UNOFFICIAL TRANSLATION OF THE DRAFT EXPLANATORY MEMORANDUM TO THE DRAFT ACT ON COURT CONFIRMATION OF EXTRADJUDICIAL RESTRUCTURING PLANS (*WET HOMOLOGATIE ONDERHANDS AKKOORD*)

DRAFT Amendment of the Bankruptcy Act in view of the introduction of the possibility of court confirmation of extrajudicial restructuring plans (Act on Court confirmation of extrajudicial restructuring plans)

THE EXPLANATORY MEMORANDUM

I General Section

1. Purpose and substance of the bill

This bill introduces a framework that will enable the courts to confirm an extrajudicial restructuring plan between a company and its creditors and shareholders to restructure the company's debts. This court confirmation will make a restructuring plan binding on all creditors and shareholders affected by it. Creditors or shareholders who have not consented to a restructuring plan may still be bound by it if the decision-making involved in it and its substance meet certain requirements. This is why the term 'compulsory restructuring plan' is also used in this context. This framework will be integrated into the Bankruptcy Act (*Faillissementswet*).

The proposed Act on Court Confirmation of Extrajudicial Restructuring Plans (*Wet homologatie onderhands akkoor*d) ("CERP") is primarily aimed at companies that are on the brink of insolvency due to excessive debts but still have viable businesses. Its aim is to strengthen these companies' restructuring capacity. The Netherlands does not have a statutory framework for a compulsory restructuring plan outside bankruptcy proceedings. At present, an extrajudicial debt restructuring plan can only be adopted if all capital providers, i.e. creditors and shareholders, consent to it. Each individual capital provider therefore has an incentive to refuse its consent in order to gain a better position for himself. This often makes it difficult – and sometimes impossible – to reach agreement. Accordingly, the behaviour of one or several dissenting creditors or shareholders can still lead to a company becoming bankrupt; alternatively, the other capital providers may be forced to shoulder a disproportionate share of the restructuring costs in order to avert bankruptcy. The CERP provides a solution to this problem. Its intention is to strengthen consensual debt restructuring and the restructuring process and to provide the possibility of a compulsory restructuring plan as a 'last resort'. The CERP does not in any way aim to erode the existing practice of extrajudicial restructuring. On the contrary, one of the aims of the CERP is to strengthen this practice. In the consensual restructuring process, the parties negotiate against the background of the alternative provided by the statutory regime. Because the CERP will provide an effective means of having a solution imposed by a court, opposing parties will be less likely to make exaggerated demands. This will facilitate agreement of a restructuring plan. The mere fact that an effective and efficient

process is available that opens the way to a quick, final decision by the courts can obviate the need for actual recourse to it.

The CERP also allows for court confirmation of a restructuring plan to wind up a company that is unable to survive. The CERP can then be applied if the result of a controlled winding up of its operations on the basis of a restructuring plan outside bankruptcy proceedings would be better than a winding-up achieved through proceedings.

The bill is part of the Review of Bankruptcy Law Programme (*Programma 'Herijking Faillissementsrecht'*). As stated in the letter to the Second Chamber of the Dutch Parliament of 26 November 2012, this programme is founded on three cornerstones: (i) fraud prevention, (ii) enhancing company restructuring capacity and (iii) modernising the bankruptcy procedure.[1] This bill is part of the second of these, which will now consist of four legislative proposals in all, including this one. The other three bills will introduce:

(i) a framework offering a legal basis for a method developed in practice (also referred to as 'pre-pack') whereby the courts, at the management board's request, determine who is to be appointed as receiver (curator) (without disclosing his or her identity) shortly before a company is expected to be declared bankrupt. These rules will be set out in the Continuity of Companies Act I (*Wet Continuïteit Ondernemingen I*)[2],

(ii) an Act on Transfer of Undertaking in Bankruptcy (*Wet overgang van onderneming in faillissement*)[3], and

(iii) various measures aimed at increasing the effectiveness of the bankruptcy and suspension of payments regime.

2. Background; reasons for the bill

When large companies are faced with serious financial problems, it is customary for the management board or the actual managers (hereinafter: the management) to contact advisers in order to seek a solution. The creditors in such a restructuring process are often contacted and asked to accept an extension of payment or a partial waiver of their outstanding claims or conversion of them into share capital. However, until bankruptcy is declared or a suspension of payments is granted, such arrangements are subject to the general rules of property law. The main rule of property law which applies here is that creditors can demand full payment of their claim. Only under very special circumstances (on the basis of the doctrine of abuse of authority (Article 3:13 of the Civil Code) ("BW")) can an order be issued to a creditor to cooperate with the implementation of a restructuring plan offered to him.[4] According to the Supreme Court, debtors wishing to

[1] Parliamentary Papers II 2012-2013, 29 911, No 74.
[2] Parliamentary Papers I 2015-2016, 34 218.
[3] https://www.internetconsultatie.nl/overgang_van_onderneming_in_faillissement.
[4] Supreme Court 24 March 2017, ECLI:NL:HR:2017:485 and Arnhem-Leeuwarden Court of Appeal 22 December 2015, ECLI:NL:GHARL:2015:9827.

legally enforce such cooperation are in principle responsible for establishing and proving specific facts and circumstances from which it can be inferred that the creditor could not reasonably have refused to consent to the restructuring plan.[5]

The financial problems can also be resolved by raising new capital, with shareholders being asked to make an additional investment in the company or to agree to the issue of new shares to attract new investors (cf. Articles 2:96a and 206a BW). In principle, the shareholders are free to cooperate or not, and they cannot be forced to buy new shares (Articles 2:81 and 192 BW). The pre-emptive right of shareholders on the issue of new shares can be overridden by the courts due to the financial distress of the company.[6]

A comparison of Dutch insolvency law with regimes elsewhere shows that the Netherlands ranks highly when it comes to resolving insolvencies.[7] However, it lags well behind in terms of restructuring opportunities for companies. The current framework that applies to suspensions of payments has proved ineffective and consequently is little used despite the urgent need for a practicable restructuring framework outside bankruptcy proceedings. This is clear from the literature[8] and from the responses to the two initial drafts for which consultations were held in 2014 and 2017.[9] Reference is also made in this regard to the fact that, in the past year, an enormous number of companies around the world have sought solutions to their financial problems in the United Kingdom or the United States, availing themselves of the 'Scheme of Arrangement' and 'Chapter 11 procedure', respectively. Among them were several Dutch companies.[10]

In addition, at the end of 2016 the European Commission issued a proposal for a directive whose object is to ensure that 1) *viable enterprises and entrepreneurs that are in financial difficulties have access [in every Member State] to effective national preventive restructuring frameworks which enable them to continue operating*; 2) *honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance*; and 3) *that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt*

[5] Supreme Court 12 August 2005, NJ 2006/230 (Groenmeijer v Payroll) and Supreme Court 24 March 2017, ECLI:NL:HR:2017:485.
[6] Enterprise Chamber 31 December 2009, Inter Access, ECLI:NL:HAMS:2009:BL3680.
[7] This is made clear by the World Bank's 'Doing Business Indicator' (http://www.doingbusiness.org/data/exploretopics/resolving-insolvency) and the 'Insolvency Indicator' of the Organization for Economic Cooperation and Development (OECD) (http://www.oecd.org/eco/growth/policies-for-productivity-the-design-of-insolvency-regimes-across-countries-2018-going-for-growth.pdf).
[8] The case for a restructuring framework that does not involve bankruptcy has been made since 1835. For a concise history of this, see N.W.A. Tollenaar, 'Het pre-insolventieakkoord. Grondslagen en raamwerk' (diss. 2016), section. 1.2.) [in Dutch].
[9] https://www.internetconsultatie.nl/wco2/details and https://www.internetconsultatie.nl/wethomologatie.
[10] Most cases remain confidential and are not publicised. A number of examples that were publicised are: Van Gansewinkel Groep B.V. (the English scheme); New World Resources (the scheme); Indah Kiat International Finance Company B.V. (the scheme); DAP Holdings N.V. (the scheme); European Directories (the scheme); Estro Groep B.V. (the scheme); NEF Telecom B.V. (the scheme); Magyar Telecom B.V. (the scheme); Nortel Networks B.V. (English administration), Eurodis B.V. (the English pre-pack); Almatis B.V. (Ch. 11, US); Marco Polo Seatrade B.V. (Ch. 11, US); Global Telesystems Europe B.V. (Ch. 11, US); Versatel Telecom International N.V. (Ch. 11, US); United Pan-Europe Communications N.V. (Ch. 11, US).

is improved, in particular with a view to shortening their length (the "Directive").[11] The object of the Directive is also to ensure a properly functioning internal market and to remove obstacles to the free movement of capital and the freedom of establishment resulting from differences between national frameworks. The Council, the European Parliament and the European Commission reached agreement on this Directive at the end of December 2018.[12] The first part of the Directive obliges the Member States to introduce a framework for a pre-insolvency restructuring procedure. The bill is in line with it. This is clarified in the explanation of the bill's individual articles set out below. A separate bill will be prepared for the implementation of the Directive. The explanatory memorandum to that bill will include a transposition table that will also indicate how the CERP corresponds to the first part of the Directive.

The intention of the bill, which is inspired by the 'Scheme of Arrangement' and 'Chapter 11 procedure', is for the CERP to provide an effective and broadly accessible restructuring framework that not only big companies but also small and medium enterprises ("SMEs") can use. The expectation is, however, that the CERP will largely apply to bigger companies to start with. The principal benefit of the CERP for smaller companies will initially be an improvement in their position as creditors (frequently as suppliers). As a rule, smaller companies have the status of unsecured creditors in bankruptcies. A creditor with an unsecured claim ranks lowest in its debtor's bankruptcy and accordingly, in most cases, only receives part of its claim, if any. According to American research on the application of the Chapter 11 procedure, however, unsecured creditors receive on average 52% of their claims where there is a compulsory restructuring plan in place.[13] It is therefore likely that the application of the CERP will in any case indirectly strengthen the position of smaller companies as creditors.

3. Brief description of the substance of the framework

3.1 Introduction

The bill envisages a framework under the CERP on the basis of which the courts can confirm an extrajudicial plan for restructuring a debtor's debts so that creditors and shareholders who have not consented to the restructuring plan can still be bound by it (Article 385). The proposed framework will be incorporated into the Bankruptcy Act in a new Section 4.2 (court confirmation of an extrajudicial restructuring plan), which will be divided into four paragraphs:

[11] Proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. 2016/0359 (COM/2016/723/FINAL) Parliamentary documents II 2016/17, 22 112, no. 2292 (BNC fiche).
[12] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), OJ EU 2019, L 172/18.
[13] The economic impact of Chapter 11 reorganization versus Chapter 7 liquidation, Wade D Druin en Mike Allgrunn, in Journal of Criminal Justice and Legal issues, Volume 2, September, 2014.

- § 1. General provisions
- § 2. The offer of and vote on a restructuring plan;
- § 3. Court confirmation of a restructuring plan, and
- § 4. The consequences of court confirmation of the restructuring plan

The debtor can initiate the process of agreeing a restructuring plan himself. However, it is also possible for creditors, shareholders or a company's Works Council or staff representative body to take the initiative. They can ask the court to appoint a plan expert who can then prepare and propose a restructuring plan to the affected creditors and shareholders.

A restructuring plan may only be confirmed by the courts if the decisions taken in it and its substance meet a number of requirements. One of the main rules is that the creditors and shareholders must have had the opportunity to express their views by voting on the restructuring plan. Furthermore, a compulsory restructuring plan is only possible if it is justified in the circumstances. Therefore, the following conditions must be fulfilled:

1. the company for which the restructuring plan is put forward is in a situation in which it is reasonably likely to become insolvent (Articles 370(1) and 371(3)).

2. the purpose of the restructuring plan may be:

   (a) to avert the imminent bankruptcy of a business which would be financially sound again once its debts are restructured, or

   (b) to wind up a company that cannot survive, now or in the future, thus leading to a better result than if the company were to be wound up in bankruptcy proceedings.

3. the vote shows that there is at least one category (hereinafter: class) of affected creditors or shareholders that supports the restructuring plan with the required majority.

4. the restructuring plan is reasonable in the sense that it will benefit the affected creditors and shareholders or at least not be to their detriment if the restructuring plan is agreed. This means at least that:

   (a) the restructuring plan will not put the creditors and shareholders in a significantly worse position than they would be in the case of bankruptcy proceedings (Article 384(3));

   (b) the value (hereinafter: reorganisation value) that can be retained or realised with the restructuring plan can be distributed *fairly* among the

creditors and shareholders (i.e. the reorganisation value is distributed in accordance with the creditors' statutory ranking in the case of recourse by the creditors against the debtor's assets unless one or more classes consent to a different proposal) (Article 384(4)(a), and

(c) creditors who are expected to receive a cash payment in the event that the debtor becomes bankrupt and the majority of whose class has voted against the restructuring plan, must have the right to 'opt out' (i.e. they must be able to opt for a cash payment) (Article 384(4)(b)).

If all classes have consented to the restructuring plan and the decision-making has been correct (i.e. none of the grounds for refusal listed in Article 384(2) applies), the restructuring plan can be considered *reasonable*. There could, however, be creditors or shareholders who have not consented to the restructuring plan and who oppose the court confirmation. If these creditors or shareholders can demonstrate that the restructuring plan is *unreasonable* because it would put them in a significantly worse position than in the case of bankruptcy proceedings, the court will then refuse the request for confirmation (Article 384(3)). If not all classes have consented to the restructuring plan on offer, the decisive factor is how the reorganisation value that can be retained or realised with the restructuring plan is distributed among the affected creditors and shareholders. This distribution may not deviate, to the detriment of a class that voted against the restructuring plan. from the creditor's statutory ranking in the case of their recourse against the debtor's assets. If there are creditors or shareholders the majority of whose class voted against the restructuring plan, and if they demonstrate that it does not satisfy this requirement, this is also a reason for the court to refuse the request for confirmation (Article 384(4)). This is because, in that case, the restructuring plan provides for an *unfair* distribution of the reorganisation value and the plan is therefore unreasonable.

To offer the parties maximum scope to consult on and agree a restructuring plan that is adapted to the specific circumstances of the case at hand, the CERP has been drafted as far as possible in the form of a framework. Until asked to confirm the restructuring plan, the court's involvement is, in principle, limited. In order to prevent the court from only clarifying uncertain points at the end of the proceedings when it may be too late, debtors may ask the court to provide clarification at an earlier stage (Article 378(1)). This enables 'deal certainty' to be obtained quickly and definitively; in other words, it soon becomes clear whether the proposed restructuring plan has a chance of success or whether it will be necessary to adjust the preparation process and/or amend the proposed restructuring plan. This system is in line with Article 4(6) of the Directive, which provides: "*Member States may put in place provisions limiting the involvement of a judicial* (…) *authority in a preventive restructuring framework to situations where it is necessary and proportionate* (…)."

Furthermore, the CERP clarifies the consequences of the court confirmation of the restructuring plan for the debtor and the affected creditors and shareholders, and of any noncompliance with it.

Finally, it is important that the CERP provides two procedures within which the restructuring plan can be agreed: 1) a *private restructuring procedure outside bankruptcy proceedings* and 2) a *public restructuring procedure outside bankruptcy proceedings* (Article 369(6)). Notification of a public restructuring procedure outside bankruptcy proceedings will be given to the European Commission with a request to have this procedure listed in Annex A to the European Insolvency Regulation (the "Insolvency Regulation").[14] As for private restructuring procedures that do not involve bankruptcy proceedings, it will not be publicly disclosed that the debtor or a plan expert intends to offer a restructuring plan, and all requests to the court will be heard in closed session (Article 369(9)). In the case of the public restructuring procedure outside bankruptcy proceedings, the process will actually be publicised by reporting it in the insolvency register (Article 370(4)). Furthermore, the Trade Register Decree 2008 will stipulate that the application of the public restructuring procedure outside bankruptcy proceedings must be registered in the Trade Register. This is already customary in the case of other public insolvency procedures, i.e. declarations of bankruptcy, granting of suspensions of payments and the application of the debt restructuring plan (Article 39 of the Trade Register Decree 2008). In addition, requests to the court will be heard in open session (Article 369(9)).

It is the responsibility of the debtor or the creditors and shareholders, or the Works Council or employee representative body appointed within the company, if they request the appointment of a plan expert on the basis of Article 371(1), to consider which procedure best suits the debtor's situation and offers the best chance of success. They must choose between these two procedures. In any event, it must be clear which procedure is chosen when the court first becomes involved in the attempt to adopt a restructuring plan. In any event, if one or more creditors or shareholders take the initiative to adopt a restructuring plan, the choice must be made before the court appoints a plan expert (Article 371(2)). If it is the debtor who prepares and proposes the restructuring plan, this choice must in any event have been made before the court deals with a request for confirmation (Article 383(3)). In both situations, however, if a request for a cooling-off period has been put to the court before that, the choice between the two procedures has to have been made at a much earlier stage (Article 376(3)). Once one of the two procedures has been chosen, the process of adopting a restructuring plan must be entirely compliant with that procedure. Accordingly, an interim switch from the private to the public procedure is not possible. Before the court decides on requests submitted to it regarding the adoption of the restructuring plan, it must first determine whether it has jurisdiction to hear them. In the case of a private restructuring procedure outside bankruptcy proceedings, this is determined on the basis of Article 3 of the Code of Civil

[14] Regulation 2015/848 of 20 May 2015 on insolvency proceedings, OJ EU L 141/19.

Procedure ("Rv"). As for the public restructuring procedure, it is decisive whether the centre of the debtor's main interests (its 'COMI') is located in one of the EU Member States (with the exception of Denmark).[15] If this is the case it will be determined, on the basis of the Insolvency Regulation (by listing the public restructuring procedure not involving bankruptcy proceedings in Annex A) whether the Dutch courts have jurisdiction. If the debtor's 'COMI' is outside the EU or in Denmark, the question of whether the Dutch courts have jurisdiction must again be answered on the basis of Article 3 Rv. If the Dutch courts have jurisdiction, it then follows from Articles 262 and 269 Rv which Dutch court has territorial jurisdiction and, therefore, which court must be applied to in the context of the CERP (Article 369(7) and (8)).

These key elements of the framework are briefly discussed below.

3.2 Offer, substance and structure of a restructuring plan

Offer of a restructuring plan

Firstly, the debtor itself may prepare and offer a plan for restructuring its debts to its creditors and shareholders. In order to benefit from the CERP, the debtor must be in a situation in which it is reasonably likely to become insolvent (Article 370(1)).

One or more creditors and shareholders, or the Works Council or employee representative body appointed within the company, may also take the initiative to adopt a restructuring plan. Under the CERP, they may ask the courts to appoint a plan expert. This plan expert can prepare a proposal for a restructuring plan and then initiate the process that could lead to court confirmation of the restructuring plan. The debtor may also request the appointment of a plan expert. It can do this, for example, to avoid any suggestion of a conflict of interest or to increase confidence in the process and thus the chances of the restructuring plan succeeding (Article 371(1)). The appointment of a plan expert means that the debtor cannot simultaneously offer a restructuring plan (Article 371(1)). This means that the attempt to adopt a restructuring plan is always concentrated within a single process.

The request for the appointment of a plan expert will be subject to the condition that the debtor must be in a situation in which is reasonably likely to become insolvent. If necessary, the court may ask an expert to examine this situation (Article 371(4)). If the debtor is indeed in the situation described, the court will grant the request unless it there is prima facie evidence that the interests of the joint creditors would not be served by this request (Article 371(3)). This may be the case, for example, if the request for an appointment is made by a creditor who apparently does so for no other purpose than to frustrate or delay an advanced and promising restructuring process in order to create a better bargaining position for himself, while the joint creditors are disadvantaged by such

[15] 'COMI' is a term that is used in Article 3(1) of the Insolvency Regulation. It is "the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties."

strategic behaviour and the resulting delay. A request for the appointment of a plan expert is granted in any case if it has been filed by the debtor itself and it is supported by the majority of the creditors.

When appointing the plan expert, the court will also stipulate the salary of the plan expert and determine the maximum cost of the work to be done the plan expert and third parties engaged by him. This amount may subsequently be increased by the court. Unless otherwise agreed, the debtor must pay these costs (Article 371(10)). There is one exception to this rule: if the majority of the creditors has requested the appointment of a plan expert, then the creditors will bear the costs. This is in line with Article 5(3) of the Directive.

If the court decides on an appointment, the debtor and all parties directly involved in the company managed by him - i.e. the managing directors, shareholders and supervisory directors, as well as the employees - are obliged to provide the plan expert with all the required information, whether requested or not, and to cooperate fully to enable him to perform his task properly (Article 371 (8)). The plan expert must also be given the opportunity to consult the financial records and all other relevant business information (Article 371(7)). The plan expert will only share this information with third parties where this is necessary to adopt the restructuring plan (Article 371(9)). Since the powers of the plan expert under the CERP are totally identical to those of the debtor under the new Section 4.2 if the latter proposes a restructuring plan himself, this general explanation mainly relates, for the sake of convenience, to the scenario in which it is the debtor who proposes the restructuring plan.

Once the debtor starts preparing a restructuring plan, it lodges a statement to that effect with the court registry. This is in its interest because from that moment on it can invoke a number of provisions included in the framework to help him adopt a restructuring plan (see section 3.7). After the debtor has proposed its restructuring plan to the creditors and shareholders, they can consult the statement (Article 370 (3)).

