

RESOR

THE ACT ON THE CONFIRMATION
OF PRIVATE PLANS



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RESOR

BULLET POINT SUMMARY



THE PROPOSED DUTCH SCHEME

A WORLD-LEADING RESTRUCTURING TOOL IN THE MAKING

On 5 July 2019, after six years of hard work and field study, the Dutch Ministry of Justice submitted to parliament a bill, the Act on the Confirmation of Private Plans, seeking to introduce a pre-insolvency procedure in the Netherlands, which one might refer to as the “Dutch scheme”. It is expected or hoped for that the bill will be adopted by parliament this year and enter into force in January or July next year.

The Dutch scheme combines elements of the UK scheme, such as the ability to implement a plan outside formal insolvency proceedings, with elements of Chapter 11, such as a cram down mechanism, whilst innovating on both. The result is a fast and flexible restructuring procedure containing all the powers needed to do the job. The Dutch scheme is compliant with, and as such the first procedure to give effect to, the recently adopted EU Restructuring Directive (EU 2019/1023).

We offer a short bullet point summary of the proposed procedure below.

GENERAL CHARACTERISTICS – PLAN PROCEDURE OUTSIDE OF FORMAL INSOLVENCY

- Procedure in which a restructuring plan is put to vote, a majority can bind a minority within each class, and the court has the power to impose the plan on dissenting classes (cram down)
- Outside of formal insolvency proceedings
- Debtor-in-possession
- Can be limited to a subset of the capital providers (creditors and/or shareholders)
- Option to choose between a public variant and a confidential variant
- Minimal court involvement

INITIATING THE PLAN – DEBTOR AND CREDITORS ALIKE

- When the debtor is or can reasonably be expected to become insolvent (could be a year ahead)
- The debtor may propose a plan as long as a restructuring expert has not been appointed
- A creditor, a shareholder, the works council or the workplace representation may request the appointment of a restructuring expert, who is then entitled to propose a plan to the exclusion of the debtor

- The restructuring expert is only concerned with the development of a plan. The debtor remains in full control of the ordinary course of business throughout the process
- The restructuring expert requires the consent of the debtor to propose a plan in case of an SME

CONTENTS OF THE PLAN – MAXIMUM FLEXIBILITY

- No prescriptions and a high degree of flexibility as to the commercial contents of the plan (extension and/or reduction of debt, debt for equity swap, sale of assets, controlled wind-down, etc)
- Can bind all types of capital providers, including secured and preferential creditors and shareholders
- Can be limited to a subset of the capital providers
- Can include third party releases
- Cannot effect obligations arising out of employment contracts

PROCEDURE – FAST AND EFFICIENT, DEALT WITH BY SPECIALISED JUDGES

- No court test at entry where the debtor proposes the plan
- Electronic voting 8 days (may be more) after plan is proposed
- No convening hearing, not prior approval of disclosure statement and no formal creditors meetings
- Confirmation hearing within two weeks after vote
- Confirmation decision as soon as possible thereafter (within one or two weeks)
- No appeal – the entire procedure can be finalised within 3 – 5 weeks
- Cases dealt with by a small team of specialised judges specifically trained for the purpose

VOTING AND ACCEPTANCE

- Voting takes place in classes
- Class formation on the basis of similarity of new and existing rights
- Where legal title is split from beneficial ownership, the beneficial owner is entitled to vote
- Class acceptance on the basis of two thirds (2/3) in amount of those participating; no head count

CONFIRMATION AND CRAM DOWN

- Where all classes have accepted the plan: no dissenting creditor may receive less in value, whether in cash or in non-cash, than it would expect to receive in liquidation (best interest of creditors test)
- Where one or more classes have rejected the plan (cram down):
 - Consent of the debtor required in case of an SME (but equity may not exercise hold out position)
 - at least one in the money class must have accepted the plan
 - the members of the dissenting class must have the right to choose between either:
 - a distribution with a value equal to their share, in accordance with their rank, of the reorganisation value (i.e. the value distributable if the plan comes about), regardless of the form in which this distribution is made (cash or non-cash), or
 - a distribution in the form of cash equal to their share, in accordance with their rank, of the liquidation value (i.e. what they would expect to receive if liquidation were to take place).

SUPPORTIVE MEASURES

- A tailored individual or general stay at the request of the proponent of the plan for a period of 4 months with the possibility of extension to a maximum of 8 months
- The stay can also be extended to protect guarantors
- Protection of security for new funding
- Ability to continue using encumbered working capital subject to adequate protection
- Ability to continue essential contracts despite default by providing security for the performance of new obligations (while pre-existing defaults continue)
- Invalidity of *ipso facto* and change of control clauses
- Ability to reject onerous contracts; rejected contract is converted into a monetary damages claim that can be restructured under the terms of the plan (employment contracts are exempted)
- Ability of the court to make bespoke provisions in departure of statutory provisions to facilitate tailor made solutions
- Ability of the court to make binding determinations on any difficult issues at an early stage (i.e. before the vote) so that uncertainty can be removed as quickly as possible. This includes issues such as eligibility, jurisdiction, admission to the vote, class formation, valuation, etc.

INTERNATIONAL ASPECTS - JURISDICTION AND USE BY FOREIGN DEBTORS

- The public procedure will be placed on Annex A of the European Insolvency Regulation
- The confidential procedure will fall outside the European Insolvency Regulation
- Jurisdiction for the public procedure based on COMI or establishment
- Jurisdiction for the confidential procedure based on domicile of applicant or

affected party or sufficient connection, which is very broad and does not require the COMI of the debtor to be located in the Netherlands

- An officeholder in foreign reorganisation or insolvency proceedings can be appointed as a restructuring expert in Dutch scheme proceedings in respect of the same or a different member of the group

ANALYSIS

- The bill provides for a fast, efficient and highly flexible instrument with all the powers required to reconfigure the capital structure as appropriate whilst protecting the interests of everyone involved and preserving the business throughout
- The instrument is debtor friendly in that it offers debtors an effective business rescue tool
- The fact that also others than the debtor (controlled by out of the money equity) can initiate the procedure, enhances early intervention
- The instrument is creditor friendly in that it enables creditors to preserve and realise the value of the business on a non-distressed basis, without disruption and without value leakage to out of the money parties
- The instrument enables existing equity to inject new money into the business and thus to protect its investment by facilitating the elimination of unsupported debt
- The instrument properly protects senior dissenting classes' exit rights; they cannot be forced to remain seated and to continue financing the business (i.e. taking non-cash) against the majority will of the class, which also obviates the need for a feasibility test
- The availability of a variant that falls within the European Insolvency Regulation and a variant that falls outside the European Insolvency Regulation, with very broad jurisdiction, makes the instrument particularly useful for dealing with cross-border groups. The variant that falls within the European Insolvency Regulation offers the benefit of automatic recognition. The variant that falls outside of the European Insolvency Regulation can be used where the Insolvency Regulation is problematic because of the existence of security rights on foreign assets (rights in rem exception) or because of the COMI of guarantors or other group members being located in different jurisdictions. This enables a cross-border group to be restructured through proceedings in a single jurisdiction.

In sum, the Dutch scheme appears to have the potential of becoming a world-leading restructuring tool.

EYES CONFERENCE ON DUTCH SCHEME ON 1 NOVEMBER 2019 IN AMSTERDAM

RESOR and the Business & Law Research Centre of the Radboud University of Nijmegen, in cooperation with the Dutch Ministry of Justice and the relevant industry associations, are organising a conference on the Dutch scheme that will be held on 1 November 2019 in Amsterdam. The conference will be held in Dutch, but an English interpreter will be present for non-Dutch speakers. If you are interested in participating, please register by sending an email to annelies.bierenbroodspot@resor.nl.

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BILL ON DUTCH SCHEME AS PUBLISHED



Amendment to the Bankruptcy Act to make provision for court confirmation of private plans (*Act on the Confirmation of Private Plans*)¹

BILL

We Willem-Alexander, by the grace of God, King of the Netherlands, Prince of Orange-Nassau, etc.

Greetings to all who shall see or hear these presents! Be it known:

We have considered the desirability of making provision in the Bankruptcy Act for court confirmation of a private debt restructuring plan;

Therefore, having heard the Advisory Division of the Council of State, and in consultation with the States General, We have approved and decreed, and We hereby approve and decree:

ARTICLE I

The **Bankruptcy Act** is amended as follows:

A

The following article is inserted after Article 3c:

Article 3d

Concurrent applications for bankruptcy and the appointment of a restructuring expert

- 1 Where an application for bankruptcy submitted by the debtor itself or by a creditor is made at the same time with a request to appoint a restructuring expert as meant in Article 371, the latter request shall be considered first.
- 2 The court shall in any event stay consideration of the application for bankruptcy until it has given a decision on the request to appoint a restructuring expert. Where the court grants the application it shall simultaneously order a stay under Article 376, and the stay shall remain in force throughout that period.

B

The following Article 42a is inserted after Article 42²:

Article 42a

Protection of security for new financing

The preceding article may not be invoked to annul a legal act performed after the debtor has submitted a declaration to the clerk of the court as meant in Article 370(3) or after the court has appointed a restructuring expert under Article 371 if the court, upon the debtor's request, has granted prior approval of that act. The court shall grant the requested approval if:

- a. the legal act is necessary to continue the debtor's business during the preparation of a plan, as meant in Article 370(3) or Article 371; and
- b. it could reasonably be assumed at the time approval was granted that this legal act would be in the interests of the general body of creditors and would not materially prejudice the interests of any individual creditors.

C

In Article 47³, insert 'and consideration of that application has not been stayed under Articles 3d(2) and 376(2)(c)' after 'application had been filed'.

D

The following paragraph is added to Article 54⁴:

3. A person who invokes setoff is acting in good faith as meant in Article 54(1) if this setoff:
 - a. takes place after the debtor has submitted a declaration to the clerk of the court as meant in Article 370(3) or after the court has appointed a restructuring expert under Article 371; and
 - b. is invoked in the context of financing the continuation of the debtor's business and does not aim to restrict that financing.

E

The following two paragraphs are added to Article 215:

3. Where an application for suspension of payment proceedings is made at the same time as a request to appoint a restructuring expert as meant in Article 371, the latter request shall be considered first and in derogation from Article 371(2) preliminary suspension of payment proceedings will not ensue.
4. The court shall in any event stay consideration of the application for suspension of payment proceedings until it has decided on the request to appoint a restruc-

turing expert. Where the court grants the application, it shall simultaneously order a stay under Article 376 and the stay shall remain in force throughout that period.

F

Add the following new section after Article 368:

SECTION TWO THE CONFIRMATION OF A PLAN

Section 1. General provisions

Article 369

Scope of application

1. The provisions of this Section do not apply where the debtor is a natural person who does not practise an independent profession or carry on a business, a bank as meant in Article 212g(a), or an insurer as meant in Article 213(a).
2. The provisions of this Section concerning creditors or shareholders with voting rights apply to creditors and shareholders with voting rights under Article 381(3).
3. Where the debtor is an association or cooperative, the provisions of this Section concerning shareholders apply *mutatis mutandis* to the members.
4. The provisions of this Section do not apply to rights of employees of the debtor under employment contracts within the meaning of Article 7:610 of the Dutch Civil Code.
5. Except in cases involving the appointment of a restructuring expert as meant in Article 371, the provisions of this Section do not apply if the debtor has proposed a plan in the last three years that was rejected by all classes in a vote as meant in Article 381 or that the court refused to confirm on the basis of Article 384.
6. A plan under this Section may be proposed in either a confidential pre-insolvency plan procedure or a public pre-insolvency plan procedure.
7. The jurisdiction of the Dutch court to consider requests such as those as meant in this Section is determined:
 - a. on the basis of the Regulation referred to in Article 5(3)⁵, insofar as the requests are submitted in the context of a public pre-insolvency plan procedure and that Regulation applies; or
 - b. on the basis of Article 3 of the Dutch Code of Civil Procedure⁶.
8. The provisions of this Section concerning the court apply to courts that are competent under Article 262 or Article 269 of the Dutch Code of Civil Procedure⁷ to consider requests such as those described in this Section. Once the court has declared its competence to consider a request in relation to the debtor in the context of a confidential pre-insolvency plan procedure or public pre-insolvency plan procedure, that court is also competent, to the exclusion of other compe-

tent courts, to hear all further requests on the basis of this Section that are submitted in relation to the debtor in those proceedings. Where legal entities that form a group as meant in Article 2:24b of the Dutch Civil Code⁸ propose a plan on the basis of this Section, they may jointly request one of the competent courts to consider all requests submitted on the basis of this Section in the context of preparing a plan in relation to these legal entities.

