Conclusion

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Implementation of the EU Preventive Restructuring Directive

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Recommended short citation: Boon, Koster & Vriesendorp, *Implementation of the EU Preventive Restructuring Directive, Part I, BLRN No 1*, 2023.

Recommended full citation: J.M.G.J. Boon, H. Koster & R.D. Vriesendorp, *Implementation of the EU Preventive Restructuring Directive, Part I, Business and Law Research Network Series No 1*, Den Haag: Eleven, 2023.

Published, sold and distributed by Eleven
P.O. Box 85576
2508 CG The Hague
The Netherlands
Tel.: +31 70 33 070 33
Fax: +31 70 33 070 30
e-mail: sales@elevenpub.nl
www.elevenpub.com

Sold and distributed in USA and Canada
Independent Publishers Group
814 N. Franklin Street
Chicago, IL 60610, USA
Order Placement: +1 800 888 4741
Fax: +1 312 337 5985
orders@ipgbook.com
www.ipgbook.com

Eleven is an imprint of Boom (Den Haag).

ISBN 978-90-4730-186-8
ISBN 978-94-0011-359-6 (E-book)

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Gert-Jan Boon, Harold Koster and Reinout Vriesendorp[*]

1 Introduction

Upon the adoption by the Council and the European Parliament of the Preventive Restructuring Directive (2019/1023) (PRD 2019) in June 2019,[926] it was up to the national legislators to ensure its timely transposition[927] into domestic restructuring and insolvency laws.[928] Besides provisions on a debt discharge to over-indebted entrepreneurs (Title III) and measures to improve efficiency of restructuring, insolvency and discharge procedures (Title IV), a key part of the PRD 2019 entails the so-called preventive restructuring frameworks (also PRFs) in Title II. This Title lays down a set of provisions that enable debtors that face financial distress to restructure by amending their capital structure, while continuing their business.

Although the PRD 2019 provides for minimum harmonization, also for the PRFs, the EU legislator has not refrained from setting ambitious objectives. As part of its endeavour to build a European Capital Markets Union (CMU),[929] the PRD 2019 aims to contribute not only to reducing legal uncertainty and the costs of cross-border investments, but also to "enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises".[930] Has the PRD 2019 succeeded in achieving such objectives? The expectations have been diverse: some expect that it may result only in a very limited degree of harmonization;[931] others expect that reforms in national laws may benefit the economies of specific jurisdictions, in particular those

* We thank the authors of the preceding chapters reporting on the domestic transposition of the PRD 2019, as well as Pien Kets (lecturer at Leiden University) for her assistance with the research for this Chapter. All sources have been checked on 1 August 2023. This chapter is a more extensive version of a paper that was published before: J.M.G.J. Boon, H. Koster, & R.D. Vriesendorp, 'Implementation of the Preventive Restructuring Directive 2019 in Review: A Directive Delivering on Its Promise?', *HERO* 2023/W-002.

926 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), O.J. L 172/18.

927 In this Chapter, transposition is used synonymously to implementation.

928 Arts 34 and 35 PRD 2019.

929 Recital 8 PRD 2019.

930 See for instance recitals 2, 7 and 9 PRD 2019.

931 D.C. Ehmke, J.L.L. Gant, J.M.G.J. Boon, L. Langkjaer & E. Ghio, 'The European Union Preventive Restructuring Framework: A Hole in One?', *International Insolvency Review*, 2019, 28(2), Para. 5.

lacking a PRF.[932] This chapter reviews the objectives of the PRD 2019 and focuses on the question as to whether and to what extent the transpositions (already) deliver on the policy objectives. We do so by focussing at one part of the PRD 2019: the provisions on PRFs, as laid down in Title II PRD 2019. We adopt a 'law at the books' approach concerning the PRFs in Austria, Denmark, France, Germany, Greece, the Netherlands and the United Kingdom, even though after Brexit the latter is not part of the EU anymore and, consequently, was not bound to implement the PRD 2019.[933]

The EU legislator has left considerable discretion to the Member States in transposing the PRD 2019. At first glance this seems commendable, as it allows national legislators to accommodate for the extensive difference between domestic laws. For instance, for some Member States, like France, it was commented that transposition would require limited reforms because already a more extensive domestic PRF was in place. However, for other Member States the PRD 2019 would require revision of existing restructuring regimes, or – as was the case with Denmark and the Netherlands – even the introduction of new frameworks.[934] However, the degree of minimum harmonization is also a direct impediment to any real harmonization of PRFs. It leaves much discretion to Member States to design their own, diverse PRFs, limiting the *de facto* convergence.[935]

The rules on PRFs have brought about ample legal and academic debate.[936] In this regard, the PRD 2019 has been referred to positively as "a milestone in the harmonisation movement",[937] but also more critically or negatively, as "a radical and substantive reform",[938] or even "a refuge for failing firms".[939] The PRD 2019 suggests that even in restructuring and insolvency law, as "one of the last vestiges of a nationalistic, codified approach to private law on the European continent",[940] harmonization is not a 'mission impossible'. However,

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932 European Bank for Reconstruction and Development, *EBRD Insolvency Assessment on Reorganisation Procedures*, 2022, p. 4, 10; R.P. Freitag, 'General Aspects of the Directive on Restructuring and Insolvency', *Zeitschrift für Vergleichende Rechtswissenschaft*, 2022, 121, pp. 243-244.

933 This Chapter provides a synthesis and analysis of Chapters 2-8.

934 D.C. Ehmke, J.L.L. Gant, J.M.G.J. Boon, L. Langkjaer & E. Ghio, above note 931, Para. 4.1 and 5.

935 Ibid., Para. 5.

936 Consider for instance: H. Eidenmüller, 'Contracting for a European insolvency regime', *European Business Organization Law Review*, 2017/18, p. 273-304; R.J. de Weijs, A. Jonkers & M. Malakotipour, 'The Imminent Distortion of European Insolvency Law: How the European Union Erodes the Basic Fa'ric of Private La' by Allowing 'Relative Priority' (RPR)', *Tijdschrift voor Belgisch Handelsrecht*, 2019/*125*(4), pp. 477-493; D.C. Ehmke, J.L.L. Gant, J.M.G.J. Boon, L. Langkjaer & E. Ghio, above note 931, pp. 208-209.

937 M. Vanmeenen, 'Pre-Insolvency Arrangements: The Belgian Experience', in: R. Parry and P.J. Omar (eds), *Reimaging Rescue*, Nottingham: INSOL Europe 2016, p. 162.

938 D.C. Ehmke, J.L.L. Gant, J.M.G.J. Boon, L. Langkjaer & E. Ghio, above note 931, Para. 1.

939 H. Eidenmüller, 'The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union', *European Business Organization Law Review*, 2019/20, p. 559.

940 J.H. Dalhuisen, 'Harmonization of Substantive Insolvency Law in the EU', *Maandblad voor Vermogensrecht*, 2021/5, p. 159, who uses this quote to refer to the more recent publication by the European Commission, Proposal for a Directive of the European Parliament and the Council harmonising certain aspects of insolvency law, 7 December 2022, COM(2022) 702 final.

that depends not merely on the adoption of a directive, but even more so on its transposition. This study shows that to date, the results of the transpositions have only partially reached the PRD 2019's objectives. This is important, as a next wave of harmonization is forthcoming with the proposal for a directive harmonizing certain aspects of insolvency law,[941] and lessons may be learned of what the PRD 2019 did and did not deliver to further effective efforts at harmonization.

This chapter is structured as follows. Section 2 sets out the background of the PRD 2019 and discusses the objectives set by the EU legislator. Section 3 analyses the so-called 'logic and limits' of minimum harmonization on any implementation efforts of the PRD 2019. Subsequently, the chapter contains a substantive comparison of seven domestic PRFs, analysing the extent to which there is convergence among these PRFs (Section 4), followed by an analysis showing that the PRD 2019 has only partially delivered on its promises (Section 5) and some final concluding remarks (Section 6).

2 Background of PRD 2019

2.1 The EU's Efforts for a Shared Business Rescue Culture

Legislative efforts of some eight years culminated in the PRD 2019. The European Parliament can be seen as the instigator, with its Resolution in November 2011.[942] In this Resolution, the European Parliament called upon the Commission to bring forward legislative proposals that would also touch upon restructuring plans, as corporate rescue had emerged as an alternative to liquidation.[943] The EU legislator has taken several steps towards what became the PRD 2019. Including a In subsequent Communications of the Commission in 2012, in which the Commission stated that EU laws should better "facilitate the survival of businesses and present a second chance for entrepreneurs",[944] and

941 European Commission, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 7 December 2022, COM(2022) 702 final.

942 European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)). The Resolution built on two studies that were commissioned by the European Parliament: European Parliament, 'Harmonisation of insolvency law at EU level, note', European Parliament 2010, PE419.633, and European Parliament, 'Harmonisation of insolvency law at EU level with respect to opening of proceedings, claims filing and verification and reorganisation plans, note', 2011, PE 432.766.

943 European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), recitals I, J and L, and Annex at 1.1 and 1.5.

944 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Single Market Act II, Together for new growth, 3 October 2012, COM(2012) 573 final, at 11.

that the EU should take steps to develop a "rescue and recovery culture across the Member States".[945]

Following public consultations and meetings with stakeholders, in 2014 the Commission published its Recommendation on a new approach to business failure and insolvency (Commission Recommendation 2014).[946] It laid down objectives and key topics that would be amalgamated and elaborated along in much more detail in the later PRD 2019, including the adoption of a PRF that enables financially distressed but viable business to restructure at an early stage and give honest bankrupt entrepreneurs a second chance.[947] The next steps were embedded in the Commission's new initiative for a European CMU.[948] In furthering a CMU, the widely differing insolvency regimes in the EU were considered to inhibit cross-border investment and prevent timely restructuring.[949] To this end, the Commission published a proposal (Proposal PRD 2016)[950] that commenced the legislative process that resulted in the PRD 2019. Whereas harmonization of core aspects of insolvency is considered a so-called 'bridge too far',[951] the Commission held that preventive restructuring is an area where harmonization is possible.[952] The Commission

945 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A new European approach to business failure and insolvency, 12 December 2012, COM(2012) 742 final, Para. 1 and 2.

946 Commission Recommendation on a new approach to business failure and insolvency, 12 March 2014, C(2014) 1500 final.

947 Recital 1 Commission Recommendation 2014. The Recommendation introduced a PRF with the following main features: (a) enable a debtor to restructure at an early stage, (b) a debtor to keep control over the day-to-day operation of its business, (c) enable a debtor to request a stay, (d) provide for confirmation of a restructuring plan adopted by the required majority, (e) facilitate a debtor to acquire new financing which is would not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors, and (f) require limited court involvement (Commission Recommendation 2014, at 6 and 7).

948 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union, 30 September 2015, COM(2015) 468 final, p. 3.

949 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union, 30 September 2015, COM(2015) 468 final, pp. 6, 24-25.

950 Proposal for a Directive of the European Union and the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU of 22 November 2016, COM(2016) 723 final (Proposal PRD 2016).

951 Explanatory Memorandum to Proposal PRD 2016, p. 6. Notably, in the meantime the Commission has changed its mind this regard and recently published the Proposal for a Directive of the European Parliament and the Council harmonising certain aspects of insolvency law, 7 December 2022, COM(2022) 702 final.

952 European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), Paras. A, C and D; Explanatory Memorandum to Proposal PRD 2016, p. 6.

observed that only a few Member States lack a form of preventive restructuring, while others have a PRF, but it is not always an effective tool to enable debtors to restructure.[953]

Whereas the PRD 2019 is the first real binding legal instrument in the area of substantive European restructuring and insolvency law, it is the result of a long-running legislative process. By means of minimum harmonization it introduces a framework – or toolbox – for Member States to introduce in its domestic legislation tools important to facilitate preventive restructuring. Therefore, the PRD 2019 functions as an important step for the EU to contribute to a paradigm shift at the European and domestic levels promoting a shift away "… from the sacrosanct 'pay what you owe' to the balanced promotion of the continuity of companies in distress …",[954] and therewith contributing towards a shared European rescue culture.[955]

2.2 Objectives of Harmonized Preventive Restructuring Frameworks

Before we review whether the PRD 2019 is delivering on its promise, it should be made clear what the EU legislator – so to say – has 'promised'. As has been reiterated many times, domestic insolvency regimes are widely differing;[956] this difference also regards restructuring frameworks. As noted in the Commission Recommendation 2014:

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953 European Commission, Commission Staff Working Document, Impact Assessment, Accompanying the document Proposal for a Directive of the Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 20212/30/EU, SWD(2016) 357 final (Impact Assessment Proposal PRD 2016), pp. 14-15.

