Amendment of the Bankruptcy Act ("Fw") in connection with the introduction of the possibility of declaring a composition for restructuring debts made outside bankruptcy universally binding (Continuity of Enterprises Act II)

EXPLANATORY MEMORANDUM

I. General Part

1. Object and contents of the bill

This proposed bill aims at introducing a scheme into the Bankruptcy Act for the creation of a compulsory composition outside bankruptcy. It is part of the second pillar of the "Recalibration of Bankruptcy Law" programme, which comprises measures to prevent unnecessary bankruptcies as much as possible by stimulating entrepreneurs under the threat of payment problems to address those problems at an early stage and to facilitate reorganisation and restructuring outside bankruptcy.

The proposed bill meets a need felt in practice. Its object is to render flexible the process of restructuring problematic debts in enterprises outside bankruptcy, to accelerate it and have it accompanied by a minimum of formalities, costs and uncertainties, and also to retain employment for people working in the enterprise as much as possible. The bill will make it possible to carry out the restructuring of problematic debts on the basis of a composition between an enterprise and its creditors and shareholders to the effect that the rights of those creditors and shareholders are amended. If the composition is supported by the majority of the creditors and shareholders, creditors and shareholders who resist on unreasonable grounds can be forced to cooperate by the composition being declared universally binding by the court. By making such a declaration dependent on a court decision, the bill on the one hand guarantees that the restructuring of the problematic debts is not done at the expense of a minority of creditors and shareholders for arbitrary, uncommercial or otherwise inappropriate reasons, while on the other hand the initiative for offering the composition and the management of achieving it will remain with the enterprise as much as possible.

The proposed scheme applies to enterprises, irrespective of the type of their activities and their legal form, but not to natural persons who do not carry on an independent profession or business, because the law already provides the possibility of a compulsory composition for them with the possibility of the debt rescheduling scheme for natural persons. Employees are not subject to the proposed scheme. The Act on Work and Security, which will take effect on 1 January 2015, already offers possibilities of bringing things in line with changed economic circumstances.

2. Background and reason for the bill

2.1. Introduction

As a result of the economic and financial crisis the number of enterprises that has experienced financial difficulties or even suspension of payments or bankruptcy has steadily increased in the past few years. At present the first signs of a cautious economic recovery seem to be appearing. To maintain this recovery it is
relevant that the Dutch economy can boast as many healthy enterprises as possible. A contribution to this may be that enterprises faced with problematic or possibly problematic debts, but which are economically viable as such according to the relevant stakeholders, can restructure these debts and reduce them to manageable proportions.

### 2.2. **Desirability of restructuring outside bankruptcy as much as possible**

In order to promote and speed up successful restructurings as much as possible, it must be accomplished that those can be effectuated through a streamlined procedure that can be fitted to the circumstances of the case. It is also important that reorganisations can be performed outside bankruptcy as much as possible. Bankruptcy is aimed at liquidation of the estate of debtors who have stopped paying (article 1 in conjunction with article 68 Fw). If a bankruptcy occurs, the enterprise is often caught in an uncontrolled process: creditors demand immediate payments of their claims, credit providers enforce on their security interests, suppliers and customers lose confidence and employees start looking for other jobs. This leads to needless loss of value and employment and may, moreover, result in a damaged to the reputation of the relevant entrepreneur. Generally it is too late for a successful reorganisation at that point in time. In addition, formal insolvency proceedings and the corresponding loss of value and employment are accompanied by high costs for society.

For this reason the second pillar of the programme announced at the end of 2012 "Recalibration of Bankruptcy Law" (Parliamentary Documents II, 2012-2013, 29 911, no. 74, p. 2) is aimed at strengthening reorganising capabilities by stimulating entrepreneurs to seek timely help for their potentially problematic debts and to facilitate solutions for this purpose outside bankruptcy.

### 2.3. **Outside bankruptcy creditors are not obliged at present to cooperate in a reasonable composition and may therefore frustrate reorganisation**

In order to prevent bankruptcy, enterprises often try to persuade their creditors informally to agree to waive part of their claims or to be paid at a later time than originally anticipated. If it is sufficiently plausible for creditors that such a private composition is the maximum to be achieved, and that its non-acceptance would lead to bankruptcy while bankruptcy in turn leads to no recovery or lower recovery for the relevant creditors than provided for in the composition, they have no reasonable interest in refusing their cooperation with the composition.

However, as the extrajudicial composition is not regulated by law, and therefore is governed by the general rules of property law, the statutory base rule applies that creditors outside bankruptcy are entitled to full payment of their claims. The possibilities for obtaining injunctive relief forcing them to cooperate with the composition on the basis of abuse of power (article 3:13 Dutch Civil Code ("BW")) are highly limited: the Dutch Supreme Court has held courts are to be restrictive in granting relief to the effect of forcing creditors to cooperate with an extrajudicial composition. Only under very special circumstances can there be room for
an order requiring a creditor to cooperate with the implementation of a composition offered to him. 
According to the Dutch Supreme Court it is in principle up to the debtor who seeks to enforce such 
cooperation at law to assert and, if necessary, to prove specific facts and circumstances from which it can 
be concluded that the creditors reasonably could not have arrived at a refusal to consent to the composition 
(Dutch Supreme Court, 12 August 2005, NJ 2006/230 (Payroll)).

As creditors cannot be forced to cooperate with a reasonable extrajudicial composition, not even if it is 
supported by the majority of the creditors, a single creditor can frustrate a composition and thereby the 
reorganisation outside bankruptcy. In many cases the debtor who wants to save his enterprise has no other 
choice but to pay the relevant creditor in full, while in the event of a possible bankruptcy this creditor would 
perhaps not see his claim paid or only to a smaller amount than for provided by the composition.

2.4. Practice needs a compulsory composition

2.4.1. Insolvency (advisory) practice advocates a compulsory composition

From informal consultations of and meetings with experts from all layers of insolvency practice – bankruptcy 
trustees, bankruptcy judges, lawyers and company lawyers – and also from the stakeholders meetings that 
were held in the run-up to the programme and in the preparatory phase of this proposed bill, it appeared 
that the possibility of a single creditor frustrating a composition is seen as a practical problem and as an 
important cause of the failure of reorganisation outside bankruptcy of enterprises which are as such economically viable.

Similar opinions were voiced explicitly at a major symposium about the recalibration of bankruptcy law that 
was organised by the Association of Insolvency Law Lawyers INSOLAD, the association of bankruptcy judges RECOFA, the Dutch Association of Lease Companies and the Research Centre for Enterprise and Law of Radboud University Nijmegen and where hundreds of representatives of insolvency practice were 
present.

2.4.2. Entrepreneurs advocate a compulsory composition

VNO-NCW and MKB Nederland [Confederation of Netherlands Industry and Employers and Association for 
Small and Medium-size Enterprises Netherlands] also consider it objectionable that one unwilling creditor 
can frustrate the salvation of an enterprise. These organisations point out that abroad, creditors can be 
forced to cooperate if the majority of creditors are in favour of a composition. They assert that such an 
arrangement can also be introduced in the Netherlands and believe that a compulsory composition should 
be possible if the court has examined whether creditors are better off with it than with a bankruptcy (see vno-ncw.nl/Nieuws/Pages/Faillissementswet_op_de_schop).

2.4.3. Banks see additional value in compulsory composition

During the stakeholders' meetings that were held in the preparatory phase of this proposed bill the Dutch 
Association of Banks (NVB) indicated that its members see additional value in the introduction of the 
possibility of a compulsory composition outside bankruptcy. From the ranks of this organisation it has been
remarked that a compulsory composition could offer a solution in the event that several banks finance an enterprise that came in financial problems and one of those banks resists the salvation of the relevant enterprise on unreasonable grounds while the other banks are willing to support it. Furthermore it has been remarked that the compulsory composition could offer a solution if one or more shareholders resists the salvation by means of a debt for equity swap, whereby part or all of a loan is converted into share capital, on unreasonable or uncommercial grounds. This point will be discussed in more detail in subsection 3.6.

2.4.4. **Doctrine advocates a compulsory composition**

In legal writing, for the same reasons as discussed above, the introduction of a compulsory composition outside bankruptcy has been advocated for a considerable time. See inter alia A.D.W. Soedira, *Het akkoord (The composition)* (thesis) Serie Onderneming en Recht (Series for Enterprise and Law), part 60 (2011); R.D. Vriesendorp, R.M. Hermans and K. de Vries, *Herijking Faillissementsrecht en het informeel akkoord (Recalibration of Bankruptcy Law and the informal composition)*, TvI 2013, pp. 63-69 and *Wetsvoorstel tot aanpassing van de Faillissementswet door uitbreiding met titel (Bill for adjustment of the Bankruptcy Law by expansion with a chapter)* VI, TvI 2013/20; J.T. Jol, *Wettelijk faciliteren van (financiële) herstructureringen: het dwangakkoord (Statutory facilitation of (financial) restructurings : the compulsory composition)* (www.legalhoudini.nl) and R.J. van Galen, *Knelpunten in ons faillissementsrecht (Bottlenecks in our bankruptcy law)*, Ondernemingsrecht 2014/81.

2.5. **Recommendation of the European Commission in respect of a new approach to bankruptcy and insolvency encourages Member States to introduce a compulsory composition**

2.5.1. **Introduction**

The introduction of a compulsory composition outside bankruptcy is also an important component of the recommendation presented on 12 March 2014 by the European Commission in respect of a new approach to bankruptcy and insolvency. This recommendation aims at encouraging the Member States to introduce a system whereby viable enterprises in financial difficulties may restructure efficiently, at an early stage and outside insolvency, and insolvency can be prevented (points 1 and 6). The recommendation sets as a framework that restructurings should be able to be carried out in the cheapest and most flexible manner and to the greatest extent possible extrajudicially in the sense that it should in any case be possible to start the restructuring without judicial action being necessary and without the designation of an intermediary or supervisor (points 7, 8 and 9). The recommendation furthermore presumes that in the event of a restructuring the control over the enterprise will remain with the debtor (point 6(b)) and that temporary suspension of individual enforcement measures can be requested (point 10).

The European Commission points out that at this time several Member States are working on revising their insolvency legislation to improve what the Commission calls "the system of saving enterprises". In points 10 and 11 of the recommendation the Commission explains that it considers it appropriate to promote the coherence between those national initiatives and to reduce the differences between the national systems. In point 36 of the recommendation the Commission subsequently indicates that the implementation of the
recommendation in the Member States will be assessed ultimately 18 months after the date of publication of the recommendation. In that connection it is remarked that the Commission will then assess whether further measures must be proposed to strengthen the approach proposed in the recommendation.

2.5.2. **Background**

The recommendation of the European Commission concerning a new approach to bankruptcy and insolvency is based among other things on the outcome of a consultation held by the Commission about bankruptcy law and on the recommendations of an Expert Group instituted by the Commission which met a few times last year and in which three authoritative Dutch experts in the field of bankruptcy law were represented.

The recommendation follows from a process that has been ongoing for a longer time in which the European Union aims at promoting the restructuring of enterprises that are economically viable as such. At the end of 2011 the European Parliament passed a resolution urging harmonisation of national insolvency laws in respect of restructuring plans (Resolution of the European Parliament with recommendations to the Commission on insolvency proceedings in the context of EU company law, P7_TA (2011) 0484). In 2012 the Commission designated the modernisation of rules in respect of insolvency as a "key action to facilitate the survival of businesses and offer entrepreneurs a second chance " (Communication from the Commission in respect of the Single Market Act of 3 October 2012, COM (2012) 573 final). In the communication "A new European approach to business failure and insolvency" the European Union refers to the differences between the national rules in the field of insolvency (COM (2012) 742 final). In the "Entrepreneurship 2020 Action Plan" (COM (2012) 795 final) Member States are requested "to offer support services to businesses for early restructuring and also advice to prevent bankruptcies." by 2020. It also asks for "support for small and medium-sized enterprises to restructure and re-launch".

2.5.3. **Framework for arrangement of compulsory composition is an important part of the recommendation**

By stimulating the Member States to introduce a compulsory composition outside bankruptcy it is intended, according to the European Commission, that (a) it should be possible for a restructuring plan, approved by the majority of the creditors and confirmed by a court, to be binding on all creditors, provided that this is confirmed (in writing) by a court (points 6d, 16 and 20), (b) involvement of the court is limited to situations in which this is necessary and proportional to protect the rights of creditors and other interested parties that are affected by the restructuring plan, and restructuring plans can be confirmed by the court in principle (points 7 and 21), (c) if the restructuring plan does not affect all the creditors, all the creditors need not agree either (point 20), (d) it should be possible for creditors with different interests to be placed in separate classes reflecting those interests within the framework of a restructuring plan (point 17), and (e) restructuring plans that have little chance of success, for instance owing to a lack of new financing, may be rejected (point 23).

For the success of a reorganisation the acquisition of new or additional financing is often essential. Normally speaking, credit providers will require security. In bankruptcy the provision of security may in some cases be set aside on the grounds of prejudice to the entirety of the (existing) creditors. In that case the new credit
providers will be left empty-handed while the old creditors, who would not have received any payment either without the additional credit, may be (partly) paid as a result of the emergency credit. An important aspect of the recommendation is that the position of providers of new credit should be improved in the sense that legal acts performed within the framework of new financing should not be liable to be set aside on the grounds of prejudice to the entirety of creditors (points 27-29).

2.6. Countries of importance or comparable to the Netherlands have successful schemes of the compulsory composition outside bankruptcy

2.6.1. Introduction

In the second progress letter on the "Recalibration of Bankruptcy Law" programme (Parliamentary Documents 2012-2013, 33 695, no. 1, p. 2) the Second Chamber was informed that under the direction of Professor mr. P.M. Veder of the Research Centre for Enterprise and Law of Radboud University Nijmegen comparative law, research was done into inter alia compositions outside bankruptcy in six Member States of the EU. In that connection it was outlined what schemes have been laid down by law in the relevant countries or have been developed in established case law. The countries that were involved in the research are England and Wales, Belgium, Germany, France, Italy and Spain.

The research shows that in all EU Member States examined measures exist to stimulate a composition before the opening of insolvency proceedings. In five of the six, Germany being the exception, there is a certain form of compulsory composition outside bankruptcy. Furthermore in most countries the providers of new credit are offered protection against setting aside of security provided for new credit in the event that bankruptcy occurs anyway at a later stage. Largely the same conclusion follows from research done by INSOL Europe by order of the European Commission (www.insol-europe.org).

The schemes show considerable differences but have all been inspired to a certain extent by the schemes for reorganisation by means of a compulsory composition outside bankruptcy in England and Wales and the United States of America.

2.6.2. England and Wales: the scheme of arrangement

The scheme of the composition outside bankruptcy in England and Wales is the oldest and best known in the European Union. There the procedure is known as the scheme of arrangement, which has already been used for more than 100 years for the reorganisation of enterprises and also plays an important part in many restructurings of international groups of companies. With the scheme of arrangement, unreasonably obstructive creditors and/or shareholders can be forced to cooperate with a reasonable composition. The provider of the scheme may decide himself which parties he involves in the scheme: not all creditors and/or shareholders need to be involved.

The scheme of arrangement procedure comprises reaching a composition between the enterprise and its creditors and/or shareholders. The legal person that wants to carry out a scheme of arrangement directs a request to the court for that purpose. The request may also be made by someone else, for instance a
shareholder or a creditor. A vote is subsequently taken about the scheme of arrangement in groups, the so-called classes. In the request to the court the different classes are indicated. Customary classes are those of secured creditors, preferential creditors, ordinary creditors and shareholders. It is not necessary that a scheme is entered into with all the creditors and/or shareholders. The starting point in that connection is that creditors with claims and shareholders with rights that do not differ essentially are ranked in the same class.

A scheme may also relate to certain groups, such as only the financing banks. The statutory regulation of the scheme of arrangement provides that only parties that are affected by the scheme must be given an opportunity to express their position. Parties that are not affected by it because their rights are not affected or because the enterprise would go bankrupt without the scheme and in that case no payment would be to be expected for them either, need not be given an opportunity to express their views on the subject.

The court checks whether the placement of creditors and other relevant parties into different classes proposed by the enterprise meets the requirements applicable thereto and also whether the scheme has a reasonable chance of success. If this is true, the different classes are convened by the court and a vote is taken. The scheme may be accepted if it is supported in every class by an ordinary majority of the number of creditors representing three-fourths of the value of the claims in the relevant class. It is not possible to accept the scheme if every class does not agree.