9. Unless the plan is prepared and proposed in the context of a public pre-insolvency plan procedure, requests to the court in the context of this Section are dealt with in the judge's chambers.
10. Unless determined otherwise, decisions of the court in the context of this Section are not subject to any ordinary remedies.

Section 2. Plans: proposing and voting

Article 370

Plan proposed by the debtor

1. If it can reasonably be assumed that the debtor will not be able to continue paying its debts as they fall due, the debtor may propose to its creditors and shareholders, or any number of them, a plan that amends their rights and can be confirmed by the court under Article 384.
2. Where a third party, that may include a guarantor and a joint debtor, is liable for an obligation of the debtor to a creditor as meant in Article 370(1) or has provided any form of security for the satisfaction of that obligation, Article 160 of the Bankruptcy Act⁹ applies *mutatis mutandis*, unless a plan is proposed as meant in Article 372(1). The third party may not recover from the debtor any amounts paid to the creditor where such payments were made after confirmation of the plan. Where the third party satisfies liabilities of the debtor in whole or in part while the creditor has also been offered rights under the plan in satisfaction of those liabilities, those rights under the plan transfer to the third party by operation of law, if and insofar as the payment by the third party and the rights conferred under the plan would provide the creditor with value that exceeds the amount of its claim as it existed before the plan was confirmed.
3. As soon as the debtor starts to prepare a plan, the debtor shall submit a declaration to that effect to the clerk at the court where that declaration shall remain for no longer than one year. Submitting the declaration is free of charge. Once the debtor has presented the plan to creditors and shareholders with voting rights, the declaration is available for their inspection, free of charge, until the court has decided on the request as meant in Article 383(1) or until the report as meant in Article 382 has been submitted, in which the debtor gives notice that it will not submit such a request.
4. A debtor that proposes a plan in the context of a public pre-insolvency plan procedure shall request the clerk at the court of The Hague, immediately after the court has taken its first decision on the basis of this Section, to publish the information as meant in Article 24 of the Regulation referred to in Article 5(3)¹⁰ without delay in the registers referred to in Articles 19 and 19a, and in the Government Gazette (*Staatscourant*).
5. Where the debtor is a legal entity, the board does not require the approval of the general meeting or a meeting of holders of shares of a given type or spe-

cification to propose a plan as meant in Article 370(1) or to implement a plan confirmed by the court under Article 384, and insofar as and for as long as the following derogations are necessary, and without prejudice to the principle of equal treatment of all shareholders, Articles 38, 96, 96a, 99, 100(1), 107a and 108a and Book 2, Title 5.3 of the Dutch Civil Code, as well as Article 5:25ka of the Dutch Act on Financial Supervision and any statutory provisions or arrangements agreed privately between the entity and its shareholders or between two or more shareholders in regard to decision-making by the general meeting or a meeting of holders of shares of a certain type or specification shall not apply. Where a resolution of the general meeting or a meeting of holders of shares of a given type or specification would be required to implement a plan, such resolution shall be substituted by the plan that has been confirmed by the court under Article 384.

Article 371

Creditor's right to initiate a plan through the appointment of a restructuring expert

1. Each creditor, shareholder or statutory works council or workplace representation that is set up in the debtor's business may submit a request that the court appoint a restructuring expert who may propose a plan to the debtor's creditors and shareholders, or any number of them, under this Section. The debtor may also submit such request. In that case, Article 370(5) applies *mutatis mutandis*. If the request is granted, the debtor may not propose a plan on the basis of Article 370(1) as long as the restructuring expert remains appointed.
2. Where the court has not yet taken a decision under this Section, the applicant, as meant in Article 371(1), shall indicate which of the procedures of Article 369(6) they have chosen, stating the reason for that choice. The request must include such information as to enable the court to determine whether it has jurisdiction. Where the request is not submitted by the debtor, the debtor shall be given an opportunity to express its views, in a manner and within a period determined by the court, on the choice from the procedures mentioned in Article 369(6). In the event of a dispute on the matter, the court shall decide which of the procedures as meant in Article 369(6) apply. Article 370(4) applies *mutatis mutandis*, with the exception that the restructuring expert or the debtor may make the request as meant in Article 370(4).
3. Where the debtor is in a state as described in Article 370(1), the court shall grant the request as meant in Article 371(1), unless there is *prima facie* evidence that this is not in the interests of the general body of creditors. A request to appoint a restructuring expert that is submitted by the debtor itself or has the support of the majority of shareholders shall in any event be granted.
4. The court may appoint one or more experts to assess whether a state exists as described in Article 371(3). Article 378(5), first and fourth sentences, and Article 371(7) and (8) apply *mutatis mutandis*.
5. Before taking a decision pursuant to Article 371(1), the court shall offer the applicant described in Article 371(1), the debtor and the observer described in Article 380, if appointed, an opportunity to express their views in a manner and within a period determined by the court. This also applies to decisions pursuant to Article 371 (10), (12) and (13). In the latter three cases, the court shall also call on the restructuring expert to be heard.

6. The restructuring expert shall carry out his tasks in an effective, impartial and independent manner.
7. The restructuring expert is entitled to consult the debtor's records, documents and other data carriers where the restructuring expert considers examination of the debtor's records, documents and other data carriers necessary for the proper performance of his tasks.
8. The debtor or its directors, the shareholders and supervisory directors, if any, and the employees of the debtor shall provide all information the restructuring expert requests and in the manner he specifies. They shall inform the restructuring expert on their own initiative of facts and circumstances that they know or ought to know are relevant to the restructuring expert for the proper performance of his tasks and provide him all cooperation necessary.
9. The restructuring expert shall not share the information received with third parties, other than as required for the application of the provisions of this Section.
10. The court shall determine the salary of the restructuring expert. The court shall also determine the maximum cost of the work of the restructuring expert and any third parties he consults. The court may increase this amount during the process at the request of the restructuring expert. Unless agreed otherwise, the costs shall be paid by the debtor, it being understood that where the majority of creditors support a request to appoint restructuring expert, the creditors shall bear the costs. To that end, the court may require security for costs or the transfer of an advance to the court's bank account as a condition for the appointment.
11. The restructuring expert is not liable for losses sustained in any attempt to put a plan into effect under this Section, unless he can be held personally to blame for his failure to act as might reasonably be expected of a restructuring expert with sufficient experience and expertise who carries out his task with care and diligence.
12. As soon as it is clear that a plan cannot be put into effect under this Section, the restructuring expert shall duly notify the court and request that his appointment be revoked.
13. The restructuring expert's appointment ends by operation of law as soon as the court confirms the plan under Article 384, unless the court determines in its confirmation decision that the restructuring expert's appointment shall continue for a period determined by the court. Having heard or properly notified the restructuring expert, the court may also dismiss and replace him at any time, either at his own request, at the request of one or more creditors, or on its own initiative.
14. Where the court has not previously taken a decision under this Section, and where the jurisdiction of the court is derived from the Regulation referred to in Article 5(3)¹¹, the appointment decision must indicate whether the procedure is a main proceeding or a territorial proceeding within the meaning of that Regulation. Any creditor who has not yet been given an opportunity to express its views on the basis of Article 371(5) may challenge the decision on the ground of lack of international jurisdiction as meant in Article 5(1) of that Regulation within a period of eight days after the publication referred to in Article 370(4).

Article 372*Restructuring group guarantees*

1. A plan as meant in Article 370(1) may also amend the rights of creditors against legal entities that form a group with the debtor as meant in Article 2:24b of the Dutch Civil Code, provided that:
 - a. the rights of those creditors against the relevant legal entities entail payment of or security for the obligations of the debtor or obligations for which the legal entities are liable together with or alongside the debtor;
 - b. the relevant legal entities are in a state as meant in Article 370(1);
 - c. the relevant legal entities have approved the proposed amendment or the plan is proposed by a restructuring expert as meant in Article 371; and
 - d. the court would have jurisdiction if these legal entities were to propose their own plan under this Section and submit a request as meant in Article 383(1).
2. In the case of a plan as meant in Article 372(1):
 - a. the debtor or the restructuring expert as meant in Article 371 must also provide the information as meant in Article 375 for the legal entities described in Article 372(1); and
 - b. in considering the request to confirm the plan, the court shall also establish, on its own initiative or upon request, whether the plan meets the requirements of Article 384 in respect of these legal entities.
3. Only the debtor or the restructuring expert, if appointed, is authorised to submit the requests as meant in Articles 376(1), 378(1) 379(1) and 383(1) to the court on behalf of the legal entities as meant in Article 372(1).

Article 373*Executory contracts*

1. Where the debtor is in a state as meant in Article 370(1), the debtor or the restructuring expert, if appointed, may propose to a counterparty that an agreement it has concluded with the debtor be amended or terminated. If the counterparty does not agree to the proposal, the debtor or restructuring expert may have the agreement prematurely terminated, provided that a plan proposed under Article 384 is confirmed by the court and the court grants leave for this unilateral termination in the confirmation. The termination is then notified by operation of law on the date on which the court confirms the plan and becomes effective after expiry of a notice period specified by the debtor or the restructuring expert. Where the court considers this period to be unreasonable, it may provide for a longer notice period when granting leave for termination, it being understood that three months from the date of confirmation of the plan is in any event sufficient.
2. Following a unilateral termination under Article 373(1), the counterparty is entitled to compensation for termination of the agreement. Book 6, Title 1, Section 10 of the Dutch Civil Code applies. The plan as meant in Article 370 (1) may amend the future right to compensation.
3. The preparation and proposal of a plan as meant in Article 370(1), the appointment of a restructuring expert as meant in Article 371, and events and acts that are directly related and reasonably necessary to the implementation of the plan do not constitute grounds for amending commitments or obligations to the

debtor, for suspending performance of an obligation to the debtor, or for terminating an agreement concluded with the debtor.

4. Where a stay has been ordered under Article 376, a breach of performance by the debtor prior to the stay does not constitute grounds during the stay for amending commitments or obligations to the debtor, for suspending performance of an obligation to the debtor or for terminating an agreement concluded with the debtor, if security is provided for the performance of new obligations that arise during the stay.

Article 374

Class formation

Creditors and shareholders are placed in different classes if the rights they have in the liquidation of the debtor's assets in bankruptcy or the rights they are offered under the plan are so different that they are not in a comparable position. In any event, creditors or shareholders shall be placed in different classes if upon enforcement against the debtor's assets they have a different ranking under Book 3, Title 10 of the Dutch Civil Code, any other law or instrument based on it or under an agreement.

Article 375

Contents of the plan

1. The plan shall contain all information that creditors and shareholders need to come to an informed opinion prior to the vote as meant in Article 381, including:
 - a. the name of the debtor;
 - b. the name of the restructuring expert, where applicable;
 - c. the class formation and the criteria used to place creditors and shareholders in one or more classes, where applicable;
 - d. the financial consequences of the plan for each class of creditors and shareholders;
 - e. the expected value that can be realised if the plan is put into effect;
 - f. the expected proceeds that can be realised from a liquidation of the assets of the debtor in bankruptcy;
 - g. the principles and assumptions used in calculating the values referred to in (e) and (f);
 - h. where the plan involves the allocation of rights to creditors and shareholders, the moment or moments at which the rights are allocated;
 - i. the new financing the debtor wishes to obtain to implement the plan, where applicable, and why it is needed;
 - j. the manner in which creditors and shareholders can obtain further information on the plan;
 - k. the procedure for voting on the plan and the time of the vote or the deadline for casting votes; and
 - l. the manner in which the works council or workplace representation that is set up in the debtor's business in accordance with Article 25 of the Works Councils Act¹² has been or will be asked to issue its advice.
2. The following shall be appended to the plan:
 - a. a properly documented statement of all assets and liabilities;

- b. a list containing:
 - 1. the identity of the creditors and shareholders with voting rights by reference to name or, if that is not possible, by reference to one or more categories;
 - 2. the amount of their claim or the nominal amount of their share; and
 - 3. a specification of the class or classes into which they have been placed.
- c. where applicable, the identity of the creditors and shareholders that are not included in the plan by reference to name or, if that is not possible, by reference to one or more categories, together with an explanation of why they are not included in the plan;
- d. information on the financial position of the debtor; and
- e. a description of:
 - 1. the nature, extent and cause of the financial problems;
 - 2. what attempts have been made to resolve these problems;
 - 3. the restructuring measures that are part of the plan;
 - 4. how these measures contribute to a solution; and
 - 5. how long implementation of these measures is expected to take.
- 3. An order in council may stipulate what other information must be included in the plan or the appended documents, how that information is to be supplied, and may also provide a form template.