954 B. Wessels, 'On the Future of European Insolvency Law', in: Rebecca Parry (ed), *European Insolvency Law: Prospects for Reform*, Nottingham: INSOL Europe 2014, p. 157.

955 See for instance: J.M.G.J. Boon & S. Madaus, 'Toward a European Business Rescue Culture', in: J.A.A Adriaanse & J.I., van der Rest (eds), *Turnaround Management and Bankruptcy: A Research Companion* (Routledge Advances in Management and Business Studies), Routledge: New York, 2017; B. Wessels & S. Madaus, *Instrument of the European Law Institute on Rescue of Business in Insolvency Law*, 2017, p. 6, available at: https://ssrn.com/abstract=3032309; E. Ghio, J.M.G.J. Boon, D.C. Ehmke, J.L. Gant, L. Langkjaer & E. Vaccari, 'Harmonising Insolvency Law in the EU: New Thoughts on Old Ideas in the Wake of the COVID-19 Pandemic', *International Insolvency Review*, 2021, 30(3), pp. 434-435.

956 See for instance: Recital 11 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, O.J. L 160; Recital 22 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), O.J. L 141/19; European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), recitals A; Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A new European approach to business failure and insolvency, 12 December 2012, COM(2012) 742 final, Para. 5; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union, 30 September 2015, COM(2015) 468 final, Para. 6.1; European Commission, Commission staff working document, Economic analysis, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action

> [n]ational insolvency rules vary greatly in respect of the range of the procedures available to debtors facing financial difficulties in order to restructure their business. Some Member States have a limited range of procedures meaning that businesses are only able to restructure at a relatively late stage, in the context of formal insolvency proceedings. In other Member States, restructuring is possible at an earlier stage but the procedures available are not as effective as they could be or involve varying degrees of formality, in particular in relation to the use of out-of-court processes.[957]

As an area that had benefited hardly from harmonization before,[958] this is not surprising. At the same time, the Commission repeatedly pointed out that these differences cause problems to the internal market:

> [t]he discrepancies between the national restructuring frameworks, and between the national rules giving honest entrepreneurs a second chance lead to increased costs and uncertainty in assessing the risks of investing in another Member State, fragment conditions for access to credit and result in different recovery rates for creditors. They make the design and adoption of consistent restructuring plans for cross-border groups of companies more difficult. More generally, the discrepancies may serve as disincentives for businesses wishing to establish themselves in different Member States.[959]

Whereas the European Parliament recognized a need for harmonization of restructuring and insolvency law in 2011, the Commission brought it within the scope of the CMU. Here, the disparity between national restructuring and insolvency laws has been regarded as one of the key bottlenecks hampering cross-border investment in the European single market.[960] In this regard, insolvency laws play a key role in addressing financial distress. However, most domestic "frameworks seem unclear, inflexible and costly", according to

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Plan on Building a Capital Markets Union, 30 September 2015, SWD(2015) 183 final, pp. 73-74; Proposal PRD 2016, p. 2; Recital 4 PRD 2019.

957 Recital 2 Commission Recommendation 2014.

958 See also B. Wessels, above note 954, pp. 131-158; J.M.G.J. Boon, 'Harmonising European Insolvency Law: The Emerging Role of Stakeholders', *International insolvency Review*, 2018, 27(2), pp. 162-163.

959 Recital 4 Commission Recommendation 2014.

960 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union, 30 September 2015, COM(2015) 468 final, Para. 6; European Commission, Commission staff working document, Economic analysis, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union, 30 September 2015, SWD(2015) 183 final, pp. 74-77.

the European Parliament.[961] Therefore, harmonization of restructuring law was aimed not only to contribute to creating more legal certainty for cross-border investors but also to encourage that debtors will pursue restructuring timely.[962]

These two key objectives, as stated in the Action Plan for the CMU, were reiterated in the Proposal PRD 2016 and elaborated in the accompanying Impact Assessment.[963] The Proposal PRD 2016 states that:

> [t]he aim is for all Member States to have in place key principles on effective preventive restructuring and second chance frameworks, and measures to make all types of insolvency procedures more efficient by reducing their length and associated costs and improving their quality. More specifically, such frameworks aim to help increase investment and job opportunities in the single market, reduce unnecessary liquidations of viable companies, avoid unnecessary job losses, prevent the build-up of non-performing loans facilitate cross-border restructurings, and reduce costs and increase opportunities for honest entrepreneurs to be given a fresh start.[964]

This is done because "a higher degree of harmonisation in insolvency law is thus essential for a well-functioning single market and for a true Capital Markets Union".[965] However, from a more practical viewpoint, the Proposal PRD 2016 does not have the objective "to interfere with what works well, but to establish a common EU-wide framework to ensure effective restructuring, second chance and efficient procedures both at national and cross-border level".[966]

The final text as adopted in the PRD 2019 finds its legal basis in Article 114 TFEU,[967] which regards private law harmonization of direct and indirect obstacles to the internal market.[968] In this regard, recital 1 PRD 2019 lays down the main objective of the Directive:

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961 European Commission, Commission staff working document, Economic analysis, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union, 30 September 2015, SWD(2015) 183 final, p. 73.

962 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union, 30 September 2015, COM(2015) 468 final, Para. 6.

963 Proposal PRD 2016, p. 2; Impact Assessment Proposal PRD 2016, p. 13 et seq.

964 Proposal PRD 2016, pp. 5-6.

965 Ibid., p. 2.

966 Ibid., p. 7.

967 Treaty on the Functioning of the European Union, O.J. C 326/47.

968 See further E. Ghio, J.M.G.J. Boon, D.C. Ehmke, J.L.L. Gant, L. Langkjaer & E. Vaccari, above note 955, pp. 431, 435-436.

> [t]he objective of this Directive is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications.[969]

In order to reach this objective, the PRD 2019 provides for minimum harmonization of PRFs, in addition to separate rules on the debt discharge for honest and insolvent or over-indebted entrepreneurs.[970] Especially with regard to PRFs, it is stated that they should "enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises".[971] In addition, the PRFs should also serve other objectives, such as (i) preventing job losses, (ii) preventing the loss of know-how and skills, (iii) maximizing the total value not only to creditors but also to the owners and the economy as a whole, (iv) maintaining business activity and (v) preventing the build-up of non-performing loans.[972]

In concluding, the above puts forward two overall key objectives of the PRD 2019 with respect to PRFs. Firstly, that is to create more legal certainty for cross-border investment, by reducing the divergences between Member States. Secondly, it aims to enable debtors to restructure at an early stage, in order to avoid increasing losses and consequently, prevent unnecessary insolvency proceedings. This brings us to the next question: what can we expect of the PRD 2019?

3 What Can Be Expected from Implementing the PRD 2019?

3.1 Introduction

When discussing harmonization, we must first note that harmonization as a concept is remarkably vague. As pointed out by Tadic: "[t]he open nature of the term harmonisation and the resultant indeterminacy enables people to say something without really saying anything".[973] There are in fact various descriptions of what harmonization (and related

969 Recital 1 PRD 2019.
970 Recitals 1 and 8 PRD 2019.
971 Recitals 2 and 15 PRD 2019.
972 Recitals 2, 3 and 16 and Art. 4(1) PRD 2019; Impact Assessment Proposal PRD 2016, p. 13 et seq; R.D. Vriesendorp, 'How to Measure the Success of National Implementations of the Restructuring Directive?' in: E. Vaccari & E. Ghio (eds), *Insolvency Law in Times of Crisis*, Nottingham: INSOL Europe, 2023, pp. 96-97.
973 F. Tadic, 'How Harmonious Can Harmonisation Be? A Theoretical Approach Towards Harmonisation of (Criminal) Law', in: A. Klip & H. van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal*

concepts) mean. In line with Ghio, we consider harmonization within the EU as an act making laws more similar across the Member States so that the national legal frameworks can work better together.[974] Before assessing the harmonization that is achieved by the PRD 2019, it is important to consider what generally can be expected by its transposition. In this section, we review factors which may impact the harmonization that can be achieved by Member States, by looking at three meta dimensions of harmonization processes. We (i) review the limitations imposed by the EU's 'harmonisation strategy' which has opted for minimum harmonization, (ii) elaborate on the perils of harmonization by means of a directive and (iii) look back on prior experience from harmonization efforts in the field of restructuring and insolvency law.

3.2 *The Implications of Minimum Harmonization of Preventive Restructuring Frameworks*

According to the Treaty on the Functioning of the European Union (TFEU), harmonization aims at "establishing or ensuring the functioning of the internal market".[975] This shapes the legislative action of the EU in the internal market, also for preventive restructuring. To pursue this aim, in recent years the EU legislator has shifted to an approach of 'differentiated integration'.[976] Under this approach towards European integration, more discretion is left to Member States in implementing legislation. As a consequence, the extent to which an integral market can be effectively realized is of course limited, because Member States have more discretion to shape legislation when transposing EU law. This seems to have impacted the PRD 2019 too.[977]

In preparing the Proposal PRD 2016, the Commission considered different approaches to come to more harmonization. In addition to maintaining the status quo, it considered to (i) set up a fully harmonized PRF; (ii) introduce an alternative, optional EU restructuring regime for cross-border cases; and (iii) set up a minimum harmonized legal framework in the area of restructuring.[978] The Commission chose the latter option.[979] While noting that restructuring and insolvency law is regulated nearly exclusively at the national level and

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Law, Amsterdam: Koninklijke Nederlandse Akademie van Wetenschappen, 2002, p. 21.

974 Adaptation after the definition proposed by E. Ghio, *Redefining Harmonisation: Lessons From EU Insolvency Law*, Cheltenham: Edward Elgar, 2022, p. 141.

975 Art. 26(1) TFEU.

976 European Parliament, Committee on Constitutional Affairs, Report on Differentiated Integration (2018/2093(INI)), 27 November 2018, A8-0402/2018. See further: E. Ghio, above note 974, Paras. 7.3.1-7.3.4.

977 See further E. Ghio, J.M.G.J Boon, D.C. Ehmke, J.L.L. Gant, L. Langkjaer & E. Vaccari, above note 955, pp. 430-431.

978 Impact Assessment Proposal PRD 2016, pp. 48-51.

979 See Impact Assessment Proposal PRD 2016, pp. 51-55; Recitals 12, 13 and 16 PRD 2019.

that it is strongly embedded in other areas of law, the Commission considered in its Proposal PRD 2016 that "[m]inimum standards are therefore the most appropriate means to ensure a coherent framework in all Member States while also enabling Member States to go beyond the Directive's provisions."[980] This has been reflected in the PRD 2019 itself, stating that:

> [t]here is therefore a need to go beyond matters of judicial cooperation and to establish substantive minimum standards for preventive restructuring procedures as well as for procedures leading to a discharge of debt for entrepreneurs.[981]

Whereas full harmonization would be able to address the legal uncertainty caused by fragmented restructuring and insolvency laws, it would result in an overly complex legislative endeavour for three reasons. Firstly, such harmonization would have to give full consideration to the domestic insolvency regimes. Secondly, it would have to consider various connected areas of domestic law. Thirdly, it may not be in conformity with the principles of subsidiarity and proportionality. Instead, allowing for some flexibility would enable Member States to better integrate the reform into national law, although not resolving all legal uncertainty.[982] Still, the Commission considered that this would:

> ensure major progress towards the functioning of the internal market. Under such a convergent framework, cross-border investment would no longer be inhibited by concerns that, for example, preventive restructuring of the debtor is not effectively possible in all Member States or that shareholders may bloc a plan which is supported by creditors.[983]

Various scholars have criticized that, despite the EU legislator's ambition at harmonization, the PRD 2019 has become a directive that provides for minimum harmonization at most.[984] Eïdenmüller commented that a:

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980 Proposal PRD 2016, p. 16.
981 Recital 12 PRD 2019.
982 Impact Assessment Proposal PRD 2016, p. 51.
983 Ibid., p. 51.
984 See for instance R.P. Freitag, above note 932, p. 229; D.C. Ehmke, J.L.L. Gant, J.M.G.J. Boon, L. Langkjaer & E. Ghio, above note 931, Para. 4.1 and 5; H. Eidenmüller, above note 939, Para. 6; J.L.L. Gant, J.M.G.J. Boon, D.C. Ehmke, E. Ghio, L. Langkjaer, E. Vaccari & P.J. Omar, 'The EU preventive restructuring framework: in extra time?', *Fizetésképtelenségi Jog (Insolvency Law)*, 2022, Para. 1, available at: https://jogaszvilag.hu/szakma/the-eu-preventive-restructuring-framework-in-extra-time.