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2.6.3 United States of America: Chapter 11 United States Bankruptcy Code

The United States has what is known as Chapter 11 proceedings, providing for a procedure by which companies can be restructured. Chapter 11 proceedings also provides possibilities for forcing creditors and/or shareholders who are unreasonably obstructive to cooperate with a reasonable composition and also that the debtor itself may choose with whom it wants to enter into a composition and is not required to amend the rights of all the creditors and/or shareholders in the composition.

Chapter 11 proceedings may commence at the request of the company or at the request of the creditors. In the first case it is called voluntary proceedings. In the second case, involuntary proceedings. An important element of Chapter 11 proceedings is the automatic stay that provides an almost complete freeze of (enforcement) proceedings against the company. In this manner the company receives large protection in order to continue to carry on its business activities.

With Chapter 11 proceedings the creditors and shareholders are also divided into different classes, unless their claims or rights do not differ essentially. Classes whose rights are not amended are deemed to vote in favour of the composition. Classes that will not receive any distribution under the composition are deemed
to vote against the composition. After the first assessments of the restructuring plan by the court the creditors and shareholders must vote on the plan. In each class of creditors, with the exception of the classes that are not affected by the plan, the plan will be accepted if half of the creditors, who jointly represent two-thirds of the amount of the verified claims, vote in favour of the plan. For the classes of shareholders it is required that a two-thirds majority of the shareholders eligible to vote will vote in favour of the composition.

After the plan has been accepted, the court must confirm it. There are many formal requirements at this stage as well, except in the event that all the classes have voted in favour of the plan. The plan must, for example, have been realised in accordance with the statutory prescriptions, have been proposed in good faith and be feasible. Each stakeholder may lodge an objection to the plan. The court will only confirm the plan when all the stipulated requirements have been met. In contrast to the scheme of arrangement in England and Wales, Chapter 11 provides the possibility that the classes voting against the plan may as yet be bound to the composition by the court.

2.7. Second pillar of the “Recalibration of Bankruptcy Law” programme

It has been explained above that the absence of a possibility to impose a compulsory composition outside bankruptcy is considered a concrete problem. With the announcement of the “Recalibration of Bankruptcy Law” programme (Parliamentary Papers II, 2012-2013, 29 911, no. 74, p. 2) it has therefore been indicated that provisions would be made for the possibility of a composition outside bankruptcy that may be compulsorily imposed on individual creditors to prevent them from allowing a company to go bankrupt unnecessarily.

In the first progress letter about the Recalibration of Bankruptcy Law programme (Parliamentary Papers II, 2012-2013, 33 695, no. 1) it was stated that a bill to that effect, the Continuity of Enterprises Act II, was being prepared. In the second progress letter (Parliamentary Papers II, 2012-2013, 33 695, no. 3) a sketch outline was given of the arrangement of the compulsory composition to be implemented with the Continuity of Enterprises Act II. It was indicated that the arrangement would entail that creditors or shareholders, who are unreasonably obstructive in the event of the restructuring of debts of the company supported by the majority of the creditors, could be forced to cooperate with such a restructuring if a bankruptcy could be prevented by it. The arrangement would enable placement of creditors into different classes and also a separate composition being presented to each of the classes, which they could then vote on. If the majority of the creditors in the relevant class voted in favour of the composition, the composition could be declared binding for the other creditors and shareholders in that class as well. In the second progress letter it was announced that in consultation with the stakeholders and experts from practice the further design of this arrangement was being elaborated, which has been translated into concrete terms in the currently proposed bill.

3. Starting points of the proposed arrangement
3.1. **Offering practical solutions, linking up with existing arrangements**

It has already been noted above that the "Recalibration of Bankruptcy Law" programme is aimed at offering practical solutions for concrete problems. It has been explained that for solving the problem of a creditor opposing a reasonable composition on other than uncommercial grounds, the scheme of arrangement in England and Wales and Chapter 11 of the United States Bankruptcy Code in the United States have been used successfully for quite some time. In other Member States of the European Union arrangements have also been made available that in many important aspects resemble the scheme of arrangement and Chapter 11. As the scheme of arrangement and Chapter 11 are used frequently for international restructurings, Dutch companies are regularly involved therewith in one way or the other. On that account, part of the insolvency consultancy practice and financial service providers already have relevant experience with these proceedings.

For this reason the scheme of arrangement and Chapter 11 have served as major inspiration for the arrangement now proposed for the Netherlands. In this context attempts have been made, where necessary, in respect of subjects that are felt to require improvement or a slightly adjusted arrangement in England and Wales and the United States, to offer an alternative that is practicable in the Dutch context, which is for that matter in many respects different from the one in England and Wales and the United States. On account of their different origin, the arrangements from England and Wales and the United States and also the terminology used in them are not applicable one-on-one for Dutch law. In view of the above the legal methodological design of the bill presently proposed and the terminology used in it link up as much as possible with the existing statutory regulations in the Netherlands, in particular those of the composition in bankruptcy and in suspension of payments, and also with the framework that the European Commission has outlined in its recommendation concerning a new approach to bankruptcy and insolvency.

3.2. **Restricting the judicial involvement to improve the speed, reduce the costs and to obtain certainty quickly**

The scheme of arrangement assumes the involvement of the court in two stages, namely in the preparation of the composition and the vote and also in declaring the composition universally binding. Nevertheless, a scheme of arrangement can be implemented relatively quickly: everything can be put into effect within approximately eight weeks. This speed is generally experienced as a favourable element of the framework. In general Chapter 11 proceedings take (much) longer. On account of the fact that it concerns formal insolvency proceedings, Chapter 11 assumes very intensive judicial involvement. Prior to the vote the court examines for instance whether the composition contains adequate information, establishes a creditors' committee and may hear creditors. Creditors can go to court at many different points in time to ask the court to take a formal decision. In addition to these formal decisions there is in general intensive contact between the court and the relevant company. Both proceedings, also on account of the many formal requirements, are considered to be relatively expensive. The recommendation of the European Commission about a new approach to bankruptcy and insolvency states in particular that the involvement of the court is restricted to situations where this is necessary and proportionate for the protection of the rights of the creditors and other
stakeholders who are affected by the restructuring plan. In addition it envisages reduction of the costs of a restructuring as much as possible (points 7, 15, 17 and 21 of the preamble).

To expedite the progress of the restructuring process, the choice has been made to leave the initiative for the composition with the relevant enterprise as much as possible in the proposed arrangement and the judicial involvement is in principle restricted to the phase in which the order declaring the composition universally binding is requested. The composition to be declared universally binding may be entirely realised out of court. On the other hand guarantees have been provided for those parties whose rights are amended by the composition. This structure limits the duration of the proceedings and the relevant enterprise is able to obtain “deal certainty” relatively quickly. It also results in a reduction of the costs of the proceedings. This is not only true for the enterprise, but also for society: by means of the structure chosen, the burden for the judiciary is restricted as much as possible.

3.3. Facilitating tailor-made work to promote broad usability

The recommendation of the European Commission concerning a new approach to bankruptcy and insolvency is aimed at realising arrangements that are practicable both for large enterprises and for small and medium-sized enterprises. In order to make the proposed arrangement practicable to a range of businesses as broad as possible, it is important that it creates the possibility to offer a composition attuned to the specific circumstances of the case and to have that composition declared universally binding by the court. The proceedings used for this purpose must be so flexible that they can be applied to all enterprises in this broad range. In point 20 of the recommendation of the European Commission it is noted in this respect that it should be possible that a restructuring plan is only offered to specific creditors or specific categories of creditors and furthermore, in order to promote the efficiency and to restrict delays and costs, the national preventive restructuring schemes should contain flexible procedures.

The arrangement proposed now provides the possibility to involve only specific creditors in the composition. Furthermore, as already noted in the previous subsection, it is set up in such a manner that the composition can in principle be entirely realised out of court. If the composition has been accepted, the debtor or creditor who has offered the composition can request the court to declare the composition universally binding. If the court proceeds to do so, the composition will apply to all the creditors and shareholders involved in the composition, including those who voted against the composition.

Since the guarantee for individual creditors and shareholders is included in the fact that the court may reject declaring the composition universally binding if the interests of one or more creditors or shareholders would be disproportionally prejudiced by granting the request (cf. the proposed article 373(3) (a)), this presumes that the creditors and shareholders affected by the composition will be summoned. Because of the fact that compositions may occur in very large enterprises, but also in small and medium-sized enterprises, there may be a large difference in the number of creditors and shareholders whose interests are affected by the composition, which entails that there will also be different needs in respect of the manner in which the parties involved will be summoned.

With a view to promoting the usability of the proposed arrangement, provisions have been made that the court may determine that the summons will be effectuated in accordance with the proposal that the debtor
or creditor offering the composition has made in that regard. Furthermore the proposal makes it possible that the relevant documents will be made accessible electronically instead of sending them to all the creditors and shareholders involved. For further explanation on this point reference is made here to the explanatory notes on individual articles, in particular for articles 375 and 377.

3.4. Preventing abuse and monitoring the cohesion with measures from the other pillars

As said, the arrangement proposed now forms part of the second pillar of the “Recalibration of Bankruptcy law” programme which is aimed at preventing bankruptcies as much as possible by facilitating that the restructuring of enterprises with financial problems may be realised as much as possible with a composition outside bankruptcy. In the first progress letter on the programme (Parliamentary Papers 2013-2014, 33 695, no. 3, p. 2) it is explained that the first pillar of the programme contains measures aimed at combating objectionable conduct in the event of or prior to a bankruptcy. The background of this is inter alia that it must be prevented that creditors and employees of an enterprise, as a result of fraud or other chicanery and conduct that is only geared to the personal gain of the management board or the actual policymakers of an enterprise, will not get paid for their claims and will suffer damage as a result. In point 19 of the recommendation of the European Commission concerning a new approach to bankruptcy and insolvency it is noted in this respect that the court should reject declaring a composition universally binding if the rights of those voting against the composition would be reduced to less than what they would receive in the event of bankruptcy, whereby the expected costs of the settlement of the bankruptcy should be taken into account. In the first progress letter it was furthermore explained that the third pillar of the programme is formed by the modernisation of bankruptcy proceedings and contains measures that are aimed at facilitating and expediting the settlement of bankruptcies.

An important starting point of the arrangement proposed now is that it does not interfere with the first and third pillars and the measures taken within the framework of those pillars. It is thus aimed at preventing a composition from being offered with fraudulent or inappropriate objectives, such as the harming of one or a few creditors or shareholders or the needless delay of bankruptcy proceedings. These points are addressed in the proposed bill because the court has the possibility to reject declaring a composition universally binding if the interests of one or more creditors or shareholders would be harmed disproportionately or if, on the basis of the composition, they would receive less than (a) the cash amount of the assets to which they have an in rem security right or (b) the payment that would accrue to them upon settlement after bankruptcy (cf. the proposed article 373 (2) and the proposed article 373 (3) (a through d).

Furthermore, the offering of a composition does not automatically result in the suspension of a petition for bankruptcy, but requires a petition by the party offering the composition, after which judicial assessment will take place (cf. the proposed article 3c). Finally the court must reject the petition to declare the composition universally binding if its implementation is not sufficiently safeguarded (cf. the proposed article 373 (3) (b).
3.5. **Letting economic reality be decisive wherever possible**

A restructuring of an enterprise in financial difficulties is accompanied by a rearrangement of legal claims: the rights of certain creditors or investors will be amended. In order to let the restructuring be successful it is important that the rearrangement of legal claims is based as much as possible on the economic value of the enterprise. The value of the enterprise must be examined and what amount would be available for distribution in the event of bankruptcy. For this purpose it must be taken into account that certain creditors, such as the Dutch Revenue Service or pledgees and mortgagees have priority recourse on the assets of the debtor.

Insofar as a certain creditor or investor can recover his claim or investment in the event of bankruptcy in full or in part, it may be said that he is “above water” [in the money]. Insofar as this is not the case, the relevant claim or investment is “under water” [out of the money]. The current proposal is based on economic reality. The starting point is that creditors or investors whose claims or investments are “under water” and who therefore would not receive any payment in a bankruptcy either, may still express their position with respect to the composition by voting on it, but would in principle not be able to stop that composition. For stakeholders whose claims are entirely or partly “above water” the point is that in principle they should not be able to stop the composition insofar as their position will not become worse than would be the case in the event of bankruptcy.

For all of this it is also true that the distribution which would become available after bankruptcy is not only determined by the claim and any security rights connected to it, but also by the costs of the settlement of a bankruptcy.

3.6. **Enabling the rearrangement of the shareholder’s position**

3.6.1. **Introduction**

The starting point described in the previous subsection that stakeholders whose claim or investment is “under water” should in principle not be able to prevent the composition is of special interest in respect to the position of the shareholders. They provide the capital with which the company can conduct its business. If the enterprise and as a result the company is doing well, the shareholders will benefit. Dividend may then be paid to them or distributions from the company’s freely distributable reserves may be made.

3.6.2. **Linking up with the reality that shareholders provide risk-bearing capital and are the first bear the losses.**

Where shareholders benefit if the company does well, they are in principle also the first to bear the losses as soon as the business is not doing so well. The capital provided by them is “the cushion on which the creditors may lay down their heads” (see G.T.J. Hoff, *De aandeelhouder als schuldeiser (the shareholder as creditor)*: in I. Spinath (red.) *Curator en Crediteuren (Receiver and Creditors)*, INSOLAD Yearbook 2009, p. 22) and, in the words of the authoritative corporate law lawyers Van der Heijden and Van der Grinten, must be seen as an “undischargeable corporate debt” (see E.J.J. van der Heijden, *Handboek voor de naamloze*
Within this context it is illustrative that the important starting point of corporate law that there cannot be any question of a payment of dividend or payment from the freely distributable reserves if this would lead to the company being unable to continue the payment of its due and payable debts. For the N.V. this starting point follows from case law (Supreme Court 8 November 1991, NJ 1992/174 (Nimox)), but for the B.V. this has been incorporated in the Act on the simplification and flexibilisation of private limited company law (article 2:216 (2) BW).

If the enterprise is doing so poorly that a bankruptcy follows, any assets still present in the company will be divided among the creditors. In that case the shareholders come last: they will not receive any payment until all the other creditors have been paid. But in general this stage is not reached. An essential element of bankruptcy is after all that the company can even no longer pay its due and payable debts. In that case the investment of the shareholder is “under water” which in contemporary financing terms is also described with the phrasing that the shareholder is “out of the money”.

3.6.3. Removing "perverse incentive" for shareholders not to cooperate in a restructuring

A restructuring can take the shape of the existing shareholders contributing additional capital. In practice they are frequently urged to do so by the creditors. If their investment is "under water", shareholders may, however, be tempted to submit to a ‘perverse incentive’ and decide not to contribute any additional capital. By doing so they take the risk that the enterprise will go bankrupt and that they will not get back their investment, but if the surplus of debts will be restructured in another manner, for instance because the creditors accept that they will not get back their claim or will get it back at a later point in time in order to restrict a possible loss, the company could in due time also become profitable without a capital injection of the shareholders. As a result the value of the shares will ultimately rise again and the value of the creditors will be shifted to the shareholders while the creditors, from an economic viewpoint, have provided the risk-bearing capital. They do not control the enterprise, because that remains in the hands of the shareholders. Without contributing anything further to the rescue of the enterprise themselves, the shareholders may benefit from it nevertheless.

A good solution to let the cooperating creditors share in the benefits of the continued existence of the enterprise affected by their offer is the debt for equity swap, which is therefore often used for the restructuring of debts. The debt for equity swap has many variations, but in essence it means that part of the claim of the creditors is converted into equity, as a result of which the creditors get an equity interest and consequently control in the company. The issue of shares to creditors requires a resolution, however. That resolution must in principle be adopted by the general meeting, unless the general meeting has left the power to do so to the company’s management board. In that case the management board may adopt the resolution to issue shares to the creditors, unless the maximum number of shares has already been issued: in that case a resolution of the general meeting is required to issue additional shares (article 2:96/206 (1) BW).
With every issue of ordinary shares existing shareholders have, moreover, a pre-emptive right. This entitles them to take new shares for a proportionate amount to what they already hold. The background of this is to prevent their interest and consequently their control from being diluted. In order to effect that a share issue to creditors leads to the acquisition of control, the pre-emptive right of existing shareholders is excluded. But this requires the agreement from the existing shareholders. If they do not agree and adhere to their pre-emptive right, the debt for equity swap and consequently the rescue of the enterprise can be endangered.