Article 376

Stay

- 1. Where the debtor has submitted to the clerk of the court a declaration as meant in Article 370(3) and has proposed a plan as meant in Article 370(1) or undertakes to propose a plan within two months, or the court has appointed a restructuring expert under Article 371, the debtor or the restructuring expert may request that the court order a stay.
- 2. During the stay, which may not exceed four months:
 - a. third parties may not enforce their rights against assets belonging to the debtor's estate or require the repossession of assets from the debtor without leave from the court, provided that those third parties have been informed that the court has ordered a stay or are aware of the preparations for a plan;
 - b. the court can lift attachments at the request of the debtor or the restructuring expert, if appointed; and
 - c. consideration of a request for a suspension of payments, a bankruptcy application submitted by the debtor, or a bankruptcy application submitted by a creditor is suspended.
- 3. Article 371(2), first, second and fifth sentences, apply *mutatis mutandis*.
- 4. The court shall grant the request described in Article 376(1) if there is *prima facie* evidence that:
 - a. it is necessary to continue the debtor's business during the preparation of a plan and to enable negotiations on a plan to continue; and
 - b. it could reasonably be assumed at the time of ordering a stay that it would be in the interests of the debtor's general body of creditors and would not materially prejudice the interests of the third parties, attaching party and creditor who submitted the bankruptcy application, as described in Article 376(2).

5. If such a request is submitted by the debtor or the restructuring expert, if appointed, before the maximum period of the stay as meant in Article 376(2) has expired, the court may extend this period by a period to be determined by the court, provided that the total period including extensions does not exceed eight months. The debtor or the restructuring expert must demonstrate in the request that significant progress has been made on preparations for the plan. The latter will in any event be deemed to be the case where a request to confirm the plan as meant in Article 383(1) has been submitted.
6. In derogation from Article 376(5), the stay shall not be extended if:
 - a. the stay is requested in the context of a public pre-insolvency plan procedure; and
 - b. the debtor's centre of main interests as meant in Article 3(1) of the Regulation referred to in Article 5(3) has been moved from another Member State in the three months prior to the time of the court's first decision under this Section.
7. Where the debtor has created a right of pledge under Article 3:239(1) of the Dutch Civil Code on a receivable or on the right of usufruct of a receivable, the pledgee may not issue the notice described in Article 3:239(3) of the Dutch Civil Code or receive payments or offset payments against a claim on the debtor during the stay, provided the debtor has provided adequate replacement security for that pledge.
8. Articles 241a(2)¹³ and (3)¹⁴, 241c¹⁵ and 241d¹⁶ apply *mutatis mutandis*, provided that application of Article 241a(3) relates to a term that is imposed on the debtor.
9. At the request of the third parties, attaching party and creditor who submitted the bankruptcy application, as described in Article 376(1), the court may make the provisions as meant in Article 379 in its decision to order a stay or during the period of the stay. At the time of ordering a general stay, the court may appoint an observer as meant in Article 380 if the court determines that it is necessary to secure the interests of the creditors or shareholders.
10. If the requirements of Article 376(1) and (4) are no longer satisfied, the court shall lift the stay. The court may do so on its own initiative or at the request of the debtor, the restructuring expert, if appointed, or the third parties, attaching party and creditor who submitted the bankruptcy application, as described in Article 376(2).
11. Before taking the decision on granting the leave meant in Article 376(2)(a) or the requests meant in Article 376(5), (9) and (10), the court shall offer the debtor, the restructuring expert, if appointed, the observer as meant in Article 380, if appointed, and the third parties attaching party and creditor who submitted the bankruptcy application, as described in Article 376(2), an opportunity to express their views in a manner and within a period determined by the court.
12. Article 371(14) applies *mutatis mutandis*.
13. The request for a suspension of payments or the bankruptcy application submitted by a creditor or by the debtor itself, as meant in Article 376(2)(c), expires by operation of law as soon as the plan is confirmed by the court under Article 384. If the creditor was unaware that a plan was being prepared when it submitted the bankruptcy application, the court shall decide whether the debtor must compensate the creditor for the costs of the action.

Article 377*Continued use of encumbered property in the ordinary course of business*

1. A debtor who had the right to use, expend or dispose of property or to collect claims prior to the ordering of the stay as meant in Article 376 shall retain this right during the stay, provided this falls within the debtor's ordinary course of business.
2. The debtor may exercise the right described in Article 377(1) only if the interests of the third parties affected are adequately protected.
3. If the requirement of Article 377(2) is no longer satisfied, the court shall revoke or limit the exercise of the right referred to in Article 377(1) at the request of one or more affected third parties. Before taking its decision, the court shall offer the third parties affected, the debtor, the restructuring expert as meant in Article 371, if appointed, and the observer as meant in Article 380, if appointed, an opportunity to express their views in a manner and within a period determined by the court.

Article 378*Directions from the court*

1. Before the plan has been put to a vote under Article 381(1), the debtor or the restructuring expert as meant in Article 371, if appointed, may request that the court make a determination on any issues that are relevant in the context of putting a plan into effect under this Section, including:
 - a. the information provided in the plan or the appended documents, as well as the valuation proposed and the principles and assumptions used by the debtor, as meant in Article 375(1) (e)-(g);
 - b. the class formation;
 - c. the admission of a creditor or shareholder for voting purposes;
 - d. the voting procedure and the period within which the vote may reasonably be held after the plan has been presented to creditors and shareholders with voting rights, or they have been notified how it can be accessed;
 - e. whether, if the plan is accepted by all classes, there would be a ground for refusal as meant in Article 384(2) and (3) to prevent confirmation of the plan;
 - f. whether, if the plan is not accepted by all classes, there would be a ground for refusal as meant in Article 384(2),(3) and (4) to prevent confirmation of the plan; and
 - g. whether, if the debtor is a legal entity as meant in Article 381(2) and Article 383(2), the shareholders are unreasonably preventing the board from consenting to a vote on the plan or submission of a request to confirm the plan.
2. Article 371(2), first, second and fifth sentences, apply *mutatis mutandis*.
3. Where possible, the court shall consider requests submitted to it under Article 378(1) jointly and in a single hearing.
4. Where the court receives a request pursuant to Article 378(1) for a determination on the admission of a creditor or shareholder to the vote, the amount of the claim of the creditor with voting rights or the nominal amount of the share of the shareholder with voting rights, the court shall determine whether that creditor or shareholder is admitted to the vote and, if so, for what amount. Article 147 applies *mutatis mutandis*.

5. If the court deems it necessary when taking its decision, it may appoint one or more experts to conduct an examination and issue a report of their findings, stating reasons, within a period determined by the court, that may be extended if necessary. The experts shall submit a report to the court, where it will be available for inspection by creditors and shareholders with voting rights. Article 371(7) and (8) apply *mutatis mutandis*. The court may at any time dismiss and replace an expert after having heard or properly notified him, either at his own request or on the court's initiative.
6. If information needed for the decision is lacking, the court may allow the debtor or the restructuring expert a reasonable period to produce the missing information before it takes a decision as meant in Article 378(1) and (5).
7. Before taking a decision as meant in Article 378(1) and (4), the court shall offer the debtor or the restructuring expert, if appointed, the observer as meant in Article 380, if appointed, and the creditors and shareholders whose interests are directly affected by the decision an opportunity to express their views in a manner and within a period determined by the court. If the court is asked to take a decision as meant in Article 378(4), the preceding sentence applies in any event to the creditor or shareholder referred to in Article 378(4).
8. Decisions of the court under this article are binding only on those creditors and shareholders who were given an opportunity by the court to express their views on the basis of Article 378(7).
9. Article 371(14) applies *mutatis mutandis*.

Article 379

Bespoke measures

1. Where the debtor has submitted a declaration to the court as meant in Article 370(3) or the court has appointed a restructuring expert under Article 371, the court may, at the request of the debtor or the restructuring expert or on its own initiative, make such determinations or provisions as it deems necessary to safeguard the interests of the creditors or shareholders.
2. Article 371(2), first, second and fifth sentences, and Article 371(14) apply *mutatis mutandis*.

Article 380

Observer

1. If the debtor prepares a plan under Article 370, a provision as meant in Article 379 may include the appointment of an observer. The observer's task is to monitor the plan process with due regard to the interests of the general body of creditors.
2. The observer shall duly notify the court as soon as it is clear that the debtor will be unable to put a plan into effect under this Section or that the interests of the general body of creditors are harmed. In such circumstances, the court shall give the observer and the debtor an opportunity to express their views in a manner and within a period determined by the court and draw from it such consequences as it deems appropriate. One such consequence may be that the court appoints a restructuring expert as meant in Article 371.

3. If a request to appoint a restructuring expert as meant in Article 371 is submitted and granted by the court after the court has appointed an observer, the court shall revoke the appointment of the observer.
4. Article 371(2), first, second and fifth sentences, and Article 371(5)-(14) apply *mutatis mutandis*.

Article 381

Voting and acceptance

1. The debtor or the restructuring expert as meant in Article 371, if appointed, shall make the plan available to creditors and shareholders with voting rights for a reasonable period of at least eight days before the vote, or inform them how it can be accessed, in order that they can come to an informed opinion.
2. The restructuring expert may present a plan to the creditors and shareholders with voting rights only with consent of the debtor if:
 - a. the restructuring expert is appointed at the request of one or more creditors or of the works council or workplace representation that is set up in the debtor's business; and
 - b. the debtor or, where the debtor is a legal entity, the group, as meant in Article 2: 24b of the Dutch Civil Code, to which the debtor belongs runs a business that employs fewer than 250 people and had an annual turnover in the preceding financial year that did not exceed €50 million or a balance sheet total at the end of the preceding financial year that did not exceed €43 million.

Where the debtor is a legal entity, the shareholders may not unreasonably prevent the board from giving its consent.
3. Creditors and shareholders with voting rights are the creditors and shareholders whose rights are amended under the plan.
4. Where the debtor or the restructuring expert proposes a plan that affects rights in which most if not all of the economic interest is held by a party other than the creditor, as a result of which the position of that other party must reasonably be equated in the circumstances to that of a creditor as meant in Article 381(3), the debtor or the restructuring expert may allow that other party, rather than the creditor, to vote on the plan. In that case the provisions of this Section concerning the creditor apply to that other party.
5. Where the debtor or the restructuring expert proposes a plan that also concerns shares for which depositary receipts have been issued, the debtor or the restructuring expert may allow the depositary receipt holder, rather than the shareholder, to vote on the plan. In that case the provisions of this Section concerning the shareholder apply to the depositary receipt holder. The same applies in respect of usufructuaries.
6. The vote on the plan takes place by class of creditors or shareholders, in accordance with the information provided in Article 375(1)(k), in a meeting held physically or electronically or in writing.
7. A class of creditors has accepted the plan if a group of creditors that together represent two-thirds of the total amount of the claims of the creditors who cast a vote in that class has voted in favour.
8. A class of shareholders has accepted the plan if a group of shareholders that together represent two-thirds of the total amount of the issued capital of the shareholders who cast a vote in that class has voted in favour.

Article 382*Report on the vote*

1. The debtor or the restructuring expert as meant in Article 371(1), if appointed, shall prepare a report as soon as possible and in any event within seven days after the vote, which contains:
 - a. the names of the creditors and shareholders or, if that is not possible, a reference to one or more categories of creditors and shareholders that cast a vote and whether they accepted or rejected the plan, together with the amount of their claims or the nominal amount of their shares;
 - b. the result of the vote; and
 - c. whether the debtor or the restructuring expert intends to submit a request as meant in Article 383(1) and if so, any other information about the vote, or if applicable, the meeting at which the vote took place, that is relevant in the context of that request.
2. The debtor or the restructuring expert shall ensure that creditors and shareholders with voting rights are able to inspect the report without delay. Where the debtor or restructuring expert has submitted a request as meant in Article 383(1), it shall submit the report to the clerk of the court. The report shall be made available there for inspection by creditors and shareholders with voting rights until the court has given a decision on the request as meant in Article 383(1).