> 'political price' the European law-maker had to pay for getting the [PRD 2019] adopted is a serious compromise to the harmonisation goal that was driving the project from the beginning. The Directive contains more than 70 regulatory options for the Member States.[985]

Furthermore, Ehmke et al. remarked that:

> [t]he Directive leaves so much open to the Member States that the effects of the directive's implementation are difficult to foresee. Minimum harmonization requirements may not lead to the convergence envisaged by the [Commission Recommendation 2014] or the early discussions on the purpose of the Directive and its eventual form as a Preventive Restructuring Directive. The wording in the Directive tends to take an almost optional approach, using the word 'may' instead of something more prescriptive that would present a more obligatory implementation parameter. The impression left by the wording in the Articles is vague and even voluntary.[986]

A thorough analysis of the many policy options offered by the PRD 2019 was made by the IMF, noting that the PRD 2019's "harmonization effect will be limited given multiple options for implementation, likely leading to divergent restructuring models in Europe".[987] In fact, the IMF sees not just upsides to minimum harmonization but points at the downsides. This approach to harmonization may result in substantial differences on how preventive restructuring regimes treat debtors and creditors. At the same time, it is stated that:

> [s]ome countries may compete with each other in implementing the most effective restructuring framework, but this 'race to the top' may also produce some dysfunctional effects, and in some cases, there may even be a 'race to the bottom'.[988]

It is best to consider the PRD 2019 as a toolbox, with Articles 4-19 PRD 2019 stating the tools that any PRF should have. In this regard it is important to emphasize that PRFs are not to be seen as 'proceedings' or 'procedures'. Article 4(5) PRD 2019 clarifies that a PRF can "consist of one or more procedures, measures or provisions". In fact, they can be both

985 H. Eidenmüller, above note 939, Para. 6.
986 D.C. Ehmke, J.L.L. Gant, J.M.G.J. Boon, L. Langkjaer & E. Ghio, above note 931, p. 208.
987 J. Garrido, C. DeLong, A. Rasekh & A. Rosha, Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive, IMF Working Paper, 2021/152, p. 3 and 5.
988 Ibid., p. 5.

in- or out-of-court, reiterating that the PRF of Title II PRD 2019 can be best regarded as a toolbox allowing for different tools.[989] Although many policy options are available within this toolbox, there is limited guidance for Member States in implementing the PRD 2019. Instead, some guidance in reviewing the many options in the PRD 2019 comes from other institutions and experts.[990]

Lastly, the room for harmonization is limited by the personal and substantive scope of the PRD 2019 itself. In particular for PRFs, the personal scope regards debtors, but excludes financial institutions.[991] In line with its objective, the material scope of the PRD 2019 focuses on those debtors that are businesses which are in financial difficulties.[992] More specifically, with respect to PRFs, the PRD 2019 is restricted to those debtors that are not yet insolvent (pre-insolvency).[993] As regards the substantive scope of the PRD 2019, various other topics that were considered for harmonization (conditions for filing for insolvency (definition of insolvency), ranking of claims, the wider issue of avoidance actions, the length of formal insolvency proceedings, directors' responsibilities relating to insolvency)[994] that would contribute to reducing the legal uncertainty for investors have been left out of this first initiative for substantive harmonization. Instead, the PRD 2019 has been restricted in scope and aims to contribute to the EU legislator's objectives with the CMU in a specific area only.

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989 Compare also: R.P. Freitag, above note 932, p. 229.

990 Guides have been prepared informing Member States of the policy options, see Guidance Notes of INSOL Europe, Touching Upon Several Aspects of the PRD 2019, available at: www.insol-europe.org/publications/guidance-notes; S. Madaus, A Simple Guide to the Relative Priority Rule, 2020, available at: https://stephanmadaus.de/2020/01/20/a-simple-guide-to-the-relative-priority-rule/; J. Garrido, C. DeLong, A. Rasekh & A. Rosha, above note 987.

991 Art. 1(1)(a) and 1(2) PRD 2019.

992 Art. 1(1)(a) PRD 2019.

993 Recital 24 and Arts 1(1)(a) and 4(1) PRD 2019; Impact Assessment Proposal PRD 2016, pp. 14, 58, 59, 131. See also European Commission, Commission Staff Working Document, Impact Assessment, Accompanying the document Proposal for a Directive of the Parliament and of the Council harmonising certain aspects of insolvency law, 7 December 2022, SWD(2022) 395 final, pp. 8 and 13-14.

994 Impact Assessment Proposal PRD 2016, pp. 23-25. Compare also European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)) where most of these topics were raised for a legislative proposal by the Commission. Notably, several of the topics for harmonization have now become part a recent legislative proposal (European Commission, Proposal for a Directive of the European Parliament and the Council harmonising certain aspects of insolvency law, 7 December 2022, COM(2022) 702 final).

3.3 The Limits of Directives and Top-Down Harmonization

After the Commission Recommendation 2014 had not delivered sufficient results,[995] the Commission followed up with the Proposal PRD 2016, a directive. Within the legislative tools of the EU legislator, a directive is stronger than a recommendation because it is a legal instrument which binds Member States to the result that is to be achieved. Directives require domestic implementation in the Member States to whom it is left to decide about the form and the methods to be used.[996] Directives leave a margin to manoeuvre for Member States.[997] Depending on the respective minimum or maximum harmonization of the directive, it should at least increase the degree of harmonization in the Union.[998] The discretion in implementing directives is not unlimited. Also for directives like the PRD 2019 that bring minimum harmonization, a Member State is:

> obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective that it pursues.[999]

In this regard, Member States are bound to a transposition which is "sufficiently precise and clear to enable the individuals concerned to know the extent of their rights and obligations".[1000]

Whereas the PRD 2019 is a directive providing for minimum harmonization, the EU legislator's narrative on the PRD 2019 and objectives shows an approach that is focussed primarily on achieving top-down harmonization. The need for EU legislation on PRFs is presented as the sole driver for achieving its policy objectives.[1001] However, harmonization is not necessarily or solely a process that results from top-down legislative action of the EU

995 Directorate-General Justice & Consumers of the European Commission, 'Evaluation of the implementation of the Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency', 30 September 2015, pp. 2 and 5. The same conclusion was repeated in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union, 30 September 2015, COM(2015) 468 final, p. 25.

996 Art. 288 TFEU.

997 See also CJEU 16 June 2005, C—456/03, ECLI:EU:C:2005:388, at 50-51 (*Commission v. Italy*); CJEU 5 July 2007, C-321/05, ECLI:EU:C:2007:408 (*Kofoed*), at 43. Compare EUR-Lex, EU Legal Instruments, available at: https://eur-lex.europa.eu/EN/legal-content/glossary/eu-legal-instruments.html.

998 Compare recital 8 PRD 2019.

999 CJEU 5 July 2007, C-321/05, ECLI:EU:C:2007:408 (*Kofoed*), at 41. See also: ECJ 17 June 1999, C-336-97, ECLI:EU:C:1999:314, at 19 (*European Commission/Italy*); CJEU 30 November 2006, C-32/05, ECLI:EU:C:2006:749, at (*European Commission/Luxemburg*); CJEU 8 May 2008, C-491/06, ECLI:EU:C:2008:263, at 28 (*Danske Svineproducenter*).

1000 CJEU 16 June 2005, C 456/03, ECLI:EU:C:2005:388, at 51 (*Commission v. Italy*).

1001 Impact Assessment Proposal PRD 2016, p. 47 et seq.

legislator. Instead, it may also result from bottom-up reforms driven by Member States, for instance due to regulatory competition. Furthermore, as argued by Ghio et al., harmonization may even rely on both strategies, simultaneously and/or subsequently.[1002] As such, focussing on the transposition of the PRD 2019 itself is important, but presents a partial view of what harmonization is as it neglects that it is the result of a multi-layered process.

Previous information indicates that Member States have considerable discretion in implementing the PRD 2019 in their domestic legal frameworks. It leaves much leeway for diverse approaches among jurisdictions. Whereas this study focuses on the transposition of the PRD 2019 in domestic laws, the focus on top-down harmonization alone may not suffice to achieve the PRD 2019's objectives, in particular due to the minimum harmonization provided by the PRD 2019 itself.

3.4 Prior Experiences in Harmonizing Restructuring and Insolvency Laws

A third reason why expectations of harmonization should not be overly optimistic relates to the prior reluctance of Member States towards harmonization of restructuring and insolvency laws. This was demonstrated in the process leading to the European Insolvency Regulation 1346/2000 (EIR 2000)[1003] and the PRD 2019. The EIR 2000 had to overcome several political hurdles before it was adopted, involving prior legislative initiatives including the Convention on Certain international Aspects of Bankruptcy (1990)[1004] and the Convention on Insolvency Proceedings (1995) that did not succeed.[1005] Although these initiatives regarded cross-border insolvency law and occurred in a different time frame, it took several decades to develop.

There was seemingly limited appetite for pursuing harmonization of PRFs from Member States.[1006] In 2013, the Commission already envisaged a directive; however, this was later converted into a non-binding recommendation with a more limited scope. In addition, it regarded only in part the topics that were pointed out by the European

1002 E. Ghio, J.M.G.J Boon, D.C. Ehmke, J.L.L. Gant, L. Langkjaer & E. Vaccari, above note 955, pp. 429, 444 and 450.

1003 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, O.J. L 160.

1004 Council of Europe, Convention on Certain International Aspects of Bankruptcy, 1990 (Istanbul Convention), available at: https://rm.coe.int/168007b3d0. See further B. Wessels & J.M.G.J Boon, *Cross-Border Insolvency, International Instruments and Commentary*, Alphen aan den Rijn: Kluwer Law International, 2015, at p. 39.

1005 Council of the European Union, Convention on Insolvency Proceedings, 1995, available at: http://aei.pitt.edu/2840/. See further B. Wessels & J.M.G.J Boon, above note 1004, at p. 34.

1006 This was clear in particular from the responses of Member States to the public consultations, see further J.M.G.J Boon, above note 958, pp. 169-172.

Parliament in 2011.[1007] The evaluation of the Commission Recommendation 2014 showed disappointment, as it had "not succeeded in having the desired impact in facilitating the rescue of businesses in financial difficulty".[1008] Or as observed in the 2015 'Leeds study', a study commissioned by the European Commission, it "appears to be the incomplete and inconsistent implementation of the Recommendation".[1009]

The Proposal PRD 2016 was adopted by the European Parliament and the Council at its first reading, even though Member States were initially reluctant with the proposed harmonization and preferred a principle-based approach.[1010] It raises the question of:

> whether the [PRD 2019] has introduced provisions of an obligatory enough nature to go beyond what was set out in the original [Commission Recommendation 2014], which did not see a major change among the Member State[s]. If the [Commission Recommendation 2014] failed to encourage reform, will a watered-down Preventive Restructuring Directive allowing massive margins of appreciation in its implementation result in member state implementation that actually bridges the gap between procedures, fomenting European harmonisation in member state approaches to preventive restructuring?[1011]

4 Implementations of the PRD 2019: an Overview

4.1 Introduction

To date, a majority of Member States have completed the implementation of the PRD 2019. In the prior seven successive chapters, the domestic PRFs of Austria, Denmark, France, Germany, Greece, the Netherlands and the United Kingdom (UK) have been examined. Apart from the first six countries, after Brexit, the UK was no longer under an obligation to implement the PRD 2019. However, their legislative reforms in this area closely resemble features of the PRFs under the PRD 2019. Furthermore, the UK still has

1007 European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)).

1008 Directorate-General Justice & Consumers of the European Commission, 'Evaluation of the implementation of the Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency', 30 September 2015, p. 5.

1009 G. McCormack, A. Keay, S. Brown & J. Dalgreen, *Study on a New Approach to Business Failure and Insolvency, Comparative Legal Analysis of the Member States' Relevant Provisions and Practices* (Tender No. JUST/2014/JCOO/PR/CIVI/0075), 2016, p. 18.