The CERP provides that the restructuring plan may amend the rights of creditors (Article 370(1)) to enforce the debtor's obligations. This could entail:

- a full or partial waiver of an outstanding claim, thus releasing the debtor from its payment obligation, in whole or in part, and ending the creditor's right to claim (full or partial) payment of the original debt from the debtor, or

- an extension of payment giving the debtor more time to meet its payment obligations and ending the creditor's right to enforce payment at the originally agreed time.

The restructuring plan may include amendments to the rights of all categories of creditors and shareholders. Unlike a suspension of payments agreement, a compulsory restructuring plan that is adopted on the basis of the CERP may therefore also involve an amendment to the rights of the preferential and secured creditors. A restructuring plan

cannot alter the rights of employees pursuant to their employment contracts and Title 10 of Book 7 BW (Article 369 (4)). The legal position of employees cannot be changed by a restructuring plan and it is therefore safeguarded.

If a creditor is affected by a restructuring plan and its claim is amended in that context, it will retain the right to hold a third party, including a surety or a co-debtor who is liable for a debt of the debtor or who has in any way provided security for payment of that debt, liable for payment of its original claim in the form and at the time agreed before the restructuring plan was confirmed (Article 370(2), first sentence). The third party cannot take any action against the debtor for the amount that it pays to the creditor after the restructuring plan has been confirmed (Article 370(2), second sentence). This prevents the situation whereby the debtor is still held liable for the original debt and the restructuring plan ultimately fails to resolve the financial problems. If and to the extent that payment by the third party and the assignment of rights on the basis of the restructuring plan results in the creditor receiving a value that exceeds the amount of its original claim against the debtor, the rights assigned to the creditor will automatically be transferred to that third party (Article 370(2), third sentence). This enables the loss suffered by the third party due to its not having a right of recourse against the debtor to be somewhat compensated, and prevents the creditor from ultimately receiving more than it is entitled to on the basis of its original claim against the debtor. The following situations are conceivable:

1. The restructuring plan entails a creditor receiving payment of 50% of its claim three years after the restructuring plan is adopted (with interest at the market rate). The creditor is unwilling to wait that long and demands 100% of its claim from the guarantor. The guarantor then pays the entire claim. As soon as this has happened, the creditor's rights on the basis of the restructuring plan (payment of 50% of the claim in three years, with interest) are automatically transferred to the guarantor. If the restructuring plan is implemented as agreed, the guarantor will receive from the debtor, after three years, 50% of the amount that it has paid to the creditor. If the rights on the basis of the restructuring plan are not transferred to the guarantor, then the creditor would ultimately receive 150% of its original claim against the debtor, with the guarantor being deprived of any right of recourse.

2. The restructuring plan again entails a creditor receiving payment of 50% of its claim three years after the restructuring plan is adopted (with interest at the market rate). The creditor now demands payment of the "other 50%" of its claim from the guarantor. The guarantor pays this 50% of the claim. The creditor now has now received a value that is exactly equal to the amount of its original claim against the debtor: 50% on the basis of the restructuring plan and 50% from the guarantor. The rights on the basis of the restructuring plan are not transferred to the guarantor in this case. If they were, the creditor would still receive 50% of its original claim and the surety provided by the guarantor would in fact be worthless.

An exception to the rule that a restructuring plan leaves rights against third parties intact is made in the case of a restructuring plan as referred to in Article 372. The purpose of such a restructuring plan is also to restructure guarantees insofar as they have been issued by companies that are part of the group to which the debtor also belongs. This is only possible if the conditions set out in that Article are met.

The CERP also allows a debtor to unilaterally terminate current agreements if the counterparty does not agree to a proposed voluntary amendment or termination (Article 373). One example would be a rental agreement that is an unwelcome financial burden to a company. Employment contracts cannot be adapted (Article 369(4)).

The CERP provides that the debtor may make a proposal to the counterparty to amend or terminate the agreement. If the counterparty does not agree, the debtor has the right to terminate the agreement unilaterally with the court's authorisation. In such a case, the debtor must accompany its request for court confirmation with a request for authorisation to unilaterally terminate the agreement (Article 383(7)). The conditions for this unilateral, early termination with the court's authorisation are as follows:

(a) the debtor is in a situation in which it is reasonably likely to become insolvent, and

(b) the court confirms the restructuring plan (Articles 373(1) and 384(5)).

The (unsecured) damages claim that the counterparty may have after such unilateral, early termination of the agreement may involve the debtor in the restructuring plan (Article 373 (2)). As a result, the counterparty to the agreement will become a voting creditor with all the rights vested in him under the CERP, including the right to vote on the restructuring plan and the right to ask the court to refuse the request for court confirmation of the restructuring plan (Articles 381(3) and 383(8)). If the debtor does not include the counterparty's possible damages claim in the restructuring plan, the counterparty will not have the right to vote on the restructuring plan. It will then not be able to oppose the court confirmation of the restructuring plan either. However, the counterparty may ask the court not to authorise the termination of the agreement on the grounds that the situation is not one of inevitable insolvency (Article 384(5)).

In addition to amending the rights of creditors, a restructuring plan may also lead to the rights of shareholders being amended (Article 370(1)). This mainly involves restructuring plans that include a debt for equity swap. Debt for equity swaps come in many forms but, in general, they entail creditors' claims being converted wholly or in part into equity. This gives the creditor an equity interest and thus also a controlling interest in the company, thus diluting the equity interest and the related controlling interest of the existing shareholders.

As a rule, share issues require a resolution to be adopted by the general meeting of shareholders (Article 2:96/206 BW). In addition, existing shareholders have a pre-emptive

right on any issue of ordinary shares (Article 2:96a/206a BW). These rules do not apply where a compulsory restructuring plan is adopted (Articles 370(5) and 371(1)). This is in line with Article 32 of the Directive.

A debtor may decide to offer all its creditors and shareholders a restructuring plan. It may also choose to limit the offer to a certain group of creditors or shareholders, for example by offering a restructuring plan aimed exclusively at restructuring debts owed to lenders and leaving the claims of unsecured creditors intact (Article 370(1)). In the latter case, the debtor only has to submit the restructuring plan to that limited group of creditors or shareholders (Article 381(1)). This gives him the opportunity to use the private settlement procedure outside bankruptcy proceedings to adopt a restructuring plan in relative peace and to avoid negative publicity about the financial problems that have arisen and the associated adverse consequences. Not involving a particular group of creditors in the restructuring plan effectively means that the rights of those creditors are not amended in any way and that their rights must be complied with in full. In such a case, there is a risk of one or more classes of creditors affected by the restructuring plan not consenting to the restructuring plan and creditors in that class objecting to the court confirmation. The restructuring plan can then only be eligible for court confirmation if:

- the requisite majority of the classes of creditors of equal or higher ranking consent to the restructuring plan (i.e. they agree to the deviation from the creditors' statutory ranking in the case of their recourse against the debtor's assets), or

- the debtor provides reasonable grounds for its decision to exclude certain creditors from the restructuring plan (meaning that those creditors do not bear part of the deficit) and demonstrates that this will not harm the interests of creditors of equal or higher ranking (Article 384(4)(a)).

Substance and structure of a restructuring plan

A debtor is free, in principle, to decide what to offer its creditors and shareholders and how to structure a restructuring plan. However, in order for the restructuring plan to be eligible for court confirmation, its substance and structure must meet a number of requirements (Articles 374 and 375). As such, the debtor must include the information required by law in the restructuring plan and in the documents that it is required to submit. This ensures that creditors and shareholders are able to make a well-informed decision if they are asked to vote on the restructuring plan (Article 381(1)).

If a restructuring plan covers different categories of creditors and shareholders - i.e. they have such different rights in bankruptcy proceedings or obtain such different rights on the basis of the restructuring plan that they end up in dissimilar positions - then the restructuring plan should define classes of creditors and shareholders. This means the following:

- the different categories of creditors and shareholders are assigned to different classes (Article 374);

- each class receives a proposal commensurate with the rights of the creditors or shareholders concerned (Article 375), and

- each class votes separately on the restructuring plan (Article 381(6)).

Creditors or shareholders who do not belong to the same rank must be assigned to different classes. These should include different classes for preferential creditors, creditors with a retention of title, creditors with a possessory lien, and unsecured creditors. The debtor may assign a single category to different classes. It can also make different offers to these classes, which may lead to one class being given an advantage over another class. In this case, if the restructuring plan is to be eligible for court confirmation, the debtor must ensure:

- that the requisite majority of the less advantaged class agrees to the restructuring plan and thus to the choice to make a better offer to the other class, or

- that it can put forward reasonable grounds for its decision to make a distinction and can demonstrate that the interests of creditors in the less advantaged class will not be harmed as a result (Article 384(4)(a)).

3.3 Voting procedure and voting rights

Voting rights and participation in decision-making

Creditors and shareholders whose rights are amended by a restructuring plan are eligible to vote on it. Creditors or shareholders whose rights are not affected by a restructuring plan need not be informed about it or involved in voting on it (Article 381 (1) and (3)).

As a restructuring plan cannot alter the debtor's obligations towards its employees, employees are not considered to be voting creditors. A restructuring plan will often form part of a broader reorganisation process involving the restructuring of debts and adjustment of business operations in order to save costs. Other legislation may provide that parties not directly affected by a restructuring plan must nevertheless be involved in the process. For example, Article 25 of the Works Councils Act grants representative bodies an advisory right with regard to a number of intended company decisions, including ones concerning:

- "*any significant reduction, expansion or other change in the company's activities*" (paragraph d);

- "*major changes to the organisation or to the distribution of powers within the company*" (paragraph e), or

- "*taking out major loans for the company*" (paragraph i).

If the broader reorganisation process of which the restructuring plan forms part includes any such decision, then, according to Article 25 of the Works Councils Act, the Works Council must be given the opportunity to express its opinion by issuing advice. If this is the case, then this must be stated in the restructuring plan (Article 375(1)(l)). The company must request the advice in good time (Article 25(2) of the Works Councils Act).

There are conceivable situations in which the economic interest in a claim is vested wholly or predominantly in a person other than the legal holder of the claim. This might be, for example, the beneficiary of bonds issued. According to the Supreme Court, this could lead (in a specific case, depending on the circumstances) to such beneficiaries being in a position that, given the circumstances of the case, and for reasons of justice and efficiency, should be equated to the position of creditors as referred to in the Bankruptcy Act.[16] In the event of suspension of payments or bankruptcy proceedings, they will then already have the power to vote on a restructuring plan. If, on the basis of the CERP, a restructuring plan is adopted which provides for an extension of payment or partial waiver of the claim, the economic beneficiary will bear the resulting financial consequences. This is one reason for giving economic beneficiaries the opportunity to vote on restructuring plans. This is usually also in the debtor's interest. Economic beneficiaries are in the best position to estimate a restructuring plan’s worth.

There are several ways in which an economic beneficiary can exercise its voting right. This can be done in stages, via the legal holder of the claim. The latter will in that case vote as instructed by the economic beneficiary. It can also be done directly by giving the economic beneficiary direct voting rights and withholding voting rights from the legal holder of the claim. Which method is appropriate depends on the circumstances. The framework therefore provides flexible rules in this regard. The debtor may, but is not required to, invite the economic beneficiary (instead of the legally entitled person) to vote (Article 381(4)). If it decides to do so, the economic beneficiary will acquire voting rights and the other rights vested in voting creditors under the CERP, including in particular the right to ask the court to refuse the request for confirmation of the restructuring plan (Articles 381(3) and 383(8)). The legal beneficiary will then no longer have those rights. The same rule applies to a situation in which the economic interest in a share (i.e. all the benefits arising from the share) has been transferred by the shareholder to another person (the depositary receipt holder), while the legal rights attached to the share (including control rights or voting rights) remain vested in the shareholder (Article 381(5)).

A logical consequence of this rule is that if someone other than the creditor or shareholder has voted on the restructuring plan pursuant to Article 381(4) or (5), the restructuring plan will nevertheless be binding upon the creditor or shareholder (Article 385).

[16] Supreme Court 26 August 2003, JOR 2003/211 (UPC).

Voting procedure

The debtor must present the final restructuring plan to the voting creditors and shareholders for their consideration for a reasonable period of time. In any event, this period may not be less than eight days prior to the vote (Article 381(1)). The aim is to give creditors and shareholders ample opportunity before the vote to assess the restructuring plan and to examine its consequences for them.

As noted above, the CERP also allows creditors, shareholders and the Works Council or employee representative body appointed within the debtor's company to take the initiative to adopt a restructuring plan. They may ask for a plan expert to be appointed in this regard (Article 371(1)). This plan expert can prepare a restructuring plan and then initiate the process that could lead to a court confirming the restructuring plan. The first step in this process is giving the creditors and shareholders the opportunity to vote on the restructuring plan. If the debtor is an SME company, then the plan expert may only do this with the debtor's consent (Article 381(1) and (2)).

If the restructuring plan defines classes of creditors and shareholders, each class will vote individually on the restructuring plan. The debtor itself decides on the way in which the vote is to be held. Votes may be cast in writing. The debtor may also decide to organise a meeting for this purpose. In both situations, electronic means of communication may be used (Article 381(6)).

Outcome of the vote

Only creditors or shareholders that have actually cast a vote will be considered when determining the outcome of the vote. This will prevent uninterested creditors or shareholders who do not participate in the vote from reducing, whether intentionally or not, the chances of a restructuring plan from being adopted.

In order for a class of creditors to confirm a restructuring plan, it is imperative that the restructuring plan is supported by a group of creditors who together represent at least two thirds of the total amount of claims belonging to the creditors who have voted within their class. The same rule applies to a class of shareholders, such that a class of shareholders will have approved the restructuring plan if it is supported by a group of shareholders who together represent at least two-thirds of the total amount of issued capital belonging to the shareholders who have cast a vote within that class (Article 381(6) and (7)).

After the vote, the debtor must draw up a report in which, put briefly, it indicates the outcome of the vote. In addition, it must ensure that the creditors and shareholders concerned are immediately able to inspect the report (Article 382(1)). This is especially important if the debtor decides to request court confirmation of the restructuring plan. The fact is that the report will include information relevant to creditors or shareholders who have not consented to the restructuring plan and are considering asking the court to

refuse the request for confirmation of the restructuring plan (Article 383(8)). They can use the information set out in the report to make an initial assessment of the chances of a successful request for refusal. Should they decide to actually submit a request, this information can be used to substantiate their objections to the court confirmation. If the debtor submits a request for court confirmation, it must file the report with the registry of the court that will hear the request. The voting creditors and shareholders can then inspect the report until such time as the court decides on the request for confirmation (Article 382 (2)). It is in the debtor's interest to file the report and the request for court confirmation as soon as possible. The fact is that the framework provides that the hearing of the request for court confirmation must be held within eight to fourteen days of the request being submitted and the report being made available for inspection (Article 383(6)).

3.4 Court confirmation of a restructuring plan

Court confirmation is possible if the vote shows that there is at least one class that agrees to the restructuring plan. This should be a class consisting of creditors who are expected to receive a cash payment in the event of the debtor's bankruptcy. This requirement does not apply if the restructuring plan only concerns creditors who do not expect any payment in the event of bankruptcy (Article 383(1)). The debtor or the plan expert can file a request for confirmation of an extrajudicial restructuring plan with the courts. If not all classes have consented to the restructuring plan and the debtor is an SME company, then the plan expert may only file a request for court confirmation with consent of the debtor (Article 383(1) and (2)).

The court will issue a decision as soon as possible setting a date for a hearing at which it will assess the court confirmation. If not all classes have consented to the restructuring plan and a plan expert or observer has not yet been involved in the process, the court will appoint an observer in the same decision (Article 383(4)). According to Article 380(1), the task of the observer is to supervise the realisation of the restructuring plan, taking account of the interests of all creditors. It is in this light that the observer will assess the restructuring plan presented to him and provide information to the court.

Until the day of the hearing, all creditors and shareholders with voting rights may submit a written request to the court to refuse the request for confirmation. They may base their request on the *general* or *additional grounds for refusal* set out in paragraphs 2, 3 and 4 of Article 384. The general grounds for refusal are mainly intended to guarantee proper decision-making. The additional grounds for refusal aim to ensure that the restructuring plan is *reasonable*. Only creditors or shareholders who have not themselves consented to the restructuring plan may invoke the additional grounds for refusal. Moreover, creditors or shareholders may no longer invoke the general and additional grounds for refusal if they were previously aware of their possible applicability but did not point them out to the debtor in due time (Article 383(7)). This encourages creditors and shareholders to report any objections to the structure of the decision-making process or the substance

of the restructuring plan in good time, i.e. before the vote takes place. This enables the debtor to find a solution to these objections before the vote, with or without the intervention of the court (Article 378(1)). The debtor can then still make adjustments and remove any obstacles to court confirmation if necessary. A process that has no prospect of success is then brought to a halt and unnecessary costs are avoided.

If the debtor has requested authorisation to unilaterally terminate an agreement, the counterparty to that agreement may request the court to refuse it. The counterparty must then base this request on the argument that the debtor is not entitled to terminate the agreement because its insolvency is not inevitable insolvency (Articles 383(5) and (6) and 384(5)).

The court will decide on the request for confirmation as quickly as possible. If the court has not been asked for a finding earlier on in the process, the court must first determine whether it has jurisdiction and is competent to hear the request. The Insolvency Regulation or Article 3 Rv determines whether the court has jurisdiction. As noted earlier, the decisive factor here is whether the restructuring plan was offered in the context of a private restructuring procedure outside bankruptcy proceedings or a public restructuring procedure outside bankruptcy proceedings. If the debtor has not yet made a choice in this respect, the court will give him the opportunity to do so.

The court will refuse the request for confirmation if one of the general grounds for refusal listed in Article 384(2) applies. It may do so at the request of a creditor or shareholder with voting rights. However, if it is immediately clear to the court that one of these grounds for refusal applies, the court can also ex officio refuse the request for confirmation without having to await such requests from creditors and shareholders. The general grounds for refusal are largely similar to those already in force in relation to court confirmation of a suspension of payments agreement or bankruptcy agreement. Since the question of whether a restructuring plan can be confirmed depends largely on the support that exists for the restructuring plan, it is crucial that the decision-making process has been correct. In this context, it is in any case important to determine whether:

- all creditors or shareholders to whom the restructuring plan relates have been duly informed about it, have had the opportunity to vote on it, and have been notified of the date of the hearing of the request for court confirmation (Article 384(2)(b));

- the information contained in the restructuring plan and its annexes is sufficient (Article 384(2)(c)), and

- the creditors and shareholders are correctly divided into classes and whether they have been assigned to their relevant class for the correct amount (Article 384(2)(c) and (d)).

If the court has no reason to assume that any of the general grounds for refusal applies, and none of the creditors or shareholders has objected to the court confirmation by

invoking the additional grounds for refusal, it will grant the request for court confirmation. Only if an objection has been made to court confirmation will the court carry out a further assessment of the restructuring plan (Article 384(3) and (4)).

If all classes of creditors and shareholders have consented to the restructuring plan, the court may, at the request of one or more dissenting creditors or shareholders, nevertheless refuse the request for court confirmation if there is evidence that, on the basis of the restructuring plan, the creditors or shareholders in question would be in a significantly worse position than in a bankruptcy scenario (Article 384(3)). This would make the restructuring plan *unreasonable*.

If not all classes have consented to the restructuring plan, the court will refuse the request for court confirmation if the restructuring plan is *unfair* and therefore unreasonable. It will do so if it receives a request to this effect from a creditor or shareholder who is assigned to a class that has not consented to the restructuring plan and that particular creditor or shareholder itself has not consented to it. A restructuring plan is unfair if it does not distribute *fairly* among the creditors and shareholders the reorganisation value that can be retained or realised with it. This is the case if this distribution deviates, to the detriment of the dissenting class in question, from the creditors' statutory ranking in the case of their recourse against the debtor's assets, and the debtor:

- is unable to provide good grounds for such a deviation, and

- cannot demonstrate that the interests of the creditors or shareholder who have objected are not being harmed (Article 384(4)(a)).

A restructuring plan is also unfair if the class that did not consent to the restructuring plan consists of creditors who can expect a cash payment in bankruptcy proceedings and the restructuring plan does not offer these creditors the opportunity to opt for this (Article 384(4)(b)). The additional grounds for refusal listed in Article 384(3) and (4)(a) were largely based on two sections of the Chapter 11 procedure in the United States, specifically the 'best interest of creditors' test and the 'absolute priority rule'. The ground for refusal given in Article 384(4)(b) includes an additional guarantee for creditors who have not consented to the restructuring plan with the required majority. These creditors cannot be forced to continue investing in the company if they would be able to expect a cash payment in the event of the debtor's bankruptcy.

A court decision on a request for confirmation is not open to appeal or cassation (Article 369(10)). The justification for this is that a restructuring plan is adopted in the critical situation in which insolvency is imminent (Article 370(1)). In order to be able to avert bankruptcy, the restructuring plan must be implemented soon after court confirmation. Questions concerning the correct application of the CERP may, however, be referred to the Supreme Court if the court asks preliminary questions regarding the hearing of a request for an interim ruling or a request for court confirmation. This can be done on the basis of Articles 378 and 384 respectively, ex officio or at the request of the debtor or an

interested creditor or a shareholder (Article 392 et seq. Rv). Given the nature of the case, any preliminary ruling procedure must be completed with the requisite expeditiousness. Another possibility is an appeal in cassation by the Procurator General (*procureur-generaal*) in the interest of the law (Article 78(1) lid 1 Judiciary (Organisation) Act) *(Wet op de rechterlijke organisatie*).