SECTION 3. CONFIRMATION OF THE PLAN**Article 383***Confirmation hearing*

- 1/ Where at least one class of creditors has accepted the plan, the debtor or the restructuring expert as meant in Article 371, if appointed, may submit a written request to the court to confirm the plan. If the plan seeks to amend the rights of creditors whose claims would be expected to be at least partially satisfied in a liquidation of the debtor's assets in bankruptcy, the class referred to in the preceding sentence must consist of creditors who fall within this category of creditors.
2. The restructuring expert may submit a request to confirm the plan only with consent of the debtor if:
 - a. the restructuring expert is appointed at the request of one or more creditors or of the works council or workplace representation that is set up in the debtor's business;
 - b. the plan has not been accepted by all classes; and
 - c. the debtor or, where the debtor is a legal entity, the group, as meant in Article 2:24b of the Dutch Civil Code, to which the debtor belongs runs a business that employs fewer than 250 people and had an annual turnover in the preceding financial year that did not exceed €50 million or a balance sheet total at the end of the preceding financial year that did not exceed €43 million.

Where the debtor is a legal entity, the shareholders may not unreasonably

prevent the board from giving its consent.

3. Article 371(2), first, second and fifth sentences, apply *mutatis mutandis*.
4. The court shall issue a decision as soon as possible scheduling a hearing to consider the confirmation. Where the debtor submits a request to confirm a plan that has not been accepted by all classes and the court has not yet appointed a restructuring expert as meant in Article 371 or an observer as meant in Article 380, the court shall appoint an observer in the same decision.
5. The debtor or the restructuring expert shall send written notice of the decision referred to in Article 383(4) promptly to creditors and shareholders with voting rights.
6. The hearing shall be held at least eight days and no more than fourteen days after the request to confirm and the report as meant in Article 382 have been made available at the court for inspection.
7. Where the debtor or the restructuring expert seeks to terminate an agreement unilaterally under Article 373(1), the confirmation request shall also include a request seeking the court's leave to terminate that agreement unilaterally.
8. Creditors and shareholders with voting rights may submit a written request for the court to deny confirmation, stating their reasons, up to the date of the hearing as meant in Article 383(4). Until that time, the counterparty to the agreement as meant in Article 383(7) may submit a written request, stating reasons, for the court to deny the requested leave to terminate as meant in Article 383(7).
9. A creditor, shareholder or counterparty as meant in Article 383(8) may not invoke a ground for refusal if it did not raise an objection to that effect with the debtor or the restructuring expert, if appointed, promptly after it discovered or should reasonably have discovered the possible existence of that ground for refusal.

Article 384

Confirmation criteria

1. Where the court has jurisdiction to hear the request to confirm, it shall issue its reasoned judgment as soon as possible granting this request and, if applicable, a request for leave to terminate an agreement as meant in Article 383(7), unless one of the grounds for refusal as meant in Article 384(2)-(5) arises.
2. The court shall deny a request to confirm the plan if:
 - a. the state of the debtor as meant in Article 370(1) does not exist;
 - b. the debtor or the restructuring expert have not complied with all of their obligations to creditors and shareholders with voting rights, as meant in Articles 381(1) and 383(5), unless the creditors and shareholders in question confirm that they accept the plan;
 - c. the plan or the appended documents do not contain all of the information prescribed in Article 374, the class formation does not meet the requirements of Article 374, or the voting procedure did not comply with Article 381, unless the shortcoming could not reasonably have led to a different outcome of the vote;
 - d. a creditor or the shareholder should have been admitted to the vote on the plan for a different amount, unless that decision could not reasonably have led to a different outcome of the vote;

- e. performance of the plan is not adequately safeguarded;
 - f. the debtor wishes to obtain new financing to implement the plan and this will materially prejudice the interests of the general body of creditors;
 - g. the plan was procured by deception, by favouring one or more creditors or shareholders with voting rights or by other unfair means, irrespective of whether it was with the cooperation of the creditor or any other party;
 - h. the salary and disbursements for the restructuring expert, expert or observer instructed or appointed by the court under Article 371, 378(5) and 380 respectively have not been paid or no security for payment has been provided; or
 - i. other reasons militate against confirmation.
3. The court may refuse to confirm the plan, at the request of one or more creditors or shareholders who rejected the plan or who were wrongly excluded from the vote, if there is *prima facie* evidence that these creditors or shareholders will be worse off under the plan than they would have been in a liquidation of the debtor's assets in bankruptcy.
 4. The court shall refuse to confirm a plan that was not accepted by all classes, at the request of one or more creditors or shareholders who rejected the plan and who were placed in a class that did not accept the plan or who were wrongly excluded from the vote and should have been placed in a class that did not accept the plan if:
 - a. the distribution of the value realised with the plan deviates to the disadvantage of the class that did not accept the plan from the ranking that applies upon enforcement against the debtor's assets under Book 3, Title 10 of the Dutch Civil Code, any other law or instrument based upon it or under a contractual arrangement, unless there are reasonable grounds for such deviation and the interests of the said creditors or shareholders are not prejudiced by it; or
 - b. the plan does not give the said creditors a right to opt for a cash payment in the amount they would have expected to receive in cash in a liquidation of the debtor's assets in bankruptcy.
 5. At the request of the counterparty to the agreement, the court shall deny the request for leave to terminate the agreement as meant in Article 383(7) on the ground as meant in Article 384(2)(a).
 6. Article 378(5) applies *mutatis mutandis*.
 7. Before taking the decision as meant in Article 384(1), the court shall offer the debtor, the restructuring expert, if appointed, the observer as meant in Article 380, if appointed, and creditors and shareholders with voting rights or the counterparty, where they have submitted a request as meant in Article 383(8) for the court to deny the request for confirmation or the request for leave to terminate the agreement, an opportunity to express their views in a manner and within a period determined by the court.
 8. Article 371(14) applies *mutatis mutandis*.

SECTION 4. THE CONSEQUENCES OF CONFIRMATION

Article 385

Effects of the plan

The confirmed plan is binding on the debtor and all creditors and shareholders with voting rights. Where the vote on the plan was not cast by the creditor or shareholder but by a third party in accordance with Article 381(4) or (5), the plan is nevertheless binding on the creditor or shareholder.

Article 386

Enforceable title

For creditors with voting rights whose claims are undisputed by the debtor, the judgment confirming the plan constitutes an enforceable title against the debtor and against the persons that have become a party to the plan as guarantors, insofar as the creditors obtain a monetary claim under the plan.

Article 387

Failure to comply with the plan

1. Every failure by the debtor to comply with the plan constitutes a breach and makes the debtor liable to creditors or shareholders with voting rights for the resulting losses, unless the breach is not attributable to the debtor. Article 75 and Book 6, Section 10, Title 1 of the Dutch Civil Code apply *mutatis mutandis*.
2. The plan may exclude rescission of the plan. Where the plan does not contain a provision to that effect, Article 165 applies *mutatis mutandis*.

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Insert the following at the end of Article 362(2)¹⁷: ‘, with the exception of Articles 262 and 269 of that code insofar as the requests are submitted on the basis of the second section of Title IV in the context of a confidential pre-insolvency plan procedure or a public pre-insolvency plan procedure.’

ARTICLE II *COURT FEES*

Insert the following new Article 19a in the Court Fees (Civil Cases) Act¹⁸:

Article 19a

1. The court shall charge parties submitting requests as meant in Articles 42a, 371(1), 376(1), 377(3), 378(1), 379(1), and 383(7) of the Dutch Bankruptcy Act a court fee for cases other than subdistrict court cases for a claim of undetermined value, based on the table appended to this Act.
2. The court shall charge parties submitting a request to confirm a plan as meant in Article 383(1) of the Dutch Bankruptcy Act a court fee for cases other than subdistrict court cases for a claim, or a request with a value of more than €100,000, based on the table appended to this Act.
3. The court shall charge a creditor or shareholder with voting rights who submits a request to deny confirmation of the plan as meant in Article 383(8) of the Dutch Bankruptcy Act a court fee for cases other than subdistrict court cases, based on the table appended to this Act. The amount of the court fee is determined by the amount of their claim or the nominal amount of their share.
4. When applying Article 19a(1) and (2), the court fee is levied on the debtor if the request is made by a restructuring expert.

ARTICLE III *ENTRY INTO FORCE*

This Act shall enter into force on a date to be determined by Royal Decree, which may differ for the various articles or sections of the Act.

ARTICLE IV *OFFICIAL TITLE*

This Act shall be known as the Act on the Confirmation of Private Plans.

We order and command that this Act be published in the Bulletin of Acts and Decrees, and that all ministries, authorities, tribunals and officials concerned monitor its proper implementation.

Issued,

The Minister of Justice

Endnotes

- 1 *Wet homologatie onderhands akkoord.*
- 2 Article 42 of the Bankruptcy Act currently reads:
 1. The bankruptcy trustee may, for the benefit of the estate and by a statement not requiring legal formality, annul each legal act which the debtor performed without obligation prior to the declaration of bankruptcy where the debtor was or should have been aware that the act would result in being prejudicial to the creditors. Article 3:50(2) of the Civil Code does not apply.
 2. A legal act, other than for no consideration, which is either multilateral or unilateral and which concerns one or more specific parties, may only be annulled on the grounds that it causes prejudice where the parties, with or in respect of whom the debtor performed the legal act, were or should have been aware that the act would result in being prejudicial to creditors.
 3. Where a legal act for no consideration is annulled on the grounds that it causes prejudice, this annulment will have no effect in respect of a beneficiary who was neither aware nor should have been aware that the legal act could result in being prejudicial to the creditors, to the extent he shows that he had not benefited from the legal act at the time of the declaration of bankruptcy.
- 3 Article 47 of the Bankruptcy Act currently reads:
Settlement by the debtor of a claim which is due may only be annulled if it is proved either that the person receiving the payment knew that the bankruptcy of the debtor had already been applied for or that the payment was arranged between the debtor and the creditor with the intention of giving that creditor a preferential position over other creditors.
- 4 Article 54 of the Bankruptcy Act currently reads:
 1. Nevertheless, a person who has assumed a debt owed to, or acquired a claim against, the bankrupt from a third party before the declaration of bankruptcy, may not effect a setoff if he, when taking over the debt, was not acting in good faith.
- 5 Reference is made here to the European Insolvency Regulation 2015/848.
- 6 Article 3 of the Dutch Code of Civil Procedure reads as follows:
The Dutch courts have jurisdiction in cases in which an application has been submitted, except for cases as meant in Articles 4 and 5, where:
 - a. either the applicant or, where there are multiple applicants, one of them, or one of the interested parties specified in the originating document, has its domicile or habitual residence in the Netherlands;
 - b. the application relates to an action in which a claim is or will be submitted in respect of which the Dutch courts have jurisdiction; or
 - c. the case is otherwise sufficiently connected to the Dutch legal system.
- 7 Articles 262 and 269 of the Dutch Code of Civil Procedure read as follows:
Article 262
 Unless the law provides otherwise, the court of the domicile of the applicant or of one or more of the applicants, or of one of the interested parties named in the originating document, has jurisdiction, or, if there is no such known domicile in the Netherlands, the court of the actual abode of one of them.
Article 269
 Where Articles 109(1) and 262 to 268 inclusive do not confer jurisdiction on a court, the District Court of The Hague has jurisdiction.
- 8 Article 2:24b of the Dutch Civil Code reads as follows:
A group is an economic unit in which legal persons and partnerships are united in one organisation. Group companies are legal entities and partnerships which are united in one group.
- 9 Article 160 of the Bankruptcy Act reads as follows:
Notwithstanding the plan, the creditors shall retain all their rights against any guarantors and other co-debtors of the debtor. Any rights which they may have in respect of property of third parties shall continue as if no plan had been made.
- 10 Reference is made here to the European Insolvency Regulation 2015/848.
- 11 Reference is made here to the European Insolvency Regulation 2015/848.
- 12 *Wet op de ondernemingsraden.*
- 13 Reference is made here to a notice of enforcement. Article 241a(2) reads as follows:
The District Court may restrict its decision to certain third parties, and it may attach specific conditions to its decision. The District Court and the President of the District Court may attach conditions to the authorisation they grant to a third party in exercising its rights under this authorisation.
- 14 Article 241a(2) provides that the court may limit the stay to one or more specific third parties and attach conditions to its order to grant or to grant leave from the stay. Article 241a(3) reads as follows:
Where a third party has stipulated a reasonable time period to the bankruptcy trustee, this time period will be suspended while the action is stayed.
- 15 This article concerns the ability of third parties to prevent the Dutch Revenue Service (*ontvanger*) from recovering its claims against the debtor from their property.
- 16 This article excludes financial collateral as meant in the Financial Collateral Directive (2002/47/EC) from the operation of the stay.
- 17 Article 362(2) reads as follows:
Book 1, Title 3 of the Code of Civil Procedure is not applicable to applications pursuant to this Act.
- 18 *Wet griffierechten burgerlijke zaken.*

RESOR

EXPLANATORY MEMORANDUM



Amendment to the Bankruptcy Act to make provision for court confirmation of private plans (*Act on the Confirmation of Private Plans*)

EXPLANATORY MEMORANDUM

I GENERAL

1. PURPOSE AND CONTENT OF THE BILL

This legislation introduces a legislative instrument as a basis for court confirmation of a debt restructuring plan between a business and its creditors and shareholders. Once confirmed, the plan is binding on all creditors and shareholders that are a party to it. Creditors or shareholders who have not accepted the plan can still be bound by the plan if decision-making on the plan and the content of the plan meet certain requirements. That is the reason that the term 'coercive plan' is also used in this context. The instrument will become part of the Bankruptcy Act.