3.6.4. **Linking up with the development in case law that the shareholders under specific circumstances must cooperate in emergency funding**

In case law there are signs of a development that entails that the shareholder, while in principle is not obliged to extend his equity participation in the event of emergency funding, under certain circumstances must cooperate in the issue of new shares or must tolerate such issuance when the company’s interest so requires (Court of Appeal of Amsterdam 11 March 2004(OK), JOR 2004/190 (Piton/Booij)). This is the case if the issuance is necessary to prevent a suspension of payments or bankruptcy and the possibilities and the means for the issuance are present. (Dutch Supreme Court 19 October 2001, JOR 2002/5 (Skygate)). The shareholder must in that case accept a dilution of his interest and/or a shift in the control structure (Court of Appeal of Amsterdam (OK) 15 November 2001, JOR 2002/6 (Decidewise); 25 April 2002, JOR 2002/128 (Gorillapark) and 25 May 2011, JOR 2011/288 (Rhodes)).

A striking case in this connection is Inter Access. In that case a minority shareholder/financer of a company in financial difficulties made a proposal that entailed that a loan provided by him to the company would be converted into shares. As a result the financial problems might be resolved and the continued existence of the company with more than 700 employees made possible. Due to the issuance of shares, a dilution of the interest of the major shareholder would, however, occur. For that reason the relevant major shareholder opposed the rescue plan and came up with an alternative proposal, which would not offer a realistic solution for the financial problems of the company. The Enterprise Chamber of the Court of Appeal of Amsterdam (31 December 2009, JOR 2010/60 (Inter Access)) held, supported by the Supreme Court (25 February 2011, JOR 2011/115 (Inter Access)), that the interest of the continuity of the relevant enterprise was more important than the interest of the relevant major shareholder. In this way an arrangement could be made immediately, entailing that an issue of shares with exclusion of the pre-emptive right of the major shareholder was made possible, as a result of which the rescue of the enterprise could go ahead.

The bill currently proposed is in line with the development in case law outlined above. It makes it possible that shareholders, after an assessment by the court, will be bound to a composition in order to prevent them from frustrating the restructuring of the enterprise for improper or uncommercial reasons. Within this framework the relationship between the rules provided in this bill for the realisation of the composition and the provisions included in Book 2 BW or in the articles of association concerning shareholders’ rights and the adopting of resolutions by the general meeting. For a further explanation reference is made to the part with the individual articles.
4. **Description of the proceedings**

4.1. **Power to offer a composition**

The proposed arrangement means that a debtor who conducts a business can offer his creditors a composition for restructuring his debts. Equally, a creditor who finds that his debtor is heading for bankruptcy can offer his co-creditors and the shareholders a composition. The proviso for this is, however, that the relevant creditor has asked the debtor first to offer a composition and that the debtor did not comply with this request.

4.2. **Contents of the composition**

The composition must form part of an underlying, well-substantiated restructuring plan. The requirements for that plan will differ according to the nature and the size of the enterprise. With a large company listed on the stock exchange, in general more information and more extensive information will be required than with a small or medium-sized enterprise. The composition will ensure that a rearrangement of the legal claims of the creditors and shareholders will be effected in the sense that their rights are amended.

For creditors the amendment will in most cases entail that they accept that a part of their claim against the debtor is not paid at the agreed time or that the creditors instead of repayment of their claim get a share in the equity. For shareholders the amendment may entail that the resolution normally reserved to the general meeting to attract new equity may be adopted also without the general meeting’s cooperation. The pre-emptive right of existing shareholders may also be excluded with the issue of new shares to the provider of new credit or the creditors as compensation for a partial depreciation of their claim. It may also be expected from shareholders that they cooperate in the sale of shares to the provider of new funds. Upon the issue of new shares or the sale of existing shares the interest of the original shareholders is diluted. As a result their influence will be smaller when the company is healthy again.

The position of the creditors of an enterprise is not in all cases equal. Some creditors have a claim that is strengthened by a security right, such as a pledge or mortgage, or with a special right of recovery and other creditors do not. In the event of a composition it will often be the case that only the rights of creditors with claims with a right of pledge and mortgage, such as banks, are strengthened, and the rights of ordinary creditors, such as trade creditors, remain unchanged, while in the event of bankruptcy the creditors with a right of pledge or mortgage would in fact have priority over the ordinary creditors. The continued existence of the enterprise depends, however, on the supplies of the trade creditors.

The position of shareholders is not in all cases equal either. The law knows various classes of shares such as ordinary shares, preference shares or non-voting shares or non-profit shares. For this it also applies that it may only be appropriate to amend the rights of the holders of a certain class of shares, for instance holders of preference or priority shares. In general, shareholders will not receive payment in the event of bankruptcy of the enterprise. So, in many cases they have no reason to oppose the composition and will therefore have to accept an amendment of their rights.
As the position of creditors and shareholders may differ, the bill provides that the creditors in the proposal for a composition may be placed into different classes. Creditors with claims and shareholders with rights of a not essentially different nature must, however, be placed in the same class, because otherwise the vote on the composition could be manipulated by means of the ‘divide and rule’ tactic.

4.3. **Setup of a composition**

4.3.1. **Introduction**

An important part of the proposal consists of rules for setting up a composition. It contains safeguards for creditors and shareholders whose interests are affected by the composition.

4.3.2. **Presenting a proposal for a composition**

The first stage in setting up a composition is to offer a proposal for a composition to the creditors and shareholders whose rights are amended by the composition. The proposed scheme determines that they must be able to timely take cognisance of the proposal for the composition. It also provides the information that the proposal for the composition must in any case contain. This seeks to enable creditors and shareholders with voting rights to form an adequate view. Furthermore, it ensures that creditors and shareholders are able to fend for their interests if they believe that the proposal for the composition contains irregularities, the class constitution is manipulative or otherwise inadequate or the voting procedures not objective. Addressing such issues at an early stage prevents a composition from being delayed or undermined at a later stage. Therefore, the proposed arrangement provides that creditors and shareholders can apply to the court to appoint a delegated judge who can direct the assessment method or the voting procedure.

4.3.3. **Voting on the composition**

The next step is voting on the composition. In order to accelerate restructuring or to prevent it from being obstructed by creditors or shareholders who do not have a reasonable interest in it, the proposed scheme grants voting rights only to those creditors and shareholders for whom the composition has consequences. This is the case if their rights are amended. Creditors for whom the composition has no consequences may not vote on the composition. This is the case if the relevant creditors simply have their claim paid even after the composition. In respect of shareholders, the proposed scheme provides that they are only entitled to vote on the composition if the rights associated with their shareholding are changed.

From the point of view of time and cost savings, the proposed scheme provides that a vote may take place at a physical meeting or electronically. The composition is adopted if the simple majority of each class of creditors and shareholders with voting rights has voted in favour of the composition and those creditors and shareholders together represent at least two-thirds of the total claims or two-thirds of the issued share capital in those classes. The supermajorities are justified as it concerns a procedure outside insolvency and there is no liquidator to supervise the situation. They are also in line with the conditions that are used in the models of the Loan Market Association, which are known internationally and generally used for financing.
4.4. **Composition is declared universally binding**

If the composition is adopted, the debtor or the creditor who offered the composition may apply to the court to have the composition declared universally binding. This means that it is binding on all creditors and shareholders, including those who voted against the composition, refrained from voting or did not appear. The court will declare the composition universally binding, unless it would prejudice the interests of one or more creditors or shareholders disproportionally. The court does not only consider the interests of the shareholders and the creditors who voted on the composition, but where necessary also the interests of the shareholders and creditors who were not allowed to vote on the composition. This scrutiny constitutes a second safeguard for those creditors and shareholders.

If the composition is rejected, the arrangement provides that court is still able to declare the composition universally binding following an application by the debtor or creditor who offered the composition. This is possible if, taking all the circumstances into consideration, the class or classes that voted against were not able to arrive at that voting behaviour reasonably. In this manner an entire class of creditors or shareholders who vote against the composition without a founded reason can still be bound by the composition. However, this is not possible if the principles of reasonableness and fairness would dictate that declaring the composition universally binding would create an unjustifiable difference in treatment between one or more classes with voting rights, for example because the class that voted against did so because they would receive a more limited payment than they would in the case of bankruptcy.

In assessing whether this constitutes a reasonable composition, the court may consider all the circumstances of the case, such as the payment the class voting against would have received if the debtor were to go bankrupt. The fact that the majority of classes voted against the composition may also be an important indicator for a court. Such a situation would beg the question as to how much support there is for the composition.

5. **Consultation**

Tad

6. **Administrative burden**

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II ARTICLES

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2. Explanatory Notes by article

Article I

A (Introduction new article 3c of the Bankruptcy Act

Introductory remarks

The new article 3c provides the party offering a composition with the option to apply to the court that is dealing with a petition for bankruptcy of a company to stay that petition if a composition has been offered, but that has not been voted on or that has been voted on and a petition to declare a composition universally binding has been submitted.

The proposed provision is aimed at preventing a creditor from applying for bankruptcy or threatening to do so as an improper means of exerting pressure to claim full payment of his claim or to delay negotiations about a composition or to turn it his way. However, it is not set up in such a way that a debtor can offer a composition purely to avert or delay a likely inevitable bankruptcy. Consequently, in line with the principles set out in subsection 3.4 of the general part of this explanatory memorandum, this proposed article is in line with the objective of the measures in the first pillar [of the Recalibration of Bankruptcy Law programme], aimed at preventing fraud during an impending bankruptcy and with the objective of the measures in the third pillar, focused on a speedy and efficient completion of the bankruptcy.

The way in which the currently proposed article is structured means that measures of enforcement other than a bankruptcy petition, such as attachment or eviction, in principle remain possible pending the proceedings. However, this does not mean that a creditor who disagrees with the negotiations about the composition can use those means to his heart’s content to frustrate or interfere with the negotiations. In first instance, the adage "never touch a painting when it is wet" should apply. If the debtor or creditor who offered the composition makes it plausible that the composition has a reasonable chance of success, the court in interim relief proceedings has the option to remove an attachment or to suspend its enforcement or to order the creditor to refrain from eviction.

Paragraph 1

This paragraph provides that if a petition for bankruptcy has been submitted with respect to of a legal entity, or a natural person who, whether or not in cooperation with one or more other natural persons or legal entities has an independent professional practice or business, dealing with that petition can be stayed by the court at the request of the debtor or one or more of his creditors who offered the composition during a reasonable period if (i) a composition is offered as referred to in the proposed article 368 or (ii) if that composition is rejected, but the party offering the composition submitted a petition for declaring a composition universally binding on the basis of the proposed article 373:2 because the class or classes that voted against could not reasonably have arrived at that voting behaviour.
It follows from the proposed provision that it is possible to apply for a stay of the proceedings on the bankruptcy petition from the time the debtor or his creditors offered a composition. The choice of that time is based on two considerations. The first consideration is that it is easy to determine - it concerns the time foreseen in the proposed article 370:1 at which the composition is put before those who are allowed to vote on it. The second consideration is that it must be prevented that a new phase, preceding the suspension of payments, is created during which the rights of creditors could potentially be limited. This would not sit well with the objective of the second pillar of the “Recalibration of Bankruptcy Law” programme, being to promote restructuring outside bankruptcy, but from the point of view of foreseeability it would be undesirable too as the start of such a phase is not clear in advance.

The objection to the current choice could be that during the period of negotiating the composition without it having been offered it leaves creditors with the option to submit a petition for bankruptcy. The setting up of a composition could still be thwarted by creditors who wish to enforce full settlement of their claim or by creditors who believe they would receive more during a bankruptcy than under the composition.

In relation to the first reason, the idea that supports this draft bill is that debts that arise during the period in which the composition is formed must be settled. If and insofar as that is the case, there is not a situation in which the debtor "stopped paying". At that point the requirements for bankruptcy of article 1:1 Fw and there cannot be a bankruptcy, which can also not be used as a means of exerting pressure. If the debtor does not have the option to pay the new operational debts that arise during the period of setting up the composition, there is a compelling reason within the meaning of paragraph 3 of this article. This means that the application for staying the proceedings on the bankruptcy petition must be rejected in any case.

In relation to the second reason, if and insofar as a creditor would receive more during bankruptcy and the subsequent liquidation than under the composition, the application to declare the composition universally binding must be rejected on the basis of the proposed article 373:2 a or b.

Paragraph 1 also provides that the court may stay the proceedings on the bankruptcy petition. This offers the court a discretionary power that leaves it room to decide to stay a petition for bankruptcy or not and to involve all the circumstances of the case in that decision. An important consideration would be the extent to which the proposal for the composition is properly substantiated and to what extent it contains the information required by the proposed article 370:2. If the court believes that this was not, or not sufficiently, the case, or if the court has indications that the composition will be rejected for that reason, it may reject the application for the stay.

At this point, there is a difference with the option, foreseen in paragraph 2, to stay the proceedings on the bankruptcy petition if the composition has been adopted – in that case there is no discretionary power. This difference is in connection with the situation provided for by this paragraph where the composition has not been adopted yet or has been rejected. Consequently, in contrast to the situation provided for by the second paragraph, it is not yet certain that the majority of creditors and shareholders support the composition and an independent and wide margin of assessment for the court is justifiable.
Paragraph 2

This paragraph provides the debtor or creditor who offered an adopted composition, and who has petitioned for that composition to be declared universally binding on the basis of the proposed article 373:2, with the option to apply to the court to stay the bankruptcy proceedings until the petition for declaring the composition universally binding has been decided.

This paragraph concerns an adopted composition. The previous paragraph concerns a composition that has not been adopted because (i) there has not yet been a vote on the composition, or (ii) the composition was rejected, but a petition for a universally binding declaration was made nevertheless. As this paragraph concerns an adopted composition, this paragraph does not provide for a discretionary power of the court – in principle an application for a stay must be awarded. The notes to the previous paragraph already dealt with the reason for this difference – in a situation where the composition has been adopted it is clear there is support for it. Here we add that adoption of a composition on the basis of the proposed article 372:2 requires that the composition was adopted in all the classes with voting rights by a majority of the creditors and that the majority represented two-thirds of the amount of claims of debtors that participated in the vote in that class. The adoption of the composition means there is a broad support for the composition and therefore for saving the company. In such a situation it is undesirable that this rescue should be thwarted by a bankruptcy or that a creditor who voted against the composition for whatever reason could frustrate its implementation by petitioning for bankruptcy. Therefore it has been provided that if a petition for bankruptcy and an application for a stay of the proceedings of the bankruptcy petition are pending simultaneously, the application for the stay is dealt with first.

The aforementioned does not mean that a court, if it finds there are founded reasons to assume that the application for declaring the composition universally binding will be rejected, should not reject the application to stay the proceedings of the bankruptcy application. This would be the case if convening the creditors does not comply with the relevant requirements imposed by the proposed Article 376. Even when it is clear in advance that one of the cases of the proposed article 373:3 occurs in which the court may reject the application for declaring the composition universally binding, being: (a) the interests of one or more creditors are prejudiced disproportionally by the composition, (b) performance according to the composition is not sufficiently guaranteed, or (c) the composition was made dishonestly, or (d) other compelling reasons preclude declaring the composition universally binding.

Paragraph 3

This paragraph seeks to at prevent abuse. It provides that the court does not decide on the stay of the proceedings on the bankruptcy petition if this is precluded by compelling reasons. This paragraph is an addition to the first and second paragraph s as it were, which provide that an application to stay the proceedings on the bankruptcy petition cannot be awarded if there are founded reasons to assume that the composition will be rejected (paragraph 1) or will not be declared universally binding (paragraph 2). These reasons are universally limited. The ground provided for in this paragraph is more wide-ranging and provides for the situation in which
the composition may well be adopted or declared universally binding. In that situation there could still be circumstances that justify deciding against a stay. The court may take account of all the circumstances of the case, in particular whether the debtor can continue to pay the operational debts that arise during the process of setting up the composition. If that is not the case, the company is essentially bankrupt already. In that case the court will have to reject the application to stay the proceedings on the bankruptcy petition pursuant to this paragraph.

Paragraph 4

During the formation phase of this proposal, a stakeholder suggested that during the period of the stay a type of "silent administrator" should be appointed who would prevent that postponing the bankruptcy would lead to the debtor making payment to a majority shareholder, selective payment of certain creditors or a certain group or to enter into obligations he knows he cannot fulfil.

However, rules already exist for these situations. In the event of a payment to a shareholder, the payment test of article 2:216 BW applies to a B.V. – if the payment leads to a company not being able to continue paying its debts, its directors and shareholders are liable. For an N.V. this rule follows from case law (Supreme Court 8 November 1991, NJ 1992/174 (Nimox)). If a director enters into liabilities on behalf of the company of which he knows or should know that they cannot be met, the director is personally liable if the company does not offer recourse for the damage suffered by the creditor (Supreme Court 16 October 1989, NJ 1990/286 (Beklamel)). When it concerns a group relationship, in the event of creating the appearance of creditworthiness or if there is intensive involvement by the parent with the subsidiary, the corporate veil can be pierced (Supreme Court 19 February 1988, NJ 1988/487 (Albeda Jelgersma II)). In relation to the point of selective payment, making a distinction between creditors who do and do not belong to the same group, which results in the second category of creditors being subordinated, is unlawful. This is only different if the preferential treatment of the group-linked creditors can be justified by the company on the basis of special circumstances. The obligation to furnish facts and the burden of proof rest with the company. (Supreme Court 12 June 1998, JOR 1998/107 (Coral/Stalt) and 26 March 2010, JOR 2010/127 (Zandvliet/ING)).