3.5 Consequences of court confirmation of a restructuring plan

Court confirmation of a restructuring plan makes it binding upon the debtor and all creditors and shareholders involved in the restructuring plan who were entitled to vote on it. This means that even creditors or shareholders who ultimately did not vote or did not consent to the restructuring plan are still bound by it (Article 385). It is possible for a debtor to offer a restructuring plan to a certain group of creditors or shareholders. It may also choose to limit the offer to a certain group of creditors or shareholders, for example by offering a restructuring plan aimed exclusively at restructuring debts owed to lenders and leaving the claims of unsecured creditors intact (Article 370(1)). In that case, only the financiers (creditors and shareholders) are entitled to vote on the restructuring plan (Article 381(3)). After court confirmation, only they are bound by the restructuring plan.

A court judgment approving a restructuring plan is enforceable to the extent that creditors obtain a right to claim a cash payment under the restructuring plan (Article 386). If the debtor does not fulfil its obligations under a restructuring plan in a timely manner, the creditors who have outstanding claims against him may invoke the judgment directly to enforce compliance with it. In addition, if the debtor fails to comply with the restructuring plan or comply with it on time, it is obliged to compensate for any loss the creditors and shareholders suffer as a result. In that case, the creditors or shareholders also have the right to dissolve the restructuring plan. The framework provides that Article 165 of the Bankruptcy Act, which concerns the dissolution of a bankruptcy agreement, applies mutatis mutandis. However, this right may also be ruled out in the restructuring plan. This is reasonable if the restructuring plan includes elements that are difficult to reverse, such as a debt for equity swap, whereby the claims of certain creditors have already been converted into shares in the company (Article 387). That fact is that (as with the dissolution of a bankruptcy agreement) granting the claim would lead to the restructuring plan being dissolved altogether. Dissolution thus operates in respect of all creditors on whom the restructuring plan is binding in accordance with Article 385 and not merely in respect of the creditor who requested the dissolution of the restructuring plan. As in the case of bankruptcy and suspension of payments agreements, a restructuring plan adopted on the basis of the CERP may not be set aside.

3.6 Court involvement

As noted in section 1 of this explanatory memorandum, the purpose of this bill is to create an effective and widely accessible framework for restructuring plans. It introduces a procedure which should be able to be implemented quickly, efficiently and flexibly. This is particularly important, as the framework will be applied in the critical situation of

imminent insolvency and the intention is to provide companies in that situation with an instrument to resolve their financial problems in good time. Against this background, much attention has been paid to finding the right balance between:

- on the one hand, avoiding unnecessary appeals to the courts by creditors or shareholders who do not wish to cooperate with a restructuring plan and who try to block or delay the process, and

- on the other hand, providing the necessary judicial safeguards where the framework could significantly impact creditors and shareholders.

In addition, involvement of the court is in principle limited up to the time that a request for court confirmation is submitted, unless the debtor appeals to the court before that.

It may be desirable to involve the court in the process at an earlier stage. This would be the case if, for example, at the stage prior to the vote on the restructuring plan it is uncertain whether there are any grounds for refusal which, even if all classes of creditors or shareholders consent to the restructuring plan, would preclude the court from approving the restructuring plan. This lack of certainty could seriously hamper negotiations about the restructuring plan if it persists until the court hears the request for confirmation. Accordingly, the debtor has the opportunity to submit this question to the court before the vote on the restructuring plan (Article 378(1)). Creditors and shareholders who believe that there are aspects that should be brought before the court can notify the debtor of them. To prevent creditors or shareholders from trying to delay the process, the decision was taken not to give them the opportunity to submit interim requests to the court themselves. If the debtor decides not to submit the question to the court earlier in the process, creditors or shareholders may request the court to appoint a plan expert who, if the court confirms the request, can take over the work of preparing the restructuring plan (Article 371(1)). If they choose not to do so or if the court refuses the request for the appointment of a plan expert, the creditors or shareholders still have the opportunity to raise their objections during the hearing of the request for court confirmation (Article 383(8) and (9)). Conversely, if the debtor has already referred the issues to the court at an earlier stage and the court has subsequently ruled on them, that ruling must be regarded as a binding final decision with the force of res judicata (Article 378(8)). This is subject to the condition that the creditors or shareholders concerned must have been given the opportunity to express their views (Article 378(8)). A binding final decision is subject to the rule that it may not be reversed in the same forum, unless there are special circumstances which would make it unacceptable for the court to be bound by that decision. This may be the case particularly if the court has made an obvious factual or legal error or if the decision in question appears to have an incorrect factual basis which cannot be attributed to the interested party.[17] If the court has already ruled that the decision-making process and the substance of the restructuring plan meet the legal requirements, there is therefore no point in a creditor or shareholder objecting to

[17] Supreme Court 25 April 2008, NJ 2008, 553 with commentary by HJS.

the court confirmation of the restructuring plan on the sole grounds that these requirements have not been met.

Once the court has been asked to decide on a request for confirmation of an extrajudicial restructuring plan, its position is quite decisive. The court must decide whether a restructuring plan needs to be adopted to avert imminent insolvency and whether the restructuring plan is reasonable. The latter concerns the value that is expected to be realised if the restructuring plan is adopted. This value depends on a number of factors including whether the company is to be continued or shut down and wound up without involving bankruptcy proceedings. Valuation issues (and the principles, starting points and assumptions used) can be the subject of major disputes between the creditors and shareholders involved in the adoption of a the restructuring plan.[18] In the consultations on the initial draft, various participants proposed having requests for court confirmation of restructuring plans be dealt with by a single specialised court. The Advice Department of the Council of State also made a number of remarks about this. This matter was discussed with the Council for the Judiciary (*Raad voor de rechtspraak*). The Council for the Judiciary stated (put briefly) that it was not yet clear how many additional cases the CERP would lead to every year, which made it difficult to decide at this point how the judiciary could handle such specialised cases as effectively as possible. If the number of additional cases were to remain small, then the Council for the Judiciary expressed the preference for have a relatively small specialised national team. If, however, the number of cases were to increase considerably, then the preference would be for each court to be sufficiently equipped to deal with them. The advantage of a specialised national team would be that, with a limited number of cases, judges at all the courts could still gain experience with the CERP. This would make it possible to scale up the disposal of CERP to all the courts if, in a different economic climate, the number of cases were to increase substantially.

With these considerations in mind, the Council for the Judiciary proposed that the judiciary do the following in the first three years after the CERP's entry into force:

- each court should put forward a judge and a legal assistant who form part of the CERP pool;

- the eleven judges and legal assistants in the national pool are given a specific training in this area;

- if a case comes up, the CERP judge from the court territory in question should hear the case together with two other CERP judges in the national pool. They are then assisted by the legal assistant from the court territory in question;

[18] S.W. van den Berg, 'Waarderingsvragen in het ondernemingsrecht en insolventierecht' (diss. 2019) [in Dutch].

- no physical location for the pool.

This would provide a flexible basis for specialised judges to hear requests for confirmation of extrajudicial restructuring plans.

3.7 Provisions to enable the debtor to adopt a restructuring plan

A number of provisions have been made to enable the debtor to adopt a restructuring plan. In order to benefit from the application of these provisions, the debtor must file a statement with the court registry that it is attempting to adopt a restructuring plan. It must also have actually offered the restructuring plan or undertake to do so within a maximum period of two months (Articles 3(1) and 376(1)).

The debtor may ask the court to order a cooling-off period in respect of all or of some of the creditors (hereinafter: a “general cooling-off period”) (Article 376(1)). This declaration of a cooling-off period, which will not exceed four months, has three consequences:

- creditors to whom the cooling-off period applies cannot exercise their power to recover assets belonging to the debtor, or assets which are under the debtor's control, without the authorisation of the court;

- the court may lift attachments at the debtor’s request, and

- the hearing of a request to grant a suspension of payments or a bankruptcy petition will be suspended (Article 376(2)).

Furthermore, during the cooling-off period the debtor retains the right to use, consume or dispose of the assets to which the cooling-off period applies to the extent necessary for the normal continuation of its business (Article 377(1)). In order to be able to continue its business, the debtor must be able to consume and dispose of stocks, use business assets and collect claims against its customers. This also applies if those assets or claims are encumbered with rights of third parties. These include stocks or business assets delivered subject to retention of title and claims secured by a security right. It is important to note that the debtor may only exercise this power if the interests of the parties who derive rights in any way from the assets or claims in question are sufficiently safeguarded (Article 377(2) and (3)). This may be achieved, inter alia, by providing replacement security.

It is also important to note that the offer of a restructuring plan does not constitute a ground for a change in commitments or obligations in respect of the debtor, for withholding the fulfilment of an obligation in respect of the debtor or for the dissolution of an agreement concluded with the debtor (Article 373(3)).

These provisions prevent creditors or shareholders who do not wish to cooperate in a restructuring following the offer of a restructuring plan from directly taking recourse to the

courts or filing a petition for bankruptcy in order to block or delay the process. To prevent improper use of the framework by the debtor - who retains full power of disposition throughout the entire process – the CERP provides that the court may only declare a cooling-off period if there is prima facie evidence that:

- this is necessary in order to continue the company run by the debtor during the preparation of and negotiations about a restructuring plan;

- the joint creditors have an interest in this happening, and

- it can reasonably be assumed when the cooling-off period is declared that this will not fundamentally harm the interests of any of the creditors to whom the cooling-off period applies (Article 376(4)).

The debtor must convince the court of this. When the court declares a cooling-off period, it may make any provisions it deems necessary in order to safeguard the interests of the creditors or shareholders (Article 376(9)). In this regard, the court could, for example, choose to appoint an observer to monitor the preparatory phase. The court considers appointing an observer particularly if it declares a cooling-off period. The task of this observer is to represent the interests of the debtor's joint creditors (Article 380(1)). As soon as it becomes apparent that the debtor will not succeed in adopting a restructuring plan or that the interests of the joint creditors will be harmed by the debtor, the observer must inform the court accordingly. The court will then decide what the next steps should be. If the chances of adopting a restructuring plan have not yet been exhausted, it may conclude that it is desirable to appoint a plan expert to take over the preparation of a restructuring plan (Article 380(2)). The court is free, but under no obligation, to appoint the observer as a plan expert if it deems this appropriate.

The new Article 42a and the amendment to Article 54 should also be included in the category of provisions to enable the debtor to adopt a restructuring plan. Article 42a concerns the provision of financing for the adoption of a restructuring plan. The debtor may apply to the court for authorisation to perform the legal acts required for this purpose. The court shall grant the authorisation if, at the time the legal acts are entered into, some of the preconditions referred to in the article have been met. In short, these preconditions are essentially that:

- financing is needed to prepare a restructuring plan and to continue the company in the meantime,

- it is in the interest of all creditors that this happens, and

- this does not harm the interests of individual creditors.

The authorisation of the court means that the legal acts in question cannot be annulled by the receiver on the basis of Article 42 of the Bankruptcy Act if a bankruptcy order is subsequently issued.

The amendment to Article 54 of the Bankruptcy Act is intended to enable the debtor to continue to make use of a current account facility during the preparatory phase. This facility offers the debtor a credit that must remain within a certain range. For this purpose, amounts - i.e. the debtor's income and expenditure - are set off against each other on an ongoing basis. Article 54 offers the receiver the possibility to reverse set-offs made in the run-up to the bankruptcy proceedings if the debtor has not acted in good faith. The new Article 54(3) now provides that if the set-off took place during the period in which an attempt was made to adopt a restructuring plan and this did not aim to restrict the available credit (account 'in the red'), the person who carried out the set-off was acting in good faith. The purpose of this provision is to prevent the person offering the debtor the current account from freezing this facility as soon as the debtor starts negotiating a restructuring plan.

The fact that a debtor has started a process to adopt a restructuring plan does not limit the Tax and Customs Administration in the use of all fiscal and civil liability provisions at its disposal (including directors' liability). For example, the provisions on the liability of members of a fiscal entity in respect of turnover tax remain applicable to all existing tax liabilities (whether formalised or not). The Tax and Customs Administration's right to seize movable assets on the tax debtor's premises also remains applicable.

4. Consultation and advice

In 2014, consultations were held on an initial draft bill for a framework whereby a company was enabled to offer a restructuring plan to its creditors and shareholders to restructure problematic debts (the Bill on the continuity of companies II).[19] Following the responses to the consultation, the draft bill and the accompanying explanatory notes were updated. From the beginning of September to the beginning of December 2017, consultations were held on this amended initial draft with the new title *Act on Court Confirmation of Extrajudicial Restructuring Plans for the Prevention of Bankruptcy*. During the latter consultation - in addition to the necessary responses from individual market parties and academics - comments were received from the following umbrella organisations: the Council for the Judiciary (Rvdr)[20], the Dutch Association for the Judiciary (NVvR)[21], the Association of Insolvency Lawyers (Insolad)[22], the Insolvency Law Advisory Committee of the Netherlands Bar Association (NOvA)[23], the Dutch Banking Association (NVB)[24], Eumedion (representative of institutional investors)[25], the Dutch Association of Leasing

[19] https://www.internetconsultatie.nl/wco2/details.
[20] Made available at the Central Information Office of the Lower House.
[21] Made available at the Central Information Office of the Lower House.
[22] Made available at the Central Information Office of the Lower House.
[23] Made available at the Central Information Office of the Lower House.
[24] Made available at the Central Information Office of the Lower House.
[25] Made available at the Central Information Office of the Lower House.

Companies (NVL), Factoring & Asset based financing Association Netherlands (FAAN)[26], the Royal Dutch Professional Body of Accountants (NBA), the Confederation of Netherlands Industry and Employers VNO-NCW, Dutch Federation of Small and Medium-Sized Enterprises (MKB-Nederland)[27], the trade unions FNV, CNV and VCP[28], and the Federation of Dutch Pension Funds[29].

The responses to the CERP were generally positive. Several respondents explicitly noted that the CERP addresses a strong practical need and can make an important contribution to the reorganisational capacity of companies in financial difficulties. Nevertheless, the consultation also yielded various suggestions for improving the framework or the explanatory notes to it. The main elements of the framework have remained the same. However, the technical detail has been tightened up or clarified, with or without additions, in response to the suggestions made. This has also led to several articles being renumbered.

Predominantly material amendments were made to the following aspects of the framework:

- The draft bill provided a scenario in which a restructuring plan restores a company's financial soundness and enables its activities to be continued (as a 'going concern'). Following a suggestion by the Association of Insolvency Lawyers, a second scenario has now been added. It is now possible to adopt a restructuring plan regarding the controlled closure and winding-up of a company. The condition for this is that it achieves a better result than would be the case if the company were to be wound up in bankruptcy proceedings. A combination of these two scenarios is also possible. This involves the closure of some parts of the company and the continuation of the other parts.

- Two procedures enabling a restructuring plan to be adopted have been introduced: 1) a private restructuring procedure outside bankruptcy proceedings and 2) a public restructuring procedure outside bankruptcy proceedings (Article 369(6)). The framework also makes it clear that, before taking a decision in one of these procedures, the court will always have to establish whether it has jurisdiction and the rules under which it will have to do so have been specified and explained (Articles 369(7) and 371(2)). These amendments were the result of advice given by NOvA, and others.

- In order to increase the participation of creditors in the restructuring and to prevent the debtor from abusing the framework:

[26] Made available at the Central Information Office of the Lower House.
[27] Made available at the Central Information Office of the Lower House.
[28] Made available at the Central Information Office of the Lower House.
[29] https://www.internetconsultatie.nl/wethomologatie.

(a) creditors are given greater possibilities to initiate the adoption of a restructuring plan, i.e. through the appointment of a plan expert (Article 371(1) and (3));

(b) the court has been given the possibility of appointing an observer to monitor the process of realising a restructuring plan initiated by the debtor and, in that context, to represent the interests of the debtor's joint creditors (Article 380), and

(c) in almost all cases in which the court is asked to take a decision during the preparatory phase, the framework provides that the creditors who will be affected by this will also have the opportunity to express their views first (Articles 371(5), 376(11), 377(3), 378(7), 384(7)).

These amendments were made in response to suggestions from inter alia the Council for the Judiciary, the Confederation of Netherlands Industry and Employers VNO-NCW, the Dutch Federation of Small and Medium-Sized Enterprises, the Dutch Banking Association and Eumedion.

- The tasks and powers of the plan expert have been specified in more detail. Provision has also been made for the payment of costs relating to its activities (Article 371(6) to (13)). This took into account comments made during the consultation by inter alia the Association of Insolvency Lawyers, the Dutch Banking Association and various individual market parties.

- In order to give the debtor or the plan expert a better opportunity to adopt a restructuring plan, the following adjustments have been made:

  (a) The provisions concerning the declaration of a cooling-off period (including the suspension of the proceedings for hearing a bankruptcy petition) have been broadened. These can now be requested as soon as the debtor has started to prepare a restructuring plan or a plan expert has been appointed and not - as was the case in the initial draft - only when a concrete restructuring proposal is already on the table. In addition, the cooling-off period lasts four months in principle but can be extended to a total of eight months (Article 376).

  (b) The provisions to make it easier to obtain new financing have also been broadened. On this basis, the court may approve the legal acts to be performed for the purpose of such financing. These provisions are no longer limited to any security to be provided in this context. In addition, all forms of financing are included in this (Article 42a).

(c) New provisions have also been introduced to allow the continued use of a current account facility or assets subject to third party rights during the preparatory phase (Articles 54 and 377).

These amendments were made in response to suggestions from inter alia the Association of Insolvency Lawyers, the Insolvency Law Advisory Committee of the Netherlands Bar Association, VNO-NCW and MKB Nederland, NVB, NBA, academics and a number of market parties.

- In response to the advice of the Council for the Judiciary, the role of the courts has been strengthened. The judicial review in the context of the request for court confirmation has been broadened insofar as it relates to the general grounds for refusal, which are mainly intended to guarantee proper decision-making and to prevent agreements where certain creditors are given unfair preferential treatment (Article 384(2)). Following suggestions to this effect from inter alia the Association of Insolvency Lawyers and the Dutch Banking Association, the number of aspects on which the court may issue an interim ruling has been increased (Article 378(1)).

- On the advice of inter alia the Insolvency Law Advisory Committee of the Netherlands Bar Association, the Association of Insolvency Lawyers, the Dutch Banking Association and the Dutch Association of Leasing Companies, improvements have been made as regards the possible consequences of the court confirmation of a restructuring plan for:

  (a) the right of creditors to hold third parties liable for the satisfaction of their claims against the debtor, and

  (b) the right of these third parties, after payment to the creditor, to take recourse against the debtor (Articles 370(2) and 372).

- In order to address the concern expressed in the consultation process by, among others, the Dutch Association of Leasing Companies and the Factoring & Asset based financing Association Netherlands that it would be too easy for the debtor to terminate agreements unilaterally on the basis of the CERP, the provisions in this respect have been tightened. The court will have to give permission for the unilateral termination. In addition, the conditions are that there must be a situation of inevitable insolvency and that the restructuring plan must be confirmed by the court. The counterparty may ask the court to refuse consent (Articles 373, 383(8) and 384(5)).

Following the advice from the Advice Department of the Council of State, further amendments were made to the bill to bring it into line with the Directive, the definitive version of which was adopted recently.

5. Impact on business, citizens and the judiciary

The bill does not contain any consequences *for citizens* in terms of regulatory burdens. Compliance costs *for business* can be broken down into administrative burdens and substantive compliance costs. Administrative burdens are the costs that businesses incur in order to comply with information obligations towards the government which arise from laws and regulations. The bill does not entail any administrative burden. Compliance costs consist of other costs that the business community incurs in order to comply with the obligations imposed by new laws and regulations. The bill does not contain substantive compliance costs, because the consequences of the bill fall outside the definition of compliance costs.[30] It is also expected that entrepreneurs will find that the framework reduces their burden.

The CERP will entail new work for the judiciary. The expectation is that the costs involved will be partially offset by, on the one hand, the court fee levy based on the new Article 19a of the Court Fees (Civil Cases) Act (*Wet griffierechten burgerlijke zaken*) and, on the other hand, the reduction in workload due to averting bankruptcy. The Ministry of Justice and Security has a budget for any additional costs (up to EUR 1.9 million from 2022). This budget forms part of the price negotiations for the period 2020-2022.

ARTICLE BY ARTICLE

Article I

Parts A and E

Articles 3d (new) and 215(3) and (4) (new)

The new Article 3d deals with the situation in which a bankruptcy petition is pending at the same time as a request for the appointment of a plan expert (Article 371). The CERP provides that, in that case, the latter request will be heard first and the hearing of the bankruptcy petition will be suspended. If the request for the appointment of a plan expert is granted, that will be the start of a process aimed at adopting a restructuring plan. In order to give this process a chance, the court will also order a cooling-off period. The suspension will remain in effect during the cooling-off period. Article 376 applies to this. This Article is discussed below.

[30] This is due in part to the fact that the framework makes a considerable number of changes to proceedings before the courts. Obligations in the context of court proceedings fall outside the definition of compliance costs. Civil procedural law provides safeguards for fair and efficient litigation. Where procedural law imposes requirements on the exchange of information with the court or the counterparty or otherwise, the charges arising from this are directly connected to this safeguarding function. For this reason, these charges are not considered to be a regulatory burden. See also Meten is Weten II ('Measuring is Knowledge II'): Manual for defining and measuring administrative burdens on business, p. 33. Civil procedural law provides safeguards for fair and efficient litigation. Where procedural law imposes requirements on the exchange of information with the court or the counterparty or otherwise, the charges arising from this are directly connected to this safeguarding function. For this reason, these charges are not considered to be a regulatory burden.