1010 J.M.G.J Boon, above note 958, pp. 171-172.

1011 D.C. Ehmke, J.L.L. Gant, J.M.G.J. Boon, L. Langkjaer & E. Ghio, above note 931, p. 209.

a prominent role in the European restructuring and insolvency sector. Consequently, it has been included in this analysis of how the PRD 2019 has influenced domestic European restructuring laws.[1012]

Per jurisdiction, the prior chapters analysed in detail the most important parts of the PRD 2019's PRFs. Here, we present a comparative study focussing on a selected number of these topics: the domestic approach to implementation (Section 4.2), the criteria or test to access PRFs (Section 4.3), the actors involved in PRFs (Section 4.4), the stay of individual enforcement actions (Section 4.5), the adoption and confirmation of restructuring plans (Section 4.6), and the jurisdiction for and recognition of court decisions relating to PRFs (Section 4.7).

4.2 Domestic Approach towards Implementation

Jurisdictions are free to choose the form and method to implement directives.[1013] Furthermore, the PRD 2019 also allows Member States to design PRFs to consist of a single or multiple "procedures, measures or provisions".[1014] Adopting such measures may, but does not have to, impinge on other solutions available in the domestic restructuring regimes to avoid insolvency.[1015] This grants considerable discretion to national legislators in (re)shaping their PRFs (Table 1).

Table 1 Approach to implementing preventive restructuring framework (PRF) in the respective Member States.

Jurisdiction and PRFs	Form of Implementation
Austria	Introduction of new PRFs with the adoption of the *Restrukturierungsordnung (ReO)*, introducing the regular (private), European (public) and simplified (private) *Restrukturierungsverfahren*
Denmark (*Preventive restructuring procedure*)	Introduction of a new PRF in a new chapter of the Danish Bankruptcy Act, introducing the preventive restructuring procedure (*forebyggende rekonstruktion*)

1012 Where references are made to implementation, for the UK this must be read as drawing inspiration from the PRD 2019, without being formally required to do so.

1013 See above Section 3.3.

1014 Art. 4(5) PRD 2019, see also above Section 3.2.

1015 Art. 4(1) PRD 2019.

Jurisdiction and PRFs	Form of Implementation
France (*Ad hoc mandate, conciliation, safeguard, accelerated safeguard*)	The implementing act introduced amendments to three already existing procedures: the safeguard (*sauvegarde*), the accelerated safeguard (*sauvegarde accélérée*) and the judicial reorganization (*redressement judiciaire*)
Germany (*Restrukturierungssache*)	Introduction of new PRFs with the adoption of the *Unternehmensstabilisierungs-und-restrukturierungsgesetz* (StaRUG), introducing the private and public *Restrukturierungssache*
Greece (*Διαδικασία Εξυγίανσης* (*Pre-insolvency rehabilitation*))	Introduction of a revised PRF with the adoption of the Debt Settlement and Facilitation of a Second Chance (resulting in a new Greek Insolvency Law), including a chapter that modifies the provisions on the pre-insolvency rehabilitation procedure
The Netherlands (*WHOA*)	Introduction of new PRFs with the adoption of the *Wet Homologatie Onderhands Akkoord* (WHOA), introducing a public (disclosed) and a non-public (undisclosed) *onderhands akkoord* (also referred to as a 'WHOA')
United Kingdom (*Pt 26A restructuring plan, Pt A1 moratorium*)	Introduction of a new PRF with the adoption of the Corporate Insolvency and Governance Act (CIGA) 2020, introducing the Restructuring Plan (Pt 26A Companies Act 2006), and Moratorium (Pt A1 Insolvency Act 1986)

The forms of implementing the PRD 2019 in the various Member States show some divergences. Except for France and Greece, all jurisdictions in this study introduced new PRFs, adding it to their current restructuring and insolvency regime(s). In the Netherlands, there was some discussion on possibly amending the existing suspension of payments, even while the Dutch WHOA was being drafted.[1016] However, ultimately it was decided to consider the Dutch WHOA as the partial implementation of the PRD 2019.[1017] For Greece, implementation of the PRD 2019 was part of a general overhaul of its insolvency laws,[1018] whereas for the other jurisdictions the reform focussed (primarily) on implementation of the PRD 2019 as such. The UK introduced a new PRF with two stand-alone measures, incorporated in the Companies Act 2006 and the Insolvency Act 1986. France too adopted features from the PRD 2019 in multiple processes, amending in particular the already existing safeguard and accelerated safeguard.

1016 *Kamerstukken II* 2017/18, 33 695, nr. 17, p. 4; *Kamerstukken II* 2018/19, 35 249, nr. 3, p. 4; *Kamerstukken II* 2018/19, 33 695, nr. 18, p. 3. See on this matter also S. Schreurs, 'Implementatie van de Herstructureringsrichtlijn: wellicht beter in de surseance dan in de WHOA?', *Tijdschrift voor Insolventierecht*, 2019/33, Para. 1 and 4.

1017 Chapter 7, Section 3.2.

1018 See also D. Skauradszun & G. Tsignopoulou, 'The Transposition of the Directive on Preventive Restructuring Frameworks Into Greek Law', *Nottingham Insolvency and Business Law E-Journal*, 2022, 10(1), Para. IV.

At the same time, most jurisdictions have maintained their existing restructuring and insolvency regime. This is explicitly permitted under the PRD 2019, stating that:

> [t]his Directive should allow Member States flexibility to apply common principles while respecting national legal systems. Member States should be able to maintain or introduce in their national legal systems preventive restructuring frameworks other than those provided for by this Directive.[1019]

In sum, the implementation of the PRD 2019 has mostly broadened the pre-existing regimes by extending the scope of restructuring tools available to debtors in financial distress.

4.3 Criteria and Tests to Access Preventive Restructuring Frameworks

Under the PRD 2019, PRFs should enable debtors "to restructure, with a view to preventing insolvency and ensuring their viability".[1020] To avoid the risk of preventive restructuring being misused to clear debts, the PRD 2019 requires that:

> the financial difficulties of the debtor should indicate a likelihood of insolvency and the restructuring plan should be capable of preventing the insolvency of the debtor and ensuring the viability of the business.[1021]

A PRF should furthermore be available to debtors at their request, but may also be available at the request of creditors and employees' representatives.[1022] This presented national legislators with various policy options in shaping the entry to the PRFs (Table 2).

1019 Recital 16 PRD 2019.
1020 Art. 4(1) PRD 2019. Compare also Art. 1(1)(a) PRD 2019.
1021 Recital 24 PRD 2019.
1022 Art. 4(1) and (8) PRD 2019.

Table 2 Commencement of preventive restructurings.

Jurisdiction and PRFs	Commenced by/at the Request of	Criteria to Enter Preventive Restructuring Framework
Austria[1023] (*Restrukturierungs-verfahren*)	Debtor	Likelihood of insolvency (warscheinliche Insolvenz) is present when the debtor's viability would be threatened without restructuring, in particular in case of imminent illiquidity. Under certain financial conditions, likelihood of insolvency is presumed. The court can deny an application for Restrukturierungsverfahren only when there is obviously no likelihood of insolvency. There is no explicit viability test. However, a debtor may not be illiquid at the time when the application for Restrukturierungsverfahren is made.
Denmark[1024] (*Preventive restructuring procedure*)	Debtor	Likelihood of insolvency is undefined and will be assumed if not disputed. There is no viability test to enter the preventive restructuring procedure.
France[1025] (*Ad hoc mandate, conciliation, safeguard, accelerated safeguard*)	Debtor	In ad hoc mandate, a debtor must face legal, economic or financial difficulties while not being insolvent yet. Conciliation is available to debtors facing legal, economic or financial difficulties, while not being insolvent for more than 45 days. The safeguard is available to debtors that are unable to pay debts that have become due (in *cessation des paiements*) or merely face difficulties that cannot be overcome, but which may later result in an inability to pay debts as they fall due (likelihood of insolvency). The accelerated safeguard is available to debtors who are not insolvent or insolvent not for more than 45 days before requesting the preceding conciliation procedure for negotiating a restructuring plan. Except for the accelerated safeguard, there is no viability test applicable for entering these procedures. In the accelerated safeguard, the debtor must show that the proposed restructuring plan will receive support from the involved creditors.

1023 Chapter 2, Section 4.2.
1024 Chapter 3, Section 4.2.
1025 Chapter 4, Section 3.1.

Jurisdiction and PRFs	Commenced by/at the Request of	Criteria to Enter Preventive Restructuring Framework
Germany[1026] (*Restrukturierungs-sache*)	Debtor	Likelihood of insolvency is transposed as imminent or prospective insolvency (drohende Zahlungsunfähigkeit). This is the case when it is more likely than not that the debtor will not be able to cover all debts once they fall due with the available liquidity within a forecast-period of 24 months. The StaRUG does not allow debtors to access the private or public *Restrukturierungssache* if they are already unable to pay their debts as they fall due or over-indebted[1027] (but they may continue the procedure if such inability to pay debts due/over-indebtedness occurs during the procedure provided continuation is in the best interest of creditors). There is no viability test to in the StaRUG to initiate the procedure.
Greece[1028] (*Διαδικασία Εξυγίανσης* (*Pre-insolvency rehabilitation*))	Debtor or individual creditors	Pre-insolvency rehabilitation is available to debtors (excluding consumers) meeting one of the statutory criteria, which range from a likelihood of insolvency to a general and permanent inability to pay debts as they fall due.
The Netherlands[1029] (*WHOA*)	Debtor, individual creditors, individual shareholders, the Works Council, and the Employee Representative Body	Debtors can enter a WHOA process when they are in a situation in which it can reasonably be assumed that they will be unable to continue paying their debts. There is not an explicit viability test to enter a WHOA.

1026 Chapter 5, Section 4.2.

1027 A debtor is considered to be over-indebted if (i) liabilities exceed asset value and (ii) the debtor is more likely than not to be unable to pay its debts within a forecast period of 12 months (shortened to 4 months until 31 December 2023).

1028 Chapter 6, Section 4.2.2.

1029 Chapter 7, Section 4.2.

Jurisdiction and PRFs	Commenced by/at the Request of	Criteria to Enter Preventive Restructuring Framework
United Kingdom (*Pt 26A restructuring plan, Pt A1 moratorium*)	Pt 26A restructuring plan Company and its directors, individual creditors,[1030] individual members of the company, and the liquidator (when the company is being wound up) and administrator (in administration).[1031] Pt A1 moratorium Company directors[1032]	In Pt 26A restructuring plans likelihood of insolvency requires that they "are only available to companies that are encountering or are likely to encounter financial difficulties that either are affecting, will affect, or may affect their ability to carry on business as a going concern".[1033] There is not a full viability test, still it is required that the petitioner shows the restructuring plan's compromise or arrangement is aimed at "eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties".[1034] In a Pt A1 moratorium, a stand-alone stay is available when the directors believe that a company is or is likely to become unable to pay its debts.[1035]

Lacking a definition of what 'likelihood of insolvency' entails in the PRD 2019,[1036] the various jurisdictions have taken different approaches. Some have clearly described time frames within which such a likelihood should be present (like Germany and France), others leave it more open for case-by-case assessment (the Netherlands), whereas again others do not give any indications (Denmark) or take a fluid approach by opening the frameworks not exclusively to debtors that are facing a likelihood of insolvency (Greece and the UK). Although the PRD 2019 gives much flexibility to the Member States to define likelihood of insolvency, it is unclear whether certain approaches fall within the envisaged scope of the PRD 2019, in particular when they include debtors that face formal insolvency. Then again, leaving the desirability of such varied approaches aside, the minimum harmonization of the PRD 2019 does not explicitly preclude Member States from introducing a broader application of its PRFs.[1037]

To achieve more uniformity of the entry test, when debtors can access PRFs, the EU legislator should take action. In the PRD 2019 it has intentionally been left to Member States themselves to define what 'insolvency' as well as 'likelihood of insolvency' are.[1038] As

1030 Although in practice it is difficult for a creditor to do so without the involvement of the company.

1031 Chapter 8, Section 4.5.1.

1032 Chapter 8, Section 4.4.1.

1033 Chapter 8, Section 4.2.1; Section 901A(2) Companies Act 2006.

1034 Chapter 8, Section 4.2.2; Section 901A(3) Companies Act 2006.

1035 Chapter 8, Section 4.4.1.

1036 The EU legislator left the meaning of this concept, explicitly to the discretion of Member States, see Art. 2(2)(b) PRD 2019.

1037 This may be inferred from the lack of provisions regarding non-applicability to insolvent debtors, and at various points furthering general flexibility with implementing the PRD 2019 is reiterated, including in Recitals 13 and 16, and Arts 2(2)(a) and (b), 4(3) and (5) PRD 2019.