In light of the aforementioned, a general rule to the effect that if a composition is offered and an application to stay the proceedings of the bankruptcy petition is awarded, a "silent administrator" or another person who supervises the composition before it is declared universally binding is not deemed necessary. Such a rule could also cause delays and could mean a debtor would be put off unnecessarily. It would also prejudice the underlying principle of the scheme of arrangement, Chapter 11 and the recommendation by the European Committee (point tbd) [sic] that in principle the debtor should continue to retain control over his assets.

Following on from article 225 Fw, instead of an "undisclosed administrator" the court has been given the option to make the provisions it deems necessary to secure the interests of the creditors. It would be possible to imagine that for certain legal acts a debtor would have to ask permission from the delegated judge. In that
framework, the court could also find inspiration in immediate relief as provided by the Enterprise Chamber of the Amsterdam Court of Appeal on the basis of article 2:349a paragraph 2 BW in the case of inquiry proceedings.

**Paragraphs 5 and 6**

These paragraphs provide that the proceedings on the bankruptcy petition must be resumed by the court as soon as their stay is no longer justifiable. This is the case as soon as (i) debts that arose and became due and payable during the stay process remain unpaid, (ii) the composition was rejected, or (iii) the expectation that the composition will be adopted is no longer justifiable and (iv) the court rejected the application to declare the composition universally binding on the basis of article 373.

In respect of the situation under (i) the proposed paragraph 3 provides that the court does not rule on the stay of the proceedings in the bankruptcy petition unless there are compelling reasons. The notes to that paragraph already indicated that the court can take all the circumstances of the case into consideration, in particular whether the debtor can continue to pay the operational debts that arose during the process of setting up the composition. If that is not the case, the company is essentially bankrupt already. In that case the court will have to reject the application to stay the proceedings on the bankruptcy petition pursuant to this paragraph. It may also happen that in first instance there is an expectation that the debtor will be able to continue paying his operational debts that arise during the period of the stay, but that this proves not to be the case. Again, the company is essentially bankrupt already and staying the proceedings on the bankruptcy petition is not desirable, as this will increase the damage for the creditors. In that case the court will have to suspend the application to stay the proceedings on the bankruptcy application pursuant to this paragraph.

The situation under (ii) is an objective moment that arises as soon as the result of the vote on the composition has been determined. The situation under (iii) contains a more variable element. Each case will be different as to the time it becomes clear that there is no longer any justification for expecting the composition to be adopted. In order to provide as much certainty as possible, existing terminology from article 2:118a paragraph 2(a) BW has been maintained, which provides that a holder of depositary receipts for shares may be refused a power to vote if there is a justifiable expectation that a public bid will be issued, which is also interpreted as a "reasonable expectation" (see M.L. Lennarts, *Tekst en Commentaar Ondernemings- en effectenrecht* (Commentary on the Civil Code), article 2:188a BW). Furthermore, the relevant wording emphasises that a composition without chances of success may not be offered purely to delay bankruptcy or to delay proceedings on a bankruptcy petition.

In relation to the situations referred to under (ii) and (ii), as the composition is set up by means of an extrajudicial procedure, the debtor or the creditor that offered the composition must inform the court of this being the case. The court will not lift the stay if a creditor, other than the one who offered the composition, provides the notification. Potentially this could lead to abuse by a dissenting creditor with respect to the composition. In relation to the situation under (iii), the court itself will be aware and therefore does not have to wait for a notification by the debtor or creditor who offered the composition.
The fact that a notification must be made immediately is based on the consideration that a bankruptcy must not be postponed any longer than necessary, as this can only lead to an increase in debts and more damage for the creditors. On the other hand, there are already safeguards because directors who fail to make the notification, and have the stay of proceedings on the bankruptcy petition continue longer than necessary, risk personal liability if there is a chance that the legal entity no longer offers recourse for the relevant debts (Supreme Court 16 October 1989, NJ 1990/286 (Beklamel)).

If the composition has been adopted or if the application for declaring it universally binding is awarded, there is no cause to lift the stay on the proceedings of the bankruptcy petition. If an appeal is instigated against a decision with respect to declaring a composition universally binding, a test is required and a new application to stay the proceedings on the bankruptcy petition can be submitted. If an appeal is lodged against the judgment declaring the composition universally binding, lifting the stay is not obvious. If an appeal is instigated against rejecting petition for declaring the composition universally binding, it will depend on the circumstances of the case.

The wording "the court lifts" in paragraph 6 was chosen to emphasise that the court does not have discretion in this case. If it were to have that, there would be a risk of too much 'legalisation' and the court would almost have to rule twice on the same petition for declaring the composition universally binding or it would have to anticipate the decision of the debtor or creditor who offered the composition to apply for declaring the composition universally binding on the basis of the proposed article 373:2.

B (Amendment of article 5 of the Bankruptcy Act)

Introductory remarks

Article 5 Fw provides in which situations compulsory legal representation is required. As the compulsory composition outside bankruptcy is not yet provided for by statute, it is also not provided whether submitting an application for declaring the composition universally binding requires legal representation.

Amendment to paragraph 1

The proposed amendment to paragraph 1 achieves that submitting an application to declare the composition universally binding requires compulsory legal representation. This applies to an application to declare an adopted composition universally binding (article 373:1) and to an application to declare universally binding declaration a rejected composition (article 373:2). The debtor who applies for declaring a composition universally binding will have to represented be assisted by legal counsel. The same applies to a creditor who offered the composition and applies for declaring the composition universally binding.
The requirement of compulsory legal representation is justifiable because it is important that the debtor, before applying for declaring the composition universally binding, is informed of the conditions this application must comply with by virtue of the proposed article 370:1, for the court to be able to proceed. It is also important that the debtor or creditor who applies for declaring the composition universally binding has knowledge of the legal implications of that application before he submits it. For example, it is important that he realises what is expected from him and in any case he must be pointed to the duty of information that will rest on him by virtue of the proposed articles 371:3 and 377:1. Furthermore, a debtor who applies for declaring the composition universally binding should realise that he continues to be solely responsible for his own actions - he retains control over and disposes of the assets that form part of the company. Legal counsel should therefore advise the debtor to be cautious of entering into new liabilities in any case. If the debtor is a company, the directors of that company, in order to prevent subsequent liability claims, will have to ascertain whether the company can fulfil obligations it enters into and in the event of bankruptcy would offer sufficient recourse, because otherwise they risk personal liability (Supreme Court 16 October 1989, NJ 1990/286 (Beklamel)).

The involvement of legal counsel can also ensure that the application is argued and substantiated properly. A lawyer will also indicate when an application for declaring the composition universally binding is unlikely to be successful. To some extent, he can contribute to keeping from the court compositions that are not suited for being declared universally binding or applications that are not substantiated adequately so that there is no unnecessary use of the scarce means of the legal system and equally scarce capacity.

C (Introduction of new article 42a of the Bankruptcy Act)

Introductory remarks

Article 42 Fw provides for the voidable preference action in bankruptcy (Pauliana), which allows a liquidator to set aside voluntary legal acts which were performed by the debtor before the bankruptcy and prejudiced creditors after the bankruptcy for the benefit of the estate. Consequently article 42 Fw limits debtors’ freedom to dispose of assets or revenue in their possession at their own discretion. This restriction is aimed at preventing a debtor who foresees his impending bankruptcy from removing assets for his own benefit or prejudicing his creditors by other means. Otherwise safeguard for creditors contained in article 3:276 BW, on the basis of which the debtor is liable for paying his debts with all his assets, would have been a dead letter (see B. Wessels, Gevolgen van faillietverklaring (Consequences of Bankruptcy) (2), Serie Insolventierecht, Deel III (2010), nr. 3017).

On the basis of article 42 Fw, a preference action can be brought successfully if five conditions have been met: (i) the debtor must have performed a legal act before the bankruptcy, (ii) he performed this legal act without being obliged to do so, (iii) the legal act resulted in prejudice to the creditors, (iv) at the time of performing the legal act, the debtor knew or should have known that prejudice to creditors would be the result, and (v) those
with whom or against whom the debtor acted knew or should have known that prejudice to creditors would be the result.

Article 43:1 Fw provides that if the legal act that prejudiced the creditors was performed within a year before the bankruptcy and the debtor had not already committed to that act before the start of that period, the knowledge of prejudice is deemed to exist in some cases except for proof to the contrary, both on the part of the debtor and those with whom he acted. Part 2 of article 43:1 Fw means that one of those cases are legal acts to provide security for a debt that is not due and payable, in other words a debt that the debtor does not have to repay to the relevant creditor at that time. Since the judgment by the Supreme Court of 29 November 2013 (Roeffen q.q./Jaya, JOR 2014/213) it has been ascertained that the presumption by virtue of article 43:1 preamble and under 2º Fw does not apply to a legal act whereby security was stipulated for entering into a new credit relationship for providing credit (commitment). However, even without applying the presumption of article 43:2 Fw, article 42:1 Fw may lead to complications on setting up the composition. That process requires some time during which the company must continue to be financed. In most cases that means that the credit provider provides additional credit, for example by permitting a company to have a larger overdraft or by providing a bridge loan. In most cases, the credit provider will require additional collateral for this additional credit. Thereby he can seek recourse before other creditors if bankruptcy is declared after all, because the composition ultimately does not succeed, because it is rejected or not declared universally binding. Strictly speaking, this state of affairs means that the recourse of other creditors reduces and they are prejudiced by this.

Particularly in a case in which a composition does not succeed and bankruptcy is declared, the legal act to provide security was entered into during a period when it was clear that restructuring was required, the liquidator will try to void it by invoking article 42: Fw. If he succeeds, the provider of the emergency credit is left empty-handed. In order to prevent such a risk, the credit provider could choose to end the credit relationship. However, terminating a credit relationship too soon could be unlawful (see, for example Assen District Court in Interim Relief Proceedings 31 August 2005, JOR 2005/285 and Arnhem Court of Appeal 18 February 2003, JOR 2003/267) and could lead to the financier not seeing his claim paid at all or only to an extremely limited extent.

Faced with a debtor in financial problems and who offered a composition to his creditors, but in need of emergency credit, credit providers are often faced with what Advocate-General Huydecoper described in his conclusion for Van Emden q.q./Rabobank (Supreme Court 2 February 2007, JOR 2007/102) as a situation where they are stuck between a rock and a hard place - they have to choose between a possible refinancing liable to be set aside on the ground of voidable preference and a credit reduction that may be deemed to be untimely which would mean they do not have their claim paid. If they choose not to finance the company, rescuing the company is without any chance of success. This means that many of the other creditors will also not have their claims paid and many employees will lose their jobs who might have continued working in the event of a successful composition. It must be prevented that the emphasis shifts too much to that side.
The general part of this explanation has set out that the scheme of arrangement of England and Wales was one of the most important sources of inspiration for this proposal. It noted that it has been attempted to provide a solution for the improvement points that have been identified for that scheme. This point is such an improvement point: it has been identified in relation to the scheme of arrangement in England and Wales that there is a need for more security for the providers of new credit (see G. O'Dea, J. Long e.a. (red.), Schemes of arrangement, Law and Practice, Oxford University Press (2012), p.6). The European Commission, in its aforementioned recommendation of 12 March 2014 regarding a new approach to bankruptcy and insolvency (points 27-29), encouraged Member States to improve the position of providers of new credit in the sense that legal acts that are performed in the framework of new financing cannot be set aside due to prejudicing the entire body of creditors. This article heeds the relevant recommendation from the European Commission.

**Paragraph 1**

It is provided here that legal acts that serve to provide security for debts that arise at the time of offering the composition or the time the creditor asked the debtor to offer a composition and the time of closing the vote cannot be set aside by invoking the voidable preference actions.

The proposed provision fits within the approach where a voidable preference action is deemed to follow from the principle that the relationship between the creditor and the debtor and between the creditors themselves is governed by the principles of reasonableness and fairness (see J.J. van Hees, *Enkele pauliana-perikelen*, in: S.C.J.J. Kortmann e.a. (red.), Onderneming en 5 jaar nieuw Burgerlijk Recht, Serie Onderneming en Recht deel 7, p. 567 ff and *Benadeling in verhaalsmogelijkheden: pauliana of onrechtmatige daad?*, JORplus 2002, p. 66 ff). This approach is about the question as to whether the acting parties dealt with the interests of the other creditors in such a manner that this must be qualified as unseemly in the light of the expected consequences and of what they should have realised in that regard. In the abovementioned conclusion, Advocate-General Huydecoper comments in this regard that providing credit to a party in financial difficulties in exchange for collateral could only be qualified as fraudulent if both parties intended to benefit or disadvantage one or more creditors in this way. This is not at all the case when providing emergency credit for a *bona fide* rescue attempt. In fact the contrary is true - if a composition is adopted and the rescue attempt succeeds, this will lead to creditors having their claim paid to a much greater extent than would be the case in a bankruptcy. Consequently, creditors benefit from emergency financing.

The process of setting up a composition does not start when the composition is offered: generally it requires negotiations during a certain period. During that period continued financing will be necessary and there will be a need for the option to provide security without this being set aside later on. In this phase it should also be the case that the party that dares to take the risk of continued financing should not be punished for this in the unlikely event things go wrong. The other creditors would benefit if the attempt succeeds.
The time at which the negotiations about the composition commence will differ from case to case. Consequently it is difficult to capture in a general provision. Therefore this paragraph provides for a time that can be determined objectively, being the time of offering the composition or the time at which the creditor makes a written request to the debtor to offer a composition. In relation to legal acts that serve to provide security for debts that arose after this time, the voidable preference actions cannot be invoked in any case. In respect of legal acts that serve to provide security for debts that arose before this time, in principle they are not open to being set aside on the basis of the voidable preference actions if and insofar as they were performed in view of guaranteeing that the company could continue to be financed and the interests of the other creditors were treated with care.

*Paragraph 2*

This paragraph aims at largely the same as the previous paragraph with the difference that it concerns a different starting time, being the time of filing for declaring the petition universally binding. Such a petition is possible by virtue of the proposed article 373 if the composition has been adopted (paragraph 1), but also if the composition has been rejected, but should be considered reasonable taking all the circumstances into account (paragraph 2). The choice of these times is connected with the circumstance that if the composition has been adopted, the chance of bankruptcy will generally reduce, but bankruptcy could still occur if the court rejects the application for declaring the petition universally binding. If the composition has been rejected, the chance of bankruptcy increases, which means the risk the security provided being set aside on the basis of voidable preference actions increases too. Without this provision, the willingness of credit providers to provide emergency credit would decrease even further.

**D**

(Amendment of article 47 Fw)

*Introductory remarks*

Article 47 Fw is intended to prevent distortion of the equality of creditors in respect of recourse against the debtor’s assets. It stipulates that the payment by the creditor of a debt due after the declaration of bankruptcy can be annulled by the trustee if (i) the person who received the payment knew that the bankruptcy of the debtor had been filed or (ii) the payment was the result of consultation between the debtor and the creditor the purpose of which was to give the creditor that received the payment an advantage over other creditors. The provision is based on the idea that if the creditor knows that there already is an application, a claim or a petition for bankruptcy of the debtor, he is acting contrary to reasonableness and fairness, which he must respect with regard to his fellow creditors, if with or without having insisted on it he receives a payment and thus undermines the equality of creditors.

*New paragraph 1*
Article 47 Fw does not presently consist of different paragraphs, but that will change with this bill. The proposed paragraph 1 includes the complete text of the old Article 47. For the sake of readability, however, it is now divided into parts a and b. There is no substantive change.

New paragraph 2

This bill is intended to promote the continuity of economically viable enterprises through enabling those to reorganise outside bankruptcy and creating the power to force cooperation by creditors in the composition if for non-commercial of improper reasons they refuse to agree to cooperate. In order to avoid that a dissenting creditor can use a petition for bankruptcy to frustrate the conclusion of the composition, gain too much control as to its terms or to enforce full payment of his claim without making any attempt to bring about a composition, the proposed article 3c provides for the possibility of an application to suspend the proceedings on a petition for bankruptcy. Such a request may be made by the debtor or the creditor that has offered the composition. If the company can be kept in business then it should, even if a bankruptcy petition has been filed, be able to purchase and pay for the products and services required without the creditors running the risk of having to repay the payments received. The obstacle article 47 could present in its present form is removed by this paragraph.