In part E, the addition of two new paragraphs to Article 215 of the Bankruptcy Act provides the same framework for cases in which a request by the debtor to grant a suspension of payments is pending at the same time as a request for the appointment of a plan expert.

Part B

Article 42a of the Bankruptcy Act (new)[31]

The new Article 42a envisages the provision of financing for the adoption of a restructuring plan. This not only concerns financing in the form of a loan, but also, for example, the supply of assets on credit. This article derogates from Section 42 of the Bankruptcy Act, which includes a bankruptcy-related framework for the annulment of juristic acts that the debtor has performed voluntarily which has prejudiced creditors ('fraudulent preference' or faillissementspauliana). If the debtor has carried out such a fraudulent juristic act in the run-up to bankruptcy, the receiver may, after bankruptcy is declared, annul that act for the benefit of the joint creditors. A receiver may exercise an actio pauliana (power to take action against such fraudulent preference) pursuant to Article 42 of the Bankruptcy Act if five conditions are met: (i) the debtor must have performed a juristic act before the declaration of bankruptcy, (ii) it performed it voluntarily, (iii) the juristic act is prejudicial to creditors, (iv) the debtor knew or should have known when performing the juristic act that this would be the consequence and (v) those with or for whom the debtor acted knew or should also have known this.

The new Article 42a deals with the situation in which an attempt has been made to adopt a restructuring plan before bankruptcy proceedings, and financing has also been provided in that regard. Article 42a allows the debtor to apply to the court for authorisation to perform the juristic acts necessary to obtain financing. The court will grant this authorisation if the following preconditions mentioned in the article are met:

- financing is are needed to prepare a restructuring plan and to continue the company in the meantime, and

- when the authorisation is granted, it is reasonable to assume that the joint creditors would be served by such an act, and that none of the individual creditors' interests would be materially harmed by that.

It is always difficult to say in advance how the proposed juristic acts will eventually turn out. The point is that at the time the authorisation is requested, there is no sign that the proposed juristic acts will result in creditors being prejudiced. The debtor will have to perform the juristic act soon after obtaining the authorisation. This is because the situation may change rapidly and an expectation that seemed realistic at the time the authorisation was granted may no longer be so sometime later, due to new developments. The court

[31] Amsterdam Court of Appeal, 29 May 2018, ECLI:NL:GHAMS:2018:1832, JOR 2018/286, with commentary by Ph.W. Schreurs. Amsterdam Court of Appeal, 13 February 2018, ECLI:NL:GHAMS:2018:476, JOR 2018/221, with commentary by Ph.W. Schreurs.

authorisation means that the legal acts in question cannot be annulled by the receiver on the basis of Article 42 of the Bankruptcy Act if bankruptcy is subsequently declared.

The appointment of the plan expert does not result in the debtor losing the power to dispose of or manage its assets. It retains control of its own company and can continue to do so while the restructuring procedure is ongoing ('debtor in possession'). The debtor therefore retains sole competence to perform juristic acts. In view of this, the possibility provided for in Article 42a to apply to the court for authorisation to perform juristic acts in the context of financing has been drawn up only for the debtor, but not for the plan expert as well.

Article 42a is in line with Articles 17 and 18 of the Directive. Put briefly, these articles provide that the Member States must ensure that interim financing or other transactions needed for the negotiating phase are protected.

Part C

Article 47

The amendment to Article 47 of the Bankruptcy Act follows logically from the introduction of the new Articles 3d and 376. As explained in the context of Section B, a receiver can only invoke actio pauliana with respect to juristic acts that the debtor has performed voluntarily (Section 42 of the Bankruptcy Act). Accordingly, the payment of a *due and payable* debt by the debtor cannot be affected by reliance on action pauliana. However, Article 47 of the Bankruptcy Act makes two exceptions to this rule: the payment of a due and payable debt (and thus a mandatory juristic act) can still be annulled if (i) the creditor knew at the time the debtor paid that the debtor's bankruptcy petition had already been filed or (ii) the payment was made after consultation between the debtor and the creditor with the intention of favouring the creditor over other creditors. The proposed amendment to Article 47 means that nullification due to the creditor knowing about the filing of a bankruptcy petition is not possible if the hearing of that petition has been suspended on the basis of Articles 3d(2) and 376(2)(c) due to the debtor's appointment of a plan expert (or request for such) or the debtor’s offer of a restructuring plan (or announcement thereof). This provision also falls within the category of provisions designed to enable the debtor to adopt a restructuring plan. This provision aims to ensure that the debtor can continue its business operations and make the payments required for this purpose.

Part D

Article 54(3) (new)

Part D adds a new third paragraph to Section 54 of the Bankruptcy Act. This provision is also in the category of provisions designed to enable the debtor to adopt a restructuring plan. The background to Section 54 of the Bankruptcy Act is that creditors who fear the bankruptcy of their debtor may be tempted to create a set-off possibility for themselves

by taking over a debt of or claim against the debtor. The debt or claim taken over can then be set off after bankruptcy is declared. This allows creditors to act for their own benefit but to the detriment of the other creditors. Article 54 of the Bankruptcy Act aims to limit this risk. It provides the following in this regard. If bankruptcy occurs and the receiver succeeds in proving that the debt or claim was not taken over in good faith, Article 54(1) of the Bankruptcy Act rules out the possibility of relying on set-off for a debt or claim that was taken over, and the set-off can be reversed. The Supreme Court has ruled that, when taking over a debt or claim, a creditor is not acting in good faith if it knows that its debtor is in such a situation that its bankruptcy or suspension of payments can be expected.[32] The same may apply if the bankruptcy does not occur for a considerable period of time after the debt or claim is taken over.[33]

In view of this explanation, a new third paragraph has been added to Article 54 of the Bankruptcy Act that specifically relates to the situation in which, prior to the bankruptcy, another process took place in which an attempt was made to adopt a restructuring plan. The amendment to Article 54 of the Bankruptcy Act is intended to enable the debtor to continue to make use of a current account facility during that process. A current account facility provides the debtor with credit that must remain within a certain range. For this purpose, sums of money - i.e. the debtor's income and expenditure - are set off against each other in the relevant account on an ongoing basis. The new Article 54(3) now provides that if a set-off took place during the period in which an attempt was made to adopt a restructuring plan and this does not aim to restrict the available credit (account 'in the red'), the person who carried out the settlement was acting in good faith. If the attempt to adopt a restructuring plan fails and bankruptcy proceedings follow, the receiver cannot reclaim the set-off amounts. The purpose of this provision is to prevent the person offering the debtor the current account from freezing this facility as soon as the debtor starts negotiating a restructuring plan.

Part F

Section Two "Court confirmation of a restructuring plan" (new)

The bill for the Continuity of Enterprises Act I (WCO I) introduces a new Title IV "Not involving bankruptcy proceedings and suspension of payments" into the Bankruptcy Act. As noted in the explanatory memorandum to that bill, the intention is to incorporate the rules provided for in the WCO I concerning the appointment of an intended receiver and this framework into two separate sections in the new Title IV.[34] The CERP will be included in a new Section 4.2 (Court confirmation of an extrajudicial restructuring plan). The provisions are divided into four paragraphs:

[32] Supreme Court, 30 January 1953, NJ 1953/578 (Doyer and Kalff v Bouman q.q.) and 7 October 1988, NJ 1989/449 (Amro v Curatoren THB)).
[33] Supreme Court, 17 February 2012, JOR 2012/234 (Rabobank Maashorst v Kézér q.q.).
[34] Parliamentary Papers II 2014-2015, 34 218, No. 3, p. 42.

- § 1. General provisions

- § 2. The offer of and vote on a restructuring plan;

- § 3. The court confirmation of a restructuring plan, and

- § 4. The consequences of the court confirmation of the restructuring plan

§1. General provisions

Article 369

Article 369 provides:

- the scope of the CERP (paragraphs 1 to 5);

- that the CERP allows for a private restructuring procedure outside bankruptcy proceedings and a public restructuring procedure outside bankruptcy proceedings (paragraphs 6 and 9);

- the conditions under which the Dutch courts have jurisdiction to hear requests submitted under the CERP (paragraph 7);

- which court has territorial jurisdiction (paragraph 8), and that the decisions of the court pursuant to the CERP are not subject to appeal or appeal in cassation (paragraph 10).

Paragraph 1

Paragraph 1 provides that the CERP applies to debtors that run a business. As noted earlier in the general part of this explanatory memorandum, the intention is to create an effective and widely accessible framework for restructuring plans in the Netherlands that is useful not only for large companies, but also for SMEs. It has therefore been decided to design the CERP as a framework to the extent possible. This will make it possible to adopt a restructuring plan that is adapted to the specific circumstances of the case at hand. It also provides the flexibility required to apply a restructuring plan to a wide range of companies. The legal form the debtor's business does not matter.

The CERP does not apply to banks or insurers. The reason for this is that banks and insurers have their own rescue mechanism under Chapter 3A of the Financial Supervision Act (*Wet op het financieel toezicht*), which includes the prevention of bankruptcy.[35] The envisaged compulsory restructuring plan should not interfere with this rescue mechanism.

[35] Currently, the bill for the Act on the recovery and settlement of insurers (34,842) is pending before the Dutch Senate. After this Act takes effect, a specific rescue mechanism for insurers will be added to the Financial Supervision Act.

Paragraph 2

Paragraph 2 clarifies what is meant when the CERP refers to "*creditors and shareholders who are eligible to vote*". These are creditors and shareholders whose rights are amended under the proposed restructuring plan. This is why they are entitled to vote on the proposed restructuring plan (Article 381(3)). The debtor may decide to offer all its creditors and shareholders a restructuring plan. However, it may also choose to limit the restructuring plan to a specific group of creditors or shareholders (Article 370(1)). This provision is therefore important. If Article 369(2) is read in combination with the articles in which the term 'creditors and shareholders eligible to vote' is used, it follows that in a more limited restructuring plan of this sort, the debtor only has the following obligations to the creditors or shareholders from whom it requests a contribution to the restructuring:

- to inform them about the restructuring plan (Article 381(1));
- to give them the opportunity to vote on the restructuring plan (Article 381(3));
- to allow them to examine the report to be drawn up by him after the vote (Article 382(2)), and
- to notify them of the decision of the court holding the hearing for the request for court confirmation (Article 383(5)).

Furthermore, only these creditors and shareholders may ask the court to refuse the request for court confirmation of the restructuring plan (Article 383(8)). In addition, it is only these voting creditors and shareholders who are bound by a restructuring plan once it is confirmed by the court and who may exercise rights under it from it against the debtor (Article 385 et seq.).

The fact that the debtor does not have to involve all the parties involved in the company in the process enables him, by means of the private restructuring procedure, to adopt a restructuring plan in relative peace without resorting to bankruptcy proceedings. This might also enable him to avoid negative publicity about its financial problems as well as the associated adverse consequences. As already mentioned in the general part of the explanatory memorandum, this does not alter the fact that, pursuant to Article 25 of the Works Councils Act, the representative bodies may have to be informed and given the opportunity to issue advice on the restructuring plan.

Paragraph 3

The CERP may also be applied if the debtor’s business is run in the form of an association or cooperative, which have members rather than shareholders. In view of this, the third paragraph provides that what applies to shareholders also applies to the members of an association or a cooperative.

Paragraph 4

It follows from paragraph 4 that the restructuring plan cannot alter the debtor's obligations to its employees on the basis of an employment contract. Specific rules that are in accordance with the Work and Security Act (*Wet Werk en Zekerheid*) and the Balanced Labour Market Act (*Wet arbeidsmarkt in balans*) serve this purpose.

Paragraph 5

Paragraph 5 provides that a debtor cannot use the CERP if it has made a failed attempt to adopt a compulsory restructuring plan on the basis of the CERP during the last three years. Where an attempt by the debtor to adopt a restructuring plan has failed, it remains possible for creditors or shareholders to initiate another attempt by having a plan expert appointed. This plan expert can prepare a new proposal for a restructuring plan and then present it to the voting creditors and shareholders. This can then lead to the adoption of a restructuring plan.

Paragraph 5 is in line with Article 4(4) of the Directive, which provides that Member States may limit the number of times a debtor can access a preventive restructuring framework within a certain period.

Paragraphs 6 to 9

As clarified in section 3.1 of this explanation above, the CERP provides for two procedures for establishing a restructuring plan: 1) a *private restructuring procedure outside bankruptcy proceedings*, and 2) a *public restructuring procedure outside bankruptcy proceedings*. This is provided in paragraph 6. The person who initiates a restructuring procedure chooses between these two procedures. This is either the debtor itself or the creditors, shareholders or the Works Council or employee representative body appointed within the company if they request the appointment of a plan expert on the basis of Article 371.

In the case of the private restructuring procedure outside bankruptcy proceedings, it is not publicly disclosed that a restructuring plan is being prepared. In addition, all requests to the court are heard in closed session (Article 369(9)). This procedure therefore seems particularly appropriate where the restructuring plan is restricted to a particular group of creditors or shareholders (Articles 369(6) and 370(1)). The private settlement procedure outside bankruptcy proceedings thus offers the possibility of adopting a restructuring plan in relative peace, and avoiding negative publicity about the financial problems that have arisen and the associated adverse consequences.

In the case of the public restructuring procedure outside bankruptcy proceedings, however, the process is publicised by reporting it in the insolvency register (Article 370(4)). Furthermore, on the basis of the Trade Register Decree 2008, the application of the public insolvency procedure outside bankruptcy proceedings must be registered in

the Trade Register, as is already common practice in other public insolvency proceedings, i.e. when bankruptcy is declared, a suspension of payments is granted and a debt restructuring plan is applied (Article 39 of the Trade Register Decree 2008). In addition, requests to the court are heard in open session (Article 369(9)).

Once one of the two procedures has been chosen, the process of reaching a restructuring plan must be entirely compliant with that procedure. An interim switch from the private to the public procedure is therefore not possible.

In any event, the procedure chosen should be clear when the court is first involved in the attempt to adopt a restructuring plan. Before the court decides on requests submitted to it in the context of the adoption of the restructuring plan, it must first determine whether it has jurisdiction to hear these requests. Paragraph 8 sets out the rules for this.

In the case of a private restructuring procedure outside bankruptcy proceedings, jurisdiction is determined on the basis of Article 3 Rv. To the extent relevant in this context, Article 3 Rv provides that the Dutch courts have jurisdiction in cases that are initiated with the submission of a request if:

(a) the applicant or, if there are several applicants, one of them or one of the stakeholders named in the request has his or her permanent address or usually resides in the Netherlands, or

(b) the case is otherwise sufficiently connected with the jurisdiction of the Dutch courts.

With regard to the latter reason, circumstances that (each separately) provide a sufficient connection with the jurisdiction of the Dutch courts include (but are not limited to):

(i) the debtor offering the restructuring plan has its 'COMI' or an establishment in the Netherlands[36];

(ii) the debtor offering the restructuring plan has (substantial) assets in the Netherlands;

(iii) a (substantial) part of the debts to be restructured by means of the restructuring plan is the result of obligations that are subject to Dutch law or for which the Dutch courts have been chosen as the legal forum;

(iv) a (substantial) part of the group to which the debtor belongs consists of companies that have their seat in the Netherlands, or

[36] If one or more restructuring plans are proposed involving the restructuring of the debts of several legal entities that together form a group, it is sufficient for at least one of the debtors to have its 'COMI' or an office in the Netherlands.

(v) the debtor is liable for debts of another debtor in respect of which the Dutch courts have jurisdiction.

A public restructuring procedure outside bankruptcy proceedings will be notified to the European Commission with a request to have this procedure included in Annex A of the Insolvency Regulation. This means that the answer to the question whether the Dutch court has jurisdiction in the context of this procedure will depend on whether the debtor's 'COMI' is located in the Netherlands. If this is the case, it follows from the Insolvency Regulation that the Dutch courts have jurisdiction. If the debtor's 'COMI' is located outside the EU or in Denmark, the question of whether the Dutch court has jurisdiction must again be answered on the basis of Article 3Rv.

If the Dutch courts have jurisdiction, Articles 262 and 269 Rv provide which Dutch court has relative jurisdiction and where the requests that can be made to the court in the context of the restructuring procedure must be submitted (Article 369(8)).

Paragraph 10

Paragraph 10 provides that decisions of the court made in relation to this section are not subject to appeal, unless otherwise provided. It follows from this that a court ruling confirming a restructuring plan on the basis of Article 384 cannot be appealed (or appealed in cassation). This is justified and necessary because a restructuring plan is adopted in a critical situation where insolvency is imminent (Article 370(1)). In order to be able to avert bankruptcy, the restructuring plan must be implemented soon after court confirmation. This requires a final decision to be made quickly by the court.

The clause ‘unless otherwise provided’ refers to the following. If the public restructuring procedure outside bankruptcy has been opted for and the court bases its jurisdiction to hear requests in the context of that procedure on the Insolvency Regulation, then creditors can still challenge this based on the lack of international jurisdiction (Article 371(14)). This possibility of a challenge is provided by Article 5(1) of the Insolvency Regulation.

§ 2. The offer of and vote on a restructuring plan

Article 370

Article 370 provides when a debtor may propose a restructuring plan and what it may entail. It also provides that if the debtor is a private limited liability company or a public limited liability company, certain rules on decision-making within the company do not apply.

Article 370 is in line with Article 4(1) and (7) of the Directive. Article 4(1) of the Directive provides: “*Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to*

restructure, with a view to preventing insolvency and ensuring their viability (…)". Article 4(7) provides that preventive restructuring frameworks must be available on application by debtors.

Paragraph 1

Article 370(1) contains one of the key provisions of the CERP. It provides that a debtor may offer its creditors and shareholders a restructuring plan that provides for an amendment of their rights. The court can then confirm (homologeren) the restructuring plan if the decision-making and the content of the restructuring plan meet certain requirements (Articles 383(1) and 384(1)). This court confirmation makes the restructuring plan binding on all creditors and shareholders that are affected by it (Article 385). Voting creditors or shareholders who have not consented to the restructuring plan or have not voted can thus still be bound by the restructuring plan.

In order to benefit from the CERP, the debtor must be in a situation in which it is reasonably likely that it will not be able to continue paying its debts. In brief, a situation in which it is reasonably likely that the debtor will no longer be able to pay its debts amounts to the following. The debtor is still able to meet its current liabilities. At the same time, it does not anticipate any realistic prospects of avoiding future insolvency if its debts are not restructured. A period of time may elapse between the time that framework is invoked and the time that insolvency is expected to occur. It is therefore conceivable that a debtor anticipates not being able to repay a loan that is due in six months or a year, and that it will then become insolvent. The debtor must then be able to take immediate action by invoking the CERP.

An amendment to the rights of creditors and shareholders' is in fact an amendment to a creditor's or shareholder's right to enforce the debtor's obligations. This could entail:

- a full or partial waiver of an outstanding claim, whereby the debtor is relieved in whole or in part of its payment obligation, and the creditor's right to claim (full or partial) payment of the original debt from the debtor expires, or

- a deferral of payment, whereby the debtor more time to meet its payment obligations and the creditor's right to enforce payment at the originally agreed time expires, or

- a 'debt for equity swap', whereby part of a creditor's claim is converted into an equity interest and thus also a controlling interest in the company, while the equity interest and the related controlling interest of the existing shareholders are diluted.

A restructuring plan may pertain to all creditors and shareholders of the company. A restructuring plan that is limited to '*some of them*' - i.e. to one or more groups (classes) of creditors and shareholders - is also possible. This may be a restructuring plan that focuses solely on restructuring debts to lenders with security rights, leaving claims by unsecured creditors intact. The CERP differs in this respect from the framework for

bankruptcy and suspension of payments agreements. In bankruptcy, the bankrupt party can offer a restructuring plan to '*his joint creditors*' (Article 138 of the Bankruptcy Act) and, in a suspension of payments, the debtor is authorised to offer a restructuring plan to '*those who have claims in respect of which the suspension of payments operates*' (Article 252 of the Bankruptcy Act). Not involving a particular group of creditors in a restructuring plan effectively means that the rights of those creditors are not amended in any way and that they must be fulfilled. In such a case, there is a risk that one or more classes of creditors involved in the restructuring plan do not consent to the restructuring plan and that creditors in that class object to the court confirmation. The restructuring plan can then only qualify for court confirmation if:

- the requisite majority of the classes of creditors of equal or higher ranking consent to the restructuring plan (i.e. they consent to the deviation from the statutory ranking in the case of their recourse against debtor's assets), or

- the debtor provides reasonable grounds for its decision to exclude certain creditors from the restructuring plan (meaning that those creditors do not bear part of the deficit) and demonstrates that this will not harm the interests of creditors of equal or higher ranking(Article 384(4)(a)).

It is conceivable that the debtor may offer a restructuring plan and that the plan is subsequently discussed and negotiated with the creditors and shareholders. This may lead to the restructuring plan having to be amended. The CERP makes this possible. The only condition it imposes in this regard is that the debtor eventually has to submit a definitive restructuring plan to the voting creditors and shareholders. It must at a reasonable time and in any case not less than eight days before the vote takes place (Article 381(1)).