The proposed Act on the Confirmation of Private Plans (in what follows: ACPP) is primarily for businesses that, although they are over-indebted and at risk of insolvency, still have viable activities. The aim is to bolster the capacity of these businesses to reorganise. There is no legislative instrument in the Netherlands for a pre-insolvency plan procedure. At this time, a private debt scheduling plan can be put into effect only if it is accepted by all of the capital providers affected, i.e. creditors and shareholders. Each individual capital provider consequently has an incentive to refuse to accept the plan and so put themselves in a better position. This makes it difficult and often impossible to reach consensus. Such conduct by one or several dissenting creditors or shareholders can result in the bankruptcy of the business or in the other capital providers bearing a disproportionate part of the burden of restructuring to avoid a bankruptcy. The ACPP offers a solution to this problem. The ACPP is intended to reinforce the out-of-court debt rescheduling and restructuring process; the possibility of a restructuring plan must be regarded as a 'last resort'. By no means is the ACPP intended to undermine the existing practice of out-of-court restructuring. Far from it: one of the aims of the ACPP is to reinforce that practice. In the out-of-court restructuring process, the negotiating parties face the alternative of the legislative instrument. Because the ACPP offers an effective means of imposing a court-confirmed solution, dissenters are less likely to be over-demanding. This will facilitate an agreement. The mere existence of an effective and efficient instrument that expedites a final decision from the court could actually avoid the need to go to court.

The ACPP also allows for confirmation of a plan to liquidate a business that has no further chance of survival. The ACPP can be applied in circumstances where a controlled

wind down of the business in a pre-insolvency plan procedure achieves a better result than a liquidation in bankruptcy.

The bill is part of the 'Bankruptcy Law Review' Programme [*Programma 'Herijking Faillissementsrecht'*]. As the Lower House was informed by letter on 26 November 2012, the programme rests on three pillars: (I) to prevent fraud, (II) to bolster the capacity of businesses to reorganise, and (III) to modernise the bankruptcy procedure.¹ This bill is part of the second pillar. The second pillar is currently expected to consist of a total of four bills, including this bill. As they currently stand, the other three bills will introduce:

- I an instrument to provide a specific statutory basis for a method developed in practice (also referred to as the 'prepack'), where the court is asked by the board of a company shortly before its expected bankruptcy to quietly indicate who will be appointed as trustee if the business is declared bankrupt; the Continuity of Enterprises Act [*Wet Continuïteit Ondernemingen I*]²;
- II a *Transfer of Undertaking in Bankruptcy Act*³; and
- III various measures aimed at increasing the effectiveness of the legislative instrument for suspension of payments and bankruptcy.

2. BACKGROUND AND REASON FOR THE BILL

When businesses of any size are facing serious financial difficulties, it is customary for the board or *de facto* management ('the board') to contact advisers in their search for a solution. Creditors in such a restructuring process are often asked to agree to a suspension of payments or a partial waiver of outstanding debts, or to convert the debts into share capital. Until there is a bankruptcy or suspension of payments, however, preparations for this type of agreement are governed by the general rules of property law. In addition, the main rule of law is that creditors are entitled to full payment of their claim. Only in very exceptional circumstances can a creditor be ordered (on the basis of the doctrine of abuse of rights (Article 3:13 DCC)) to cooperate in implementing a plan that is proposed to it.⁴ The Dutch Supreme Court found that it is for the debtor who seeks a court order to compel such cooperation to assert and prove specific facts and circumstances to show that the creditor could not reasonably have refused to accept the plan.⁵

Another way of resolving financial difficulties can be to raise fresh capital. Shareholders are then asked to make an additional investment in the business or to agree to the issue of new shares as a way of attracting new investors (cf. Articles 2:96a and 206a DCC). In principle, shareholders are free to decide whether or not to cooperate and

¹ Parliamentary Papers II 2012–2013, 29 911, no. 74.

² Parliamentary Papers I 2015–2016, 34 218.

³ https://www.internetconsultatie.nl/overgang_van_onderneming_in_faillissement.

⁴ Dutch Supreme Court, 24 March 2017, ECLI:NL:HR:2017:485 and Court of Appeal of Arnhem Leeuwarden, 22 December 2015, ECLI:NL:GHARL:2015:9827.

⁵ Dutch Supreme Court, 12 August 2005, NJ 2006/230 (*Groenmeijer v Payroll*) and Dutch Supreme Court, 24 March 2017, ECLI:NL:HR:2017:485.

cannot be compelled to acquire new shares (Article 2:81 and Article 192 DCC). The financial difficulties of the business may prompt the court to set aside shareholders' pre-emptive rights upon the issue of new shares.⁶

A comparison of Dutch insolvency law against regimens in other countries shows that the Netherlands has a good record in bankruptcy settlement.⁷ But the Netherlands lags behind in its instruments for business restructuring. The current plan instrument in suspension of payments proceedings has proved ineffective and is seldom if ever used in practice, although that is where a workable pre-insolvency plan instrument is urgently needed. This is clear from the literature⁸ and from the reactions in consultations on the two preliminary drafts in 2014 and 2017⁹. In this context, it can also be pointed out that numerous companies from all corners of the world have looked to the United Kingdom or the United States to resolve their financial problems. They used the 'Scheme of Arrangement' and the 'Chapter 11' procedures in those respective countries. Amongst them were a number of Dutch companies.¹⁰ Furthermore, the European Commission published a proposal for a new directive in late 2016 that aims to ensure 1) *"that viable enterprises and entrepreneurs in financial difficulties [in every member state] have access to effective national preventive restructuring frameworks which enable them to continue operating; 2) that honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance; and 3) that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved [...]"* (the 'Directive').¹¹ The objective of the Directive is to contribute to the proper functioning of the internal market and to remove obstacles to the free movement of capital and freedom of establishment which result from differences between national laws and procedures. The Council, the European Parliament and the European Commission reached agreement on this Directive in late December 2018.¹² The first part of the Directive imposes an obligation on Member States to establish a legislative instrument for a pre-insolvency plan procedure. The bill is aligned with this. This is elaborated in the explanation of articles in this explanatory memorandum. A separate bill will be drafted for the implementation of the Directive. The explanatory memorandum for this bill will include a correlation table that will also indicate which parts of the Directive correspond to the ACP.

6 Enterprise Chamber of 31 December 2009, *Inter Access*, ECLI:NL:HAMS:2009:BL3680). 31 December 2009.

7 This is demonstrated by the World Bank 'Doing Business indicator' (<http://www.doingbusiness.org/data/exploretopics/resolving-insolvency>) and the Organisation for Economic Cooperation and Development (OECD) 'Insolvency Indicator' (<http://www.oecd.org/eco/growth/policies-for-productivity-the-design-of-insolvency-regimes-across-countries-2018-going-for-growth.pdf>).

8 There have been calls for a pre-insolvency plan instrument since 1835. For a brief summary of this history, see N.W.A. Tollenaar, *'Het pre-insolventieakkoord. Grondslagen en raamwerk'* (diss. 2016), paragraph 1.2.).

9 <https://www.internetconsultatie.nl/wco2/details> and <https://www.internetconsultatie.nl/wethomologatie>.

10 Most cases remain confidential and are not made public. A number of public examples are: Van Gansewinkel Groep B.V. (English scheme); New World Resources (scheme); Indah Kiat International Finance Company B.V. (scheme); DAP Holdings N.V. (scheme); European Directories (scheme); Estro Groep B.V. (scheme); NEF Telecom B.V. (scheme); Magyar Telecom B.V. (scheme); Nortel Networks B.V. (English administration), Eurodis B.V. (English pre-pack); Almatris B.V. (Ch. 11, US); Marco Polo Seatrade B.V. (Ch. 11, US); Global Telesystems Europe B.V. (Ch. 11, US); Versatel Telecom International N.V. (Ch. 11); and United Pan-Europe Communications N.V. (Ch. 11).

11 Proposal for a directive of the European Parliament 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. 2016/0359 (COM/2016/723/FINAL) (*Parliamentary Papers II* 2016/17, 22 112, no. 2292 (BNC fiche)).

12 The definitive text of the Directive has not yet been published in the official Journal of the European Union, but has been published on the following website: <https://data.consilium.europa.eu/doc/document/PE-93-2018-INIT/nl/pdf>. [Ed: The definitive text has been published in the meantime on <https://eur-lex.europa.eu/legal-content/NL-EN/TXT/?uri=CELEX:32019L1023&from=EN>].

The object of the bill – which takes inspiration from the ‘Scheme of Arrangement’ and the ‘Chapter 11 procedure’ – is that the ACPP will create an effective and readily accessible plan instrument that is useful not only for large companies but also for small and medium-sized companies (SMEs). At the outset, it is mainly larger companies that are expected to meet the conditions for the ACPP. The greatest benefit of the ACPP for smaller businesses will initially be an improvement of their position as creditor (often as supplier). As a rule, the position of a smaller business in a bankruptcy is that of an unsecured creditor. As the lowest ranking creditor, an unsecured creditor will generally receive little if any of its claim in the bankruptcy of its debtor. However, analysis of the Chapter 11 procedure in the US has shown that unsecured creditors receive an average of 52% of their claim under a coercive plan.¹³ Therefore, application of the ACPP is likely in any event to strengthen the position of smaller businesses as creditors indirectly.

3. OUTLINE OF THE CONTENT OF THE INSTRUMENT

3.1 Introduction

The bill provides the instrument of the ACPP to facilitate court confirmation of a private plan to restructure a debtor’s debts, so that creditors or shareholders who did not accept the plan can nevertheless be bound by it (Article 385). The proposed instrument will be included in the Bankruptcy Act in a new section 4.2 (Court confirmation of private plans), which in turn is subdivided into four paragraphs:

- Section 1 General provisions;
- Section 2 Plans: proposing and voting;
- Section 3 Confirmation of a plan; and
- Section 4 The consequences of confirmation.

The debtor itself can initiate the process to put a plan into effect. It can also be initiated by creditors or shareholders or the works council or workplace representation that is set up within the business. They can request that the court appoint a restructuring expert who may then prepare a plan and present it to the affected creditors and shareholders.

A plan meets the conditions for court confirmation only if a number of requirements on the decision-making process and the content of the plan have been met. One of the main requirements is that the creditors and shareholders must have been given the opportunity to express their opinion in a vote. Furthermore, a coercive plan can only be an option if the circumstances justify it. For that reason, the following conditions must be fulfilled:

1. The state of the business for which the plan is proposed is such that it can reasonably be assumed that it will become insolvent (Article 370(1) and Article

¹³ The economic impact of Chapter 11 reorganisation versus Chapter 7 liquidation, Wade D Druin and Mike Allgrunn, in *Journal of Criminal Justice and Legal issues*, Volume 2, September 2014.

371(3)).

2. The objective of the plan may be:
 - a. to avert the impending bankruptcy of a business that will regain financial health after debt restructuring; or
 - b. to wind down a business that has and will have no prospect of survival and achieve a better result than in a liquidation in bankruptcy.
3. The vote shows that at least one category (class) of affected creditors or shareholders supports the plan with the required majority.
4. The plan is *reasonable*, in the sense that the creditors and shareholders involved in the plan will be better off, or in any event not worse off, if the plan is put into effect. In other words, at the very least:
 - a. the creditors and shareholders will not be significantly worse off under the plan than in bankruptcy (Article 384(3);
 - b. the value (the 'reorganisation value') that can be retained or realised under the plan can be distributed *fairly* amongst creditors and shareholders (i.e. the reorganisation value is distributed in accordance with applicable priority rules under which creditors can enforce claims against the debtor unless one or more classes has accepted a different proposal) (Article 384(4)(a)); and
 - c. creditors who expect to receive a cash payment in the bankruptcy of the debtor and who have voted against the plan by a majority in their class must have the right to 'exit' (i.e. they must be able to opt for a cash payment) (Article 384(4)(b)).