1038 Art. 2(2)(a) and (b) PRD 2019.

the above discussion shows, the results are divergent and possibly at odds with the objective of the PRD 2019 itself: creating more legal certainty for cross-border investment, by reducing the divergences between Member States and enabling debtors to restructure at an early stage, in order to avoid increasing losses and consequently, preventing unnecessary insolvency proceedings.

In its recent Proposal to harmonize certain aspects of insolvency law, the European Commission provides further guidance on the intended scope of PRFs under the PRD 2019. The Commission emphasizes that the scope of preventive restructuring processes – as provided for by the PRD 2019 – is confined to 'pre-insolvency'; this is to be distinguished from actual insolvency as well as post-insolvency.[1039] However, once again driven by opposition from Member States, the Commission stays away from proposing any form of definition of these concepts in the Proposal itself.[1040]

4.4 Actors Involved in Preventive Restructuring Frameworks

Article 5(1) PRD 2019 makes a clear choice regarding the governance of PRFs with the debtor remaining fully or at least partially in possession over its assets and day-to-day operation of the business, the so-called 'Debtor-in-Possession' (DIP). The recitals reiterate that debtors should "in principle, be left in control of their assets and the day-to-day operation of their business".[1041]

The involvement of other actors and specialized practitioners – the so-called 'Practitioner in the Field of Restructuring' (PIFOR) – is optional on a case-by-case basis, subject to limited exceptions where mandatory appointment is warranted to protect the interests of the creditors.[1042] This includes in particular the following situations: when its appointment is necessary to protect the creditors' rights while a debtor benefits from a stay, in case of a confirmation of a restructuring plan which requires cross-class cram-down, and when a majority of the creditors request the appointment of a PIFOR. [1043] Optional appointment of a PIFOR, on a case-by-case basis only, is possible when a

1039 European Commission Proposal for a Directive of the European Parliament and the Council harmonising certain aspects of insolvency law, 7 December 2022, COM(2022) 702 final, p. 4; European Commission, Commission Staff Working Document, Impact Assessment, Accompanying the document Proposal for a Directive of the Parliament and of the Council harmonising certain aspects of insolvency law, 7 December 2022, SWD(2022) 395 final, p. 8, 13 and 14-15.

1040 European Commission, Commission Staff Working Document, Impact Assessment, Accompanying the document Proposal for a Directive of the Parliament and of the Council harmonising certain aspects of insolvency law, 7 December 2022, SWD(2022) 395 final, p. 89. There was similar opposition on this matter when the PRD 2019 was prepared, see Impact Assessment Proposal PRD 2016, pp. 23, 60 and 93.

1041 Recital 30 PRD 2019.

1042 Recital 30 and Art. 5(2) and (3) PRD 2019.

1043 Recital 31 and Art. 5(3) PRD 2019.

restructuring plan affects the rights of workers or when a debtor's management has acted criminally, fraudulently or otherwise detrimental in business relations.[1044] Furthermore, Article 4(6) PRD 2019 provides that the involvement of a judicial or administrative authority may be limited to where it is necessary to protect the rights of affected parties and relevant stakeholders.

Compared to certain other parts of the PRD 2019, the EU legislator left limited room for divergence in transposing the Directive with respect to the involvement of actors, which is also demonstrated in the implementations in various jurisdictions (Table 3).

Table 3 Overview of involved actors in preventive restructuring frameworks.

Jurisdiction and PRFs	DIP	PIFOR(s)
Austria[1045] (*Restrukturierungs-verfahren*)	A debtor is, in principle, fully in possession, but may be partially divested when for certain decisions a debtor requires consent of the court or a PIFOR.	A PIFOR is appointed at the request of a debtor, the majority of creditors or at the court's own motion. A PIFOR is appointed mandatorily if one of the conditions of Article 5(3) PRD 2019 applies. In addition, a PIFOR is mandatory when leaving a debtor-in-possession may be detrimental to the creditors. The court may also appoint a PIFOR when this is required to examine new finance, to report on the results of the alternative scenario to the offered restructuring plan, or to review contested claims. The tasks of a PIFOR are determined by the court and may comprise, in particular, (i) support of the debtor or the creditors in relation to the restructuring plan, (ii) supervision of the debtor and report to the court and (iii) partially taking over control of the debtor's assets and business.
Denmark[1046] (*Preventive restructuring procedure*)	A debtor is, in principle, fully in possession, but may be partially divested when a PIFOR is appointed.	A PIFOR is appointed at the request of a debtor. A PIFOR is appointed mandatorily when a debtor is granted a stay. A PIFOR will assist and supervise a debtor. A debtor also requires the consent of a PIFOR for entering into transactions with material significance.

1044 Recital 30 PRD 2019.
1045 Chapter 2, Section 4.3.
1046 Chapter 3, Section 4.3.

Jurisdiction and PRFs	DIP	PIFOR(s)
France (*Ad hoc mandate, conciliation, safeguard, accelerated safeguard*)	A debtor is, in principle, fully in possession in the ad hoc mandate, conciliation, safeguard and accelerated safeguard. In the safeguard and accelerated safeguard a PIFOR is mandatory in certain circumstances.	The respective French processes provide for different types of practitioners (which may qualify as PIFORs): In ad hoc mandate, a court mandatorily appoints an ad hoc representative, who will assist with the negotiations between the debtor and its main creditors. The debtor remains fully in possession.[1047] In conciliation, a court mandatorily appoints a conciliator, who will pursue to reach an agreement between the debtor and the main creditors. A conciliator does not divest the debtor.[1048] In a safeguard and accelerated safeguard, an administrator (*administrateur judiciaire*) is in principle mandatorily appointed to supervise and/or assist the debtor when meeting a threshold of 20 employees or turnover of EUR 3 million. The administrator will assist in preparing a plan together with the debtor. The debtor requires consent from the administrator to enter into agreements and dispose of assets. A creditor's representative (*mandataire judiciaire*) is in principle mandatorily appointed to represent the interests of the creditors and to assess proof of claims.[1049]
Germany[1050] (*Restrukturierungs-sache*)	A debtor is, in principle, fully in possession and control of the operative business and the restructuring procedure. The role of the PIFOR is limited. A debtor has the exclusive right to commence a process, to propose a restructuring plan, and to request the court to sanction a stay or confirm a restructuring plan.	A PIFOR is appointed at the request of a debtor, creditor(s) holding more than 25% of voting rights or at the court's own discretion. A PIFOR is appointed mandatorily if one of the conditions of Article 5(3) PRD 2019 applies. There is an exception when there is a cross-class cram-down for a plan involving only financial creditors. Furthermore, courts may appoint a PIFOR also at their own motion to conduct certain examinations. A PIFOR monitors the process, advises the debtor and reports to the court. A PIFOR may be given the power to (dis)approve exceptional payments of the debtor and to preside over the voting process.

1047 Chapter 4, Section 3.1.
1048 Chapter 4, Section 3.1 and 4.1.1.
1049 Chapter 4, Section 3.2.
1050 Chapter 5, Section 4.3.

Jurisdiction and PRFs	DIP	PIFOR(s)
Greece[1051] (*Διαδικασία Εξυγίανσης* (*Pre-insolvency rehabilitation*))	A debtor is, in principle, fully in possession, but may be partially or fully divested when a PIFOR is appointed.	A PIFOR can be appointed at the request of anyone with a 'legitimate interest'. A PIFOR can be appointed when a debtor has delayed the filing of an insolvency application or has intentionally caused the insolvency, when there have been fraudulent transfers of assets, or in cases when a debtor abusively refuses to participate in negotiations for a rehabilitation agreement. An appointment can take place only after confirmation of the rehabilitation agreement has been requested. Furthermore, a PIFOR can also be appointed after confirmation of the rehabilitation agreement to protect the debtor's assets or implement the agreement. A PIFOR can partially or fully exercise the debtor's powers.
The Netherlands[1052] (*WHOA*)	A debtor is fully in possession, also when a PIFOR is appointed.	A PIFOR is appointed at the request of a debtor, creditors, shareholders, Works Council, Employee Representative Body or at the court's own motion. A PIFOR will be mandatorily appointed if one of the conditions of Article 5(3) PRD 2019 applies. There are two types of PIFORS: observers and restructuring experts. An observer is limited to supervising the debtor, preparing a plan and informing the court. A restructuring expert will prepare a plan (with the debtor) and supervises the debtor and the preparations for a plan and will inform the court.
United Kingdom[1053] (*Pt 26A restructuring plan, Pt A1 moratorium*)	In a Pt 26A restructuring plan, the debtor remains fully in possession. In a Pt A1 moratorium, a debtor is fully in possession, also when a monitor is appointed.	In a Pt 26A restructuring plan, no appointment of a PIFOR is envisaged. In a Pt A1 moratorium, a monitor will be appointed mandatorily. A monitor is tasked with supervising the company's activities during the moratorium.

As Table 3 demonstrates, the various implementations show considerable convergence with respect to the PRD 2019's 'DIP Principle', in which the debtor is left in full or at least in partial control of its assets and affairs. For the Netherlands and the UK Pt A1 moratorium, a debtor stays fully in possession also when a PIFOR is appointed. However, most other jurisdictions in this study provide that a debtor may be divested in case a PIFOR is

1051 Chapter 6, Section 4.3.1.
1052 Chapter 7, Section 4.3.
1053 Chapter 8, Section 4.3.

appointed. Such appointments entail in Austria, Denmark, France and Germany only partial divestment of a debtor. Only in Greece the debtor may be fully divested in pre-insolvency rehabilitation, deviating from the DIP Principle.

In most jurisdictions, the involvement of a PIFOR is decided on a case-by-case basis, which is the case in Austria, Denmark, Germany, Greece and the Netherlands. Deviating from the PRD 2019, others provide for mandatory appointment of PIFORs. For instance in France, if certain conditions are met, PIFORs are appointed mandatorily (ad hoc mandate, conciliation, safeguard and accelerated safeguard). Even though these French PIFORs do not always divest the debtor, it is not consistent with the PRD 2019. In the UK Pt A1 moratorium, a PIFOR is appointed mandatorily; however, this falls within the exception of Article 5(3)(A) PRD 2019.

According to the exception of Article 5(3) PRD 2019, the appointment of a PIFOR is envisaged typically (if necessary) when a stay is granted, when confirmation involves a cross-class cram-down or when (a majority of) the creditors request its appointment. Germany and the Netherlands follow these minimum grounds strictly. On the other end of the spectrum, Austria and Greece take a much more 'generous' approach for appointing a PIFOR, while in France it is mandatory in every case. This is opposed to the Danish approach, where mandatory appointment of a PIFOR is available only in case of a stay. A notable exception is the UK, where Pt 26A restructuring plan does not envisage the appointment of a PIFOR at all, similar to the UK Scheme of Arrangement. In sum, most jurisdictions in this study require appointment of a PIFOR, at least in the categories listed in Article 5(3) PRD 2019. However, there are still some considerable divergences, even deviating from the PRD 2019. It is also problematic that the role of the PIFOR seems to lack clear articulation in some jurisdictions. In Greece, the relevant provision merely states that a PIFOR may be assigned partial or full administration over the debtor's estate. This is different in the Netherlands and Germany, which have introduced different types of PIFORs, with more elaborate provisions on their respective rights and duties.

For all jurisdictions, the involvement of the court or an administrative authority in the governance of the restructuring process is generally limited. Court involvement relates mostly to responding to requests from the debtor (such as granting a stay or confirming a plan), and sometimes also from other (affected) parties (*e.g.* to appoint a PIFOR). This is less so in some court-supervised processes in France, such as the (accelerated) safeguard, where each case involves a supervisory judge.[1054]

1054 Chapter 4, Section 3.2.

4.5 Stay of Individual Enforcement Actions

The PRD 2019 requires availability of a stay "to support the negotiations of a restructuring plan".[1055] It provides, however, extensive policy options to national legislators in shaping the stay, including the scope of a stay (who is affected), the effects of stay (what does it entail), duration of stay (how long) and how a stay can be lifted (under which conditions).[1056] Under the PRD 2019, a stay should be available at the request of debtors, for an initial duration of not more than four months and in total not more than twelve months. This has been implemented in various ways (Table 4).[1057]

Table 4 Requesting and duration of a stay of individual enforcement actions.