E  
(Amendment of Article 54 of the Bankruptcy Act (Fw)

Introductory remarks

This article amends article 54. The background to article 54 is that creditors who fear that their debtor could find himself in bankruptcy might be tempted to create set-off possibilities for themselves by taking over claims against the future bankrupt [or a debt, editor]. The acquired claim [or debt] could be offset with [claims or] debts [against or] to the future bankrupt. Thus, any such creditor could gain a benefit to the detriment of the other creditors. Article 54 seeks to reduce this risk. This is done as follows: in the event of a bankruptcy, if the trustee manages to prove that the transfer was not in good faith, article 54 paragraph 1 excludes the possibility of set-off with the assumed debt [or claim] and stipulates that the set-off can be undone. The Supreme Court has found that the creditor is not acting in good faith when taking over a claim [or debt] if he knew that his debtor was in such a condition that his bankruptcy, or his suspension of payments, could be expected (Supreme Court 30 January 1953, NJ 1953/578 (Doyer and Kalf/Bouman qq) and 7 October 1988, NJ 1989/449 (Amro/THB trustees)). Even if bankruptcy was avoided for some time after the takeover, it could still be the case that the buyer knew or should have known that bankruptcy was to be expected (Supreme Court 17 February 2012, JOR 2012/234 (Rabobank Maashorst/Kezer qq)).

This all leads to the following conclusion: if a debtor of the debtor pays its debt to it by transfer to the bank account of the debtor, the bank accounts for that, in turn, by crediting the account a debtor of the debtor. If the bank is not acting in good faith within the meaning of article 54, this provision precludes the bank from
demanding settlement (Supreme 8 July 1987, NJ 1988/104 (Loeffen qq/Bank Mees and Hope I)). It does not matter whether the bank claimed settlement before the bankruptcy of the account holder or after it (Supreme Court 19 November 2004, NJ 2005/199 (ING/Gunning qq)).

New paragraph 3

The broad interpretation that the Supreme Court gives to article 54 means for the bank of a company that has overdrafted its account that certain payments made by third parties may not be offset by the bank against the account of the debtor if it is not in good faith. This implies that if a composition is offered, but rejected, and then bankruptcy follows, the trustee pursuant to article 54 paragraph 1 might try to adopt the view that the amounts received by the bank from the date of the offer of the composition must immediately be surrendered to the estate.

For the bank that has provided financing during the period up to the rejection of the composition, and in that context has agreed to a private sale of inventory on which it had a pledge, it can be a disadvantage if it had a pledge on that inventory, but not on the claims which arise when selling them to the debtors of the debtor, for example because they were sold for cash. In that case, the bank may not deduct the debit balance on the account [pursuant to the above]. It is true that the Supreme Court has in a recent judgment (12 January 2014, JOR 2014/118 (Feenstra qq/ING)) formulated an exception in the context of a foreclosure by the pledgor, but there can be no question of this in these cases because a foreclosure sale is only due after the funding is terminated and the claim of the bank has become due. This will generally not be at issue.

All this means that if the debtor can continue to use its current account during the suspension, the bank runs the risk under article 54 paragraph 1 of having to pay the trustee incoming payments in a bankruptcy while, on other hand, the debit balance has been increased as a result of outgoing payments by the debtor and/or the coverage for settlement decreased by selling the (pledged) inventory. Given this risk, after offering the composition most lenders will not be willing to provide financing from the moment of the stay [of the bankruptcy petition]. That would result in the discontinuation of outgoing payments. In that case it would not be possible to continue the company and the going concern and the status of the company would be acutely compromised, not least because there will be no further goods and/or services to be delivered in the absence of payment. This is undesirable in the light of the objective of this proposal, namely the continuation of viable businesses.

The currently proposed article 3 provides a solution to this problem by lifting the ban on offsetting (article 54 paragraph 1) for payments from third parties in favour of the debtor received in the bank account of the debtor. To prevent abuse, two requirements apply, namely (i) such a creditor is a bank within the meaning of article 212g(a) and thus a bank that is supervised and (ii) the debts are taken over by the bank by a payment on the account of the debtor at the bank between (a) the time of submission of the composition referred to in the proposed article 368 (1) and the closing of the vote on the composition, or (b) the timing of the written request of the creditor to offer a composition as referred to in the proposed article 368(2) and the time of the closing of the vote on the composition. This ties in with point 6 part e of the recommendation of the European Commission,
which stipulates that the position of the providers of new credit designed to keep the company going deserves reinforcement.

It has been deliberately chosen only to exclude the acquisition of a debt by the bank from the applicability of article 54, and not also the acquisition of a claim by the bank or the acquisition of assets by other creditors. The provision of additional credit by the bank, based on an existing or a new credit agreement by the bank during the relevant period, is regarded as the acquisition of a claim within the meaning of article 54 (Cf. Supreme Court 21 June 2013, NJ 2012/272 ([Eringa]/ABN AMRO NV)).

New paragraph 4

The proposed third paragraph is intended to allow for settlement by the bank of debts to the debtor which are taken over by payment on the account of the debtor at the bank. A similar situation could arise, however, if the composition is accepted and a request for declaring it universally binding has been made but dismissed by the court or the composition is rejected but a request for declaring it universally binding is made. If continued funding were not possible during this time, the rescue of the company would still be at risk. For this reason, paragraph 4 states that paragraph 3 applies accordingly.

New paragraph 5

This part stipulates that set-off can also occur during the period in which a stay of the petition for bankruptcy is sought. The reason is, mutatis mutandis, the same as for the situations governed by the preceding paragraphs.

G    (Introduction to new section IV.2 Fw)

This part provides for the introduction of a new section IV.2. The bill for the Continuity of Entreprises Act I, on the ability of the court to indicate even before bankruptcy whom they will appoint as receiver and supervisory judge, adds to the Bankruptcy Act a Title IV on restructuring outside bankruptcy. The rules relating to the appointment of a prospective receiver and supervisory judge constitute section IV.1. The proposed provisions on a universally binding composition for restructuring debts made outside bankruptcy thus form section IV.2.
Article 368  Offering an extrajudicial composition

Introductory remarks

This article stipulates who may offer a composition and what the composition may contain. In addition, the article regulates the relationship with the provisions of Book 2 BW [law of legal persons] and any provisions in the articles of association or agreed between the company and its shareholders or members as to decision making for offering a composition or the implementation thereof.

Paragraph 1

The phrase "legal entity or an individual who, whether or not in collaboration with one or more other individuals [or legal entities], practises an independent profession or runs a business" entails that the provision refers to enterprises: only they can offer a composition. The term "legal entity" expresses that the provision covers not only businesses operated by companies (N.V. or B.V.), but also businesses run by an association (vereniging), a cooperative (coöperatie) or a foundation (stichting).

The phrase "individual who, whether or not in collaboration with one or more other individuals [or legal entities], practises an independent profession or runs a business" is connected with the fact that during a discussion of a draft bill with stakeholders it was put forward that it should be beyond doubt that companies which are run in the form of partnerships, general partnerships or limited partnerships, should be covered by it. This is accomplished by the present wording. This is in line with the principle stated in subsection 3.3 of the general part of this explanatory note that the scheme should be usable by a wide range of enterprises.

This paragraph provides that the company can offer its creditors and shareholders a composition. This is intended to indicate that the composition may be offered to both the creditors and the shareholders. This enables tailor made solutions. It is by no means envisaged that, if the composition is offered to creditors, it must also be offered to shareholders.

The term "composition" is chosen because it is already known in the Bankruptcy Act, namely in the case of a composition in bankruptcy (article 138) and suspension of payments (article 214 paragraph 3). In addition, this term implies an active role of the debtor who offers the composition to its creditors or the creditor that offers the composition to its fellow creditors. The term "composition" also gives optimal expression to the fact that there must be support of the majority of those whose rights are modified by it. In this context it is illustrative that in the scheme of arrangement, by which the scheme as currently proposed is inspired, as stated, it is assumed that there is a "compromise" and this term is interpreted as meaning that there should be an element of give and take for both the debtor and the creditor, and all parties have to adapt to a certain extent. (see G. O'Dea, L. Long et al, Schemes of arrangement, Law and Practice, Oxford University Press 2012, p. 35). Depriving only one party of its rights without their opinion being asked, or without something in return, does not fit this framework: the composition is intended to distribute the risk of the debt restructuring over all relevant stakeholders rather than merely to shift this risk to one or more creditors or shareholders. In the presently
proposed scheme this element is also reflected in the proposed article 373, paragraph 3, which provides that the court will not declare the composition universally binding if the interests of one or more creditors are disproportionately prejudiced thereby.

The wording "to restructure its debts" is intended to indicate that the composition does not have to relate only to existing debts but may also include the restructuring of future obligations arising from legal relationships existing at the time of offering the composition. There are good grounds for the latter since it may be a requirement for a successful reorganisation that such future obligations are also restructured. This could, for instance, include the rental of an office building that must be adjusted downwards to ensure that it does not continue to hang like a millstone around the neck of the company and thus prevent a successful reorganisation, or the interest to be paid on a certain credit.

A number of stakeholders have argued in this context that a modification of future obligations could be unreasonably onerous for the party whose corresponding rights are amended: it could lead to that party itself getting in trouble with its business model or financing structure and in the worst case no longer being able meet its own obligations. This risk is, however, offset by two principles: the first is that the relevant creditors are grouped in a class which can vote against the composition in this case. If that happens, the composition will be rejected pursuant to the proposed article 372 paragraphs 2 and 3. The party offering the composition will, pursuant to the proposed article 373 paragraph 2, then still be able to petition the court to declare the composition universally binding, but there are protections in that case as well. For example, under the proposed article 373 paragraph 3, the court can only proceed with declaring a rejected composition universally binding if, all circumstances considered, the opposed voting class could not reasonably have come to its voting behaviour. Furthermore, the petition declaring a composition universally binding under the proposed article 373 paragraph 3 must be rejected by the court if the interests of one or more creditors or shareholders would be prejudiced disproportionately by granting the petition. If therefore the relevant creditors can demonstrate that the composition is not reasonable and/or that an amendment over their agreement will in the future harm their interests disproportionately, the composition will not be declared universally binding by the court. The second safeguard is that such creditors may terminate the relevant agreement pursuant to the proposed article 373 paragraph 4.

The word "offer" is intended to indicate that the composition is essentially nothing more than an agreement between the debtor and its creditors. It is open to the debtor or the creditor who offers the composition to design the proposal for the composition as he wishes. Next, the creditors are free to decide whether or not to accept the composition. If the creditors accept the composition, a multiparty agreement is concluded. The special feature of the multiparty "composition outside bankruptcy" agreement is that normally a creditor can only become a party to an agreement if he expressed the will to be bound in a statement (article 3:33 BW) while in the case of a universally binding composition he may also be involved against his will. This is possible if that composition is accepted by a majority of creditors and is declared universally binding by the court.
The words "that provides for amending their rights" are intended to indicate what a composition may contain, namely an amendment of the rights of creditors and shareholders. The restructuring composition outside bankruptcy will indeed require a rearrangement of the legal rights of creditors and shareholders in the sense those rights are restricted. For creditors such a restriction will usually imply that they agree that a portion of the claim that they have against the debtor will not be met by him. They thus waive (part of) their claim against the debtor. The waiver can be made in absolute or relative terms. In case of an absolute waiver, the creditors abandon the relevant part of the claim completely, so that it extinguishes. If there is relative waiver, the creditors only waive their right to demand the relevant part of the claim. In that case, the claim continues to exist (see further R.M. Hermans and R.D. Vriesendorp, *The compulsory composition in insolvency law: Freedom in bondage*, Tvl 2014/10).

Creditors may also agree in a restructuring agreement that they will relax the conditions attached to their claim. They can for instance agree a deferral of payment, accept a lower interest rate, waive penalties or ease the events of default of a loan.

For shareholders, the restriction of rights could mean that they cannot exercise rights connected to their shares such as voting rights, the right to attend meetings, rights of consent, rights to dividends or the right to the liquidation balance, or that these rights extinguish. An important and relatively common modification of the rights of shareholders is that the decisions normally reserved to the general meeting with respect to attracting new equity capital may be taken without the cooperation of the general meeting, and the pre-emptive rights of existing shareholders are excluded when issuing new shares to an issuer of new credit or to the creditors as compensation for a partial write-off of their claims. The issue of new shares will dilute the interest of the original shareholders. Thus, their influence will be smaller if the company recovers. This is also the case if the nominal value of the shares is reduced or the shares held by the shareholders are withdrawn without (full) reimbursement.

*Paragraph 2*

This paragraph provides that a creditor may offer a composition as well. On this point, the proposed scheme corresponds to the scheme of arrangement and Chapter 11, both of which also provide the opportunity for a creditor to offer a composition. The reason is that it may occur that the creditors are prepared to save the company by a composition, but the management of the company, under pressure from the shareholder, does not want to collaborate. At present creditors in such a case use the right of inquiry that applies to pledgees with a right to attend meetings or creditors who have negotiated a contractual right to request an inquiry (article 2:346 sub c BW). However, this is a time-consuming, costly and therefore undesirable solution. For that reason, it is proposed that the relevant creditor should itself be able to offer the other creditors a composition.

The offer of a composition by the creditor is, however, subject to two conditions, namely (i) the creditor has determined that the debtor is headed for bankruptcy, and (ii) it has first given the debtor an opportunity to offer a composition itself. The requirement that the creditor must be satisfied that the debtor is headed for bankruptcy
is intended to prevent creditors from offering a composition whenever they choose, thus creating unnecessary unrest and undermining the usual course of business of the company. The requirement that a reasonable time should elapse prior to offering the composition without the company having made an offer itself even after insistence of the creditor is not unknown in the law: in case of a shareholder making a request to the Chamber of Commerce to start an inquiry into the policy and affairs of a legal person, article 2:349 paragraph 1 BW also requires that the shareholder first make his objections known, and that he give a reasonable time to the management of the company to accommodate such objections. In the case of a compulsory composition, the arrangement is the same: the company must first be given the time to take action itself.

In the discussions that have taken place with the stakeholders in response to a draft for this bill, the question was asked whether shareholders or members can ask the board of the entity or indeed instruct it to offer a composition. To the extent that they themselves are creditors, the shareholders or members in their capacity as creditors can ask the entity to offer a composition. To the extent that they are not themselves creditors, shareholders or members can ask the board of the legal entity to offer a composition. Because of the principle of administrative independence, which will be further discussed in the notes to paragraph 5 of this article, a request from an individual member, in principle, does not require an answer to be given since the determination of the policy and strategy of the legal entity is reserved to the board. In the case of an association or a foundation, the articles of association may provide for a right to give instructions for certain members. For the N.V. and B.V. this is not the case. For the N.V. the law (article 2:129 paragraph 4 BW) provides that the articles of association may stipulate that the board must comply with the instructions of another body of the company. Furthermore, such instructions must concern the general outlines of the policy. An individual shareholder is not a body. A shareholder instructing the board to offer a composition is to be regarded as a specific instruction, which does not need to be followed by the board of the N.V. For a B.V., the law stipulates (article 2:239 4 BW) that the articles of association may provide that the board must follow the instructions of another body of the company. Individual shareholders cannot be regarded as a body. Thus, individual shareholders of a BV cannot instruct the board to offer a composition.

In discussions with stakeholders the question has also arisen whether creditors may offer competing composition proposals. The current wording therefore creates room for this. The idea that underlies this choice is that it reduces the risk that the party offering the composition is acting exclusively with its own interests in mind.

**Paragraph 3**

This paragraph satisfies the desire expressed by practice to be able to deal with the restructuring of a group of enterprises in one go. It opens the possibility not only to involve the relevant “main enterprise” in the composition but also the group companies of that enterprise that are guarantors, provide surety or have provided collateral. The same applies to the parent company that has issued a statement under article 2:403 BW and has undertaken joint and several liability in respect of the debts of a subsidiary, as well as to the joint and several liability of subsidiaries in the event of a tax entity within the meaning of article 39 of the Collection of
State Taxes Act. To bring about the restructuring of the entire group of enterprises, this provision is also arranged such that it includes creditors’ set-off rights, for example against the group companies of the debtor.