Where all classes have accepted the plan in a decision-making process that was pure (i.e. there are none of the grounds for refusal included in Article 384(2)), the plan may be assumed to be *reasonable*. However, there may be creditors or shareholders who have not accepted the plan and who resist the confirmation. If these creditors or shareholders can show that the plan is nevertheless *unreasonable* because they will be significantly worse off under the plan than in a bankruptcy, the court will refuse the request to confirm (Article 384 (3)). Where not all of the classes have accepted the plan, the deciding factor will be how the reorganisation value that can be retained or realised under the plan is distributed amongst affected creditors and shareholders under the plan. That distribution may not derogate from the priority rules under which creditors can enforce claims on the debtor where the dissenting classes worse off. The court can also refuse the request to confirm if a majority of creditors or shareholders in a class have voted against the plan and show that the plan does not fulfil this condition (Article 384(4)). In that case, distribution of the reorganisation value under the plan's restructuring proposal is *unfair* and the plan is consequently unreasonable.

The ACP is designed as a framework in order that the parties have maximum flexibility to agree on a plan that is suited to their specific circumstances. In principle, the court's

involvement is limited before the request to confirm is submitted. The debtor may ask the court to provide clarification on areas of uncertainty at an early stage so that the clarification is not given at the end of the process when it may already be too late (Article 378(1)). This enables 'deal certainty' to be achieved quickly and definitively, i.e. certainty can be provided quickly on whether the proposed plan has a prospect of success or whether the preparations or the proposed plan must be adjusted. This system is in line with Article 4(6) of the Directive. It provides that "Member States may put in place provisions limiting the involvement of a judicial [...] authority in a preventive restructuring framework to where it is necessary and proportionate [...]."

The ACPD also provides certainty on the consequences of confirmation of the plan and non-compliance with the plan for the debtor and the affected creditors and shareholders.

A final important aspect is that the ACPD provides for two procedures within which the plan can be put into effect: (1) a confidential pre-insolvency plan procedure and (2) a public pre-insolvency plan procedure (Article 369(6)). The public pre-insolvency plan procedure is notified to the European Commission with a request that the procedure be included in Annex A of the Insolvency Regulation.¹⁴ In the confidential pre-insolvency plan procedure, the intention of the debtor or restructuring expert to propose a plan is not made public and all requests to the court are considered in judge's chambers (Article 369(9)). Conversely, the process of the public pre-insolvency plan procedure is publicised in a notice in the insolvency register (Article 370(4)). The Commercial Registers Decree [*Handelsregisterbesluit*] 2008 will also stipulate that application of the public pre-insolvency procedure must be registered in the Commercial Register. This is already current practice in other public insolvency procedures; in other words, the declaration of bankruptcy, the granting of a suspension of payments and the application of the debt rescheduling scheme (Article 39 of the Commercial Registers Decree 2008). In addition, requests to the court are heard in public (Article 369(9)).

It is for the debtor, the creditors and shareholders or the works council or workplace representation that is set up within the business – if they request the appointment of a restructuring expert under Article 371(1) – to decide which procedure is best suited to the debtor's state and offers the greatest prospect of success. They must make a choice between the two procedures. It must in any event be clear which of the procedures has been chosen before the court becomes involved in the plan attempt. Where one or more creditors or shareholders takes the initiative to put a plan into effect, a choice must in any event be made before the court appoints a restructuring expert (Article 371(2)). Where the debtor prepares and proposes the plan, that choice must in any event be made before the court hears a request to confirm (Article 383(3)). In either situation, however, if the court receives a request before that time, for example for a stay, the choice between the two procedures must be made at a much earlier stage (Article 376(3)). Once a choice has been made for one of the two procedures, the process for putting a plan into effect must be implemented entirely within the framework of that procedure. Once underway, the procedure cannot be switched from confidential to public. Before giving a decision on requests submitted

¹⁴ Regulation (EC) No 2015/848 of 20 May 2015 on insolvency proceedings, OJEU L 141/19.

during the preparation of the plan, the court must first establish whether it has jurisdiction to hear those requests. This is determined in the confidential pre-insolvency plan procedure on the basis of Article 3 of the Dutch Code of Civil Procedure (DCCP). It is determined in the public plan procedure by whether the debtor's centre of main interests (COMI) is in one of the EU Member States (other than Denmark).¹⁵ If that is the case, the jurisdiction of the Dutch court can be determined on the basis of the Insolvency Regulation, by registering the public pre-insolvency plan procedure on Annex A. Where the debtor's COMI is outside the EU or in Denmark, the jurisdiction of the Dutch court must once again be determined on the basis of Article 3 DCCP. If the Dutch court has jurisdiction, Articles 262 and 269 DCCP will show the Dutch court that has relative competence and to which requests that can be made in the context of the ACPP must be submitted (Article 369(7) and (8)).

A brief explanation of the key elements of the instrument is provided in the following paragraphs.

3.2 *Plans: proposing, content and structure*

Proposing the plan

First and foremost, the debtor can prepare and propose its own debt restructuring plan to its creditors and shareholders. Use of the ACPP in that context is subject to the condition that the debtor's state is such that it is reasonable to assume that it will become insolvent (Article 370(1)).

One or more creditors or shareholders or the works council or workplace representation that is set up within the business can also initiate preparations for a plan. Under the ACPP they are permitted to submit a request to the court for the appointment of a restructuring expert. This restructuring expert can prepare a plan proposal and subsequently set in motion a process that can lead to the court's confirmation of the plan. The debtor can also request the appointment of a restructuring expert. It can do so, for example, to avoid any appearance of conflict of interests or to increase confidence in the process and by extension the plan's prospect of success (Article 371(1)). The appointment of a restructuring expert rules out a plan proposal from the debtor at the same time (Article 371(1)). This ensures that efforts to put a plan into effect are always concentrated in a single process.

It is a condition for granting the request to appoint a restructuring expert that the debtor's state is such that it is reasonable to assume it will become insolvent. If necessary, the court can ask an expert to investigate (Article 371 (4)). If the debtor's state is as described, the court shall allow the request unless there is *prima facie* evidence that it is not in the interests of the general body of creditors (Article 371(3)). Such circumstances may arise, for example, if the appointment request is clearly submitted by a creditor with the sole purpose of frustrating or delaying a restructuring process that has reached an advanced stage and has a good prospect of success and by doing so improve its own negotiating position, despite the fact that such strategic

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

behaviour and the resulting delay will be harmful to the general body of creditors. A request to appoint a restructuring expert that is submitted by the debtor itself or has the support of the majority of shareholders shall in any event be granted.

When appointing the restructuring expert, the court shall also determine the salary and the maximum cost of the work of the restructuring expert and any third parties he consults. The court can subsequently increase that amount. Unless agreed otherwise, the debtor must reimburse these costs (Article 371(10)). There is one exception to this rule: where the appointment of a restructuring expert is requested by a majority of the shareholders, the creditors shall bear the costs. This is in line with Article 5(3) of the Directive.

If the court decides to appoint an expert, the debtor and all those directly involved in the business run by the debtor, i.e. directors, shareholders, supervisory directors and employees, are obliged to provide the restructuring expert with all information, whether solicited or unsolicited, and all the cooperation the restructuring expert needs for the proper performance of his tasks (Article 371(8)). The restructuring expert must also be given the opportunity to consult company records and all other relevant company information (Article 371(7)). The restructuring expert may only share the information obtained with third parties insofar as it is necessary to put the plan into effect (Article 371 (9)). Because the authority of the restructuring expert under the ACP is identical to the authority of a debtor under the new section 4.2 if it proposes its own plan, this general information is based for simplicity's sake on a scenario in which it is the debtor who proposes the plan.

As soon as the debtor starts to prepare a plan, it will submit a declaration to that effect to the clerk of the court. This is important to the debtor because from that moment onwards, it may invoke only the provisions contained in the instrument to help it put the plan into effect (see paragraph 3.7). After the debtor has proposed its plan to the creditors and shareholders, they may inspect the declaration (Article 370(3)).

The bill provides that the plan can amend the rights of creditors (Article 370(1)). This is an amendment to the right of a creditor as a means of compelling the debtor to perform its obligations. For example:

- full or partial relief for an outstanding debt, where all or part of the debtor's payment obligation is waived and the right of the creditor to claim full or partial payment of the original debt from the debtor is extinguished; or
- a suspension of payments, where the debtor is given more time to perform its payment obligations and the right of the creditor to compel payment at the originally agreed time is extinguished.

The rights of all categories of creditors and shareholders can be amended under the plan. Unlike the suspension of payments plan, a coercive plan that is put into effect under the ACP can also modify the rights of preferential creditors and secured creditors. The plan cannot amend the rights of employees under employment contracts and Book 7, Title 10 of the Dutch Civil Code (DCC) (Article 369(4)). The legal position of employees is safeguarded and cannot be amended by a plan.

Where a creditor's right of action is amended when it becomes party to plan, it retains the right to take action for payment of its original claim, in the manner stipulated and

at the time agreed before the plan was confirmed, against a third party (that may include a guarantor and a joint debtor) that is liable for a debt of the debtor or has provided any form of security for payment of that debt (Article 370(2), first sentence). The third party cannot enforce a claim against the debtor for the amount it pays to the creditor after confirmation of the plan (Article 370(2), second sentence). This prevents any action against the debtor for the original debt that would ultimately leave the financial difficulties unresolved by the plan. If and insofar as the value received by the creditor as a result of the third party payment and the allocation of rights under the plan is more than the amount of its original claim on the debtor, rights assigned to the creditor under the plan transfer by operation of law to the third party (Article 370 (2), third sentence). This goes some way towards compensating the loss sustained by the third party from its lack of a reimbursement claim against the debtor and prevents the creditor from ultimately receiving more than its entitlement under its original claim on the debtor. The following are possible scenarios.

1. Under the plan, a creditor will be paid 50% of its claim (plus market rate interest) three years after the plan is put into effect. The creditor is not prepared to wait that long and calls on the guarantor for the full amount of its claim. The guarantor then pays the claim in full. As soon as it has done so, the creditor's right under the plan (payment of 50% of the claim after three years, with interest) transfers by operation of law to the guarantor. If the plan is implemented as agreed, the guarantor receives 50% of the amount it paid to the debtor's creditor after three years. If the rights did not transfer to the guarantor and the plan, the creditor would ultimately receive 150% of its original claim on the debtor, whereas the guarantor would be deprived of a reimbursement claim.
2. Under the plan, a creditor will once again be paid 50% of its claim (plus market rate interest) three years after the plan is put into effect. The creditor now calls on the guarantor for payment of the 'other' 50% of the claim. The guarantor pays this 50% of the claim. The value received by the creditor is precisely the amount of its original claim on the debtor: 50% under the plan and 50% from the guarantor. In this case the rights under the plan do not transfer to the guarantor. Were they to do so, the creditor would still receive 50% of its original claim and the surety would in fact be worthless.

The rule that the plan does not affect the rights of third parties is subject to exception if the plan is as described in Article 372. Such a plan also aims to make provision for the restructuring of guarantees, insofar as they have been issued by companies that are part of the same group as the debtor. It is a prerequisite that the conditions of Article 372 are met.

The ACPP also offers the debtor a means to terminate pending agreements unilaterally if the counterparty does not agree to a proposed voluntary amendment or termination (Article 373). For example, where a rental agreement is a millstone around the neck of the business. Employment contracts cannot be modified (Article 369(4)).

It is provided that the debtor may propose the amendment or termination of the agreement to the counterparty. If the counterparty does not accept the proposal, the debtor has the right to terminate the agreement unilaterally, with the leave of the court. In such circumstances the debtor must attach to its request to confirm a

request for leave to terminate the agreement unilaterally (Article 383(7)). Conditions for this unilateral, premature termination with the leave of the court are that:

- a. the debtor's position is such that it is reasonable to assume it will become insolvent; and
- b. the court confirms the plan (Articles 373(1) and 384(5)).