Jurisdiction and PRFs	Availability of a Stay	Duration of a Stay
Austria[1058] (*Restrukturierungs-verfahren*)	In regular and European proceedings: a stay is available upon request of a debtor. In simplified proceedings: no stay available.	In regular and European proceedings: Initial duration: max. 3 months Total duration: max. 6 months
Denmark[1059] (*Preventive restructuring procedure*)	A stay is available upon request of a debtor.	Initial duration: max. 4 weeks Total duration: max. 12 months
France[1060] (*Conciliation, safeguard, accelerated safeguard*)	In conciliation, a stay is available upon request of a debtor. In a safeguard and accelerated safeguard, a stay is granted automatically.	In conciliation: Max. duration of 2 years for debts due and payable pre-petition Max. duration 5 months for debts that are not yet due and payable In safeguard: Initial duration: max. 6 months Total duration: max. 12 months In accelerated safeguard: Initial duration: max 2 months Total duration: max. 4 months
Germany[1061] (*Restrukturierungs-sache*)	A stay is available upon request of a debtor.	Initial duration: max. 3 months Total duration: max. 8 months

1055 Art. 6(1) PRD 2019.

1056 See for a detailed overview of the different policy options J. Garrido, C. DeLong, A. Rasekh & A. Rosha, above note 987, p. 13 et seq.

1057 Art. 6(1) and (6) PRD 2019.

1058 Chapter 2, Section 4.4.1.

1059 Chapter 3, Section 4.4.

1060 Chapter 4, Sections 3.1, 3.2, 4.1.1.

1061 Chapter 5, Section 4.4.

Jurisdiction and PRFs	Availability of a Stay	Duration of a Stay
Greece[1062] (*Διαδικασία Εξυγίανσης* (*Pre-insolvency rehabilitation*))	During negotiations, a stay is available upon request of a debtor or creditor. During the confirmation phase, a stay is granted automatically.	During negotiations: Initial duration: max. 4 months Total duration: max. 6 months Duration of automatic stay is unclear from statute, but it is presumed to be: Initial duration: max. 4 months Total duration: max. 12 months
The Netherlands[1063] (*WHOA*)	A stay is available upon request of a debtor or PIFOR.	Initial duration: max. 4 months Total duration: max. 8 months
United Kingdom[1064] (*Pt 26A restructuring plan; Pt A1 moratorium*)	Pt 26A restructuring plan: there is no (automatic) stay for the restructuring plan; this is provided as a stand-alone tool by the Pt 1A moratorium. Pt 1A moratorium: a stay is available upon request of the directors of a company.	Pt 1A moratorium Initial duration: 20 business days Total duration: max. 12 months

It follows from Table 4 that each jurisdiction in this study offers a stay, mostly within a PRF. The UK stands out as it has a stand-alone stay, separate from its PRFs. A stay is typically available at the request of a debtor, although in the Netherlands, it is also available at the request of a PIFOR.

In line with the PRD 2019, the initial duration is not more than four months (although varying between 20 business days and four months). The total duration is capped at 12 months in Denmark, France (safeguard), Greece (stay upon request for confirmation) and the UK. However, several jurisdictions have opted to limit the maximum duration to eight (Germany and the Netherlands), six (Austria) or even just four months (France, in the accelerated safeguard). Looking at these minimum standards for stays and noting still considerable differences in the duration of stays, most jurisdictions offer at least one stay in line with the PRD 2019.

4.6 Adoption and Confirmation of Restructuring Plans

Chapter 3 of the PRD 2019 regulates the restructuring plan, including the contents of a plan, class formation, as well as the voting, adoption and confirmation of plans, including

1062 Chapter 6, Section 4.4.
1063 Chapter 7, Section 4.4.
1064 Chapter 8, Section 4.4.2.

grounds for rejecting confirmation. There is a plethora of options for legislators. For instance, whether class formation is mandatory for SME debtors, whether shareholders' and workers' rights can be affected, and how reorganization value should be distributed under the plan.[1065] As the IMF pointed out, the intricacy for the EU legislator was balancing a framework that maximizes legal flexibility without necessitating full legal scrutiny by a court.[1066] Whereas the PRD 2019 lays down many minimum standards and policy options, in this section we focus our analysis on four features of restructuring frameworks: (i) who can propose a plan and who can be affected by the plan, (ii) what is the threshold for intra-class adoption of a plan, (iii) what is the threshold for a plan to be eligible for cross-class cram-down and (iv) what fairness test applies in a cross-class cram-down (Table 5).

As a minimum, the PRD 2019 requires that a debtor is able to propose a plan, but creditors and/or PIFORs may be granted the right to submit competing plans.[1067] The PRD 2019 gives national legislators considerable discretion in considering who will be affected by the plan. However, all affected parties must have the right to vote on the plan.[1068] A class of such affected creditors and/or shareholders will have adopted a plan if there is majority in value of claims or interests. National legislators may not require a majority exceeding 75%.[1069] If all classes adopt the plan with the required majority, the plan may – subject to other criteria including the best-interest-of-creditors test – be confirmed.[1070]

When a plan has not been adopted by all classes, it may still be confirmed by the court by means of a cross-class cram-down. A plan will be eligible for confirmation subject to several requirements. A plan must have been adopted (i) by a majority of all voting classes (including one secured class or class senior to the unsecured creditors class) or (ii) at least one class of creditors that would be 'in-the-money' in case of either a going-concern sale or in a liquidation proceeding.[1071]

Besides the best-interest-of-creditors test, in this case also the fairness test must be adhered to for dissenting classes. The EU legislator has introduced – which resulted in a vivid academic debate[1072] – that this could be based on the so-called relative priority rule (RPR), the absolute priority rule (APR) or a relaxed version of the APR. The RPR entails

1065 Consider for instance Arts 9(4), 11, 12 and 13.
1066 J. Garrido, C. DeLong, A. Rasekh & A. Rosha, above note 987, p. 16.
1067 Art. 9(1) PRD 2019.
1068 Art. 9(2) AND (3) PRD 2019.
1069 Art. 9(6) PRD 2019.
1070 Arts 9(6) and 10 PRD 2019.
1071 Art. 11(1)(b) PRD 2019.
1072 See for instance: S. Madaus, 'Leaving the shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law', *European Business Organization Law Review*, 2019, pp. 615-647; R.J. de Weijs, A. Jonkers & M. Malakotipour, above note 936, 2019/*125*(4); G. Ballerini, 'The Priorities Dilemma in the EU Restructuring Directive: Absolute or Relative Priority Rule?', *International Insolvency Review*, 2020, 30(1), pp. 7-33; R.P. Freitag, above note 932, para. 2(b).

that in distributing the reorganization value (the excess value compared to the next best alternative to the restructuring), any dissenting class of creditors should be treated at least as favourable as classes of an equal rank and more favourable than any junior class.[1073] This is much more flexible than the APR, under which a lower ranking class can receive value only when any higher ranking class is paid in full.[1074] Whereas the latter can be rather strict, implementations may also provide for a 'relaxed APR' or 'relaxed RPR', where limited deviations from the APR or RPR are acceptable when they are necessary to achieve the aims of an restructuring.[1075]

Table 5 Adoption and confirmation of plans.

Jurisdiction and PRFs	Proposing a Plan	Threshold for Intra-Class Adoption	Threshold for Cross-Class Cram-Down and Fairness Test
Austria[1076] (*Restrukturierungs-verfahren*)	By the debtor to the affected creditors	In regular and European proceedings: simple majority of affected creditors (in number) and qualified majority of 75% of creditors (in value), both based on creditors present at the meeting. In simplified proceedings: 75% of creditors in value.	In regular and European proceedings: Threshold: simple majority of classes including secured creditors or simple majority of the 'in-the-money' classes Fairness test: RPR In simplified proceedings: no cross-class cram-down.
Denmark[1077] (*Preventive restructuring procedure*)	By the debtor to the affected creditors	Simple majority of the affected creditors (in value) present at the meeting.	Threshold: simple majority of classes. Fairness test: APR.

1073 Art. 11(1)(c) PRD 2019.
1074 Art. 11(2), first sentence, PRD 2019.
1075 Art. 11(2), last sentence, PRD 2019.
1076 Chapter 2, Sections 4.5.2, 4.6.1, 4.6.2 and 4.6.4.
1077 Chapter 3, Sections 4.3, 4.5 and 4.6.

Jurisdiction and PRFs	Proposing a Plan	Threshold for Intra-Class Adoption	Threshold for Cross-Class Cram-Down and Fairness Test
France[1078] (*Conciliation, safeguard, accelerated safeguard*)	By the debtor to the affected creditors and shareholders	Qualified majority of two thirds of the affected creditors (in value). Similar requirements apply to classes of shareholders.	Threshold: (i) simple majority of classes voting in favour, including at least one class of secured creditors or a class senior to the ordinary unsecured creditors, or (ii) at least one class of affected parties has voted in favour of the plan, which is a class which is 'in-the-money' in judicial liquidation. Fairness test: APR.
Germany[1079] (*Restrukturierungssache*)	By the debtor to the affected creditors and shareholders	Qualified majority of 75% (in value) of all affected creditors entitled to vote; qualified majority of 75% of all affected shareholders entitled to vote.	Threshold: simple majority of classes. Fairness test: – horizontal: no discrimination of a class ranking equally in a liquidation; – flexible composition of classes and different treatment of different classes possible with sound economic justification; – vertical: relaxed APR.
Greece[1080] (*Διαδικασία Εξυγίανσης* (*Pre-insolvency rehabilitation*))	By the debtor or the affected creditors	Simple majority of the affected secured creditors (in value) and simple majority of all other (non-secured) affected creditors (in value).	Threshold: qualified majority of 60% of the creditors (in value), of which at least 50% of the secured creditors (in value). Fairness test: a form of RPR, applied to individual creditors.

1078 Chapter 4, Sections 4.2 and 4.3.
1079 Chapter 5, Section 4.6.
1080 Chapter 6, Section 4.6.3.

Jurisdiction and PRFs	Proposing a Plan	Threshold for Intra-Class Adoption	Threshold for Cross-Class Cram-Down and Fairness Test
The Netherlands[1081] (*WHOA*)	By the debtor and restructuring expert to the affected creditors and shareholders	Qualified majority of two thirds of the affected creditors (in value) present and voting and a qualified majority of two thirds of the affected shareholders (based on issued capital), based on those affected creditors/ shareholders present at the meeting/having cast their vote.	Threshold: at least one class of creditors (in principle an 'in-the-money' class in case of liquidation in bankruptcy). Fairness test: relaxed APR
United Kingdom[1082] (*Pt 26A restructuring plan*)	By directors, the company, creditors, liquidator or administrator to the affected creditors and shareholders	Qualified majority of 75% of the affected creditors (in value) present and voting. Similar requirement for classes of shareholders (members).[1083]	Condition A is that none of the members of a dissenting class would be any worse off than they would be in the event of the 'relevant alternative'.[1084] Condition B is that the compromise or arrangement has been agreed by a class of members or creditors who have a genuine economic interest in the company.[1085]

All jurisdictions in this study allow a debtor to propose a plan, but in Greece, the Netherlands and the UK it has been extended to certain other parties, such as creditors and/or practitioners. Noticeable is the Greek option in the pre-insolvency rehabilitation where creditors may pursue a restructuring without any direct involvement of a debtor.[1086]

The threshold for intra-class adoption of restructuring plans shows much diversity, and it is doubtful whether the PRD 2019 succeeded in any actual harmonization. The required majority differs between a simple majority, or a qualified two-thirds majority or

1081 Chapter 7, Sections 4.6.2 and 4.6.3.

1082 Chapter 8, Sections 4.6.1, 4.6.2 and 4.6.3.

1083 Section 901F(1) CA 2006.

1084 Whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.

1085 Section 901g(3) and (4) CA 2006. There is no APR under English law, English courts have recently clarified that they are not persuaded by arguments relying on APR or RPR narratives because the introduction of these concepts in the law was rejected by the consultations leading to the CIGA

1086 Chapter 6, Section 4.2.1.

75% of the value of the claims of creditors and/or interests of shareholders. However, Austria also requires a majority in the number of affected parties that voted. Furthermore, Germany requires the majority to be calculated based on all affected parties in a class, whereas most other jurisdictions allow for the majority to be calculated based on the affected parties present and voting. With regard to the threshold for requesting a cross-class cram-down, there is also some divergence, but several jurisdictions remain close to the requirements as listed in Article 11(1)(b) PRD 2019.

In addition, the applied fairness tests show great diversity among jurisdictions. Denmark and France strictly apply the APR; Germany and the Netherlands have opted for the relaxed APR. Austria and Greece have opted for the RPR, and the UK has not adopted a statutory fairness test. It goes without saying that the features reviewed here with respect to adoption and confirmation of restructuring plans show it is hard to detect any clear convergence in Europe as regards adoption and confirmation of plans in PRFs. Much will depend on how the courts will apply these tests in practice.