This paragraph for instance provides a finance company that has raised funds by means of issuing bonds under guarantee of its parent company the possibility of offering its creditors a composition under which the creditors have to waive their claim on the guarantor parent company. This means that a substantial impairment of the group’s value can be prevented, which would otherwise be the case if the parent company were to go bankrupt. After all, in economic terms the parent company and its finance company subsidiary form one entity. If the composition for the creditors of the finance company is to be acceptable, the shareholders and (some of the) creditors of the parent company will have to agree to a voluntary debt restructuring. This, of course, requires the composition to be fair with respect to the creditors of the finance company, despite the fact that they are waiving their rights against the guarantor parent company (see R.M. Hermans and R.D. Vriesendorp, Het dwangakkoord in het insolventierecht: Vrijheid in gebondenheid? (Compulsory composition in insolvency law: Freedom in restraint?) Tvi 2014/10).

This paragraph also seeks to reduce the costs of a reorganisation (points 7, 15, 17 and 21 of the preamble), thereby satisfying the recommendation of the European Commission on a new approach to bankruptcy and insolvency, which calls on reducing as much as possible the costs of a reorganisation.

*Paragraphs 4 and 5*

These paragraphs ensure that the rules on resolutions by the general meeting do not apply to the composition. They also provide that the managing board of the legal person does not require the general meeting’s approval to offer a composition, and that contractual regulations or rules in the articles of association to that effect are void. Furthermore, they provide for the eventuality that to the extent a resolution by the general meeting would be required for the implementation of the composition, a res judicata decision declaring the composition to be universally binding will take the place of such resolution.

The proposed provision is in line with the system of our law of legal persons and the ensuing division of powers, duties and responsibilities between the different bodies. Article 2:9 BW stipulates that the board of directors is required to properly perform its tasks towards the legal person. Under article 2:129/239 paragraph 5 BW, the managing board of a public limited company (N.V.) or a private limited company (B.V.) must, in the performance of its tasks, be guided by the interests of the company and its affiliated enterprise. If the Management and Supervision of Legal Persons bill (Parliamentary Papers II, PM) is enacted, instead of these provisions a general provision (Article PM) will be included which will oblige the (boards of) directors of all entities to be guided by the interests of the legal person and its affiliated organisation.

What is meant by the managing board being guided by the interests of the legal person is that the board must ensure a healthy existence, growth and continued existence of the legal person; incidentally, continued existence is not a goal in itself. This “Rhineland model” approach to corporate law is still commonly accepted in
continental Europe and is endorsed by the Cabinet. It entails that the managing board should not only represent the interests of shareholders: the interests of the employees that work in the enterprise run by the company and the interests of the creditors must also be taken into consideration in the board’s decisions (see J.M.M. Maeijer in Asser/Maeijer 2-II (2000), No. 293; Oratie 1964 en Serie vanwege het Van der Heijden Instituut Part 7 (1972) and Part 22 (1982)).

It is settled case law of the Supreme Court that the managing board of the legal person has an autonomous role in performing its tasks; it is therefore only the board that determines the legal person’s policies and strategy (Supreme Court, 21 January 1955, Dutch Law Reports 1959/43 (Forumbank); 13 July 2007, Business & Law Reports 2007/178 (ABN AMRO) and 9 July 2010, Business & Law Reports 2010/228 (ASMI)).

It is precisely when a legal person experiences financial distress that it is, first and foremost, the task of the board of directors to find a solution. To do so it is essential that the board has the opportunity to make use, in relative calm, of the instruments at its disposal, one of which is the composition. At the same time, decisions have to be made with the necessary speed. To prevent the company from falling into a downward spiral in which its value rapidly declines, it is also important that the composition can be prepared in relative silence. If the general meeting’s approval for offering the composition had to be requested first, it would be practically impossible – especially with larger companies with many shareholders – to maintain silence about the offer of the composition. The fact that a large number of people (the shareholders) must first be called to a general meeting at which they are then notified of the financial problems and the associated intention to offer a composition entails a substantial risk that the “news” about the company’s financial problems would be out in the open before the composition is even offered. As stated in the principle outlined in subsection 3.6 of the general part of this explanation, the situation that shareholders might block the restructuring on account of “perverse incentives” rather than for business reasons must also be prevented. The same subsection explains that it is for this reason that a rearrangement of the shareholders’ position should also be possible without requiring their consent.

Given the above it is not opportune that the managing board would depend on a positive decision by the general meeting in order to offer and implement the composition. If their rights are amended by the composition, shareholders can express their opinion through the procedure provided for in the composition scheme, which also provides them with guarantees through the provision of enhanced majorities, quorums and a two-fold assessment by the court in the decision declaring the composition to be universally binding.

**Paragraph 6**

Subsection 1 of the general part of this memorandum explains that the compulsory composition scheme applies to all enterprises, regardless of the legal form in which they are run. Enterprises may also be run by associations and cooperatives. These legal forms, however, have members and not shareholders. This paragraph therefore stipulates that everything that applies to shareholders also applies to members.
Paragraph 7

What is set out above in the explanatory notes to paragraph 6 applies equally to holders of depositary receipts for shares, who may have meeting rights and on that basis may vote against the composition. This also includes New York Stock Exchange listed ADRs, which are used by Dutch companies listed on that exchange and have many similarities with depositary receipts for shares.

As regards holders of a pledge on shares, although they may have the rights of a holder of depositary receipts for shares (article 2:89/1984 BW) they do not have the economic interest in the shares: this remains with the shareholder.

Paragraph 8

This paragraph provides that the compulsory composition scheme does not apply to banks. The reason is that banks have their own rescue mechanism by means of the Intervention Act, which is also aimed at the prevention of bankruptcy. A compulsory composition could interfere with this rescue mechanism, which is undesirable.

Paragraph 9

This paragraph provides that the composition cannot entail the modification of an employment contract. This has to be done through the appropriate mechanism, which has recently been streamlined under the Work and Security Act.

Article 369 Division of creditors and shareholders into classes and voting rights

Introductory remarks

This provision describes one of the main components of the scheme. It provides a basis for the classification and determines who has voting rights.

Paragraph 1

This paragraph provides that the debtor or the creditor offering the composition can divide the creditors and shareholders into classes. This is in line with the English scheme of arrangement and US Chapter 11 proceedings. As a result, the opportunity is created to offer a composition tailored to the specific circumstances of the case and to respond to the recommendation of the European Commission on a new approach to bankruptcy which, in subsection 20, assumes that it should be possible for a restructuring plan to offer a composition only to certain creditors or certain classes of creditors.
This paragraph therefore makes it possible to, for instance, only offer a composition to creditors whose claims are backed by pledges, or to holders of preference shares, or to priority shares.

**Paragraph 2**

This paragraph contains the criterion for division into classes. In the Netherlands there is currently no compulsory composition scheme outside bankruptcy, nor does the composition scheme provide for the division into classes in suspension of payments and bankruptcy. There is, therefore, no criterion for the division into classes. Consequently, the classification and the criterion to be applied will be established in line with the scheme of arrangement and the associated case law as well as the recommendation of the European Commission on a new approach to bankruptcy and insolvency. Point 17 thereof provides for the possibility, in the framework of a restructuring plan, to classify creditors with different interests into different classes so that those interests are reflected.

The scheme under proposal, like the scheme of arrangement, does not provide for predefined classes. A system of predefined classes is inevitably static and carries the risk of ultimately not being in line with the circumstances of a particular case. It would in fact cancel out one of the main goals of this proposal: a flexible scheme that can be tailored to the circumstances of the case. It could also result in an incessant and time-consuming process of adaptation. Practitioners therefore insist that the relevant legislation should not include an exhaustively defined set of classes. That desire is fulfilled by the proposed provision.

The scheme of arrangement does not provide an explicit criterion for the division into classes. The criterion provided for in case law in this regard is that “a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.” The question that must be answered is: “are the rights of those to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought the scheme to be regarded, on a true analysis, as a number of linked arrangements? (Bowen Justice in Re Hawk Insurance Co Ltd (2001), 2 BCLC 480, Subsections 23 and 30 and Chadwick Lord Justice in Sovereign Life Assurance Company v. Dodd (1892), QB 573, Subsection 583).

The proposed paragraph 2 provides that creditors with claims and shareholders with rights that should reasonably be deemed as being similar should be placed in the same class. This proposed criterion is aimed at achieving maximum flexibility on the one hand and, on the other hand – as denoted by the terms “reasonable” and “deemed” – introducing some form of limitation to prevent what is described in case law pertaining to the scheme of arrangement as “an unnecessary proliferation of classes” (Lord Justice Pill in Re Hawk Insurance Co Ltd (2001) 2 BCLC 480, Subsection 33).

One possible interpretation of the proposed criterion could be that a class must be confined to creditors or shareholders whose claims or rights are similar to the extent that they may be reasonably expected to define a common standpoint among themselves. A further detailing of this criterion could be to consider if the rights of
those affected by the composition are similar to the extent that it can be seen as a single composition; if this is the case they should be placed in one class. If that is not the case, and the rights are so dissimilar that it is more a set of separate compositions ultimately leading to one big composition, they may be placed into separate classes. This criterion and this interpretation make it possible, for example, to distinguish between pledgees and mortgage holders of different rank, or between the secured and unsecured part of a debt.

A question that might arise in the context of this paragraph is at what point in time it should be assessed whether the claims of creditors and the rights of shareholders are similar. It is obvious that this should be the point in time when the composition is submitted to them.

**Paragraph 3**

This paragraph provides who is entitled to vote on the composition. These are the creditors and shareholders whose rights are amended by the composition. This is in line with subsection 20 of the recommendation of the European Commission on a new approach to bankruptcy and insolvency, which entails that if the restructuring plan does not affect all creditors, not all creditors have to give their consent. The scheme of arrangement also assumes that shareholders or creditors whose rights are not changed do not have to give their consent to the arrangement (Re United Provident Assurance Company Ltd (1910), 2 Ch 477, in G. O’Dea and L. Long et al, Schemes of arrangement, Law and Practice, Oxford University Press 2012, p. 37).

It was considered to include in this paragraph the provision that creditors and/or shareholders who would not get a distribution from the bankruptcy estate or who would get a lower distribution than provided for in the composition in the event of liquidation of the debtor would not have voting rights. However, as shown by the experiences of Chapter 11 such an arrangement can lead to a situation where, already in the stage of establishing the composition, all kinds of complex valuation issues arise which have to be resolved by the court. This would concern in particular the question of the amount of the distribution in bankruptcy. All these issues lead to delays and high costs. Such points of dispute could, moreover, be raised by intractable creditors early in the proceedings merely with the intent of obstructing the composition. The system proposed, in which all creditors and shareholders whose rights are amended have a vote, would prevent this.

**Paragraph 4**

This paragraph is related to the fact that there are a number of situations conceivable in which the economic interest in a claim, a derived right or a share rests with someone other than the legal owner. The beneficial owner bears the risk of any impairment of the relevant assets. In case of a composition there is therefore the risk that under the composition, part of the claim or the investment in shares is not refunded, or is refunded at a later date or under other conditions, at the expense of the beneficial owner. It is therefore obvious that beneficial owners should be able to vote on the composition if they so desire. The proposed paragraph 4 provides for that opportunity.
The fact that the beneficial owner can vote on the composition does not mean that the legal owner who considers his interests harmed by the outcome of the composition is left empty-handed: he may oppose the composition being declared universally binding. The proposed article 373 paragraph 3a, after all, provides that the court must reject an application to declare the composition to be universally binding if the interests of one or more creditors or shareholders are disproportionately harmed by declaring the composition to be universally binding.

In any event, this paragraph can be of service in a number of cases. Consider, for instance, the beneficiaries of bonds issued. According to the Supreme Court (26 August 2003, Business & Law Reports 2003/211 (UPC)), from the viewpoint of equity and efficiency such beneficiaries should be put on a par with creditors as referred to in the Bankruptcy Act. In the event of a suspension of payments or bankruptcy, they also have the power to vote on a composition. The same will be put in place for the compulsory composition outside bankruptcy.

With regard to shares, this paragraph may be of use in the event depositary receipts are issued for these shares; this means that the voting rights on the shares and the economic rights (receiving dividends) are separate. The shareholder has the voting right and the depositary receipt holder has the economic right: the shareholder passes the dividend on to the depositary receipt holder. Now, the depositary receipt holder can vote.

**Article 370 Proposal for the composition**

*Introductory remarks*

The purpose of this article is to give those whose rights are changed by the composition and may vote on it the opportunity to make a well-informed decision. To this end the article provides when the composition has to be submitted to them, as well as what information must be included in or attached to the proposal for the composition. This article also contains a provision regarding voting procedures.

*Paragraph 1*

This paragraph provides that the composition must be submitted to the creditors and the shareholders whose rights are to be amended by the composition at least eight days before voting takes place, or that they should be notified as to how they can inspect the composition.

The period of at least eight days is relatively short. One of the requirements for a successful restructuring is that it should be able to take place within the shortest possible period; this is one of the objectives of the bill. If this paragraph were to stipulate that the composition should be submitted longer than eight days before the vote, it would be at the expense of the required speed. The eight-day period will in many cases not be objectionable because the contents of the proposal will already be known to the creditors concerned before the proposal is submitted to them, as the debtor or the creditor offering the composition will already have discussed or negotiated the contents with them. In restructuring proceedings according to Chapter 11, it is in fact common for
creditors to be asked even before a composition is offered to declare whether they will vote for or against the composition.

The choice to include a provision that the composition must be submitted to those shareholders and creditors whose rights it amends is based on the fact that only those creditors and shareholders have voting rights. This approach also ensures that the composition is not publicised in a larger circle than is strictly necessary, thereby avoiding the situation that the company’s financial problems get “aired in public”. This formulation is also in line with the recommendation of the European Commission on a new approach to bankruptcy and insolvency. The recommendation states (Point 20) that if the restructuring plan does not affect all creditors, not all creditors have to consent to it.

In submitting the proposal for the composition to the creditors and shareholders, the debtor or the creditor wishing to offer the composition may elect to send all creditors and shareholders the entire proposal with the associated documents. However, in the interest of cost-savings and speeding up the process, the party offering the composition may elect to notify the creditors and shareholders of how they may inspect the associated documents. That could be on a restricted area of the company’s website, for example. The relevant information could also be made available through creditor portals like IntraLinks or Epiq (increasingly common with large financing operations) where the company and also its creditors exchange information.

**Paragraph 2**

This paragraph addresses the information that must be included in the settlement proposal.

(a) the composition, an substantiation thereof and a description of the financial consequences per class of creditors and shareholders and the manner in which the composition will contribute to the prevention of bankruptcy. This will give the parties whose rights are affected by the composition insight into the primary elements of the composition. They will not be able to take an informed decision without these elements. This information will also be essential for the assessment of a request to suspend the processing of a bankruptcy petition, which may be done based on the proposed article 3c by the debtor or creditor who offered the composition.

(b) The classification and the criteria based on which this was performed. Reference is made in this regard to the explanation to the proposed article 369.

(c) The valuation. The debtor or creditor who offers the composition in the first instance determines the valuation method. The valuation method could include the going concern value, or the liquidation value or any other form of valuation. The fact that the creditor may choose the valuation method means that he will need to explain why the particular method was chosen. After all, the valuation of the claims also depends, for example, on the amount of weight the vote of a creditor carries.
Creditors who object to the evaluation method used by the debtor or find the substantiation thereof to be lacking in some way, would ask the court, based on the proposed article 371, to appoint a delegated judge and then ask the delegated judge to render a preliminary ruling on whether the valuation method meets the court’s requirements for the assessment of an petition for declaring the composition universally binding. Further, the creditors whose rights are changed during the phase in which the creditor submitted an application for declaring the composition universally binding could state that they were treated unfairly by the evaluation method used and by the classification resulting from this.

(d) If the composition concerns a payment: the moment when the payment is to be made. This way, the debtors and creditors will know when they will be able to receive a part of their claim or investment.

(e) The manner in which the creditors and shareholders whose rights are to be amended by the composition can obtain information about this. As such, a person will need to be appointed to whom the creditors and shareholders can go with their questions. This could also be a lawyer or an auditor.

(f) The procedures for voting on the composition, which at least includes a vote during a physical meeting or a meeting held in writing or via electronic means of communication, per class of creditors or shareholders entitled to vote, and the time when the particular meeting will take place or when the vote must be cast. This part enables customisation and contributes to reducing costs because it is possible to vote electronically. The reason that there must be a meeting per class is that various (sub) agreements could be presented to different classes. If this is not the case, there are creditors with claims and shareholders with rights that could be considered more or less equal. Division into different classes does then not make as much sense.

(g) The manner in which the creditors and shareholders whose rights were affected by the composition take cognisance of the result. For this, it applies for both creditors and shareholders [sic].

**Paragraph 3**

This paragraph addresses the additional information that must be included in the settlement proposal, namely:

(a) a plan that explains the manner in which the debtor plans to secure the continuity of his enterprise after the execution of the composition. This plan must at least include the financial, operational, organization and other adjustments that form the foundation of the composition. This restructuring plan could also help the court when assessing the application for declaring the composition universally binding.