Paragraph 2

If a creditor is affected by a restructuring plan and its claim is amended in that context, it will retain the right to hold a third party, including a guarantor and a co-debtor who is liable for a debt of the debtor or who has in any way provided security for payment of that debt, liable for payment of its original claim in the form and at the time agreed before the restructuring plan was confirmed. This is possible if the creditor has had to waive part of the claim, but also if the claim is not paid at the originally agreed time or it is paid in another form (e.g. a 'debt-for-equity swap'). This is regulated in the first sentence of paragraph 2.

This is in line with Article 160 of the Bankruptcy Act, which provides the same rule for bankruptcy agreements. The provision prevents guarantees issued following the court confirmation of the restructuring plan from being called into question. Without this provision, a change to the original claim under the restructuring plan would often have the effect of altering the rights under a surety or another form of co-liability or security. If, for example, the debtor is granted a five-year extension of payment in a restructuring

plan, the claim against the guarantor would, without this provision, also be deferred by five years. In that case, the surety would be of no use to the creditor.

The second sentence of paragraph 2 provides that the third party cannot take any action against the debtor for the amount that it pays to the creditor after the restructuring plan has been confirmed by the court. This prevents a situation in which the debtor is still held liable for the original debt, and the restructuring plan ultimately does not offer a solution to the financial problems.

This provision is in line with the system of Article 136(2) of the Bankruptcy Act. In short, this provision includes a framework which prevents two or more persons - i.e. the creditor and, for example, the guarantor – from assuming the same debt in bankruptcy proceedings. This would otherwise prejudice the other creditors, as the payments made to them would then be lower. It follows from the second sentence of Article 370(2) that if a creditor's claim is restructured in the restructuring plan, the guarantor cannot then take recourse against the debtor in order to force him to pay the original debt in full. Again, the rationale for this provision is that this ought not to be possible because it would prejudice the other creditors.

The legal relationship between the debtor and the surety may also be governed by foreign law. Therefore, the provision in Article 370(2), second sentence, pertains to recourse not only on the basis of Articles 6:10 and 6:13 BW but also on the basis of a foreign statutory regime.

If and to the extent that payment by the third party results in the creditor receiving a greater value than the amount of its original claim against the debtor, then the rights that are assigned to the debtor in the restructuring plan are automatically transferred to that third party. This is regulated in the third sentence of paragraph 2. This somewhat compensates the loss suffered by the third party due to the lack of recourse against the debtor and prevents the creditor from ultimately receiving more than it is entitled to on the basis of its original claim against the debtor. Section 3.2 of this explanatory memorandum outlines two situations illustrating how this provision works in practice.

An exception to the rule that the restructuring plan leaves rights against third parties intact is made in the case of a restructuring plan as referred to in Article 372. The purpose of such a restructuring plan is also to provide for a restructuring of guarantees, insofar as they are issued by companies that are part of the same group. This is only possible if the conditions set out in that article are met.

Paragraph 3

Paragraph three provides that once the debtor starts preparing a restructuring plan, it lodges a statement to that effect with the court registry. This is the court that has territorial jurisdiction to hear requests that can be submitted in the context of the restructuring procedure (Article 369(8)). The importance of this provision lies mainly in the fact that,

from this moment on, the debtor can ask the court to take measures to help it adopt a restructuring plan (see section 3.7). These are requests to:

- grant authorisation to perform legal acts in the context of obtaining new financing to adopt a restructuring plan (Article 42a);

- order a cooling-off period (including suspending the disposal of a petition for bankruptcy) (Article 376), and

- put in place measures or further provisions to safeguard the interests of creditors or shareholders (Article 379).

Given the last category of requests, the time at which the statement is filed is also important for creditors and shareholders with voting rights. One possible provision that the court can make in its interest is to appoint an observer. The observer's task is to supervise the adoption of the restructuring plan and, in so doing, take into account the interests of all the creditors. As soon as it becomes apparent that the debtor will not succeed in reaching a restructuring plan or that the interests of the joint creditors will be adversely affected by its actions, the observer shall inform the court accordingly (Article 380(2)). In addition, based on Article 379 the court may determine that the debtor must ensure that a vote on the restructuring plan takes place within a certain period of time, and that it regularly informs the court and the affected creditors and shareholders about its progress until that time. If the court applies this provision, creditors and shareholders can keep abreast of the process, and they will be informed about whether a restructuring plan will be adopted within the foreseeable future. Since the filing of the statement is therefore also important for creditors and shareholders with voting rights, the CERP provides that they can consult the statement at the court registry after the debtor has offered a restructuring plan. This they can do until:

- the court has ruled on the request for court confirmation, or

- the debtor has filed the report on the votes and indicated in that it will not submit such a request.

As soon as the time allowed for creditors with voting rights and shareholders to inspect the statement ends, the court may nullify the statement. It does so in any case one year after it is filed. This assumes that a process initiated to adopt a restructuring plan will not last longer than one year.

It is also important to note that the filing of the statement is also relevant in the context of the new third paragraph added to Article 54 of the Bankruptcy Act. As noted above in the notes to Section D, this new provision is intended to enable the debtor to use a current account facility during the process of trying to adopt a restructuring plan. The filing of the statement is also a milestone in the process: it marks the start of the preparatory phase,

and therefore also the moment from which the new third paragraph of Article 54 of the Bankruptcy Act can be applied.

Paragraph 4

Paragraph 4 deals specifically with the situation in which the debtor chooses to enter into a restructuring plan in the context of a public restructuring procedure outside bankruptcy proceedings. As explained in section 3.1 of this explanatory memorandum above, if the public restructuring procedure outside bankruptcy proceedings is applied to a debtor who has its 'COMI' in the Netherlands, the Insolvency Regulation applies. In that case, the rules laid down in the Insolvency Regulation with regard to the publication of pending proceedings must be observed. Paragraph 4 provides for this, and it states that if the debtor offers its restructuring plan within the framework of the public restructuring procedure outside bankruptcy proceedings, it must ask the registrar of the District Court of The Hague to report this in the insolvency registers referred to in Articles 19 and 19a, and in the Dutch Government Gazette. The debtor must do so as soon as the court is first involved in the attempt to adopt a restructuring plan. The first decision taken by the court in this context marks the opening of the public restructuring procedure outside bankruptcy proceedings. The date on which the proceedings are opened is part of the information that the debtor must provide pursuant to Article 24 of the Insolvency Regulation. Depending on when the court first becomes involved in the process, an opening decision could be:

- the appointment of a plan expert at the request of the debtor (Article 371);
- granting authorisation to perform legal acts to obtain new financing in order to adopt a restructuring plan (Article 42a);
- ordering a cooling-off period (Article 376);
- putting in place measures or further provisions to safeguard the interests of creditors or shareholders (Article 379);
- issuing an interim ruling (Article 378), or
- the decision on the request for court confirmation of the restructuring plan (Article 384).

Paragraph 5

Paragraph 5 deals with situations in which the debtor is a legal person. It provides that certain rules regarding decision-making by the general meeting are not applicable if a restructuring plan is offered pursuant to the CERP. Specifically, this means in any case that the management of the legal person does not require the approval of the general meeting for the offer of a restructuring plan. If the implementation of a restructuring plan

confirmed by the court requires a decision from the general meeting, the judgment confirming the restructuring plan will replace it.

As explained and illustrated above in section 3.2 of this explanatory memorandum, a restructuring of the debt may also require an amendment to shareholders' rights. The provision contained in paragraph 5 is connected to this. This provision prevents the management from being fully unable to initiate a process that could lead to the adoption of a restructuring plan due to opposition from shareholders. Incidentally, the declaration of non-application of the rules on decision-making by the general meeting does not mean that the shareholders can no longer express an opinion on the restructuring plan at all. The way in which they can do this is simply regulated differently. If the restructuring plan provides for an amendment of the rights of the shareholders, then they have the right to participate in the vote on the restructuring plan on the basis of Article 381(3). If the debtor submits a request for court confirmation of the restructuring plan after the vote, the shareholders who voted against the restructuring plan may ask the court to refuse this request (Article 383(8)). They have a further opportunity to express their opinions during the hearing of the request for court confirmation.

The foregoing also applies to decision-making by holders of shares of a certain class or designation.

Article 371

Article 371 provides a framework on the basis of which creditors and shareholders and the Works Council or employee representative body appointed within the company, or the debtor itself, can initiate the adoption of a restructuring plan by asking a court to appoint a plan expert (Article 371). This plan expert can prepare a proposal for a restructuring plan, and by putting it to the vote, initiate the process that can lead to the court confirmation of the restructuring plan. This article regulates when this possibility can be used. It also defines the resources of the plan expert and his responsibilities. Finally, this Article regulates when an appointment ends.

The appointment of the plan expert does not result in the debtor losing the power to dispose of or manage its assets. It retains control of its own business and can continue to do so while the restructuring procedure is ongoing ('debtor in possession'). The fact that there are financial problems does not need to be widely known, especially if use is made of the private restructuring procedure outside bankruptcy proceedings. This prevents negative publicity and associated adverse consequences for the parties involved in the company.

Article 371 is in line with Article 4(1) and (8) and Article 5(1), (2) and (3)(c) of the Directive. Article 4(1) of the Directive provides: "*Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability* (…)". According to Article 4(8), the Member States may also provide that

preventive restructuring framework is available to creditors and employees' representatives. The restructuring system provided by the CERP can be made available to the creditors and the Works Council or the employee representative body by appointing a plan expert.

Article 5(1) of the Directive provides that the Member States must ensure that "*debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business.*" Article 5(2) of the Directive provides that a plan expert can be appointed by a judicial authority. The judicial authority must assess whether this is necessary on a case-by-case basis, with Article 5(3) of the Directive listing three specific instances in which a plan expert must always be appointed. One of these instances (referred to in sub-paragraph (c)), is the situation in which the debtor or a majority of the creditors has requested this.

Paragraph 1

Paragraph 1 provides creditors and shareholders and the Works Council or employee representative body appointed within the company the possibility of asking the court to appoint a plan expert.

The management of a debtor company may also request the appointment of a plan expert on the basis of paragraph 1. This enables the management to avoid being trapped in a conflict of interest between shareholders and creditors. For this reason, the management does not require the approval of the shareholders to submit a request for the appointment of a plan expert.

The appointment of a plan expert precludes the simultaneous offer of a restructuring plan by the debtor. This means that the attempt to adopt a restructuring plan is always concentrated within a single process. Several parallel restructuring procedures cannot be pending at the same time.

Paragraphs 2 and 14

As explained in section 3.1 of the general part of this explanatory memorandum, the CERP provides two procedures within which the restructuring plan can be established: 1) a private restructuring procedure outside bankruptcy proceedings and 2) a public restructuring procedure outside bankruptcy proceedings (Article 369(6)). Paragraphs 2 and 14 deal with this.

It should in any case be made clear which settlement procedure has been chosen when the court is first involved in the attempt to adopt a restructuring plan. This may be done at the same time as the debtor files a request for the appointment of an expert. Paragraph 2 provides that the person filing the appointment request must in that case indicate the restructuring plan procedure he has opted for and the reasons for this.

If the request has been submitted by a creditor or a shareholder or the Works Council or employee representative body, the debtor will still have the opportunity, on the basis of paragraph 2, to express its opinion on the choice made. If the debtor disagrees with the choice made, the court will determine which restructuring procedure will be applied.

If the submission of the application for an appointment is the first occasion on which the court is involved in the attempt to adopt a restructuring plan, it must determine whether it has jurisdiction to hear the application before taking a decision. Paragraph 2 provides that the person making the appointment request must then ensure that the information contained in the request is sufficient to enable the court to make the appointment.

If the public restructuring procedure outside bankruptcy proceedings is chosen, and the court has jurisdiction to hear the appointment request under the Insolvency Regulation, the decision to appoint a plan expert may be a *'decision to open main insolvency proceedings*' as referred to in Article 5 of the Insolvency Regulation. If this is the case, then on the basis of paragraph 14, the court must make a statement to this effect in its appointment decision. Creditors with an interest who have not previously been given the opportunity to express their views may still object to this decision on the grounds of the lack of international jurisdiction. This possibility of opposition is also regulated in paragraph 14 and arises from Article 5(1) of the Insolvency Regulation.

If the public restructuring procedure outside bankruptcy proceedings is applied and the Insolvency Regulation is applicable, the rules contained in it with regard to the publication of the current procedure must be complied with. The end of paragraph 2 provides that Article 370(4), then applies mutatis mutandis. See the explanation of that provision for a more detailed explanation of this.

Paragraphs 3, 4, 5 and 10

On the basis of paragraph 3, it is a condition for the appointment of a plan expert that the debtor is in a situation in which it is reasonably likely that it will not be able to continue to pay its debts. This condition for the appointment of a plan expert is in line with the condition provided in Article 370(1) if the debtor wishes to establish a restructuring plan on the basis of the CERP. See the explanation of Article 370(1) for a more detailed explanation of this.

If required in order to take a decision, the court may ask an expert to examine whether the debtor is indeed in such a state of unavoidable insolvency. This is regulated in paragraph 4.

If it is demonstrated that the debtor is indeed in a state of unavoidable insolvency, the court will generally grant the appointment request. The court will only not do so if there is prima facie evidence that the interests of the joint creditors would not be served by appointing a plan expert. This may be the case, for example, if the application for an appointment is made by a creditor for apparently the sole purpose of obstructing or

delaying an advanced and promising restructuring process in order to create a better bargaining position for himself, with this strategic behaviour and resulting delay causing detriment to the joint creditors.

This expresses the idea that the main purpose of the CERP is to safeguard the interests of creditors and other stakeholders - such as employees - who would like the company to continue but are faced with a small group of creditors or reluctant shareholders who are blocking a rescue attempt. The appointment of the plan expert ensures that an attempt is made to prevent imminent bankruptcy from actually coming about. The importance of appointing a plan expert for the joint creditors and other parties affected is already clear, particularly where the debtor itself appears to take no or insufficient action. But even if the debtor has already started preparing a restructuring plan, the appointment of a plan expert may still be desirable. This would be the case where, for example, the independence of the management of the debtor legal entity is not beyond doubt. If the attempt to adopt a restructuring plan is taken over by an external independent plan expert, this can increase confidence in the process and thus the chances of success. The appointment of an independent plan expert by the court can assuage any fear of abuse. However, the further the restructuring plan offered by the debtor has progressed and the greater the support of the affected creditors for it, the greater will be the creditors' interest in the debtor rapidly completing the restructuring process it has initiated. In any event, the appointment of a plan expert will delay a process which is already underway. The plan expert will always have to start from the beginning. It will always have to be considered whether the appointment of a plan expert will directly or indirectly generate added value for the joint creditors, outweighing the associated costs and any delay. If the request for the appointment of a plan expert is filed by the debtor itself or it is supported by the majority of the creditors, then paragraph 3 assumes that the interests of the joint creditors are served by appointing a plan expert and the court will have to grant that request. This is also in line with Article 5(3)(c) of the Directive. Article 5(3) of the Directive provides that, in at least three specified circumstances, the Member States must ensure "*the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in the negotiations* (…)".One of these instances – referred to in sub-paragraph (c) – is the situation in which this has been requested by the debtor or a majority of the creditors.

When appointing the plan expert, the court shall also stipulate his or her salary and shall determine the maximum amount that the work of the plan expert and of third parties engaged by him may cost. This amount may subsequently be increased by the court. In principle, the debtor must pay these costs. If, however, the plan expert is appointed following a request that is supported by the majority of the creditors, the costs will be borne by the creditors. This is in line with Article 5(3)(c) of the Directive. The court may make the appointment subject to the provision of security or an advance payment being deposited into the court's bank account. All this is regulated in paragraph 10.

Before taking decisions on the matters described above, the court will first allow the debtor, the creditor or the shareholders or the Works Council or employee representative body who have requested the appointment and, if applicable, the observer or the plan expert, to each express their opinions. This is provided in paragraph 5.

Paragraphs 7 to 9

The appointment of a plan expert on the basis of paragraphs 7 and 8 means, to the extent necessary to enable the plan expert to properly perform his task, that:

- the plan expert is given access to all business records and all other relevant business information, and

- the debtor must provide the plan expert with all necessary information and cooperate fully, whether requested or not.

The latter also applies to the employees employed by the debtor and, if the debtor is a company, to the directors, supervisory directors and shareholders. The bill is thus in line with Articles 105 and 105a of the Bankruptcy Act concerning the bankrupt party's obligation to inform, and cooperate with, the trustee in bankruptcy (curator).

If the management fails to cooperate, the plan expert may ask the court to force it to do so, possibly on pain of a penalty payment (Article 3:296 BW in conjunction with Article 611a Rv). In addition, a refusal by the management to cooperate may also qualify as mismanagement. If a declaration of bankruptcy follows and it subsequently emerges that the unwillingness of the management board was an important cause of the bankruptcy, the management board members could be held jointly and severally liable for the deficit in the bankruptcy proceedings on the basis of Articles 2:138 and 248 BW.

To avoid unwanted distribution of sensitive information, paragraph 9 provides that the plan expert will only share the information obtained with third parties to the extent necessary to adopt the restructuring plan. Depending on the circumstances, it may be appropriate for the plan expert not to share information with a third party until he has agreed the usual conditions of confidentiality with that third party.

Paragraphs 6 and 11

Paragraph 6 provides that the plan expert must perform his task effectively, impartially and independently. To be able to do this, the plan expert will have to be someone with a knowledge of financial matters and insolvency law. He must also have experience with restructuring corporate debt. In international cases, the court could, at its own discretion, also appoint an insolvency officer in foreign insolvency proceedings as a plan expert (in this regard see also recital 50 and Articles 42(3)(a) and 57(3)(a) of the Insolvency Regulation).

On the basis of paragraph 11, the plan expert is not liable for damage resulting from the attempt to adopt a restructuring plan, unless he bears serious blame for not acting as may reasonably be required of a plan expert whom performs his task with rigour and commitment and with sufficient insight and experience. In this regard the CERP is in line with the 'Maclou standard'[37] developed in case law, which is decisive in determining any liability on the part of the receiver.

Paragraphs 12 and 13

Paragraph 13 provides that, in principle, the appointment of the plan expert ends automatically as soon as the court has confirmed the restructuring plan offered by the plan expert. However, the court may decide in the judgment confirming the restructuring plan that the plan expert will continue for a longer period, for example because it would be desirable for him also to supervise the implementation of the restructuring plan.

Paragraph 12 takes into account the situation in which the impossibility of adopting a restructuring plan becomes clear at an earlier stage in the process. It provides that the plan expert must inform the court of this. This will in principle lead to the court withdrawing the appointment. Before the court takes a decision on this, it will first allow the debtor and the creditors or the shareholders or the Works Council or employee representative body who have requested the appointment, as well as the plan expert, to each express their opinions (paragraph 5).

Article 372

Article 372 provides that the restructuring plan may provide for an amendment to creditors' rights against legal entities who form a group together with the debtor, as referred to in Article 2:24b 2 BW. The situation this refers to is that in which the debtor who offers a restructuring plan (the “principal debtor”) forms an economic and organisational unit with other legal entities, and there are group guarantees. It may have been agreed, for example, that another legal entity within the group will guarantee the performance of the principal debtor's obligations.

Paragraphs 1 and 2

If a creditor is affected by a restructuring plan and its claim is amended in that context, it will retain the right to hold a third party, including a guarantor or a co-debtor who is liable for a debt of the debtor or who has in any way provided security for payment of that debt, liable for payment of its original claim in the form and at the time agreed before the restructuring plan was confirmed (Article 370(2) first sentence). Article 372 makes an exception to this rule for group guarantees issued by legal entities belonging to the same group. If the following four conditions are met, the restructuring plan can also provide for

[37] Supreme Court 19 April 1996, NJ 1996/727 (Maclou).

an amendment to the rights of the creditors vis-à-vis a guarantor or a co-debtor may no longer take action to secure payment of the debtor's debt (paragraph 1):

- the restructuring plan amends creditors' rights arising from group guarantees provided by the legal entities concerned or from obligations for which those legal entities are liable with or alongside the debtor (sub-paragraph (a));

- the legal entities concerned are - like the principal debtor - in a situation in which it is reasonably likely that they will not be able to continue paying their debts (sub-paragraph b);

- the legal entities concerned must have agreed to the proposed amendment or, if this is not the case, the restructuring plan must have been proposed by a plan expert as referred to in Article 371 (sub-paragraph c), and

- the court must have jurisdiction to hear a request for court confirmation of such a broad restructuring plan (sub-paragraph (d)).

Pursuant to Article 372, the principal debtor may only include obligations of liable group companies in its restructuring plan if the group companies concerned have not already offered a restructuring plan to restructure the obligations in question.

It follows from paragraph 2 that a broad restructuring plan is only eligible for court confirmation if the decision-making about, and the substance of, the restructuring plan meet the requirements laid down in the CERP (Articles 383(1) and 384(1)) with respect to all legal entities concerned within the group.

Paragraph 3

In order to keep the restructuring procedure well organised, the CERP provides that when a broad restructuring plan is offered, the principal debtor or the plan expert takes the lead, and that they are exclusively authorised to submit requests as referred to in Articles 376(1), 378(1), 379(1) and 383(1). These are requests to the court to:

- order a cooling-off period (Article 376(1));

- issue an interim ruling (Article 378(1));

- put in place measures or further provisions to safeguard the interests of creditors or shareholders (Article 379(1)), and

- confirm the restructuring plan (Article 383(1)).