4.7 Jurisdiction for and Recognition of Court Decisions in Europe

Whereas the PRD 2019 is introduced to reduce the costs for cross-border investors, the EU legislator has given limited consideration for the cross-border aspects of PRFs. It must be noted that the EIR 2015 covers PRFs that meet its requirements, including that it is a 'public' collective proceeding.[1087] The PRD 2019 is without prejudice to this EIR 2015, thus enabling that within the EU (excluding Denmark), PRFs listed on Annex A of the EIR 2015 would benefit from its framework for jurisdiction, recognition and enforcement of judicial decisions as well as its mechanism protecting against abusive relocation of the centre of main interests of debtors.[1088]

A notable feature, which has arisen also in implementations of the PRD 2019, is that PRFs do not necessarily meet the requirements of an 'insolvency proceeding' under the EIR 2015. This relates in particular to the requirement of publicity for insolvency proceedings falling within the scope of the EIR 2015.[1089] The EU legislator has remained silent on questions of jurisdiction and recognition in this regard, which has resulted in considerable uncertainty across Europe.[1090] Therefore, it remains unclear whether

1087 Art. 1(1) EIR 2015.

1088 Recitals 12-14 PRD 2019. Cross-border insolvency aspects of PRFs also appear in in Art. 6(8) PRD 2019 limiting the duration of a stay in case (i) a process does not meet the requirements being subject to the EIR 2015 and (ii) debtors have moved their centre of main interests within three months prior to requesting 'for the opening of preventive restructuring proceedings'.

1089 Recital 13 PRD 2019.

1090 Recital 13 and Art. 1(1) EIR 2015. See on this among others: W.J.E. Nijnens, 'Internationaal privaatrechtelijke aspecten van de WHOA', *Tijdschrift voor Insolventierecht* 2019/34; P.M. Veder, 'Internationale aspecten van

questions of jurisdiction, recognition and enforcement of decisions in such PRFs are subject to the Brussels Ibis Regulation (Brussels Ibis)[1091] or fall within the scope of domestic private international rules. As a result, diverse and sometimes hesitant approaches have been taken on this matter, as is reflected in Table 6 dealing with the question of jurisdiction for (rendering decisions in) PRFs.

Table 6 Jurisdiction of (decisions taken in) preventive restructuring frameworks.

Jurisdiction and PRFs	PRFs Listed on Annex A EIR 2015	PRFs Not Listed on Annex A EIR 2015 and Legal Basis for Courts to Exercise Jurisdiction[1092]
Austria[1093] (*Restrukturierungs-verfahren*)	*Das Europäische*	Regular restructuring proceedings and simplified restructuring proceedings. Statute remains silent on whether jurisdiction and recognition for such proceedings is based on Brussels Ibis or domestic rules. For jurisdiction, the domestic *Jurisdiktionsnorm* requires debtors using regular or simplified restructuring proceedings to operate their business or have their habitual residence in Austria. In addition, even appreciable assets in Austria suffice.
Denmark[1094] (*Preventive restructuring procedure*)	(EIR 2015 does not apply)	Preventive restructuring procedure. Statute remains silent on whether jurisdiction and recognition of decisions in the Danish preventive restructuring proceeding are based on Brussels Ibis or on domestic rules.

de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement', *Tijdschrift Financiering, Zekerheden en Insolventierechtpraktijk*, 2019/6; J.M.G.J. Boon, R.D. Vriesendorp & R. Sijbesma, 'Netherlands Commercial Court als mogelijke WHOA-rechter bij internationale herstructureringen', *HERO*, 2021/W-001, Para. 3.1; J. Schmidt, 'Präventiver Restrukturierungsrahmen: Internationale Zuständigkeit, Anerkennung und anwendbares Recht', *Zeitschrift für das gesamte Insolvenzrecht*, 2021/654, at 654-656; R.D. Vriesendorp, W. van Kesteren, E. Vilarin-Seivane & S. Hinse, 'Automatic Recognition for the Dutch Undisclosed WHOA Procedure in the European Union', *NIPR*, 2021/1. See also S. Madaus & B. Wessels, CERIL Report 2022-2 on Cross-Border Effects in European Preventive Restructuring, 2022, available at: www.ceril.eu/news/ceril-report-2022-2-on-cross-border-effects-in-european-preventive-restructuring.

1091 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), O.J. L 351/20.

1092 This category also applies to cases where the debtor's centre of main interest is located in a third country, to which the EIR 2015 does not apply (compare recital 25 EIR 2015).

1093 Chapter 2, Section 4.9 and 4.10.

1094 Chapter 3, Section 4.9.

Jurisdiction and PRFs	PRFs Listed on Annex A EIR 2015	PRFs Not Listed on Annex A EIR 2015 and Legal Basis for Courts to Exercise Jurisdiction[1092]
France[1095] (*Ad hoc mandate, conciliation, safeguard, accelerated safeguard*)	*Sauvegarde* (safeguard) and *sauvegarde accélérée* (accelerated safeguard)	Ad hoc mandate and conciliation. Statute remains silent on whether jurisdiction and recognition of decisions in ad hoc mandate and conciliation are based on Brussels Ibis or on domestic rules.
Germany[1096] (*Restrukturierungs-sache*)	*Die öffentliche Restrukturierungssache* (public Restrukturierungs-sache)	Private *Restrukturierungssache*. The Statute gives no clear guidance on the matter of international jurisdiction. German courts should be expected to assume jurisdiction provided the debtor's centre of main interest is in Germany.
Greece[1097] (*Διαδικασία Εξυγίανσης* (*Pre-insolvency rehabilitation*))	*Διαδικασία Εξυγίανσης* (rehabilitation procedure)	-
The Netherlands[1098] (*WHOA*)	Public WHOA	Private WHOA The Dutch Bankruptcy Code provides that jurisdiction and recognition of decisions in a private WHOA are based on domestic rules. A sufficient connection test is applied for a Dutch court to assume jurisdiction.
United Kingdom[1099] (*Pt 26A restructuring plan; Pt A1 moratorium*)	(EIR 2015 does not apply)	Pt 26A restructuring plan and Pt A1 moratorium Jurisdiction and recognition are based on domestic PIL rules.

It is clear that – except for Denmark and the UK to which the EIR 2015 does not apply – various PRFs have been listed as 'insolvency proceeding' on Annex A of the EIR 2015. Whereas the EIR 2015 provides a well-functioning framework for cross-border effect of insolvency proceedings, it is criticized as incompatible with preventive restructuring.[1100] When it comes to jurisdiction and recognition for those preventive frameworks that are not on Annex A or when it regards third countries (and the EIR 2015 does not apply), it is clear that not only the EU legislator but also national legislators have left considerable uncertainty to the market. The Dutch legislator has made a clear choice, but most

1095 INSOL Europe/LexisPSL joint project on the implementation analysis of the Directive (EU) 2019/1023 in the EU Member States, France, 2022, p. 4.

1096 Chapter 5, Section 4.9.

1097 Chapter 6, Section 4.7.

1098 Chapter 7, Section 4.9.

1099 Chapter 8, Section 4.9 and 5.6.

1100 S. Madaus & B. Wessels, CERIL Report 2022-2 on Cross-Border Effects in European Preventive restructuring, 2022, p. 7, available at: www.ceril.eu/news/ceril-report-2022-2-on-cross-border-effects-in-european-preventive-restructuring.

jurisdictions have remained silent. If the EU legislator will not address this itself, which for now seems to be the case, it appears to be left ultimately to the CJEU to resolve.

In the recitals to the PRD 2019, it is rightly emphasized that the EIR 2015 was not able to resolve disparities between domestic PRFs. In addition, it is stated that

> an instrument limited only to cross-border insolvencies would not remove all obstacles to free movement, nor would it be feasible for investors to determine in advance the cross-border or domestic nature of the potential financial difficulties of the debtor in the future.[1101]

Our analysis suggests that the opposite may also be true. By ignoring the implications of preventive restructuring in a European market and leaving untouched the need for an adequate cross-border insolvency regime, the PRD 2019 leaves ample uncertainty for jurisdiction, recognition and enforcement of decisions during a PRF. As a result, the EU legislator may effectively have created an impediment to the free movement of capital, contrary to the objectives of the PRD 2019.

5 Does the PRD 2019 Deliver on Its Promise?

5.1 Introduction

The discussion in Section 4 shows that the implementations of the PRD 2019 in the various jurisdictions in this study bring about a rather divergent picture. It is clear that in considering the policy alternatives of the PRD 2019, national legislators have taken different choices. The variety in outcomes is a serious impediment in formulating an answer to the question whether the approach adopted by the EU legislator – minimum harmonization of preventive restructuring by means of a directive – has been successful in achieving the aforementioned key objectives of reducing legal uncertainty for cross-border investment and promoting early restructuring of financially distressed debtors. Or to put it differently, whether the introduction of or amendments to domestic PRFs have been effective. There are several considerations to take into account.

Firstly, what can we justifiably assess at this moment, with for some jurisdictions some two years, but for most jurisdictions less of experience with a new or amended legal framework? An analysis of the effectiveness will therefore be done based predominantly on a so-called 'law at the books' approach. Although a further analysis of the 'law in action'

1101 Recital 12 PRD 2019.

will certainly provide more insights, that remains difficult to achieve shortly after the implementation.

Secondly, the high degree of minimum harmonization – including the possibility to introduce preventive restructuring tools in multiple procedures, measures or provisions – complicates any assessment of effectiveness. Although there is an obligation that restructuring frameworks must provide a coherent protection of the rights of the affected parties, such as debtors, creditors, shareholders and workers,[1102] this in itself is insufficient to guarantee the effectiveness of the frameworks. However, an understanding of how the implementation has been used to shape PRFs in the respective jurisdictions is needed first.

Thirdly, one might be critical about the PRD 2019's assumptions, including the presumed economic effects of the availability of PRFs.[1103] This draws indeed to limitations of the PRD 2019 as a tool to reach certain policy objectives. For instance, (i) PRFs are merely one indicator among many that are relevant for the (costs of a) cross-border investment climate in Europe, and (ii) the minimum standards laid down in the PRD 2019 provide mostly for a formal legal framework for preventive restructuring. One must be aware that the impact of PRFs on cross-border investment has not been substantively quantified.[1104] Similarly, the effectiveness of the preventive restructuring tools will also depend on their implementation and application in domestic law, the coherence between the different tools, as well as the domestic legal culture including the expertise and experience of judges and practitioners.[1105] In short, effectiveness may be a very different concept in practice than it is in the law.[1106]

The next two sections contain a discussion about the extent to which the PRD 2019 has (already) achieved its objectives. Firstly, we investigate whether and to what extent the PRD 2019 has reduced legal uncertainty on PRFs (Section 5.2). Secondly, we review the

1102 Art. 4(5), second sentence, PRD 2019.

1103 R.P. Freitag, above note 932, pp. 229-231 and 243-244.

1104 See Recital 6 Proposal PRD 2016 and Proposal PRD 2016, p. 2 where the Commission only states that '[m] any investors mention uncertainty over insolvency rules or the risk of lengthy or complex insolvency procedures in another country as a main reason for not investing or not entering into a business relationship outside their own country.'

1105 Compare H. Eidenmüller, above note 939, Para. 6; R.P. Freitag, above note 932, pp. 229-231 and 244; R. Dammann & M. Gerrer, 'The Transposition of the EU Directive on Early Corporate Restructuring and Second Chance into French Law', *Revista General de Insolvencias & Reestructuraciones*, 2022(5), p. 401. Although left outside of the scope of this study and having received limited discussion so far, the EU legislator has considered the role of judges and practitioners in Arts 26 and 27 PRD 2019. See on this B. Wessels, 'EU has High Expectations of Judges in Restructuring Cases', *International Corporate Rescue*, 2020, 17, p. 253 et seq. On how this has been implemented in the Netherlands, see: S. Boot, M.C. Bosch, J.C.A.T. Frima & H.J. van Harten, 'Duidelijk, transparant en rechtvaardig', *Tijdschrift voor Insolventierecht*, 2023/1, p. 4 et seq.

1106 Compare also European Bank for Reconstruction and Development, EBRD Insolvency Assessment on Reorganisation Procedures, 2022, p. 4 and the discussion in Section 3.

extent to which the PRD 2019 has succeeded in promoting early restructuring by debtors (Section 5.3).