(b) a list of the creditors stating in any case the amount of their claim and the class they are placed into. This enables the creditors to contact each other if they have not already done so. It may be the case that certain creditors are unknown. In that case they will need to be convened in a manner proposed to the court by the party offering the composition.

(c) if the composition requires an amendment of the articles of association: a draft for such amendment was signed by a notary. The proposed article 379 paragraph 2 states that insofar as the implementation of the
composition includes a decision of the general meeting or a notarial deed, the final order declaring the composition universally binding will substitute this. This is also applicable if an amendment of the articles of association is required. In that framework it would be best if the content of the amendment of the articles of association is known in advance.

(d) - (f) this information is in particular used to give holders of shares and/or securities insight into the amount of weight their votes would carry.

(g) insofar as available, the financial statements and the annual report of the last two years for which financial statements were prepared. This formulation takes into account the possibility that the financial statements have been compiled, but not adopted. In order to evaluate the composition it may be useful to not only have the latest financial statements, but at least those of the year before that too. This enables those whose rights are to be amended by the composition to make an informed comparison. It is not at all uncommon to have to provide financial statements of previous years. In buy-out proceedings based on article 2:201a BW, the Enterprise Chamber of the Amsterdam Court even requires the financial statements of the past three years.

(h) - (i) a cash flow statement and a statement of known assets and liabilities provide insight into the income that could still be expected and with that, the feasibility of the composition.

(j) the balance sheet and profit and loss statement or numbers about the last financial year, or the interim balance sheet or profit and loss statement, or numbers that provide insight into the financial position and the results of the company until at least three months before offering the composition, provide insight into the development of income and expenses.

Article 371  Disputes on value, classification and voting

Introductory remarks

The general section of this explanation outlines that one of the cornerstones of this proposal is to limit judicial involvement as much as possible. Further, it has been explained that the composition must be seen as an agreement. Since agreements are made between parties, the court is in principle only involved when it assesses the request to declare the composition universally binding. After all, declaring the composition universally binding may also bind parties to it composition with whom no agreement was reached. However, during the phase in which where the composition is set up, in particular after it is offered to the creditors and/or the shareholders, disputes may arise about the valuation of claims, the classification or the voting procedures. Postponing solving such issues until the phase in which the court assesses the request to declare the composition universally binding, could mean that the composition becomes unsettled.

That risk is undesirable in view of “deal certainty”, which is important for those involved with the composition. If the composition has to be renegotiated and voted on again, that would jeopardise the speed at which the
composition is established. On the other hand it is important to avoid that the phase during which the composition is offered and must be voted upon becomes too legal. After all, that would also lead to delays and high costs. On these points there is a need in England and Wales and the United States for improvement of the scheme or arrangement and Chapter 11.

Paragraph 1

This paragraph provides that the court, on request of the debtor, the creditor who offered the composition was or the creditors and shareholders whose rights are to be amended by the composition, may appoint a delegated judge. Such an appointment is thus not standard, since the point of departure for the composition procedure is that it takes place out of court until the time of the request for declaring the composition universally binding.

This paragraph further provides that the delegated judge may indicate whether the method used to assess the claims of the creditors, the classification or the voting procedures in his preliminary opinion comply with the requirements the court would have when assessing a request for declaring the composition universally binding. The term “in his preliminary opinion” aims to express that the delegated judge will only give an indication that could be defined as a first marginal check. A definitive assessment by the delegated judge is not appropriate: it would interfere with the basic assumption of limited judicial involvement during the extrajudicial phase and would jeopardise the speed of the proceedings. Since the compulsory composition is in fact an agreement, the parties are free to agree to it or oppose it. If, however, the majority votes in favour of the composition, the objecting parties may also be bound, but before this happens, it will first be tested legally.

Based on part b. of this paragraph, the designated judge may indicate whether the proposed composition needs to be amended or supplemented because such is reasonably required to enable informed decision making. The delegated judge will take into account which information is usually available in similar cases.

Paragraph 2

Practitioners put forward the request that the court should be able to settle differences of opinion about who will be allowed to vote to which amount. The scheme of arrangement also has provisions for this in the sense that the chairman of the meeting appointed by the court of the relevant class has the power to determine whether and if so to what amount a creditor or shareholder must be allowed to vote. As regards the compulsory composition in suspension of payments, the law actually offers this possibility, with article 267 Fw. This paragraph was inspired by that provision and gives the delegated judge, or if such a person was not appointed by the court, [sic] the opportunity to determine, on request of a creditor or shareholder, whether he will be allowed to vote and up to what amount.

The delegated judge or the court takes an independent decision based on what the parties put forward. He is free appraisal thereof. The decision of the designated judge or the court could vary from not allowing the relevant creditor or shareholder, to fully or partially allowing him. It is not possible to appeal against the decision of the delegated judge, since this would jeopardise the speed of the procedure.
The decision of the delegated judge may still be put up for discussion later, when the request for declaring the composition universally binding is dealt with.

**Paragraphs 3 and 4**

Paragraph 3 formulates the principle of the adversarial process, which is so much self-explanatory that it does not need further explanation. The composition in general and valuation matters in particular, can concern highly complicated matters. It is therefore plausible that the delegated judge or the court requires support from an independent expert. Paragraph 4 gives them the opportunity to consult such an expert.

**Paragraph 5**

This paragraph excludes appeal against the statements of the delegated judge as meant in paragraph 1 and decisions of the delegated judge or the court as meant in paragraph 2. The delegated judge will not take any formal decision with regard to the statements as meant in paragraph 1. It is up to party offering the composition to decide what he will do about the statements of the delegated judge. If he ignores them, there is a risk that the court will reach the same decision as the delegated judge and reject the request for declaring the composition universally binding. As regards the decisions referred to in paragraph s, the creditor may readdress those in this phase when the request to declare the composition universally binding is assessed. This is why an appeal is not possible here.

**Article 372  Vote on the composition**

**Introductory remarks**

This article regulates the procedures for voting on the composition, the majority required for a valid vote, as well as the manner in which the report on the vote is presented to those who voted.

**Paragraph 1**

This paragraph provides that the vote takes place according to the procedures provided for this purpose in the proposal for the composition. Based on this it is possible to adapt to the circumstances and maximum flexibility is available. This ties in with the key points set out in subsections 3.2 and 3.3 of the general section of this explanation that customisation must be possible and that costs must be limited where possible. The recommendation of the European Committee concerning a new approach to bankruptcy and insolvency aims at measures to be taken that are workable for large companies as well as small and medium-sized enterprises.

**Paragraph 2**
This paragraph provides that the composition has been accepted if all classes accepted the composition. If all classes do not accept it, the composition has been rejected. In that case the party offering the composition may request that it be declared universally binding based on the proposed article 373 paragraph 2.

Through the wording chosen for this paragraph, due to which all classes of creditors and shareholders entitled to vote must agree to the composition, a different arrangement was chosen as compared to Chapter 11, where some classes that do not receive any distribution are deemed to have voted against the composition. Even if some classes do not receive any distribution under the composition, they may have reasons to agree to the composition, for instance if implementation of the composition could lead to them being able to maintain a good trade relationship with the enterprise.

**Paragraph 3**

This paragraph determines when a class has agreed to the composition. This is the case when two requirements have been met, namely (a) a normal majority, in other words more than one-half, of the creditors or shareholders of the class that participated in the vote must have voted in favour of the composition, and (b) the majority must represent at least two-thirds of the amount of the claims of the creditors who participated in the vote or at least two-thirds of the issued capital that the voting shareholders in the class represent. These majorities are justified since it concerns a procedure outside insolvency and since there is no liquidator to supervise. The general section of this explanation already clarified that the majorities prescribed in this paragraph are in line with the requirements used in the models of the Loan Market Association, which are internationally recognized and normally used for financing transaction.

For the threshold in part b., it was decided that the majority must represent two thirds of the total amount of claims of the creditors participating in the vote or two thirds of the issued share capital held by those [participating] shareholders. A majority of the total amount of claims or the total amount of issued share capital, including the claims and shares of creditors or shareholders not participating in the vote, has not been chosen. The reason for this is to prevent creditors or shareholders from manipulating the vote by merely staying away. Further, some degree of responsibility may be expected from parties whose rights are to be amended by the composition and who were timely informed thereof and consulted about it, which means that they understand that if they do not participate in the vote the chance that their rights could be affected may increase. In addition, parties who do not participate in the vote may also appeal to the court that their interests are disproportionally prejudiced in case of a request to declare the composition universally binding based on the proposed article 373 paragraph 3.

**Paragraph 4**

This paragraph determines that posterior changes to the number of creditors or to the amount of claims, occurring after the vote, will not influence the validity of the vote. The rules concerning the composition during bankruptcy has similar provisions in article 147 Fw, which pursuant to article 268 Fw is equally applicable in
case of a composition in suspension of payments. Without such a provision, there could be major uncertainty about whether the composition will go through, which is undesirable.

Based on the proposed article 382 part a, the composition is not binding on creditors and shareholders whose rights are to be amended by the composition, but who were not given the opportunity to vote. In order to ensure the stability of the composition, the proposed article 380 paragraph 2 contains a regulation that offers room for a monetary payment. Reference is made to the relevant provisions for an explanation.

Paragraphs 5 and 6

Paragraph 5 provides that the debtor or the creditor who offered the composition must prepare a report of the vote. This must happen immediately after the vote. A fixed term was not chosen to keep the scheme as flexible as possible. The report with respect to a composition that affects the rights of many creditors and/or shareholders could after all take a lot more time than a report in connection with a composition that only amends the rights of a few creditors and/or shareholders. In addition, the debtor or the creditor who offered the composition will always want the composition to be settled as soon as possible and thus also has a major interest in fast compilation of the report. He will thus not delay preparation of the report. Further, even if the composition was rejected, fast compilation of the report will help the party offering the composition, since it will then be able to submit its request to declare the composition universally binding more quickly.

Paragraph 5 also specifies the information that must be included in the report. The provision mirrored the rules in this regard concerning the compulsory composition in bankruptcy, which are included in article 148 Fw. As compare to that article, paragraph 5 introduces that it must also be indicated whether the creditor or the debtor who proposed the composition will submit a request to have composition declared universally binding. This could concern a request based on the proposed article 373 paragraph 1, in other words declaring an approved composition universally binding, but it can also concern a request based on the proposed article 373 (2), i.e. declaring a rejected composition universally binding. This will ensure that creditors and shareholders who voted against the composition will be informed in time about a request to declare it universally binding.

Paragraph 6 is included for retaining speed in the procedure, timely informing the relevant creditors, and maintaining flexibility. It provides that the creditors and shareholders whose rights are to be amended by the composition must be able to take cognisance of the report as soon as possible after it is signed. This can be done in the manner provided for in the composition proposal. The creditors and shareholders whose rights are affected by the composition will thus be informed in advance about how they will be able to inform themselves about the vote.

Paragraph 7

The purpose of this paragraph is to guarantee that a suspension of the processing of the petition for bankruptcy based on article 3c does not take longer than necessary. If the composition is rejected, the court may in principle revoke the suspension.
**Article 373  Declaring the composition universally binding**

*Introductory remarks*

This article addresses declaring the composition universally binding. When the composition is declared universally binding, it becomes applicable to all creditors and/or shareholders whose rights were amended, including those who voted against the composition, abstained from voting or who did not attend the vote. Based on the proposed article 380 paragraph a, the composition is not applicable to creditors and shareholders who did not get an opportunity to vote, and that they can in principle claim payment of their claims as usual. The article also includes safeguards to prevent that the restructuring of problematic debts for random, non-commercial or other improper reasons is implemented to the prejudice of a minority of creditors and shareholders.

At this point a few comments about the right to peaceful enjoyment of property, as provided for by section 1 First Protocol of the European Convention on human rights and fundamental freedom (ECHR), are in order. Subsection 1 provides that every natural person or legal person will have the right to enjoy his property without any interruption and that no one will lose ownership, unless it is in the general interest and subject to the terms and conditions provided by law and the general principles of international law. Subsection 2 of section 1 First Protocol ECHR determines that a state has the right to apply such laws as it deems necessary to regulate the use of property in accordance with general interest.

When the composition is declared universally binding, the rights of the creditors and the shareholders related to it are amended, even of those who voted against the composition. By declaring the composition universally binding, creditors and shareholders may lose a part of the claims to their property or claim rights or be restricted in exerting their rights. This means an interference with their property rights. However, the interference is not an infringement of section 1, First Protocol to the EVRM as long as this is justified. From the established legal literature of the European Court of Human Rights we see that three conditions must be met for this, namely (i) the interference is provided for by law, (ii) the interference is justified because it serves a general interest, and (iii) the interference is proportional.

This proposal meets these three requirements. Concerning the first requirement, article 368 in connection with article 373 paragraph 1 or 2 serve as the basis for the interference provided for by law, since article 368 offers the opportunity to offer the composition and article 373 paragraphs 1 and 2 provide the opportunity to declare it universally binding. Concerning the second requirement, the interference is indeed justified and serves the general interest because the composition is required to guarantee the continuity of the company and thus to ensure that the creditors will receive payment for most of their claim and to ensure that the persons employed by the company retain their jobs, and because no other alternatives available. Concerning the third requirement,
proportionality, the rights of the creditors and the shareholders must not be amended more than necessary for the debt restructuring.

**Paragraph 1**

This paragraph states that the court will declare the composition universally binding when it has been accepted. This happens on the request of the debtor or the creditor who offered the composition. If the composition has been accepted by all classes, it has broad support. For this reason, the language “the court declares the composition universally binding” was chosen. The wording means that there is in principle no discretion for the court: a composition must be declared universally binding if it is requested. However, there is an exception to this, which is included in the proposed paragraph 3, namely if the interests of one or more creditors or shareholders are disproportionally prejudiced. Reference is made to the relevant paragraph for an explanation.

**Paragraph 2**

Based on the proposed article 369 (3) in conjunction with 372 (1), all classes of creditors and shareholders whose rights will be affected are allowed to vote on the composition. Based on the proposed article 372 paragraph 2 acceptance of a composition requires that all classes approve the composition. This set-up could entail that creditors or shareholders are able to, by threatening a counter-vote, extort a better position for themselves than would be justified in view of what their position would have been if the debtor’s estate were liquidated in bankruptcy. The general part of the already explained with respect to the shareholders that they tend to vote against the composition hoping that they will still be able to maintain control over the company while not having to contribute to saving it.

Subsection 3.4 of the general part of this explanation set out that the basic assumption of this proposal is that creditors or investors whose claims or investments are “under water”, and who will thus would also not receive any payment in case of bankruptcy or a lower distribution than provided for by the composition, must be allowed to express their opinion about the composition by voting on it, but that they should in principle not be able to stop the composition without good reason. Stakeholders whose claims are partially or fully “above water”, must in principle not be allowed to prevent the composition insofar as they are not worse off than would be the case in bankruptcy. This paragraph achieves that: a composition that was rejected because not all of the classes of creditors and/or shareholders entitled to vote agree to it may be declared universally binding by the court on the request of the debtor or creditor who offered it. This is possible if the court, after taking into account all circumstances, feels that the counter-voting classes could not reasonably voted the way they did.

The words “could reasonably not have come to such voting behaviour” correspond with the rules for the composition in bankruptcy (article 146 paragraph b Fw), which provides that the delegated judge may approve a rejected composition as if it was approved if the creditors who voted against it could reasonably not have come to such voting behaviour. However, the rules for the composition in bankruptcy entail that the composition
approved by the delegated judge will still need to be confirmed. This paragraph combines these two phases with regard to the composition outside bankruptcy, which will save time and costs.

Chapter 11 has similar provisions, which make it possible for the court to bind a class to the plan of reorganisation “if the plan is equitable with respect to each class” (comp. § 1129 of the United States Bankruptcy Code). Whether the composition is reasonable will depend on the circumstances of the case. It follows from this proposal that those will all have to be taken into account by the court. Whether the majority of the classes voted for the composition or against it will play an important role with the assessment, but will not, per definition, be the decisive factor.

Subsection 3.5 of the general section of this explanation clarifies that for the rearrangement of legal rights claims as required by the restructuring both the value of the enterprise and the amount that would be available for payment in case of bankruptcy need to be determined. It also indicates that it will have to be taken into account that certain creditors, such as the Dutch Revenue Service or pledgees or mortgagees have preference in the recourse against the debtor's assets.

In that framework, this paragraph includes four cases in which a vote against the composition cannot be deemed to be unreasonable. In short, this applies if a certain class of creditors or shareholders would receive less from the composition than if they had invoked their rights or if the estate of the debtor was declared bankrupt.

