commission', in: Law in Transition (EBRD publication) 2015 (forthcoming).

excluding financial institutions.[22] The scope of these core principles is 'restructuring', which means '… changing the composition, conditions, or structure of assets and liabilities of debtors, or a combination of those elements, with the objective of enabling the continuation, in whole or in part, of the debtors' activity' (R5(b)).

1. *Early recourse*

A debtor should be able to have recourse to the restructuring framework at an early stage (R6(a)). The framework only is open to a debtor that is already in 'financial difficulties' (R1), such that there is a '… likelihood of insolvency'(R6(a)).

2. *Minimised court involvement*

A debtor should have recourse to the restructuring framework without the need to formally open court proceedings (R8). More generally, a restructuring procedure should not be lengthy and costly and court involvement should be limited to circumstances where necessary and proportionate to safeguard the rights of creditors and others affected by a proposed restructuring plan (R7). On the other hand, involvement of a court in some other circumstances may be necessary, including the granting of a stay.

3. *Debtor in possession*

A debtor '… should keep control over the day-to-day operation of its business' while the restructuring framework is used (R6(b)).[23] This principle provides an incentive for a debtor to use the procedure early and ensures minimum disruption to the

[22] Recital 15: 'It is appropriate to exclude from the scope of this Recommendation insurance undertakings, credit institutions, investment firms and collective investment undertakings, central counter parties, central securities depositories and other financial institutions which are subject to special recovery and resolution frameworks where national supervisory authorities have wide-ranging powers of intervention …'. See: Matthias Haentjens & Bob Wessels (eds.), Bank Recovery and Resolution – A Conference Book, The Hague: Eleven International Publishing 2014; Matthias Haentjens & Bob Wessels (eds.), Research Handbook on Crisis Management in the Banking Sector (forthcoming, Edward Elgar, London, 2014).

[23] The Recommendation does however contemplate (not compulsory, but on a case by case basis) the appointment by a court of a 'supervisor' to oversee debtor activity and safeguard creditor interests: R9(b).

operations of the debtor and allows him to carry on his day-to-day operations.[24] Restructuring is a management tool, rather than a signal of failure.[25]

4. *Court-ordered stay*

A debtor should have the power to seek a temporary stay of individual creditor enforcement actions (including those by secured and preferential creditors), by application to a court (R6(b) and R10). From a debtor's perspective a stay is designed to enable the assets of the business to be kept together, preventing their piecemeal dismemberment by creditors. A stay improves the chances of negotiations for a restructuring plan by the debtor, but it should be balanced by the need to adequately protect secured creditors' interests, by allowing them to request a relief from the stay under certain specified conditions. The Recommendation recommends a set of safeguards, including timelimits (initial stay of up to four months, subject to renewal up to a maximum duration of 12 months; R13), and an obligation to lift the stay when it is not longer necessary to facilitate the adoption of a restructuring plan (R14). In Member States which make the granting of the stay subject to certain conditions, a debtor should be able to be granted a stay in all circumstances where: (a) creditors representing a 'significant amount' of the claims likely to be affected by the restructuring plan support the negotiations on the adoption of a restructuring plan; and (b) a restructuring plan has a reasonable prospect of being implemented and preventing the insolvency of the debtor (R11).

5. *Ability to bind dissenting creditors to a restructuring plan*

A Member States' preventive restructuring framework should provide for a plan to be negotiated between the debtor and its creditors (secured and unsecured), and – where approved by the requisite majority as described by national law of creditors in affected classes – sanctioned by a court, with the effect that dissenting creditors are bound by it (R6(d), 16, 20, 21, 26). Secured creditors are to be treated as a seperate class to unsecured creditors (R17). When a restructuring plan is adopted unanimously by affected creditors it should be binding on 'all those affected

[24] IA 2104, 10.
[25] See Madaus, o.c., 82.

creditors', which seems to provide support for a fully out-of-court contractual restructuring, also for those creditors that did not participate in the adoption process itself, although they had been duly notified to participate.

A framework should also allow for the sanctioning of a plan approved by some classes but not by others, with the result that it would be possible for a majority of classes to bind dissenting classes (i.e. for those classes to be 'crammed down'). The conditions under which a restructuring plan can be confirmed by a court should be clearly specified and should include at least that the restructuring plan (a) has been adopted in conditions which ensure the protection of the legitimate interests of creditors, (b) has been notified to all creditors likely to be affected by it, and (c) does not reduce the rights of dissenting creditors below what they would reasonably be expected to receive in the absence of the restructuring, if the debtor's business was liquidated or sold as a going concern, as the case may be (the HLR-test, the hypothesis liquidation result-test). In addition (d) any new financing foreseen in the restructuring plan is necessary to implement the plan and does not unfairly prejudice the interests of dissenting creditors (R22). Procedural requirements should safeguard rights of creditors to ensure creditors are notified of the plan, can object to it, and can appeal against it, except that an appeal should '… not in principle suspend the implementation of the restructuring plan' (R24).