The debtor can include in the plan any claim for damages the counterparty may have after the unilateral, premature termination of the agreement (Article 373(2)). The counterparty to the agreement then becomes a creditor with voting rights, with all of the rights allocated to it under the ACPP, including the right to vote on the plan and the right to ask the court to refuse a request to confirm the plan (Articles 381(3) and 383(8)). If debtor's plan does not include a potential claim for damages from the counterparty, the counterparty does not have the right to vote on the plan. In that case, it cannot oppose confirmation of the plan. However, the counterparty can ask the court to deny leave to terminate the agreement on the ground that the state of insolvency is not inevitable (Article 384(5)).

The plan can amend the rights of shareholders as well as creditors (Article 370(1)). In the main, this would be a plan involving a debt for equity swap. The debt for equity swap comes in many forms, but essentially means that all or part of the debt to a creditor is converted into equity. This gives the creditor a share interest and also by extension control in the company, whilst diluting the share interest and control of existing shareholders.

The issue of shares normally requires a resolution by the general meeting of shareholders (Article 2:96/206 DCC). Furthermore, existing shareholders have a pre-emptive right in any issue of ordinary shares (Article 2:96a/206a DCC). In the context of putting a plan into effect, these rules do not apply (Articles 370(5) and 371(1)). This is in line with Article 32 of the Directive.

The debtor may propose a plan to all of its creditors and shareholders. It may also opt to limit the proposal to a certain group of creditors or shareholders, for example by proposing a plan that focuses exclusively on restructuring the debts to financiers and does not affect the claims of ordinary unsecured trade creditors (Article 370(1)). The debtor then needs only to present the plan to that limited group of creditors or shareholders (Article 381(1)). This enables it to use the confidential pre-insolvency plan procedure to put a plan into effect in relative peace, avoiding negative publicity about the financial difficulties and the adverse consequences it causes. The rights of any group of creditors that is not involved in the plan will remain exactly the same and those creditors must be paid in full. In such circumstances there is a risk that one or more of the creditor classes involved in the plan will not accept the plan and the creditors in that class will challenge confirmation. In that case, the plan meets the conditions for confirmation only if:

- classes of creditors with the same or higher ranking accept the plan with the required majority (i.e. they consent to derogation from the priority rules for creditors enforcing claims against the debtor); or
- the debtor submits a reasonable basis for its choice to exclude certain creditors

from the plan (i.e. that those creditors do not bear part of the shortfall) and shows that the interests of creditors with the same or higher ranking are not affected (Article 384(4)(a)).

Content and structure of the plan

The debtor is in principle free to decide what to propose to its creditors and shareholders and how to structure its plan. But for the plan to meet the conditions for confirmation, its content and structure must comply with a number of requirements (Article 374 and Article 375). For example, the debtor must include the information prescribed by law in the plan and the accompanying documents. This will ensure that creditors and shareholders are able to take an informed decision when asked to vote on the plan (Article 381(1)).

A plan that covers different categories of creditors and shareholders (i.e. their rights in bankruptcy or their rights under the plan are so different that they are not in a comparable position) must make provision for classification of claims. This means that:

- the distinct categories of creditors and shareholders must be placed in different classes (Article 374);
- each class is offered a proposal that is in keeping with the rights of the relevant creditors or shareholders (Article 375); and
- a separate vote on the plan is held in each class (Article 381(6)).

Creditors or shareholders that are not of equal rank must be placed in different classes. For example, there must be different classes for preferential creditors, creditors with retention to title, creditors with a right of retention and ordinary unsecured creditors. The debtor is free to subdivide one category of creditors into different classes. It may also make different offers to those classes, potentially treating one class more favourably than another. For the plan to meet the conditions for confirmation in those circumstances, the debtor must ensure:

- that a required majority of the class that is treated less favourably accepts the plan, and by extension the choice to make the other class a better offer; or
- that it can basis submit a reasonable ground for drawing a distinction and can show that the interests of the creditors in the class that is treated less favourably are not affected (Article 384(4)(a)).

3.3 Voting procedure and right to vote

Voting right and participation in decision-making

Creditors and shareholders whose rights are amended under the plan have the right to express their views in a vote on the plan. Creditors or shareholders whose rights are not affected by the plan need not be informed about the plan or involved in the vote (Article 381(1) and (3)).

Because the plan cannot change the debtor's obligations to its employees, employees are not deemed to be creditors with voting rights. A plan will often be part of a wider restructuring process that not only restructures debts but also makes cost-cutting changes to the business operations. Other legislation may require that parties not directly affected by the plan are nevertheless involved in the process. For example, Article 25 of the Works Councils Act (WCA) gives employee councils a right of consultation on a number of proposed business decisions, including those relating to:

- a 'significant reduction, expansion or other change to the business activities' (d);
- a 'significant change in the organisation of the business or division of power within the business' (e); or
- 'raising a significant amount of credit for the business' (i).

Article 25 of the WCA provides that where the wider restructuring process that encompasses the plan involves such a decision, the works council must be given an opportunity to publish its advice on that decision. If that is the case, it must be reported in the plan (Article 375(1)), part I). The business must ask for the advice in good time (Article 25(2) WCA).

There may be situations in which a party other than the legal owner has most if not all of the economic interest in a debt. For example, the beneficiaries of issued bonds. Supreme Court found that, depending on the circumstances, this could place such beneficiaries in a position that in the circumstances must reasonably be equated, in the interests of equity and efficiency, to the position of creditors as meant in the Dutch Bankruptcy Act.¹⁶ They would then be entitled to vote on a plan in the event of a suspension of payments or bankruptcy. Where a plan that is put into effect under the ACPP provides for a suspension of payments or partial relief for that debt, the financial consequences are borne by the beneficial owner. This is why the beneficial owner should have an opportunity to vote on the plan. As a rule, it would also be in the debtor's interest. The beneficial owners are the best placed to evaluate the plan. There are various ways of giving beneficial owners a right to vote. It can be done indirectly, through the legal owner. The legal owner then votes in accordance with instructions from the beneficial owner. It can also be done directly, by giving the beneficial owners a direct right to vote and excluding the legal owner from the right to vote. The appropriate method will depend on the circumstances. The instrument is therefore flexible on this point. The debtor may, but is not required to, invite the beneficial owner (rather than the legal owner) to the vote (Article 381 (4)). If invited, the beneficial owner acquires not only a voting right but also the other rights conferred by the ACPP on creditors with voting rights, in particular the right to ask the court to refuse a request to confirm the plan (Articles 381(3) and 383(8)). The legal owner then ceases to have those rights. A similar arrangement applies where the shareholder transfers the economic interest in a share, i.e. all of the benefits from that share, to another party (the depositary receipt holder) but retains the legal rights attached to the share, including the right of control or voting rights (Article 381(5)).

It is a logical consequence of this arrangement that where the vote on the plan was cast not by the creditor or shareholder but by a third party in accordance with Article 381(4) or (5), the plan is nevertheless binding on the creditor or shareholder (Article 385).

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

Voting procedure

The debtor must make the final plan available to creditors and shareholders with voting rights for a reasonable period. It may not in any event be shorter than eight days before the vote is held (Article 381(1)). The aim is that creditors and shareholders have sufficient time before the vote to evaluate the plan and the consequences it will have for them.

As noted previously, the ACP also offers creditors, shareholders and the works council or workplace representation set up within the debtor's business scope to take the initiative preparations for a plan. To that end, they can request the appointment of a restructuring expert (Article 371(1)). This restructuring expert can prepare a plan proposal and subsequently set in motion a process that can lead to the court's confirmation of the plan. The first step in this process is to present the plan to the creditors and shareholders for a vote. If the debtor is an SME, the restructuring expert may take that step only with the consent of the debtor (Article 381(1) and (2)).

Where the plan makes provision for class formation, each class votes separately on the plan. The debtor will decide on the voting procedure. The vote may be cast in writing. The debtor may also decide to organise a meeting for the vote. Physical or electronic ballots can be used in either case (Article 381(6)).

Ballot result

Only creditors or shareholders who have actually gone to the trouble of casting a vote are considered when the result of the ballot is decided. This prevents the absence from the vote of uninterested creditors or shareholders from jeopardising the prospects of a plan, whether intentionally or otherwise.

A class of creditors is deemed to have accepted a plan if it is supported by a group of creditors who jointly represent at least two-thirds of the total amount of the claims of creditors who cast their votes in the class. The same rule applies to a shareholder class, except that in that case the deciding factor is whether the plan has the support of a group of shareholders who jointly represent at least two-thirds of the total amount of the issued capital belonging to the shareholders who cast votes in that class (Article 381(6) and (7)).

After the vote the debtor must prepare a report on the ballot result. He must also ensure that the affected creditors and shareholders are able to study the report immediately (Article 382(1)). This is of particular importance if the debtor decides to submit a request to confirm the plan. The plan contains information that is relevant for creditors or shareholders who did not accept the plan and are considering asking the court to refuse the request to confirm the plan (Article 383(8)). The information in the report will help them to make an initial assessment of the prospects of success of such a request. If they do decide to submit a request, this information can be used to substantiate their challenge to the confirmation. Where the debtor submits a request to confirm, it must submit the report to the clerk of the court that will consider the request. The report will then be made available for inspection by creditors and shareholders with voting rights until the court gives its decision on the request to confirm (Article 382(2)). It is in the debtor's interest to submit the report and the request to confirm as quickly as possible. It is provided that the hearing to consider the request

to confirm must be held within eight to fourteen days after the request is submitted and the report is made available for inspection (Article 383(6)).

3.4 *Court confirmation of the plan*

The plan can be confirmed if it is clear from the vote that at least one class has accepted the plan. This class must be made up of creditors who could expect to receive a cash payment in the debtor's bankruptcy. The latter requirement does not apply where the plan relates exclusively to creditors who did not expect payment in a bankruptcy (Article 383(1)). The debtor or the restructuring expert may submit a request to confirm to the court. Where the plan is not accepted by all of the classes and the debtor is an SME, the restructuring expert may submit the request to confirm only with the consent of the debtor (Article 383(1) and (2)).

The court will give a decision as quickly as possible, scheduling the date of a hearing to consider the confirmation. Where the plan is not accepted by all of the classes and no restructuring expert or observer has yet been appointed, the court will also appoint an observer in the same decision (Article 383(4)). Article 380(1) provides that it is the observer's task to monitor the process leading to the plan, with due regard to the interests of the general body of creditors. It is from that perspective that the observer will evaluate the proposed plan and inform the court.

All creditors and shareholders with voting rights may submit a request in writing before the date of the hearing asking the court to refuse the request to confirm. They can base this request on the general grounds for refusal (Article 384(2)) or the supplementary grounds for refusal (Article 384(3) and (4)). The main purpose of the general grounds for refusal is to safeguard pure decision-making. The aim of the supplementary grounds for refusal is to ensure that the restructuring proposal in the plan is *reasonable*. Only creditors or shareholders who have not accepted the plan may rely on the supplementary grounds for refusal. Moreover, creditors or shareholders may no longer invoke the supplementary grounds for refusal if they were already aware of the applicability of such grounds but failed to timely raise their objections with the debtor (Article 383(7)). This encourages creditors and shareholders to report any objections to the structure of the decision-making process or the content of the plan in good time, i.e. before the vote. This gives the debtor the opportunity to seek a solution before the vote, whether with intervention from the court or otherwise (Article 378(1)). The debtor is then able to make any necessary adjustments and remove any obstacles to the confirmation. It will avoid continuing with a process that has no prospect of success and incurring unnecessary costs.

Where the debtor requests leave to terminate an agreement unilaterally, the counterparty to that agreement can submit a request asking the court to deny leave. The counterparty should base this request on the argument that the debtor is not authorised to terminate the agreement because insolvency is not inevitable (Articles 383(5) and (6) and 384 (5)).

The court will decide on the request to confirm as quickly as possible. A court that has not been asked previously for a decision in the procedure must first establish whether it has jurisdiction and is competent to hear the request. The jurisdiction of the court is derived from the Insolvency Regulation or Article 3 DCCP. As observed previously, the deciding factor is whether the plan is proposed in the context of a confidential pre-insolvency plan procedure or a public pre-insolvency plan procedure. The court will give a debtor who has not yet decided the opportunity to make a choice.

The court will refuse the request to confirm if one of the general grounds for refusal of Article 384(2) exists. It may do so at the request of a creditor or shareholder with voting rights. However, if it is immediately clear to the court that one of the grounds for refusal exists, it can also refuse the request to confirm on its own initiative and need not await a request to that effect from creditors and shareholders. Most of the general grounds for refusal correspond with the grounds for refusal that currently apply in confirmation of suspension of payments and bankruptcy plans. Because the ability to confirm a plan depends largely on the support there is for the plan, it is crucial that the decision-making process is pure. In that context, it is in any event significant whether:

- all creditors or shareholders that are affected by the plan have been given proper notice of the plan, have had the opportunity to cast a vote and have been informed of the date of the hearing to consider the request to confirm (Article 384(2)(b));
- the information contained in the plan and the appendices is adequate (Article 384(2)(c)); and
- the creditors and shareholders have been correctly subdivided into classes, and whether they have been placed in the relevant class for the correct amount (Article 381(2) (c) and (d)).