Creditors with a right of pledge or mortgage have a right of immediate recourse and may realise cash revenue by exercising it. For that reason, section a of this paragraph states that a negative vote of a class of creditors with a pledge or mortgage right cannot be overruled by declaring the composition universally binding if the creditors belonging to that class receive a cash amount in accordance with the composition that is lower than the private resale value of the goods on which the pledge or mortgage right has been established.

Creditors with benefitting from a retention of title arrangement may take back the goods supplied if the price is not paid. For this reason, section b of this paragraph states that a negative vote of a class of creditors with a retention of title arrangement cannot be overruled by declaring the composition universally binding if the creditors belonging to such a class receive a cash amount in accordance with the composition that is lower than the private resale value of the goods on which the pledge or mortgage right has been established.

Preferential creditors may claim from the bankruptcy estate with preference. Ordinary creditors do not have that right, but in both cases the composition could not be seen as reasonable if the payment that they would receive from the composition is lower than the payment they would have received if the debtor was declared bankrupt. This was explicitly included in part c. The same largely applies to shareholders: if they would receive less from the composition than in case of liquidation after bankruptcy, the composition cannot be regarded as reasonable towards them.
Paragraph 3

This paragraph contains a general safety net provision that is designed to prevent compositions from being offered for improper reasons or that the damage resulting from the composition would be offloaded by the majority of creditors or shareholders onto the minority. If one of the circumstances referred to in this paragraph occurs, the court must reject the petition to declare the composition universally binding. The wording “reject” has been chosen to express that the court has no discretionary powers here. Insofar as grounds (b) through (d) are concerned, the cases in which the court must reject a petition for declaring a composition universally binding correspond to the cases in which the court refuses approval of a composition on the basis of article 153 Fw. Their main purpose is to prevent a composition being offered in order to delay a petition for bankruptcy or to unduly slow down the procession thereof. Reference is made in this regard to the explanation of the proposed article 3c, which gives the debtor or creditor who has offered the composition the possibility of requesting that the hearing of a petition for a bankruptcy order be suspended.

Paragraph (a) entails that the court must reject the request to declare the composition universally binding if granting the request to declare the composition universally binding would disproportionately prejudice the interests of one or more creditors or shareholders. Such a provision is not present in the scheme with regard to the composition in bankruptcy and the composition in suspension of payments. The part is aimed at preventing the burdens of the restructuring being charged to the minority of creditors or shareholders for improper reasons or by means of manipulative or otherwise incorrect voting procedures. The paragraph is based on case law in respect of the scheme of arrangement, from which certain requirements are arise, namely that (i) “the statutory majority must act bona fide and not coercing the minority, (ii) an intelligent and honest person, a member of the class concerned and acting in his own interest might reasonably approve the scheme and (iii) there must be no blot on the scheme”. Chapter 11 has similar criteria, namely that “the plan must not discriminate unfairly and is fair and equitable with respect to each class.”

If the criteria used in England and Wales and the United States are translated to the Dutch context, it may be asserted that the interests of shareholders or creditors who have voted against the composition will at any rate be disproportionately prejudiced by its being declared universally binding if (i) the composition serves no purpose other than shifting the risk of the reorganization to the opposing minority, (ii) no reasonably thinking creditor or shareholder would have voted for the composition, or (iii) the vote on the composition proceeded unfairly.

Paragraph 4

This paragraph is related to the possibility of the composition comprising a change of future obligations that follow from legal relationships that exist at the time of the composition. Provisions for the possibility of changing future obligations are also included in the rules regarding the scheme of arrangement, on which the proposed scheme is based. However, in the scheme of arrangement the agreement of all the classes is required for acceptance of the composition. In that way the creditors to whom the debtor will owe the future obligations may prevent those obligations from being modified by voting against the composition. The rules around the scheme
of arrangement do not provide for the possibility that the offeror of the composition may request that it be declared universally binding even if the composition has been rejected. Through paragraph 2 of this article, the scheme now proposed does provide for this possibility.

A number of stakeholders have advanced in this regard that an amendment of future obligations could be unreasonably onerous for the party in respect of which the obligations are amended: it could lead to that party itself running into problems with its business model or financing structure and in the worst case no longer being able to fulfil its own obligations. This risk is removed because the relevant shareholders are placed in a class that can vote against the composition so that the composition is rejected by virtue of the proposed article 372(2) and (3). By virtue of the proposed article 373(2) the offeror may then request as yet that the composition be declared universally binding, but protection has also been provided in that scenario. The court must examine on the basis of the proposed paragraph 2 whether the composition is reasonable, all circumstances considered, and the request for having the composition declared universally binding by virtue of the proposed article 373 (3) (a) must be rejected by the court if the interests of one or more creditors or shareholders are disproportionally prejudiced by granting the request. If therefore the relevant creditors can make it plausible that the composition is not reasonable and/or that an amendment of their agreements for the future leads to their interests being disproportionally harmed, the composition will not be declared universally binding by the court.

The second safeguard is included in this paragraph. It entails that the relevant creditors can terminate their agreement on the basis of the proposed article 373(4) with effect from the date on which the decision on declaring the composition universally binding becomes final. It has been provided, however, that the debtor can request the court to impose further conditions on such a termination. Such conditions could for instance entail that termination is only permitted by a certain, later, date or that a penalty clause will not apply. In this way a balance is created between on the one hand the interest of the debtor in not being bound by an agreement that obstructs a successful reorganisation and on the other hand the interest of his contract partner in not being bound by something that may cause problems to himself.

Article 374 The petition

Introductory remarks

This article regulates when the petition for having the composition declared universally binding can be submitted and also what requirements the request must meet.

Paragraph 1

In the first paragraph it has been provided that there must be at least eight days between the time at which creditors and shareholders can learn of the outcome of the vote and the time at which the petition for declaring the composition universally binding is submitted. This period has been mirrored from the composition in
bankruptcy, which provides that creditors may inspect the official report of the vote on the composition during eight days.

Paragraph 2

In this paragraph it has been provided which documents must be attached to the petition. They include both the composition ultimately reached and the original proposal. The court must be able to peruse both documents to be able to establish whether alterations have been implemented in the meantime. In the assessment of the petition for declaring the composition universally binding this may be important to determine whether a dissenting class could have reasonably arrived at its voting behaviour. If for instance far-reaching adjustments have been implemented to accommodate the relevant class, this may contribute to the opinion that it cannot have reasonably arrived at its voting behaviour.

With regard to shareholders, there may be registered shares and bearer shares. In the case of registered shares the company knows who its shareholders are. In the case of bearer shares it usually does not know so and they will have to be summoned in a way designated by the court.

Paragraph 3

This paragraph has been included to emphasise that the petition for declaring the composition universally binding has to be heard with the utmost urgency in order to bring about that the restructuring can be realised as soon as possible.

Article 375 Determination of the date of the court hearing

Introductory remarks

This article deals with the determination of the date of the court hearing and opens the possibility of submitting objections against declaring the composition universally binding.

Paragraph 1

The scheme proposed in this paragraph differs slightly from the rules for the composition in bankruptcy (article 150(1) Fw). The rules for the composition in bankruptcy provide that before the close of the meeting at which a vote has been taken on the composition, the delegated judge determines the session of the court at which the court will dealt with the confirmation of the composition. As the scheme now proposed presumes that the vote is taken extrajudicially, such an arrangement cannot be made. For that reason it has been provided that the court will determine the date of the session of the court about the petition for declaring the composition universally binding as soon as it has received the petition.
**Paragraph 2**

The scheme proposed in this paragraph has been taken over from the scheme for the composition in bankruptcy (article 151 Fw). It enables creditors and shareholders whose rights are amended by the composition and who object to declaring the composition universally binding to submit those objections to the court. On the basis of the proposed article 377(1) creditors and shareholders may also express their objections at the session themselves.

**Article 376   Procedural rules for convocation and exchange of procedural documents**

*Introductory remarks*

These paragraphs regulate convocation and the serving of procedural documents. An attempt has been made to provide as cost-friendly a scheme as possible for the summons and submission of procedural documents and also to make it suitable for cases in which the rights of only few creditors and shareholders are to be amended as well as cases in which the rights of a large number of creditors and shareholders are to be amended.

*Paragraphs 1, 2 and 3*

With regard to convocation, it was decided to take over the scheme from article 1013 of the Code of Civil Procedure in which convocation is regulated for a petition to declare binding an agreement for collective settlement of damage claims. It has not been decided, as in article 1013(5) of the Code of Civil Procedure, to provide that convocation will be made by announcement of the session of the court in one or more newspapers. After all, this could lead to it becoming universally known that a composition and therefore financial problems are at hand. If unknown creditors or shareholders are involved, the publication of the convocation in a newspaper or on the internet may be unavoidable, however, if it the composition is to be binding on those creditors and/or shareholders as well.

The arrangement with regard to the exchange of documents in paragraph 3 has also been taken over from the Collective Mass Claims Settlement Act.

**Article 377   Hearing of parties and experts**

*Introductory remarks*

This article lays down the principle of the adversarial process for the proceedings. The article is based on the arrangement in respect of the hearing of creditors in the event of a compulsory composition in bankruptcy, and on the Collective Mass Claims Settlement Act (Wet Collectieve afwikkeling massaschade).
Paragraph 1

The rules for the compulsory composition in bankruptcy provides that all creditors, and therefore not only the creditors in respect of whom the composition is binding, may indicate why they consider confirmation of the composition undesirable (article contained in [sic] article 152 (1) Fw). This option was not chosen here. After all, this would assume that all the creditors and shareholders would have to be summoned, which would result in it becoming universally known that a composition is under discussion. The negative publicity that could come with that could cause the company to collapse.

Paragraph 2

This scheme is taken from article 1016 (1) of the Code of Civil Procedure. Just as with an agreement for collective claims settlement, the composition may have been based on various assumptions, such as for example, with regard to the cash amount of the goods over which security is established or the payment to be expected for a specific creditor in the event of bankruptcy. For the court, it may be of importance to assess whether these assumptions are realistic in order to assess whether the interests of creditors or shareholders would not be disproportionately prejudiced by the composition or whether the classes of creditors or shareholders who have voted against the composition have been reasonably able to arrive at their voting behaviour. This paragraph provides the court with the opportunity to engage an expert in that case.

Article 378  Amendment of the composition

This article offers the court the possibility to allow the parties to amend the composition. The need for this may exist if the request to declare the composition universally binding were rejected without the relevant amendment. In that case, a new composition would otherwise have to be offered, which involves both time and costs.

Article 379  Appeal

Introductory remarks

The declaration to make the composition universally binding leads to an interference with the property of creditors and shareholders whose rights are amended by the composition. For the creditors and shareholders who voted against the composition, declaring the composition universally binding means that that interference takes place against their will. An interference with property is such a serious remedy that proceedings in two instances are appropriate. Therefore appeal and Supreme Court review are possible against the decision of the court in respect of the petition to declare the composition universally binding. Also on this point the scheme links up with the scheme of arrangement in England and Wales.
Paragraphs 1 and 2

These paragraphs provide that an appeal may be lodged against the decision of the court to declare the composition universally binding. If the application is rejected, it may be appealed by the debtor or the creditor who has offered the composition. The choice has not been made to give the creditors or shareholders who voted in favour of the composition the possibility of appeal as well, because the company would then lose too much control. If the petition for declaring the composition universally binding has been granted, an appeal may be lodged by the creditors and shareholders who voted against the agreement. The other creditors and shareholders who voted in favour of the composition have after all no interest in the appeal.

Paragraph 3

This paragraph corresponds with the scheme of compulsory composition in bankruptcy (article 155 (1) Fw) and indicates that an appeal must be lodged by petition.

Paragraph 4

This paragraph has been included to prevent the appeal from leading to so much loss of time that the composition is no longer feasible. The period corresponds to the scheme of compulsory composition in bankruptcy (Article 155 (1) Fw).

**Article 380 Supreme Court review**

In the explanatory statement above with regard to article 379, it has already been indicated that proceedings in two instances are deemed appropriate. To preserve the speed the period for Supreme Court review has been kept short as well.

**Article 381 Enforceable order and exclusion of objections**

**Introductory remarks**

This article corresponds to article 159 Fw, which provides that the decision of the court to confirm a composition constitutes an enforceable order. The article arranges the implementation of the composition and seeks to avoid as much as possible that the creditors and shareholders whose rights are amended could evade the composition.

**Paragraph 1**
This paragraph ensures, in brief, that the debtor or the creditor who has offered the composition can force the parties whose rights have been changed to cooperate on the basis of the decision that the composition is universally binding.

**Paragraph 2**

This paragraph is important to the extent that the composition requires an amendment of the articles of association or, for example, a demerger. Such decisions require a notarial deed. A notarial deed is not required pursuant to this paragraph. Insofar as the implementation of the composition requires a notarial deed, the final and binding decision to declare the composition universally binding will take the place of the notarial deed.

**Paragraph 3**

Insofar as the implementation of the composition requires measures which creditors may object to at law, such objections are excluded by this paragraph. It concerns, for example, the objection of creditors to the cancellation of shares or the reduction of the share capital (article 2:100/210(2) BW). In this way, time and money are saved while the interests of the relevant creditors are safeguarded by the assessment of the petition to declare the composition universally binding.

**Article 382 Non-binding nature of the composition in respect of creditors and shareholders who have not been given the opportunity to vote on the composition or who have not been convened.**

This article aims to offer the creditors and shareholders the safeguard that their rights will not be amended without their knowledge and without their being able to express their opinion on it.

The article provides that the composition is not binding on a creditor or shareholder whose rights are amended by the composition if the debtor or creditor who has offered the composition reasonably knew or should have known that the rights of such (other) creditor or shareholder would be amended, but did not present the composition to the creditor or shareholder and did not give them the opportunity to vote on it. The same applies to a creditor or shareholder whose rights are amended by the composition, but who has not been properly convened in the proceedings in which the petition to declare the composition universally binding was dealt with. The background of this provision is that the composition is realised is largely realised in extrajudicial conditions, in any case until the filing of the application to declare the composition universally binding.

Also thereafter a large responsibility rests with the debtor or creditor who has offered the composition because the convocation for the hearing pursuant to the proposed article 376(1) will be taken care of by the debtor or creditor who has requested to declare the composition universally binding.

This set-up has the advantage that it is flexible and relatively quick and, moreover, leads to the lowest costs possible. But it could also tempt the debtor or creditor who offers the composition to keep the creditors or
shareholders, of whom he suspects that their voting behaviour will not be agreeable to him, out of the vote on the composition. That is unacceptable, since the composition is in essence an agreement between the different parties, and the conclusion of an agreement requires the consent of both parties. Therefore it is not acceptable that the rights of creditors or shareholders are amended without their having been able to express their opinion on the matter.

The scheme of compulsory composition outside bankruptcy to be introduced by this bill will apply to companies that are conducted by a legal entity or a partnership. With regard to legal persons, article 2:10 (1) BW provides that the management board is obliged to keep such records of the financial situation of the legal entity and of the activities of the legal entity that the rights and obligations of the legal entity can be known at any time. Article 3:15i BW contains a comparable provision in respect of partnerships. Thus, the law assumes that the company knows who its creditors are. In that system it is appropriate to require that the creditors whose rights are changed by the composition will be given the opportunity to vote on the composition and will be called to the hearing concerning the application to declare the composition universally binding.

With respect to shareholders, holders of registered shares are known to the company because they have been registered in the shareholders’ register (article 2:84/194 (1) BW) and the legal entity therefore has their names and places of residence. With respect to holders of bearer shares, they are in principle only known to the company if they have made themselves known pursuant to the Disclosure of Major Holdings Act (Wet melding zeggenschap). Otherwise, they will have to be called by means of, for example, an advertisement. Moreover, in cases where a composition is offered to holders of bearer shares, the company will in most cases ensure sufficient support from a large shareholder in advance. However, this does not alter the fact that the rights of small shareholders will in that case be amended as well. However, in the law this is not an unknown phenomenon, since the buying out scheme of article 2:201a BW, for example, also provides the possibility of unknown shareholders.

Article 383 International complications

This article serves to bring the proposed scheme regarding the compulsory composition outside bankruptcy under the scope of the Insolvency Regulation. This makes the automatic recognition of the scheme in other EU Member States easier.

Section III Concurrence

PM
Section III Entry into force

This section contains the usual provisions on the entry into force of the Act.

Section IV Official title

In connection with the recognisability, as well as to emphasise the connection between the various measures of the second pillar, it has been decided to call the three bills that form part of this pillar the Continuity of Enterprises Act I, II and III. This is the second bill from the second pillar. For that reason, the official title is the Continuity of Enterprises Act II.

The Minister of Security and Justice,