5.2 *PRD 2019 as a Means to Reduce Legal Uncertainty over Preventive Restructuring*

Section 4.2 dealt with the approaches that several national legislators took in implementing the PRD 2019. Except for France and Greece, the other jurisdictions introduced new PRFs as an addition to the pre-existing domestic restructuring and insolvency regime. However, compared to the poor follow-up to the Commission Recommendation 2014 by the Member States, the PRD 2019 can be considered all in all to have succeeded in bringing top-down harmonization amending the 'law at the books'.

Furthermore, there are also some traces of regulatory competition between European legislators. We draw on two examples: firstly, although no longer a Member State, also the UK has introduced in recent years its new restructuring plan and stand-alone moratorium. Although this legislative initiative commenced before the PRD 2019 was adopted, as pointed out by Vaccari and Gant, the reform shows resemblance to the PRD 2019.[1107] It illustrates that the PRD 2019 had a prospective and broader standard-setting influence. In addition, some jurisdictions introduced features to their new PRFs, which were not explicitly provided for by the PRD 2019. This is the case in particular with the dual track preventive restructuring. Under this approach, proposed first in the Netherlands, PRF is available both as a private (not listed on Annex A the EIR 2015) and public process (listed on Annex A to the EIR 2015), has been taken on board also in Germany and Austria. This suggests that legislators have considered each other's implementation on these and possibly other features too.

Does this also lead to the conclusion that the PRD 2019 has succeeded broadly in harmonizing PRFs? Based on our study, for now, we come to answer that question in the negative. Reviewing the implementation of the PRD 2019 in six Member States clearly shows that national legislators took ample use of the flexibility offered by the PRD 2019,[1108] and sometimes even seem to have gone beyond.[1109] The divergences are reflected both in forms in which the provisions on preventive restructuring have been implemented, introducing one or multiple new "procedures, measures or provisions",[1110] and in taking different choices on the policy options provided by specific provisions of the PRD 2019. This results not only in quite disparate legal regimes, but possibly also in different dynamics

1107 Chapter 8, Sections 1, 3 and 4.
1108 Consider for instance the introduction of non-public processes in the Netherlands, Germany and Austria.
1109 Consider for instance the involvement of practitioners in Austria and France, or Greece.
1110 Art. 4(5) PRD 2019.

within processes themselves. For one, most poignantly, this relates to the effective usability of the preventive frameworks, which for certain jurisdictions has already received severe critiques. The Commission has deliberately chosen for this minimum harmonization, as this would not "interfere with what works well".[1111] That fits our perception, where the national legislators designed PRFs typically in addition to the existing framework, while making use of the many policy options the PRD 2019 offers. At the same time, this does not match with the Commission's objective to "ensure major progress towards the functioning of the internal market".[1112] As a consequence, we must be cautious about concluding whether the EU legislator's aim to reduce barriers to cross-border investments by minimizing legal uncertainty on preventive restructuring, has been achieved. Further research, especially on the 'law in action', will be necessary to determine how cross-border investors assess the investment risks with PRFs across Europe.

Ehmke et al. predicted already that the amount of actual harmonization among Member States might be limited as the PRD 2019's toolbox allowed for (too) many options.[1113] In a comparison of implementations of the PRD 2019 and commentaries on Austria, Germany, Italy, Spain and the UK, Thole observes a considerable convergence among jurisdictions, despite noticing various differences.[1114] Bork and Mangano, on the other hand, express concerns for these differences, noting that this in fact leads to 'disharmonizing' restructuring law. It must be noted that they do so in particular from a cross-border insolvency perspective, noting that for different reasons several new PRFs are not included on Annex A of the EIR 2015.[1115] However, Gant et al. reiterated that the national transposition efforts take different speeds, also depending on varying domestic circumstances. Therefore, it may take some time before we can draw conclusions.[1116]

Nonetheless, we also note that some steps in the direction of further harmonization have been made. Firstly, the PRD 2019 introduced a shared European terminology of preventive restructuring vocabulary. It also created common ground for various concepts, which have become part now in domestic regimes. Secondly, it was aimed that the PRD 2019 would bring convergence such that "cross-border investment would no longer be inhibited by concerns that, for example, preventive restructuring of the debtor is not

1111 Proposal PRD 2016, p. 7.
1112 Impact Assessment Proposal PRD 2016, p. 51.
1113 D.C. Ehmke, J.L.L. Gant, J.M.G.J. Boon, L. Langkjaer & E. Ghio, above note 931, Para. 4.1 and 5.
1114 C. Thole, 'Die Umsetzungsgesetzgebung zur Restrukturierungsrichtlinie in Europa – Gemeinsames und Trennendes – Synthese aus den Beiträgen des Heftes 3/2022 der ZVglRWiss', *Zeitschrift für Vergleichende Rechtswissenschaft*, 2022, 121, p. 396.
1115 R. Bork & R. Mangano, *European Cross-Border Insolvency Law* (2nd ed.), Oxford: Oxford University Press, 2022, p. 38.
1116 J.L.L. Gant, J.M.G.J Boon, D.C. Ehmke, E. Ghio, L. Langkjaer, E. Vaccari and P.J. Omar, above note 984, Para. 4.

effectively possible in all Member States".[1117] The PRD 2019 has indeed contributed to such convergence by introducing a more shared framework for preventive restructuring among Member States. Although, as previously discussed, the significant and substantive differences between jurisdictions downplay the level of harmonization, it nevertheless resulted in a more shared, common ground for preventive restructuring. Thirdly, the PRD 2019 has shown that substantive harmonization in restructuring and insolvency law is not impossible, an assumption that – based on the very diverse domestic regimes – over a long time played a dominant role in inhibiting efforts to bring convergence in this area.

5.3 PRD 2019 as a Means to Promote Early Restructuring by Debtors

The PRD 2019 requires that all Member States will have a PRF in place. To date, most Member States have done so already. Although the implementation deadline – including extension – has passed, in some Member States full implementation and notification of the implementation measures to the Commission is still pending.[1118] Upon completion, *de jure*, this will promote the availability of early restructuring for debtors in all Member States, as aimed for by the EU legislator. However, it remains to be seen whether this will also practically result in more early restructuring. As the Greek contributors stated: "It still remains to be seen whether the new framework will prove up to the task of addressing the issues faced by debtors and creditors and the economy at large."[1119] A difficulty is the limited uptake of PRFs in several Member States. Different from the Netherlands,[1120] no cases have been reported in Austria.[1121] In Germany and the UK, the number of cases is lower than expected.[1122] In the UK, they expected between 50 and 100 cases, with only 9 in the first year.[1123] Although this may give an indication of the *de facto* success of the PRD 2019, its limited use may be impacted by various factors. This has no doubt been influenced by the overall decline in the number of insolvency proceedings since the COVID-19 pandemic due to massive government liquidity support schemes,[1124] which were already

1117 Impact Assessment Proposal PRD 2016, p. 51.

1118 For an overview of the implementation measures reported to the Commission (Art. 34(3) PRD 2019), see: https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32019L1023. Some of these Member States – who have not notified the transposition measures – may have already a preventive restructuring framework in place.

1119 Chapter 6, Section 5.

1120 Chapter 7, Section 5.

1121 Chapter 2, Section 5.

1122 Chapter 5, Section 5; Chapter 8, Section 5.1; C. Thole, above note 1114, p. 391.

1123 Chapter 8, Section 5.1.

1124 Compare E. Inacio, 'Record Low Number of Insolvencies, Calm Before the Storm?', *Eurofenix*, Autumn, 2020, pp. 13-14; Dun & Bradstreet Worldwide Network, Global Bankruptcy Report, 2020, p. 4 et seq; Dun & Bradstreet Worldwide Network, Global Bankruptcy Report, 2021, p. 4 et seq.

rather low in years before. Furthermore, it is not clear to what extent PRFs have rather promoted informal, consensual restructurings, and where PRFs are effectively a 'stick' for when these approaches do not succeed.

The authors of the seven national chapters have pointed already at several areas to improve the domestic preventive restructuring regimes. There have been some suggestions regarding aspects that go beyond the scope of Title II of PRD 2019. This relates to not only jurisdiction, recognition and enforcement of (decisions taken in) PRFs (Section 4.7),[1125] but also the training and expertise of practitioners and judges.[1126] However, there are more critical observations by several authors. Some have stated that their domestic PRF could benefit from further legal clarity.[1127] Some have pointed at specific features, including the entry test to commence a PRF, treatment of executory contracts and availability of a debt-for-equity swap.[1128] Others more generally stated that "there is certainly need to still improve the [Austrian PRF] in several aspects."[1129] These issues may result, in particular, in time and cost inefficiencies for the involved parties, which may cause barriers, especially for micro-, small- and medium-sized debtors to enter such frameworks.[1130] Or even more drastically, some concerns were raised on the actual usefulness of the new PRF.[1131] Although further research is necessary, it suggests that mere implementation itself may not be sufficient to achieve the EU legislator's aim to promote early restructuring of debtors.

6 Concluding Remarks

The PRD 2019 has not become, what some expected it to be, a "[p]rocrustean bed that rules out radical innovations with respect to corporate restructuring regimes".[1132] Neither can it be considered the panacea for a European business rescue culture. The minimum harmonization of the PRD 2019 has resulted in – quite literally – minimum harmonization in Europe. In transposing the PRD 2019, a plethora of divergences have emerged, however, mostly within the PRD 2019's policy options. Taking a 'law at the books' approach in reviewing recent reforms in Austria, Denmark, France, Germany, Greece, the Netherlands and the United Kingdom shows that 'what you see is what you get'.

1125 See for instance Chapter 5, Sections 4.9 and 5 ; Chapter 3; Chapter 7, Section 5.
1126 See for instance Chapter 4, Section 6; Chapter 3, Section 5; Chapter 8, Section 5.7.
1127 See for instance, Chapter 2, Section 5; Chapter 3, Section 5; Chapter 6, Section 5.
1128 Chapter 2, Section 5; Chapter 5, Section 5.
1129 Chapter 2, Section 5.
1130 Chapter 2, Section 5, compare also Chapter 8, Section 5.7.
1131 Chapter 2, Section 5; Chapter 3, Section 5.
1132 H. Eidenmüller, above note 939, Para. 6.

The approach of minimum harmonization has delivered on 'its' promise, but that does not match the overall objectives of the PRD 2019. The conclusion of this study, reviewing whether the EU legislator has succeeded in fully achieving objectives, must be answered in the negative. At this point, it is at least doubtful whether the EU legislator's objective to reduce legal uncertainties in (preventive) restructuring for cross-border investments has succeeded. Although a baseline for preventive restructuring has been established, the 'law at the books' shows extensive differences. We observe that much uncertainty between jurisdictions remains, where key concepts have not been harmonized since uniform definitions lack and due to the many policy options national legislators can choose from. This has hampered the objective to effectively address legal uncertainty for cross-border investors.

Nevertheless, we can be more optimistic about the objective to promote restructuring at an early stage and avoid unnecessary liquidation. Nearly all Member States have – some still have to implement the PRD 2019 – a PRF in place, which works along certain minimum standards. This will contribute to restructuring at an early stage. However, the actual success of the PRD 2019 is to be reviewed by looking also at the 'law in action': are the PRFs effective and efficient? Are the courts, DIPs and PIFORs able to deliver on the promises of the frameworks? To what extent do PRFs promote restructuring in the shadow of the law?

Whereas several jurisdictions report that their new PRF has been used only limitedly to date, it is interesting to observe what uptake they will get in the aftermath of the COVID-19 pandemic and also to what extent this may drive harmonization through regulatory competition. However, this may be impeded because of the lack of cross-border effects of decisions in preventive restructuring cases. At this stage, there are too little data – including actual cases – to say that the PRD 2019 has succeeded in achieving its objectives.[1133] Our analysis shows that also in practice this may be a 'tough nut to crack'.

In addition to critically assessing the harmonization brought about for preventive restructuring, we also observe that the PRD 2019 has opened Europe's view on harmonization in restructuring and insolvency. No longer is this an area where substantive harmonization is unattainable, merely because of the large divergences. In that observation lies a promise for future initiatives. As we are at the start of a next wave of harmonization of EU insolvency with the recent EU Proposal for a directive to harmonize certain aspects of insolvency law,[1134] this paradigm shift that results from the PRD 2019 may prove to be

1133 Vriesendorp has launched a call for a more extensive analysis on implementations of the PRD 2019, see R.D. Vriesendorp, above note 972, p. 101.

1134 European Commission, Proposal for a Directive of the European Parliament and the Council harmonising certain aspects of insolvency law, 7 December 2022, COM(2022) 702 final.

of more significance and relevance than the current state of harmonization of preventive restructuring laws does credit to the PRD 2019.