Article 373

Article 373 provides the possibility, first and foremost, for restructuring existing agreements. In addition to the debtor, the plan expert, if appointed, can also make use of this possibility. This provision may for example pertain to a rental agreement that is a financial burden to the company. This provision may be applied to all types of agreements except employment agreements (Article 369(4)).

In addition, this article specifies that so-called '*ipso facto clauses*' have no effect. These are contractual provisions that automatically attach contractual consequences to the opening of a restructuring procedure or the occurrence of associated events or acts. The proposed provision is necessary to ensure that valuable agreements are not lost as a result of restructuring. The counterparty to these agreements has no legitimate interest in withdrawing from the agreement. After court confirmation of the restructuring plan, the counterparty will instead have a debtor who is financially sound again.

This provision is in line with Article 7(4) and (5) of the Directive. Put briefly, according to Article 7(4) and (5) of the Directive, Member States shall provide for rules that maintain "*essential contracts*". In addition, the Member States may provide that these rules also apply to "*non-essential contracts*".

Paragraph 1

Paragraph 1 provides that the debtor can make a proposal to the counterparty to amend or terminate the agreement. This is already common practice if a debtor anticipates that it will ultimately no longer be able to meet the obligations arising from an agreement. What is new, however, is that the debtor has the option, based on the paragraph 1, to terminate the agreement unilaterally if the counterparty does not agree to a proposed voluntary amendment or termination (Article 373). The debtor can exercise this option if the court:

(a) authorises the early termination, and

(b) confirms the restructuring plan.

Pursuant to the condition stated at a, the debtor must accompany its request for court confirmation with a request for authorisation to terminate the restructuring plan unilaterally (Article 383(7)). Article 384(5) provides that the court will grant this request if the debtor is in a situation in which it is reasonably likely that it will become insolvent. This condition for authorising a unilateral termination of an agreement is in line with the condition which, under Article 370(1), must be met for the debtor to be able to adopt a restructuring plan on the basis of the CERP. See the explanation of Article 370(1) for a more detailed explanation of this.

If the court authorises termination of and confirms the restructuring plan, the unilateral termination shall take place automatically on the date on which the judgment confirming the restructuring plan is given subject to a notice period proposed by the debtor, unless the court deems this notice period unreasonable. In this case, the court will set a longer period in its decision on the request for termination. That period shall in any event not exceed three months.

Apart from the debtor, the plan expert, if appointed, may also exercise the option, provided for in paragraph 1, to restructure current agreements.

Paragraph 2

An (unsecured) claim for compensation for damage which the counterparty may have after the agreement is unilaterally terminated may involve the debtor in the restructuring plan. This is provided for in paragraph 2. If the debtor opts for this, it will make the counterparty to the restructuring plan a voting creditor with all the rights accruing to him under the CERP. Among other things, the counterparty will have the right vote on the restructuring plan, and the right to ask the court to refuse the request for court confirmation of it (Articles 381(3) and 383(8)).

If the debtor does not include in the restructuring plan the claim for compensation for damage that the counterparty may have, this effectively means that after termination the claim for compensation will have to be paid in full. The counterparty will then not be a creditor with voting rights, because its right to compensation will not be amended in any way. In that case, the counterparty is therefore not entitled to vote on the restructuring plan, nor may it oppose the court confirmation of the restructuring plan. However, the counterparty may ask the court not to give its consent to the termination of the agreement on the grounds that the debtor is not in a situation of imminent insolvency (Article 384(5)). If the counterparty's request is successful, this will automatically mean that the restructuring plan cannot be confirmed either. This, too, is subject to the condition that the debtor must be in a situation of imminent insolvency (Article 384(2)(a)).

Paragraphs 3 and 4

The provision included in paragraph 3 means that the offer of a restructuring plan does not constitute grounds for amending commitments or obligations to the debtor, for suspending the performance of an obligation to the debtor or for terminating an agreement concluded with the debtor. The background to this provision is as follows. Regular contract law will in principle remain in force after the introduction of the CERP. After the CERP enters into force, the contracting parties may include provisions in their agreements (so-called '*ipso facto clauses*') on the basis of which the counterparty to the debtor could terminate current agreements as soon as the debtor starts preparing a restructuring plan or a plan expert has been appointed for this task. This could even be the case if the debtor has never failed to satisfy its obligations and has indicated that it is able and willing to continue to perform the agreement. This is now being prevented. It is

crucial for the survival of the company that these agreements are maintained, particularly where its business operations depend on certain contracts, such as agreements with suppliers, customers, employees and automation specialists.

On the basis of paragraph 3, '*ipso facto clauses*' have no effect. This applies both to clauses that automatically give legal effect to the offer of a restructuring plan and to clauses that link termination rights to it. This rule also applies to clauses whose effect is dependent not on the offer of the restructuring plan but on events or acts connected with it. Examples of these could be the negotiation of a proposal for a restructuring plan or the implementation of a confirmed restructuring plan. The latter ensures, among other things, that a restructuring plan that includes a 'debt-for-equity swap' cannot be obstructed by a 'change-of-control' provision. It also follows from the paragraph 3 that the preparation, offer or execution of a restructuring plan does not provide grounds for early reliance on the consequences of default on the basis of Article 6:80 BW. Even if reliance is placed on the provisions that are available to the debtor or the plan expert under the CERP to adopt a restructuring plan (see section 3.7), this qualifies as an event or act that is directly connected to the preparation and offer of a restructuring plan. An example of this might be the order of a cooling-off period (Article 376). Ipso-facto clauses also have no effect in such a situation.

Paragraph 3 applies to all creditors, including therefore those whose rights are not amended on the basis of the restructuring plan and those not affected by the cooling-off period.

Paragraph 4 deals specifically with the situation in which a cooling-off period has been ordered. In that case, as long as the cooling-off period continues, a default in the debtor's performance that occurred before the cooling-off period may not be used as grounds for - in short – terminating, suspending or dissolving an agreement with the debtor. However, unlike paragraph 3, paragraph 4 requires the debtor to provide security for the compliance with new obligations under the agreement which arise during the cooling-off period. The rules provided in paragraph 4 prevent, on the one hand, a cooling-off period which is intended to give the debtor some time and peace in order to be able to adopt the restructuring plan, from being ineffective. On the other hand, these rules ensure that the interests of the counterparty who has already been confronted with a default are sufficiently safeguarded. Under paragraph 3, the debtor is not obliged to provide security for new obligations. The reason for this is that paragraph 3 is based on the situation in which the debtor has not been in default. An obligation to provide security could increase the financial difficulties already experienced by the debtor, and thus put an end to or further impede the debtor's business operations. This could damage the interests of the joint creditors, while a counterparty to an agreement that is performed in full and on time has no reason to withdraw from the restructuring plan or to demand security for its continuation. This is different for a counterparty who has already had to deal with the debtor's default.

In both cases - those under both paragraphs 3 and 4 - the management of a debtor/legal entity is liable for new obligations if these are entered into while the management knows or should know that the legal entity that will not be able to fulfil them (Supreme Court 6 October 1989, NJ 1990/286 (Beklamel)).

Article 374

Article 374 prescribes when the restructuring plan must provide for a classification. This obligation exists if, put briefly, the restructuring plan involves different categories of creditors and shareholders. According to Article 374, this applies when creditors and shareholders have rights in a bankruptcy scenario, or acquire rights on the basis of the restructuring plan, that are so different that their positions are not comparable. If the creditors and shareholders are not in comparable positions, they generally assess a restructuring plan differently. It is important for this to be taken into account because it determines whether a restructuring plan qualifies for court confirmation. Section 3.1 of the general part of this explanatory memorandum, above, explains that the restructuring plan only qualifies for court confirmation if:

- the requisite majority of at least one category of the affected creditors or shareholders supports the restructuring plan, and

- the restructuring plan includes a restructuring proposal that is reasonable with respect to the affected creditors and shareholders. This means that in any case:

    (a) the restructuring plan does not put the creditors and shareholders in a significantly worse position than they would be in a bankruptcy scenario, and

    (b) the value that can be realised with the restructuring plan (i.e. the 'going concern' or reorganisation value of the company concerned) must be distributed fairly among the creditors and shareholders.

If all classes have consented to the restructuring plan and the decision-making has been correct (i.e. none of the grounds for refusal listed in Article 384(2) apply), the restructuring plan can be considered *reasonable*. There could, however, be creditors or shareholders who have not consented to the restructuring plan and who oppose the court's confirmation of it. If these creditors or shareholders can demonstrate that the restructuring plan is unreasonable because it would put them in a significantly worse position than in a bankruptcy scenario, the court will then refuse the request for confirmation (Article 384(3)). If not all classes have consented to the restructuring plan, the decisive factor is how the reorganisation value that can be retained or realised with the restructuring plan is distributed among the affected classes. This distribution may not deviate, to the detriment of a dissenting class, from the statutory ranking in the case of recourse by the creditors against the debtor's assets. If there are creditors or shareholders the majority of whose class has voted against the restructuring plan and they are able to demonstrate that the restructuring plan does not satisfy this condition, this is also a reason for the

court to refuse the request for confirmation (Article 384(4)). This is because the reorganisation value to be distributed under the restructuring plan would be *unfair* in that case and the restructuring plan is therefore unreasonable.

This implies the importance of classification in restructuring plans that relate to different categories of creditors and shareholders. This classification helps the debtor or the plan expert, if appointed, to prepare the restructuring plan, and also helps voting creditors and shareholders as well as the court to assess the plan. It also enables the debtor or the plan expert to understand how to fulfil the condition that the restructuring plan must be *reasonable*. It also enables the voting creditors and shareholders to verify whether this is the case before they vote and, after they vote, whether there is sufficient support for the restructuring plan. For the court, this classification is an important factor in deciding whether the decision-making regarding the restructuring plan was correct.

Article 374 specifically means that:

the different categories of creditors and shareholders in the restructuring plan have to be assigned to different classes;

- each class should be given a proposal appropriate to that class (Article 375), and

- each class has to be given an individual vote on the restructuring plan (Article 381(3)).

This classification depends on which rights creditors and shareholders have in a bankruptcy scenario, and which rights they have on the basis of the restructuring plan. In any case, creditors or shareholders who rank differently in the case of recourse against the debtor's assets must be classified into different classes. Differences in rank may also arise from Title 10 of Book 3 BW, from another law or framework based on it, or from a contractual framework. Examples of classification under a statutory framework for ranking could provide for different classes of creditors with a pledge or mortgage right, creditors with a retention title or unsecured creditors. Contractual rules that determine the order in which creditors can seek recourse include, for example, subordination agreements or intercreditor agreements. The latter are agreements between the debtor and several creditors who together grant a loan. In brief, this type of agreement sets out arrangements about the relationship between the various lenders, and about what happens if the debtor does not comply with the terms of the loan.

This classification may also (but not necessarily) take into account other factors that may influence the way creditors and shareholders assess the restructuring plan. These may be, for example, the different tax consequences that the restructuring plan has for the affected creditors and shareholders. For reasons of simplicity and practicability, it was decided to make a classification compulsory only if a restructuring plan is offered to debtors or shareholders whose existing rights are different (in the event of bankruptcy) or who are offered new rights (on the basis of the restructuring plan). If more factors were

to be taken into account in this classification, it would make the classification too complex. This would undermine the intended simplicity and efficiency of the framework.

A creditor may be assigned to different classes for the same claim, for example because part of the claim is secured by a pledge or mortgage and part of it is not. This creditor should be assigned to a class of secured creditors for the part of its claim that is secured by collateral. For the remainder of its claim, it should be assigned to a class of unsecured creditors. The creditor therefore votes in both classes.

The debtor is entitled to subdivide a single category into different classes. It can also make different offers to these classes, thus even advantaging one class in relation to another class. In the latter case, if the restructuring plan is to qualify for court confirmation, the debtor must, however, ensure:

- that the requisite majority of the less advantaged class consents to the restructuring plan, and thus to the decision to make a better offer to the other class, or

- that it can provide reasonable grounds for its decision to make a distinction and can demonstrate that the interests of creditors in the less advantaged class are not harmed as a result (Article 384(4)(a)).

Article 374 is in line with the first paragraph of Article 9(4) of the Directive. This provides that "*the affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law." It also provides that, "As a minimum, creditors of secured and unsecured claims shall be treated in separate classes* (…)".

Article 375

Article 375 specifies the information which has to be included in the restructuring plan, and which information has to be submitted in that regard. The main purpose of this provision is to ensure that creditors and shareholders are provided with the information they need to exercise their voting rights effectively on the basis of Article 381.

This article is in line with Article 8(1) of the Directive. This provides that the Member States must ensure that a restructuring plan to be voted on by the creditors and shareholders contains at least the information listed in that article. The Member States are allowed to supplement these information requirements. Sub-paragraphs a, b, i and l of Article 375(1) and sub-paragraphs a, b, c, d and e of Article 375(2) correspond to Article 8(1) of the Directive. The other sub-paragraphs of Article 375 supplement the information prescribed in Article 8(1) of the Directive.

Paragraphs 1 and 2

Paragraph 1 first and foremost comprises the principle that the restructuring plan must comprise all the information the voting creditors and shareholders require to reach an informed opinion on the restructuring plan before the actual vote takes place. Paragraphs 1 and 2 also specify which information must always be included in or attached to the restructuring plan. This list is not exhaustive.

The information listed in paragraph 1 must be included in the restructuring plan itself. The information listed in paragraph 2 is more extensive and is therefore more suited to being attached to the restructuring plan as an annex. There is no other distinction between the information listed in these two paragraphs. Article 384(2)(c) provides that the court will refuse a request for confirmation of a restructuring plan if the restructuring plan itself or the documents submitted with it do not contain all the information listed in Article 375.

The prescribed information must enable the creditors and shareholders to:

- assess the consequences of the restructuring plan for them (paragraph 1(c), (d) and (h));

- assess whether the adoption of the restructuring plan is necessary to avert imminent bankruptcy and whether the restructuring plan is reasonable (paragraph 1(c), (e), (f), (g) and paragraph 2), and

- ascertain how they can obtain further information (sub-paragraph (j)) and how and when they will be able to vote on the restructuring plan (section (k)).

Of course, the debtor or the plan expert must ensure that the information provided is correct and clear. This is to ensure a correct decision-making process about whether or not the creditors and shareholders can consent to the restructuring plan.

Paragraph 1(e) provides that the restructuring plan must include information about '*the value that is expected to be realised when the restructuring plan is adopted*'. This provision refers to the value that can be retained or realised by the creditors and shareholders if the restructuring plan is implemented. This is referred to as the 'reorganization value' in the United States. A restructuring plan can lead to two scenarios: 1) continuation of the activities of the company (as a going concern) and 2) closure and winding-up of the company without involving bankruptcy proceedings. A combination of these two scenarios is also possible. This involves closing some parts of the company and continuing others. Sub-paragraph (f) of paragraph 1 requires that the restructuring plan must also include information about '*the proceeds expected to be realised in the event of liquidation of the assets of the debtor in bankruptcy*'. This provision refers to the value that will remain for the creditors if the restructuring plan is not adopted. This is not necessarily the liquidation value of assets if they are sold separately in bankruptcy proceedings. If there is a possibility that an asset transaction could occur in bankruptcy

proceedings where business units are sold and then continued by the buyer, the proceeds from this will often exceed the liquidation value of the individual assets. In that case, the going concern value that can be realised on such a sale should be disclosed.

On the basis of paragraph 1(g), the restructuring plan must also explain how the debtor or the plan expert arrived at these values and, in particular, what the underlying starting points and assumptions for these are. The latter is important because creditors can then also verify the calculations of these values.[38] During the consultation, some respondents argued the case for an obligation by the debtor to submit a valuation report drawn up by an independent expert. However, such an obligation would entail a substantial cost item and could lead to the framework becoming unaffordable for certain companies. This would particularly be the case for SMEs. A statutory obligation in this regard would impose a disproportionate burden on them in particular. This is underlined by the fact that such a report is often unnecessary. Nor do the current frameworks for bankruptcy and suspension of payments agreements include such an obligation. Moreover, an external adviser who is engaged and instructed by the debtor cannot really be considered independent. He will always be guided to a greater or lesser extent by the debtor as his client. Any confidence that creditors have in his reporting would therefore be relative. Creditors would have more confidence in a report by a court-appointed expert who is truly independent, i.e. a report by;

- an independent expert as referred to in Articles 378(5) or 384(6), or

- the plan expert, or an external adviser engaged by him.

If the debtor were legally obliged always to engage an external adviser as well, this could increase costs considerably. Accordingly, the decision was taken not to make the submission of a valuation report mandatory. However, if the court is ultimately be involved in the process, and valuation questions arise in relation to the decisions to be taken by it, it could be advantageous to have a report already available. The debtor or the plan expert can make their own assessment in this regard.

The following should be noted with regard to the information referred to in paragraph 1(h). The restructuring plan may provide for an allocation of rights to the creditors and shareholders. Examples are the right to a payment in cash, or payment in a different form, such as in bonds or shares. Paragraph 1(h) provides that creditors must be notified of the time when rights are to be allocated. This means that the restructuring plan must state when the cash will be paid out, or when the bonds or shares will be issued.

On the basis of paragraph 2(d), the restructuring plan must include information on the debtor's financial position. Exactly what information must be submitted depends on the circumstances of the case. This would often be historic information or projections about

[38] S.W. van den Berg, 'Waarderingsvragen in het ondernemingsrecht en insolventierecht' (diss. 2019) [in Dutch].

the debtor's financial position (the balance sheet), results (the profit and loss account) and liquidity position (the source of and expenditure of funds and a liquidity forecast).

Paragraph 3

If it proves necessary in future to expand the list of information or to set further rules on how the information should be provided, paragraph 3 provides for the possibility of laying down further rules by government decree.

Article 376

Article 376 allows the debtor or the plan expert, if appointed, to ask the court to order a cooling-off period in respect of all or some of the creditors. Article 376 envisages giving the debtor or a restructuring expert the opportunity to adopt a restructuring plan. It also aims to prevent creditors from taking recourse. It also takes account of the risk of the debtor abusing a cooling-off period. It is not the intention for a debtor to prevent the creditors from being able to seek recourse without the debtor working to bring about a solution that would best serve the creditors' interests. Accordingly, this article attaches a number of conditions to the order of a cooling-off period.

Article 376 is in line with Articles 6 and 7 of the Directive. The first paragraph of Article 6(1) of the Directive provides that the Member States must ensure that "*debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework*". The other paragraphs of Articles 6 and 7 of the Directive provide when a cooling-off period may be granted, as well as its scope and maximum duration, and when it may be extended or cancelled.

Paragraphs 1 and 4

Paragraph 1 provides that a cooling-off period may only be ordered if a plan expert has been appointed or the debtor has filed a statement with the court registry showing that it has itself commenced a procedure aimed at adopting a restructuring plan. In the latter case, the debtor must actually have offered the restructuring plan or it must undertake to do so within a period not exceeding two months.

In addition, according to paragraph 4 there must be prima facie evidence that a cooling-off period must be ordered to enable the debtor to continue its business during the preparation and negotiation of the restructuring plan. At the time when the cooling-off period is ordered, it must also be reasonably plausible that it will not substantially harm the interests of the individual creditors to whom it applies. The debtor must convince the court of this. If, for example, a vote has already taken place in which all the classes have rejected the restructuring plan offered by the debtor and none of the creditors or shareholders has taken the initiative to give it another chance by requesting the appointment of a plan expert, then it will no longer be possible to adopt a restructuring plan. There is no reason to grant a cooling-off period in that case.

Paragraphs 2, 5, 6 and 8

Paragraph 8 provides that Article 241a(2) of the Bankruptcy Act applies. This means that the cooling-off period can apply to all the creditors (a “general cooling-off period”) or a number of them (a “limited cooling-off period”). Of importance here is that a cooling-off period can apply to all the debtor’s creditors and not merely to the creditors who are involved in the restructuring plan (the creditors who are eligible to vote).

On the basis of paragraph 2, ordering a cooling-off period has the following consequences. Firstly, creditors may only exercise their power to recover assets belonging to the debtor or claim assets that are under the debtor's control if they have court authorisation to do so. This means, for example, that a creditor with a retention of title over stock that has been delivered may not recover these assets without the court’s authorisation. The court will not grant authorisation if claiming these assets would undermine the negotiations. If the court has ordered a general cooling-off period, this will in principle apply to all the debtor’s creditors. If the cooling-off period relates to a limited group of creditors, then only these creditors will be barred from initiating actions for recovery. The condition that applies in both cases is that the creditors in question are notified about the order of the cooling-off period or are aware of the fact that a restructuring plan is being prepared. In addition, the court may lift attachments during the cooling-off period at the request of the debtor or the plan expert. Finally, the cooling-off period means that the hearing of a request by the debtor to grant a suspension of payments or of a bankruptcy petition will be suspended.

Paragraph 2 also provides the maximum duration of a cooling-off period. In principle, a cooling-off period is for four months. On the basis of paragraph 5, it can then be extended by up to four months at the request of the debtor or the plan expert. The debtor or the plan expert must then argue convincingly that important progress has been made with regard to adopting the restructuring plan. This will be considered to be the case if a request for confirmation has already been filed with the court.