6. *Protection for new finance*

Those parties who provide new finance to a debtor in accordance with the terms of a court-sanctioned restructuring plan should be shielded from the operation of avoidance provisions, paulian actions etc. in national insolvency law (R6(e) and 27), as well as from 'civil and criminal liability relating to the restructuring process' (R28) except in the case of fraud (R29).

5.4. Relation to the Insolvency Regulation

24. The Recommendation is supposed to dovetail with the (amendments to the) European Insolvency Regulation. As explained, one of the proposed amendments to the European Insolvency Regulation is the widening of its scope, to include certain

debtor-in-possession and pre-insolvency procedures. If this amendment is made, the 'preventive restructuring framework', drafted in national insolvency systems in line with the Commission's Recommendation, could potentially come within the scope of the (new) European Insolvency Regulation. The system of the Regulation governing jurisdiction to open proceedings, and the effect of proceedings once opened could therefore apply to these restructuring procedures.

25. The ELI-project Business Rescue and Insolvency Law will be discussed during the Projects Conference. The only interesting point I'd like to mention now is that the European Commission does not address some other questions which are also of utmost importance for any rescue regime. From the ELI-Questionnaire send to National Correspondents for responses, the following topics do not seem to be addressed in the Recommendation of March 2014: topics 3 ('Executory contracts, including leases, IP-licensing contracts; termination and modification of contracts; transfer of contracts'), 5 ('Labour, benefit and pension issues'), 6 ('Avoidance powers, including safe harbour for failed rescue efforts in a later bankruptcy, and avoidance powers in pre-insolvency procedures and out-of-court workouts'), 7 ('Sales of substantially all of the debtor's assets on a going-concern basis'), 9 ('Multiple enterprise/corporate group issues', although there are some references to groups in the recitals), and 10 ('Special arrangements for small and medium-sized enterprises (SMEs) including natural persons (but not consumers)').[26]

6. Conclusion

26. The Recommendation, formally, reflects a rather soft approach. It invites Member States to take or continue legislative action. Within twelve months (so before April 2015) EU Member States are invited to implement the Recommendation's 'principles' (R34). The endgame is that 18 months after adoption of the Recommendation (so in October 2015) the Commission will assess the state of

[26] From the Questionnaire topic 1 ('Governance and Supervision of a rescue in court and out-of-court'), 2 ('Financing a rescue, including critical vendors and other pressures on liquidity; the stay'), 4 ('Ranking of creditor claims; governance role of creditors') and 8 ('Rescue plan issues: procedure and structure; distributional issues') are (partly) addressed in the Recommendation.

play, based on the yearly reports of the Member States to evaluate whether further measures are necessary to strengthen the European approach (R36).

27. In its substance the Recommendation is modest. It only presents a 'minimum standard', allowing – I would argue – Member States to add specific conditions and components to have the preventive restructuring framework better operate within the legal context and economic environment of its national market. It is the bare minimum, as there is no clear principle that the debtor should not take any action which might adversely affect the prospective return to relevant creditors (either collectively or individually) as compared to a certain reference date or that the debtor should provide, and a principle that would allow relevant creditors and/or their professional advisers reasonable and timely access to all relevant information relating to its assets, liabilities, business and prospects, in order to enable proper evaluation to be made of its financial position and any proposals to be made to relevant creditors.[27]

28. It is submitted that a thourough comparative analysis during 2015 will be necessary to assess whether other, binding EU-measures are appropriate or necessary to reach the Commission's policy goals. If the new Commission, under leadership of mister Juncker, maintains the policy expressed by the Commission the last two years (which I would endorse), we will hear from the Commission, as most probably in many states the process of legislating takes mostly many years. However, as shortly demonstrated above, legislation in e.g. Germany, Spain, France and proposals in the Netherlands are of a similar nature to the content of the Recommendation.

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[27] See the Third and Fifth principle in the INSOL International Statement of Principles for A Global Approach To Multi-Creditor Workouts (published October 2000). The publication demonstrates that these Principles are endorsed by the World Bank, the Bank of England and the British Bankers Association. See Bob Wessels, International Insolvency Law, 3rd ed. 2012, par. 10107.