There is one exception to this rule. Paragraph 6 provides that a cooling-off period lasts for a maximum of four months if this has been requested in relation to a public restructuring procedure outside bankruptcy and if the debtor's ‘COMI’ has been moved from one Member State to another Member State within a three-month period prior to the date on which the court hands down a decision on the basis of the CERP for the first time. See Article 3(1) of the Insolvency Regulation for a definition of the term ‘COMI’. Paragraph 6 is in line with Article 6(8) of the Directive. This provides that, if the Member States choose to implement the Directive by means of one or more procedures that are included in Annex A to the Insolvency Regulation, then “*the total duration of the cooling-off period under such procedures shall be limited to no more than four months if the centre of main interests of the debtor has been transferred from another Member State within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings*”. It has been noted above that:

- a public restructuring procedure outside bankruptcy will be notified to the European Commission with the request to include this procedure in Annex A to the Insolvency Regulation, and

- the first decision that the court takes on the basis of the CERP marks the opening of the public restructuring procedure outside bankruptcy.

Paragraphs 7 and 8

Section 2.1 of the Bankruptcy Act already includes a cooling-off period for the suspension of payments (Article 421a et seq., Bankruptcy Act). Paragraph 8 is closely linked to this framework for the sake of consistency and practical feasibility. This does not apply to Article 241b of the Bankruptcy Act. That provision allows an undisclosed pledgee to issue notification of a pledge on a claim provided that it deposits the funds received with a depositary. This notification means that the debtor is no longer allowed to collect the claim against its customer himself. After this notification, the customer will have to pay the pledgee - usually the bank - instead of the debtor. If this happens, the debtor's income will dry up. It will then no longer be able to meet the obligations relating to its business operations. This immediately puts the continuity of the company put at risk and the debtor will then no longer be able to adopt a restructuring plan. Paragraph 7 therefore explicitly provides that the pledgee may not issue this notification. The debtor retains the right of recovery. The amount collected has to remain available to it in order for it to continue its business operations. This is, however, conditional upon the debtor providing sufficient substitute security for the pledgee’s recourse under that pledge. This will often happen more or less automatically because the new claims arising from the continued business operations will often have been pledged to the pledgee, while the debtor will still have management and disposal powers during the process.

Paragraph 9

If the court orders a cooling-off period, it can then make provisions to safeguard the interests of the creditors and the shareholders according to paragraph 9. The court may also decide to do this at a later date, i.e. during the cooling-off period. The court can decide this ex officio or at the request of the debtor, the plan expert or one of the creditors to whom the cooling-off period applies.

For example, the court may decide that the debtor must ensure that a vote on the restructuring plan takes place within a certain period of time, and that the debtor regularly informs the court and the creditors and shareholders concerned of progress made until that occurs. The court can thus ensure that creditors and shareholders are able to keep abreast of developments and to obtain clarity within a foreseeable period about whether a restructuring plan will be adopted. Another possibility is for an observer to be appointed. The observer's task is to supervise the adoption of the restructuring plan and, in so doing, take into account the interests of all creditors. If the observer establishes that the debtor will not manage to adopt a restructuring plan or that the interests of the joint creditors will

be harmed, he must inform the court immediately. The court then determines what action must then be taken. One such action could be the court appointing a plan expert who takes charge of the restructuring procedure.

Paragraph 10

On the basis of paragraph 10, the court will terminate the cooling-off period if there is a change of circumstances after it has ordered the cooling-off period such that the conditions for justifying it set by paragraphs 1 and 4 are no longer being met. The court may do this ex officio, or at the request of the debtor, the restructuring expert or the creditors to whom the cooling-off period applies (Article 380(2)).

Paragraph 11

A decision on a cooling-off period must be taken quickly (sometimes within a single day). Problems will arise if the court first has to hear the debtor, the plan expert, the observer (if appointed/assigned) or the creditors. Accordingly, this is not prescribed by paragraph 11. If an affected party is of the opinion that there are no grounds for ordering a cooling-off period, or that this would substantially harm its interests, it can ask the court to cancel it (paragraph 9). The hearing will then take place in the context of that request for cancellation. This is not the case for decisions granting authorisation to take recourse against the debtor's assets (paragraph 1), or extending a cooling-off period after the initial four months have ended (paragraph 5), or adopting provisions as referred to in Article 379 (paragraph 9), or cancelling the cooling-off period (paragraph 10). In these cases, the court will first hear the persons mentioned before taking a decision (paragraph 11).

Paragraphs 3 and 12

Paragraphs 3 and 12 deal with the fact that the CERP provides two procedures for adopting a restructuring plan: a private settlement procedure outside bankruptcy and a public settlement procedure outside bankruptcy (Article 369(6)). It should in any case be made clear which settlement procedure has been chosen when the court is first involved in the attempt to adopt a restructuring plan. This may be done at the same time as the debtor files a request for the order of a cooling-off period. Paragraphs 3 and 12 provide that paragraphs 2 and 14 of Article 371 apply (in part) mutatis mutandis. See the explanation of Article 371(2) and (14) for a more detailed explanation of these provisions.

Paragraph 13

Paragraph 13 provides that a request for a suspension of payments or a bankruptcy petition will be suspended automatically as soon as the court confirms a restructuring plan. The fact is that bankruptcy will then have been averted. If the creditor who filed the petition for bankruptcy was not aware of the fact that there was already an ongoing process to adopt a restructuring plan, the court may decide that the costs of the

proceedings it has incurred must be reimbursed by the debtor. These costs will be calculated on the basis of the customary court-approved scale of costs.

Article 377

During the cooling-off period, the creditors' options for taking recourse against the debtor's assets are suspended. The debtor may also refuse to surrender assets in its possession during this period (Article 376). Article 377 supplements this provision. The article provides that the debtor may also continue to use, consume and/or dispose of these assets during the cooling-off period if it was already allowed to do so before that period (hereinafter: the "right of use"). In the example of stock that has already been delivered subject to retention of title, as referred to in the explanation of Article 376, this means that the debtor must be able to sell that stock to its customers. Article 377 also deals with the situation in which the debtor previously had a right of use but was deprived of it shortly before the cooling-off period was ordered (e.g. two weeks). As soon as the court has ordered the cooling-off period, the debtor may rely on Article 377 and reinstate its right of use.

Paragraphs 1 and 2

Paragraphs 1 and 2 state that the debtor's right of use is framed by two conditions. The debtor may continue to use the assets to the extent that:

- this is necessary in order to continue normal business operations (paragraph 1), and
- the interests of the third parties who may claim those assets are sufficiently safeguarded (paragraph 2).

The latter condition amounts to the following: if the debtor consumes or disposes of the assets, the right of the third party to those assets generally also expires. To ensure that this does not harm the interests of secured creditors, the debtor will have to provide substitute security to the creditors concerned.

Paragraph 3

The court will cancel or limit the debtor's right of use at the request of one or more affected third parties if it can no longer be guaranteed that the interests of the third parties are sufficiently safeguarded (paragraph 3). Before the court decides on this, it will allow the third parties who have submitted the request, the debtor, the plan expert, if appointed, and the observer, if appointed, each to express their opinions.

Article 378

Article 378 provides that, before the vote on the restructuring plan, the debtor or the plan expert, if appointed, may submit disputes that have arisen to the court. As noted above, an important starting point of the framework is that, in principle, the involvement of the

courts is limited until a request for court confirmation is submitted. It is, however, possible that earlier in the process the question of whether there are grounds for refusal may arise which, even if all classes of creditors or shareholders consent to the restructuring plan, would prevent the court from confirming the restructuring plan. For the sake of promoting 'deal certainty', it is then important for this uncertainty to be eliminated as soon as possible. At the same time, it is important to prevent creditors from seizing this opportunity with apparently the sole purpose of obstructing or delaying a promising restructuring process in order to create a better negotiating position for themselves. It is partly for this reason that creditors and shareholders have not been given the option of involving the courts earlier in the process.

Paragraphs 1, 3, 5 and 6

Paragraph 1 contains a non-exhaustive list of issues that the debtor or the plan expert may submit to the court. These issues boil down to whether the restructuring plan that has been presented qualifies for court confirmation or whether there may be one or more of the grounds for refusal listed in Article 384(2), (3) or (4). If the court finds that the latter is indeed the case, then the debtor or the plan expert will still be able to amend the restructuring plan and thus adjust the course of action. To make this process as efficient as possible, the court will, to the extent possible, settle with the issues submitted to it in a single hearing (paragraph 3).

Under paragraph 5, if the court considers it necessary in the context of a decision it has to hand down, it may ask an independent expert to carry out an investigation and to report on it. Of importance here is that the general rules of evidence pursuant to the Code of Civil Procedure do not apply to this (see the explanatory notes to section G in this regard). Among other things this means that the court does not have to involve the affected parties as regards the choice of an expert or the wording of the questions to the expert, but that it can make a quick decision itself.

If the information required for the court to take a decision is not sufficient, the debtor or the plan expert will be given the opportunity to provide the necessary information before the court takes a decision (paragraph 6).

Paragraphs 1(c) and (4)

On the basis of Article 375(2)(b), the debtor is required to submit a list of the names of all the creditors and shareholders with voting rights. The same applies to the amounts of their claims or the nominal amounts of their shares. A co-creditor or creditor or the shareholder itself could subsequently call this information into question, i.e. challenge the amount or even the very existence of a claim or right. Given that this information determines whether a creditor or shareholder is to be admitted to the vote and is also decisive for the outcome of the vote, it is important for the debtor or plan expert to be able to ask the court to take a decision on this before the vote. Paragraph 4 therefore provides that, if the debtor or the plan expert brings such an issue before a court, the

court will determine whether, and up to what amount, that creditor or shareholder will be admitted to the vote on the restructuring plan. The decision about whether or not to admit a creditor or shareholder, wholly or in part, pertains solely to the admission to the vote. The decision only has procedural effect and is irrelevant to the establishment of the claim or the right. A separate procedure will be required to obtain a definitive answer on this. Paragraph 4 provides that Article 147 of the Bankruptcy Act applies mutatis mutandis. Consequently, if this procedure demonstrates that a claim did not exist or that it was lower or higher than the amount assumed in the vote, that will not affect the result of the vote. If the court does not allow a creditor or shareholder to vote at all, it cannot oppose the court confirmation of the restructuring plan, provided that the court has given creditor or shareholder concerned to express an opinion prior to this decision (Article 378(8)). However, since it will then have been established by law that the creditor or shareholder concerned is not entitled to vote, the restructuring plan cannot be declared binding upon him either (Article 385). Section 2.1 of the Bankruptcy Act includes a comparable rule for suspensions of payments (Article 267 of the Bankruptcy Act). The CERP closely mirrors that rule for the sake of consistency and practical feasibility. This rule does not apply if the debtor or the plan expert has not admitted a creditor or a shareholder to the vote and the court has not been asked to confirm the correctness of that decision and to declare it binding on the basis of Article 378. In that case, the creditor or the shareholder may object to the court confirmation of the restructuring plan on the grounds that has a voting right, and that the debtor or plan expert was wrong not to admit him to the vote. The court will then have to take a decision on this when hearing of the request for court confirmation of the restructuring plan (Article 384(2)(d)).

Paragraphs 7 and 8

Before the court decides on a matter brought before it, it will allow the debtor, the plan expert if appointed, and the creditor or the shareholders whose interests are to be directly affected by the decision, to each express their opinions. This is regulated in paragraph 7. Paragraph 8 also provides that the decision taken by the court under Article 378 is binding only on those creditors and shareholders who have had the opportunity to express their opinion. This is in line with one of the fundamental principles of Dutch civil procedural law, which is that a court decision is only binding on the parties if the principle of audi alteram partem has been adhered to.

Paragraphs 2 and 9

Paragraphs 2 and 9 again concern the fact that the CERP introduces both a private restructuring procedure outside bankruptcy proceedings and a public restructuring procedure outside bankruptcy proceedings, and that a choice has to be made between these two procedures (Article 369(6)). This must be done before the court takes its first decision under this framework. This be done simultaneously with the handing down of the interim judgment pursuant to Article 378. After the choice has been made, the court must determine whether it has jurisdiction to hear the request. See the explanation of

Article 371(2) and (13) for a more detailed explanation of these provisions. Paragraphs 2 and 9 provide that these provisions apply (in part) mutatis mutandis.

Articles 379 and 380

Under Article 379 the court may take measures or apply further provisions during the restructuring process in order to safeguard the interests of the affected creditors or shareholders. Article 379(1) provides that the debtor may ask the court to do so as soon as it has filed a statement as referred to in Article 370(3) with the court registry. The plan expert may do this as soon as he has been appointed. The court may also ex officio take measures or apply further provisions. This only applies, of course, once the court has for the first time been involved in the attempt to adopt a restructuring plan. This may occur simultaneously with:

- the appointment of a plan expert (Article 371(1));
- granting authorisation to perform legal acts to obtain new financing in order to adopt a restructuring plan (Article 42a);
- the order of a cooling-off period (Article 376(1));
- a ruling on an issue that arises before the vote on the restructuring plan (Article 378(1)), or
- the decision on the request for court confirmation of the restructuring plan (Article 383(3)).

The provisions to be applied could include making it a condition that the restructuring plan must be voted on within a certain period of time. The court could also order the debtor to regularly inform the creditors and the court on the progress of the process.

One provision concerns the appointment of an observer, as provided for in Article 380. The observer's task is to supervise the adoption of the restructuring plan and, in so doing, take into account the interests of all creditors. An observer may be appointed only in cases where the debtor is attempting to adopt a restructuring plan (Article 380(1)). If a plan expert has been appointed to prepare and then offer a restructuring plan, then an independent expert is already involved who is acting for the joint creditors. An observer does not then need to be appointed. A starting point of the present framework is that a plan expert and an observer cannot both hold office at the same time. If the observer ascertains that the debtor will not succeed in adopting a restructuring plan or that the interests of the joint creditors will be harmed, he must inform the court immediately. The court will then decide what further steps must be taken. If the chances of adopting a restructuring plan have not yet been exhausted, it may conclude that it is desirable to appoint a plan expert to take over the preparation of a restructuring plan. The court is at liberty, but under no obligation, to appoint the observer as a plan expert if it considers

this appropriate (Article 380(2)). If the court appoints a plan expert, the appointment of the observer will in any case be withdrawn (Article 380(3)).

The appointment of an observer does not entail the debtor losing the disposal or control of its assets. The debtor itself retains control of its business and can simply continue it during the restructuring procedure ('debtor in possession'). This is in line with Article 5(1) of the Directive, which provides that the Member States must ensure that "*debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business.*"

The power to make further provisions makes it possible for the court to set aside the provisions applicable to the adoption of a compulsory restructuring plan or to tailor them to a specific situation. Section 2.1 of the Bankruptcy Act already includes this rule for suspensions of payment (Article 225, of the Bankruptcy Act). This framework is in line with that rule for the sake of consistency and practical feasibility.

Article 379(2) deals with the fact that the CERP provides two procedures within which the restructuring plan may be adopted: a private restructuring procedure outside bankruptcy proceedings and a public restructuring procedure outside bankruptcy proceedings (Article 369(6)). It must in any case be clear which restructuring procedure has been chosen when the court is first involved in the attempt to adopt a restructuring plan. This may be done at the same time as the debtor files a request for the application of Article 379. See the explanation of Article 371(2) and (14) for an explanation of Article 379(2). Article 379(2) provides that these provisions apply (in part) mutatis mutandis.

Article 381

Article 381 defines the time limit within which the debtor or the plan expert must submit the final restructuring plan to the voting creditors and shareholders, provides rules about the voting procedure for the restructuring plan and rules on who is eligible to vote, and prescribes how the result of the vote is to be determined.

Paragraphs (1), (3), (4), (6) and (7) of Article 381 are in line with paragraphs (1), (2), (4) and (6) of Article 9 of the Directive. Put briefly, these paragraphs provide that the Member States must ensure that:

- a restructuring plan can be submitted for adoption by the affected parties (paragraph 1);

- the affected parties have a right to vote on the adoption of a restructuring plan (paragraph 2);

- the different categories of parties are treated in separate classes and that each class votes on the restructuring plan separately (paragraph 4), and

- a restructuring plan is adopted if it is supported in each class by a group of affected parties who together represent a majority of the total amount of the claims belonging to the parties in that class (paragraph 6).

Recital 47 of the Directive also provides that the Member States should be able to lay down rules in the event that parties do not exercise their right to vote in a correct manner.

Article 381(2) is based on Article 4(8) of the Directive. This provision is explained below under the heading Paragraph 2.

Paragraph 1

Paragraph 1 provides that the final restructuring plan must be presented to the voting creditors and shareholders at a reasonable time and in any case no fewer than eight days before the vote takes place. As the provision explicitly prescribes, the intention is for creditors and shareholders with voting rights to have sufficient opportunity, before the vote, to '*be able to form an informed opinion*' of the restructuring plan. The point is that the voting creditors and shareholders have sufficient opportunity to examine the final draft restructuring plan. Exactly how much time will be needed will depend on the specific circumstances. It is quite possible that more time will be required than the aforementioned eight-day period.

The debtor is free to decide how to inform creditors and shareholders with voting rights. It may opt to send the restructuring plan and the accompanying documents by post or electronically. It may also place the restructuring plan and the accompanying documents on a website that is accessible to creditors and shareholders with voting rights and send an (electronic) announcement of this to creditors and shareholders with voting rights.

Paragraph 2

Paragraph 2 is in line with Article 4(8) of the Directive. Article 4 of the Directive provides that "*Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability* (…)". On the basis of Article 4(8) of the Directive, the Member States may then also choose to make the preventive restructuring framework available to creditors and employee representatives. If the creditor is an SME, the condition is that the debtor must agree to this.

The CERP allows creditors and the Works Council or employee representative body appointed within the debtor's company to take the initiative to adopt a restructuring plan. They may ask for a plan expert to be appointed for this purpose (Article 371(1)). On the basis of paragraph 1, this plan expert can put the restructuring plan to the vote. Paragraph 2 provides that if the debtor is an SME, the plan expert may only do so with the debtor's

consent. The CERP draws on the European definition of an SME in this regard.[39] If the debtor is a legal entity, the management's consent must be requested. The shareholders may not unreasonably prevent the management from giving its consent. This is in line with Article 12(2) of the Directive, which provides that Member States must ensure that "*equity holders are not allowed to unreasonably prevent or create obstacles to the adoption and confirmation of a restructuring plan.*" If this gives rise to a dispute, the court may be asked to issue a ruling on it (Article 378(1)(g)).

This means that the restructuring system provided by the CERP is made available to the creditors and the Works Council or employee representative body. At the same time, if the debtor is an SME, the CERP is only available to it with the debtor's consent.

Paragraph 3

Paragraph 3 determines which creditors and shareholders are allowed to vote on the restructuring plan. These are the creditors and shareholders whose rights are amended under the restructuring plan. These are, for example, creditors who are requested to agree to an extension of payment or a partial waiver of their outstanding claims. They may also be shareholders who are asked to participate in the issue of new shares in order to achieve a 'debt for equity swap'. This would dilute their equity interest and the associated controlling interest. Creditors and shareholders whose rights are not amended are not entitled to vote, and therefore the final restructuring plan does not have to be presented to them.

Paragraphs 4 and 5

As noted in section 3.3 of the general part of this explanatory memorandum, situations are conceivable in which the economic interest in a claim lies wholly or predominantly with a party other than actual holder of the claim. If, on the basis of the CERP, a restructuring plan is adopted which provides for an extension of payment or partial waiver of the claim, the economic beneficiary will bear the financial consequences of that. This is one reason for giving the economic beneficiary the opportunity to vote on the restructuring plan. The economic beneficiary can exercise its voting right in several ways. It can do so in stages, via the statutory holder of the claim. The latter will then vote according to the economic beneficiary's instructions. The economic beneficiary can also be given direct voting rights, thus excluding the holder of the claim from the vote. Which method is appropriate will depend on the circumstances. Paragraph 4 accordingly provides flexible rules in this regard. The debtor may, but is not required to, invite the economic beneficiary (instead of the statutory holder of the claim) to vote (Article 381(4)). If it decides to do so, the economic beneficiary will then have voting rights as well as the rights accruing to voting creditors under the CERP, including in particular the right to ask

[39] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124/36, 20 May 2003).

the court to refuse the request for court confirmation of the restructuring plan (Articles 381(4) and 383(8)). The statutory holder of the claim will then no longer have those rights.

Based on paragraph 5, the same rule applies to a situation in which the economic interest in a share, i.e. all the benefits arising from the share, has been transferred by the shareholder to another person (the depositary receipt holder), while the legal rights attached to the share, including the controlling rights or voting rights, remain vested in the shareholder.

Paragraph 6

If the restructuring plan defines classes of creditors and shareholders, paragraph 6 then provides that each class must vote separately on the restructuring plan. In addition, the debtor itself decides on the way in which and when the vote is to be held. Votes may be cast in writing. The debtor may also decide to organise a meeting for this purpose, whether or not using electronic means of communication for this. The only thing that is important here is that, in accordance with Article 375(1), the debtor adheres to what it has included in the restructuring plan in this regard.

Paragraphs 7 and 8

Paragraphs 7 and 8 define how the outcome of the vote is determined. Firstly, it is important that only the votes actually cast are considered. Creditors or shareholders might not make the effort to take part in the vote particularly where it involves minor claims or rights of limited value. If the votes not cast were also counted, this would result in a restructuring plan that could not be confirmed simply because creditors or shareholders had not participated. To avoid this situation, the CERP provides that in determining the outcome of the vote, only the votes that have actually been cast are taken into account. It is of course essential in this regard that the paragraph 1 has been properly applied so that creditors and shareholders with voting rights are aware of the restructuring plan and of their right to vote on it and that they also know exactly when and how to do so. The court will check whether this has been the case when hearing the request for court confirmation of the restructuring plan. If the debtor has not complied with these requirements, the court will refuse its confirmation of the restructuring plan unless the creditors and shareholders who have not been properly informed declare that they accept it (Article 384(2)(b)).

Furthermore, what is important when establishing the outcome of the vote is not how many individual creditors or shareholders voted in favour of the restructuring plan but rather what financial interest those who voted in favour of it represents. In order for a class of creditors to confirm a restructuring plan, the requirement is that the restructuring plan is supported by a group of creditors who together represent at least two thirds of the total amount of claims belonging to the creditors who voted within their class. The same rule applies to a class of shareholders; in this case, a class of shareholders will have approved the restructuring plan if it is supported by a group of shareholders who together

represent at least two thirds of the total amount of issued capital belonging to the shareholders who cast a vote within that class.

Article 382

Article 382 requires the debtor or the plan expert to draw up a report after the vote, and to allow the creditors and shareholders concerned to have immediate access to it.

Paragraph 1

Paragraph 1 provides that the report must not only state the result of the vote but also the names of the creditors and shareholders who voted and whether they did so in favour of or against the restructuring plan (sub-paragraphs a to c). This information enables the creditors and shareholders to check the outcome of the vote as worded by the debtor.

If, after the vote, the debtor or the plan expert submits a request for court confirmation of the restructuring plan, the creditors and shareholders who did not consent to the restructuring plan can assess on the basis of the report whether there would be any point in objecting to the court confirmation of it. If they ask the court to refuse the request for court confirmation, they can use the information contained in the report to substantiate their objections to the court confirmation.

Paragraph 2

If the debtor submits a request for confirmation of a restructuring plan, paragraph 2 provides that it must file the report with the registry of the court that is to hear the request. The voting creditors and shareholders will then be able to inspect the report free of charge until the court decides on the request for court confirmation.

It is in the debtor's interest to file the report as soon as possible. The fact is that the CERP provides that the hearing of the request for court confirmation of the restructuring plan must be held within eight to fourteen days after not only the submission of the request for court confirmation but also the report being made available for inspection (Article 383(4)).

§ 3. Court confirmation of a restructuring plan

Article 383

Article 383 states when a request for court confirmation of the restructuring plan may be submitted and sets the time limit within which the court must hear this request. This article also determines the cases in which creditors and shareholders can still object to court confirmation of the restructuring plan, and how they can do so.

Together with Article 384, Article 383 is in line with Article 5(3), Article 10, Article 11(1) and (2) and Article 14 of the Directive. The following is relevant to Article 383.

- Article 5(3) provides that Member States must provide "for the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in the negotiations" in at least three specified cases. One of these cases (case (b)) is the situation in which the court is asked to confirm a restructuring plan that has not been consented to by all classes of creditors.

- Article 10 of the Directive provides the minimum requirements that must be met for a court to confirm a restructuring plan, thus making it binding on all affected parties. Put briefly, it provides that:

  - a request for confirmation of the restructuring plan is dealt with efficiently so that a court can issue a decision expeditiously (paragraph 4);

  - court confirmation the restructuring plan is in any case required if not all the affected parties have consented to it and if it provides for new financing (paragraph 1);

  - the conditions under which a restructuring plan can be confirmed by the court must be clearly specified (paragraph 2), and

  - it is at least required that:

    (a) a vote on the restructuring plan has been held (paragraph 2(a));

    (b) the restructuring plan includes a classification if the restructuring measures set out in it relate to different categories of affected parties (paragraph 2(b));

    (c) all affected parties have been notified of the restructuring plan (paragraph 2(c));

    (d) the restructuring plan serves the collective interests of the affected parties to the extent that that there is any dispute about this (paragraph 2(d));

    (e) where required, any new financing is necessary in order to implement the restructuring plan and does not unfairly prejudice the interests of creditors (paragraph 2(e)).

  - the court may refuse to confirm a restructuring plan if it does "not have a reasonable prospect of averting the insolvency of the debtor or ensuring the viability of the business" (paragraph 3).

- Article 11(1) of the Directive provides that Member States must ensure that a restructuring plan which is not approved by affected parties, in every voting class, may also be confirmed by a court. The minimum conditions for this are:

  - the restructuring plan complies with the conditions set out in Article 10(2) and (3) of the Directive (paragraph 1(a));

  - during the vote:

    (a) a majority of the classes consented to the restructuring plan and at least one of those classes was a secured creditors class or ranked higher than the unsecured creditors class, or

    (b) at least one class consented to the restructuring plan and it consisted of creditors that would not receive any payment from the liquidation of the debtor's assets in bankruptcy proceedings (paragraph 1(b));

  - the creditors in the classes who did not consent to the restructuring plan are treated at least as favourably as any other class of creditors of the same ranking and more favourably than any class of creditors with a lower ranking (paragraph 1(c));

  - no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claim against the debtor (paragraph 1 (d)).

  These conditions are based on two sections of the Chapter 11 procedure in the United States: the 'best interest of creditors' test' and the 'absolute priority rule'. The important thing is that, under the second paragraph of Article 11(2) of the Directive, Member States are allowed to derogate from these conditions where "necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties."

  If the debtor is an SME and not all classes have consented to the restructuring plan, then a request for confirmation of the restructuring plan may only be filed with the court with the debtor's consent (paragraph 1).

- Article 14 of the Directive provides the following:

  - the court will only take a decision on the valuation of the debtor's business if an affected party who has not consented to it argues that it does not satisfy the 'best interest of creditors' test' or the 'absolute priority rule' (paragraph 1);

  - Member States must in this regard ensure that the courts may appoint or hear properly qualified experts if that is necessary in order for them to decide on such a valuation (paragraph 2); and

- parties who have not consented to the restructuring plan must be able to lodge a challenge to it if the court is asked to confirm the restructuring plan (paragraph 3).

Paragraphs 1 and 2

Paragraph 1 provides that a request for court confirmation of a restructuring plan may be filed if according to the vote at least one class consented to it. This must be a class of creditors who are expected to receive a cash payment in the event of the debtor's bankruptcy. This requirement does not apply if the restructuring plan only relates to creditors who do not expect any payment in the event of bankruptcy.

Paragraph 2 provides an extra condition for filing a request for court confirmation if not all classes have consented to the restructuring plan and the debtor is an SME. Under paragraph 2, the debtor must then consent to the filing of the request for court confirmation of the restructuring plan. The CERP draws on the European definition of an SME in this regard.[40] If the debtor is a legal entity, the management's consent has to be requested. The shareholders may not unreasonably prevent the management from giving its consent. This is in line with Article 12(2) of the Directive, which provides that Member States must ensure that "*equity holders are not allowed to unreasonably prevent or create obstacles to the adoption and confirmation of a restructuring plan.*" If this gives rise to a dispute, the court may be asked to issue a ruling on it (Article 378(1)(g)).

Paragraphs 1 and 2 are in line with Article 11(1) of the Directive.

Paragraph 3

Paragraph 3 of Article 383 deals with the fact that the CERP provides two procedures within which the restructuring plan can be adopted: a private restructuring procedure outside bankruptcy proceedings and a public restructuring procedure outside bankruptcy proceedings (Article 369(6)). It should in any case be clear which restructuring procedure has been chosen when the court first becomes involved in the attempt to adopt a restructuring plan. This may be done at the same time that the debtor submits a request for confirmation of the restructuring plan. See the explanation of Article 371(2) and (14) for an explanation of paragraph 3. Paragraph 2 provides that these provisions apply (in part) mutatis mutandis.

Paragraphs 4 to 7

Paragraphs 4 to 7 provide the following. If the debtor or the plan expert files a request for court confirmation, the court will, as soon as possible, issue a decision stating a date for the request to be heard. As provided by paragraph 1, the court can also confirm a restructuring plan to which not all cases have consented. The condition for this, however,

[40] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124/36, 20 May 2003).

is that a plan expert or an observer have been involved in the process. If neither has been involved in it at the point that the request for confirmation of the restructuring plan is filed, then the court will appoint an observer in the decision in which it sets a date for the hearing of the request for court confirmation of the restructuring plan. This is provided by paragraph 4 and it is line with Article 5(3) of the Directive.

The debtor or the plan expert must immediately notify this decision to the creditors and shareholders with voting rights. The court will assess ex officio whether this was actually done when it hears the request for confirmation of the restructuring plan. If the debtor or plan expert has not met this requirement, the court will refuse the court confirmation unless the creditors and shareholders who have not been properly notified declare their consent to the restructuring plan (Article 384(2)(b)).

At any event, the hearing will be held within eight to fourteen days after the report on the vote and the request for court confirmation of the restructuring plan are filed.

If the debtor or the plan expert also wishes to exercise the option of unilaterally terminating an agreement, as provided by Article 373, they must, in accordance with paragraph 7, include a request for authorisation of such termination with the request for court confirmation of the restructuring plan.

Paragraphs 8 and 9

Based on paragraph 8, all creditors and shareholders with voting rights may file a written request with the court to refuse the request for court confirmation of the restructuring plan up to the date of the hearing. They may base their request on the *general* or *additional grounds for refusal* set out in paragraphs 2, 3 and 4 of Article 384. The general grounds for refusal are primarily intended to guarantee correct decision-making. The additional grounds for refusal are intended to ensure that the restructuring plan is *reasonable*.

The additional grounds for refusal may only be invoked by creditors or shareholders who have not themselves consented to the restructuring plan (Article 384((3) and (4)). Moreover, paragraph 9 provides that creditors or shareholders may not invoke the general and additional grounds for refusal if they were aware that those grounds might apply but they did not protest to the debtor within a reasonable period of time after discovering them. This encourages creditors and shareholders to report any objections to the set-up of the decision-making process or the substance of the restructuring plan in good time, i.e. before the vote takes place. It also provides the debtor with possibility of finding a solution before the vote, with or without the intervention of the court (Article 378(1)). If necessary, the debtor may still make adjustments and remove any obstacles to court confirmation of the restructuring plan. This prevents a process that has no prospect of success, with all the associated unnecessary costs, from being continued.

Article 384

Article 384 determines when a court can confirm the restructuring plan and when it will have to refuse a request for confirmation. As noted above Article 384, along with Article 383, is in line with Articles 10 and 11 of the Directive.

Paragraphs 1 and 5

Paragraph 1 provides that the court will decide as soon as possible on the request for court confirmation and, if applicable, on the request for consent to terminate an agreement unilaterally. The court will grant the request unless there are one or more of the grounds for refusal listed in paragraphs 2 to 5.

See the explanation of Article 373 for a more detailed explanation of paragraph 5 regarding the granting of consent to terminate an agreement unilaterally.

Paragraph 2

The court will refuse the request for court confirmation if one of the general grounds for refusal listed in paragraph 2 applies. It may do so at the request of a creditor or shareholder with voting rights. However, if it is immediately clear to the court that one of the grounds for refusal referred to above applies, it may also ex officio refuse the request for court confirmation without having to await requests from creditors and shareholders for it do so.

The general grounds for refusal largely correspond to those already in force for the court confirmation of suspension of payments and bankruptcy agreements (sub-paragraphs e, g, h and i). Since the question of whether a restructuring plan may be confirmed depends to a large extent on the support that exists for it, it is crucial that the decision-making process has been correct. In any case, what is important in this regard is whether:

- all creditors or shareholders to whom the restructuring plan relates have been duly informed of it, have had the opportunity to vote on it, and have been informed of the date of the hearing of the request for court confirmation of it (Article 384(2)(b and c));

- the information included in the restructuring plan and its annexes is sufficient (Article 384(2) (c)), and

- the creditors and shareholders have been correctly divided into classes and whether they have been assigned to their relevant class for the correct amount (Article 384(2)(c) and (d)).

The following is noted with regard to the ground for refusal provided in sub-paragraph e. This provides that the court will refuse the request for court confirmation if compliance with it is not sufficiently guaranteed. If the restructuring plan provides for a conversion of an outstanding claim into share capital or new loans, the court will have to refuse the

request for court confirmation if there are indications that this conversion will not (or cannot) take place at the promised time. Section e does not go so far as to require the court to examine whether the obligations arising from the loans proposed in the restructuring plan are certain to be performed.[41] It is up to the class of creditors concerned to assess the offer and then determine whether or not they can consent to it. If the vote shows that the requisite majority of the relevant class of creditors supports the restructuring plan (and thus the proposed conversion), the court may assume that a reasonable offer has been made.

If the court has no reason to assume that any of the general grounds for refusal applies and none of the creditors or shareholders has objected to the court confirmation of the restructuring plan by relying the additional grounds for refusal, it will grant the request for court confirmation. Only if an objection has been made to the court confirmation will it make a further assessment of the restructuring plan (Article 384(3) and (4)).

Paragraph 3

If all classes of creditors and shareholders have consented to the restructuring plan, the court may nevertheless refuse the request for court confirmation of it if it appears that it would put certain creditors or shareholders in a significantly worse position than in the event of bankruptcy proceedings. The court may do so at the request of one or more of these creditors or shareholders if they themselves have not consented to the restructuring plan. This is provided in paragraph 3.

Paragraph 4

If not all classes have consented to the restructuring plan, the court will refuse the request for confirmation of it if the value that can be retained or realised by it is not distributed fairly among the affected creditors and shareholders. This will be the case if the distribution deviates, to the detriment of a dissenting class, from the creditors' statutory ranking in the case of their recourse against the debtor's assets and if the debtor:

- cannot provide good reasons for that deviation, and

- cannot demonstrate that it will not harm the interests of the creditors or shareholder who objected (Article 384(4)(a)).

The restructuring plan would also be unreasonable if the class that did not consent to it consists of creditors who could expect a cash payment in the event of bankruptcy proceedings and the restructuring plan does not offer these creditors the opportunity to

[41] See in this respect also the decision of 11 June 2018 in which the District Court of Amsterdam followed this line in confirming the restructuring plan in the bankruptcy of 0I Brasil Holdings coöperatief U.A. The decision can be found on the website where information on the bankruptcy is provided: http://oibrasilholdingscoop-administration.com/court-and-administrator/court-decisions.

opt for an amount in cash that they would expect to receive in the event of bankruptcy proceedings (Article 384(4)(b)).

The court may only refuse a request for confirmation on the basis of paragraph 4 if it receives a request to that effect from a creditor or shareholder that has been assigned to a class that did not consent to the restructuring plan and that particular creditor or shareholder did not consent to it either.

Paragraphs 6 and 7

On the basis of paragraph 6, the court may ask an independent expert to carry out an investigation and to report on it if it deems this necessary for the purposes of a decision to be taken by it. This provision is in line with Article 378(5), which provides for the possibility of consulting an expert for the purpose of issuing an interim ruling. See the explanation of Article 378(5) for a more detailed explanation of paragraph 6.

In addition, on the basis of paragraph 7, the court will allow the debtor, the plan expert, if appointed, the observer, if appointed, and the creditor or the shareholders and the counterparty who have filed a request for refusal, each to express their opinions.

Paragraph 8

If the decision has been made to adopt a restructuring plan according to the public restructuring procedure outside bankruptcy proceedings and the court has jurisdiction to hear the request for confirmation under the Insolvency Regulation, then the decision on confirmation may be a "*decision to open main insolvency proceedings*" as referred to in Article 5 of the Insolvency Regulation. If this is the case, then, on the basis of paragraph 8, the court must state this in its judgment confirming the restructuring plan. Interested creditors who have not previously been given the opportunity to express their opinions may still challenge this decision on the grounds that the court does not have international jurisdiction. This possibility of a challenge is provided by Article 5(1) of the Insolvency Regulation.

§4. The consequences of court confirmation of a restructuring plan

Articles 385, 386 and 387

Articles 385 to 387 determine the outcome of court confirmation of a restructuring plan. Article 385 provides that, once a restructuring plan has been confirmed by the court, it is binding upon the debtor and all creditors and shareholders with voting rights. This means that the creditors and shareholders who voted against the restructuring plan are also bound by it. Exactly which creditors and shareholders these are can easily be ascertained from the list submitted with the restructuring plan pursuant to Article 375(2)(b). On the basis of Article 381(4) or (5), it might not be the creditor or the shareholder (the legally entitled party) but rather a different party (the economic beneficiary) who voted on the

restructuring plan. For the sake of clarity, Article 385 specifies that the restructuring plan is then nevertheless binding upon the creditor or the shareholder. This is the logical consequence of the rules provided in Article 381(4) and (5).

Article 385 is in line with Article 15 of the Directive, which deals with the consequences of a court's confirmation of a restructuring plan.

Article 386 provides that the judgement of the court confirming a restructuring plan is enforceable. If the debtor does not perform its obligations under the restructuring plan (or do so in good time), creditors and shareholders with voting rights that have a claim against it can rely directly on the judgment to enforce performance.

In addition, on the basis of Article 387, if the debtor fails to comply with the restructuring plan (or to do so in good time), it will be obliged to compensate the creditors and shareholders with voting rights for any damage they suffer as a result. No prior notice of default is required. The creditors or shareholders may also be entitled to dissolve the restructuring plan in that case. However, this right may be ruled out in the restructuring plan. This would be logical if the restructuring plan includes elements that are difficult to reverse, such as a 'debt for equity swap' and where the claims of certain creditors have already been converted into shares in the company.

Part G

Part G amends Article 362 of the Bankruptcy Act. On the basis of this article, given the specific nature of insolvency proceedings, the Code of Civil Procedure’s general title for petition proceedings does not apply to requests and petitions under the Bankruptcy Act (Article 362(2) Bankruptcy Act.) An important feature of insolvency law proceedings is the prompt action required. This eliminates any scope for applying the general rules of evidence. Given that procedural law on insolvency is aimed at facilitating a rapid judicial process, the insolvency courts issue decisions on the basis of whether the asserted facts and circumstances are sufficiently plausible. The insolvency courts must be able to take a decision following a brief, simple investigation without being bound by the general rules of evidence (Van der Feltz I, p. 270). These principles of insolvency procedure are also relevant, and apply equally, to the present framework. Part G provides an exception to the general exclusion of the general title for petition proceedings provided by Article 362(2) of the Bankruptcy Act specifically as regards Articles 262 and 269 of that Act, given the special rules governing the courts’ territorial jurisdiction to hear requests under this bill (Article 369(8)). The exclusion of the remainder of the Code of Civil Procedure’s general title for petition proceedings does not, however, prevent the provisions of that title from being applied by analogy in certain circumstances, insofar as this is not precluded by the special nature and requisite prompt in the proceedings on the basis of this framework (cf. Supreme Court 6 June 2014, ECLI:NL:HR:2014:1338, NJ 2014/299).

Article II

Article 3(2) of the Court Fees (Civil Cases) Act (Wet griffierechten burgerlijke zaken (Wgbz)) provides that a court fee is levied on:

(a) the debtor when filing a request for court confirmation of a restructuring plan and for filing a request for permission to terminate an agreement unilaterally (Article 383(1), (5) and (6));

(b) the creditors and shareholders when applying for the requests referred to in the preceding paragraph to be refused (Article 383(8)), and

(c) the debtor, a creditor or shareholder with voting rights or another interested party when filing one of the other requests in the context of a public restructuring procedure outside bankruptcy or a private restructuring procedure outside bankruptcy.

A court fee is levied on the debtor for requests filed by the plan expert, the Works Council or an employee representative body.

The requests listed in paragraph c) are for:

- authorisation to perform legal acts to raise new financing in order to adopt a restructuring plan (Article 42a);
- the appointment of a plan expert (Article 371 (1));
- the order or cancellation of a cooling-off period (Article 376 (1));
- the revocation or restriction of the debtor's right of use (Article 377(3));
- a ruling on an issue that is relevant to a matter arising from the adoption of the restructuring plan before it is voted on (Article 378(1));
- the putting in place of measures or further provisions to safeguard the interests of creditors or shareholders (Article 376(7), and 379).

Article II includes a new Article 19a which has been inserted into Court Fees (Civil Cases) Act the regarding the amounts of court fees. It provides that the court fee for filing a request for court confirmation of a restructuring plan corresponds to the table of fees annexed to the Court Fees (Civil Cases) Act for cases involving a claim or request representing more than EUR 100,000. The assumption is that the economic interest underlying such a claim or request will always be in excess of this amount. The fee that applies is EUR 1,599 for natural persons and EUR 4,030 for legal entities (see the annex to the Court Fees (Civil Cases) Act). The court fee levied on creditors and shareholders with voting rights when filing a request for refusal of court confirmation of a restructuring

plan is determined on the basis of the amount of their claim or the nominal value of their shares.

The underlying economic interest entailed in the other requests cannot be determined as clearly. Accordingly, the court fee levied for such requests corresponds to the table of fees annexed to the Court Fees (Civil Cases) Act for cases involving a claim or request of indeterminate value. In such cases the fee is EUR 291 for natural persons and EUR 639 for legal entities (see the annex to the Court Fees (Civil Cases) Act).

The bill is thus in line with the existing rules on court fees provided by the Court Fees (Civil Cases) Act). The new Article 19a merely provides clarification on how these rules should be applied in the context of the CERP as regards the adoption of a restructuring plan outside bankruptcy proceedings.

Articles III and IV

Article III contains the customary provision regarding entry into force. Article IV gives the official title.

The Minister for Legal Protection.