Where the court has no reason to assume that one of the general grounds for refusal exists, and none of the creditors or shareholders has invoked the supplementary grounds for refusal to challenge confirmation, the court will grant the request to confirm. The court will carry out a more detailed assessment of the plan only if objections are raised (Article 384(3) and (4)).

A request to confirm a plan that has been accepted by all classes of creditors and shareholders may still be denied by the court, at the request of one or more dissenting creditors or shareholders, if it is shown that those creditors and shareholders will be significantly worse off under the plan than in bankruptcy (Article 384(3)). The plan would then be *unreasonable*.

The court will refuse a request to confirm a plan that is not accepted by all classes if the plan contains a restructuring proposal that is *unfair* and the plan is therefore unreasonable. The court will do so if it receives a request to that effect from a creditor or shareholder that was placed in a class that did not accept the plan and the creditor or shareholder also did not accept the plan. A restructuring proposal is unfair if the reorganisation value that can be retained or realised under the plan is not distributed *fairly* amongst creditors and shareholders. For example, where that distribution derogates from the applicable priority rules under which creditors can enforce claims against the debtor at the expense of the affected dissenting class, and the debtor:

- cannot provide a good reason for that derogation; and
- cannot demonstrate that the interests of the creditors or shareholders who raised objection are not affected (Article 384(4)(a)).

The restructuring proposal is also unfair where the class that did not accept the plan is made up of creditors who can expect a cash payment in bankruptcy and who are not offered that option under the plan (Article 384(4)(b)). The supplementary grounds for refusal of Article 384(3) and (4)(a) were largely inspired by two sections from the Chapter 11 procedure in the United States of America: the 'best interest of creditors test' and the 'absolute priority rule'. The ground for refusal in Article 384(4)(b) contains an extra safeguard for creditors who did not accept the plan with the required majority. Those creditors cannot be forced to continue to invest in the business if they could expect to receive a cash payment in the event of the debtor's bankruptcy.

The decision of the court on the request to confirm is not subject to any ordinary remedies (Article 369(10)). This is justified because the plan is put into effect amid the urgency of imminent insolvency (Article 370(1)). The plan must be capable of being implemented quickly after confirmation to avert a bankruptcy. Questions concerning the correct application of the ACP may reach the Supreme Court, however, if the court seeks a preliminary ruling for the purpose of its consideration of a request for an interim judgment or a request to confirm. That may be based on Article 378 or Article 384, on its own initiative or at the request of the debtor or an interested creditor or shareholder (Article 392 *et seq* of the DCCP). Given the nature of the case, any preliminary ruling proceedings must be disposed of with the required diligence. A further possibility is an appeal by the Procurator General to the Supreme Court in the interest of the law (Article 78(1) of the Dutch Judiciary (Organisation) Act [*Wet op de rechterlijke organisatie*]).

3.5 *The consequences of confirming the plan*

As a consequence of confirmation, the plan becomes binding on the debtor and all creditors and shareholders who are involved in the plan and were entitled to vote on it. In other words, the plan also becomes binding on creditors or shareholders who ultimately did not vote on it or who did not accept it (Article 385). The debtor may propose a plan to a certain group of creditors or shareholders. For example, it can propose a plan that focuses exclusively on restructuring debts to financiers and does not involve the claims of ordinary unsecured trade creditors (Article 370(1)). In that case, only the financiers have a right to vote on the plan (Article 381(3)). And only they are bound by the plan after confirmation.

The court judgment confirming the plan creates an enforceable title, to the extent that creditors acquire a claim for a cash payment under the plan (Article 386). Non-performance or late performance by the debtor of its obligations under the plan entitles creditors with a claim on the debtor to rely directly on the judgment to compel performance. Furthermore, the debtor is liable to compensate the creditors and shareholders for damage resulting from its non-compliance or late compliance with the plan. In such circumstances the creditors or shareholders also have a right to terminate the plan. Article 165 of the Dutch Bankruptcy Act, that provides for

termination of a bankruptcy plan, applies *mutatis mutandis*. The plan can exclude that right, however. That would be logical where a plan contains elements that are difficult to reverse, such as a debt for equity swap in which the claims of certain creditors have already been converted into shares in the company (Article 387). If the court grants the request to terminate the plan, it will lead, as does the termination of a bankruptcy plan, to termination of the plan as a whole. Hence the termination affects all creditors on whom the plan is binding under Article 385 and not only the creditor who requested termination of the plan. As in the case of a bankruptcy or suspension of payments plan, a plan that is put into effect under the ACP cannot be set aside.

3.6 *Involvement of the court*

As noted in paragraph (1) of this memorandum, the purpose of this bill is to create an effective and readily accessible plan instrument. It introduces a procedure that can be applied quickly, efficiently and with flexibility. This is particularly important given that the instrument will be applied amid the urgency of imminent insolvency and the aim is to offer entrepreneurs in that situation an instrument to resolve their financial difficulties before it is too late. Against this backdrop, much of the focus has been on finding a good balance between:

- preventing unnecessary calls on the court by creditors or shareholders who are unwilling to cooperate with the restructuring process and are attempting to block or delay it; and
- at the same time offering the necessary judicial safeguards where the instrument can have far-reaching consequences for creditors and shareholders.

In keeping with this, the court has limited involvement before submission of the request to confirm, unless the debtor involves the court before that time.

It may be desirable to involve the court at an earlier stage of the process. For example, where there is uncertainty ahead of the vote on the plan as to whether a ground for refusal exists that would preclude the court confirmation of the plan, even if it was accepted by all classes of creditors or shareholders. It could seriously complicate further negotiations on the plan if this uncertainty were to continue until the hearing of the request to confirm. The debtor is therefore given the opportunity to put this question to the court before the vote on the plan (Article 378(1)). Creditors and shareholders who feel that some aspects should be put to the court can make their view known to the debtor. To prevent delaying tactics by creditors and shareholders, it was decided that they would not be able to submit their own interim requests to the court. If the debtor decides not to put the question to the court at an earlier stage, the creditors or the shareholders can ask the court to appoint a restructuring expert who, if appointed, may assume responsibility for preparing the plan (Article 371(1)). If they opt not to do so or the court refuses the request to appoint a restructuring expert, the creditors or shareholders in any event retain the right to raise their objections later during the hearing of the request to confirm (Article 383(8) and (9)). Conversely, where the debtor does put the questions to the court at an earlier stage and the court gives a decision, that decision must be deemed to be final and binding with *res judicata* effect (Article 378(8)). This is subject to the condition that the relevant

creditors or shareholders must be given the opportunity to express a view (Article 378(8)). A final and binding decision may not be reversed in the same instance, unless there are exceptional circumstances that would make it unacceptable for the court to be bound by that decision. That is possible in particular where the court has made an evident factual or legal error or the decision in question is found to rest on an error of fact that cannot be attributed to the interested party.¹⁷ Consequently, where the court has previously decided that the decision-making process and the content of the plan meet the requirements of law, it would be futile for a creditor or shareholder to advance a defence against confirmation solely on the basis that they have not been met.

Once the court has been asked to decide on a request to confirm, its position is decisive. The court must determine whether a plan is necessary to avert an imminent insolvency and whether the plan is reasonable. The latter hinges on the value that is expected to be realised if the plan is put into effect. That value depends to some extent on whether the business is continued, or discontinued and settled outside bankruptcy. Valuation issues (and the policies, principles and assumptions) can be a major point of contention between the affected creditors and shareholders during the preparation of the restructuring plan.¹⁸ In consultations on the bill, there were proposals from various sides for a specialist court to hear requests to confirm. The Advisory Division of the Council of State also had its own observations. The Dutch Council for the Judiciary [*Raad voor de rechtspraak*] was also consulted on this point. Its recommendation was essentially that it is not yet clear at this point how many additional cases the ACPP will generate. It is therefore hard to say now which method of dealing with these specialist cases will be the most effective. If the number of cases remains low, the Dutch Council for the Judiciary would prefer to see a small, or smaller specialist national team. If there are a lot of extra cases, it is preferable that each court be adequately equipped to deal with them. The advantage of a specialist national team is that if the number of cases remains low, the judges of all courts can gain experience with the ACPP. Hearings of ACPP cases could then be scaled up to all courts in the event of an increase, in a different economic climate, in the number of cases.

This prompted a proposal from the Dutch Council for the Judiciary that the judiciary implement the following procedure for the first three years after the ACPP enters into force:

- each court supplies one judge and one member of legal support staff who is part of the ACPP pool;
- the eleven judges and legal support staff who are part of the national pool will be trained specifically for this;
- if a case arises, the ACPP judge from the relevant district will hear the case, together with two other ACPP judges from the national pool. They will be supported by the member of legal support staff from the relevant district;
- the pool will not have a physical location.

This is a flexible solution to ensure that specialist courts hear requests to confirm.

¹⁷ Supreme Court, 25 April 2008, NJ 2008, 553 with note by HJS.

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

3.7 Provisions to enable the debtor to put a plan into effect

A number of provisions have been included to give the debtor the opportunity to put a plan into effect. Before it can take advantage of these provisions, the debtor must submit a declaration to the clerk of the court as evidence of its plan attempt. It must also have effectively proposed the plan or undertaken to do so within two months (Article 376(1)).

The debtor can request that the court order a stay for all of the creditors (a 'general stay') or any number of them (Article 376(1)). The order of stay, in principle for a period of no more than four months, has three consequences:

- creditors who are affected by the stay may not enforce their rights against assets belonging to the debtor's estate or require the repossession of assets from the debtor without leave from the court;
- the court can lift attachments at the request of the debtor; and
- consideration of requests for a suspension of payments or a bankruptcy is suspended (Article 376(2)).

The debtor also retains the right during this stay to use, expend or dispose of property that is covered by the stay, insofar as it is necessary for the debtor's ordinary course of business (Article 377(1)). The debtor must be able to expend and dispose of stock, use business resources and collect claims against its customers so that its business can continue. This also applies to property or claims that are encumbered with third party rights. They might include stocks or company resources that are delivered subject to retention of title and claims that are encumbered with a security right. What is important is that the debtor may only exercise this right if the interests of the parties that derive rights in any way from the said property or claims are adequately protected (Article 377(2) and (3)). For example, by offering replacement security.

It is also important that the proposal of a plan is not justification for changing commitments and obligations to the debtor, for suspending performance of an obligation to the debtor or for terminating an agreement concluded with the debtor (Article 373(3)).

Creditors or shareholders who are unwilling to cooperate in the restructuring are prevented by these provisions from instituting enforcement actions or submitting a petition for bankruptcy to block or delay the process after a plan has been proposed. To prevent misuse of the instrument by the debtor, who retains full power of disposition throughout the process, it is provided that the court may grant a request for a stay only where there is *prima facie* evidence that:

- it is necessary to enable the debtor's business to continue during the preparations for and negotiations on the plan;
- it is in the interest of the general body of creditors; and
- it could reasonably be assumed at the time of ordering a stay that it would not materially prejudice the interests of any creditors affected by the stay (Article 376(4)).

The debtor must convince the court of this. Where the court decides to order a stay, it may make all provisions it deems necessary to secure the interests of the creditors or shareholders (Article 376(9)). For example, the court might decide to appoint an observer to monitor the preparation process. The court will consider the appointment of an observer particularly if it orders a general stay. The observer's task would be to represent the interests of the general body of creditors (Article 380(1)). The observer must notify the court as soon as it becomes clear that the debtor will be unable to put a plan into effect or that its actions will harm the interests of the general body of creditors. The court will then determine what the next steps must be. If there is still a chance that the plan can be put into effect, it may conclude that it is desirable to appoint a restructuring expert to take over the preparations for a plan (Article 380(2)). The court has the option, but not the obligation, of appointing the observer as restructuring expert if it deems it appropriate.

The new Article 42a and the amendment of Article 54 must also be categorised as provisions to enable the debtor to put a plan into effect. Article 42a is intended to encourage financing to put a plan into effect. The debtor can request that the court authorise any necessary legal acts. The court will grant authorisation if a number of parameters are met at the time the legal acts are performed. In essence, they are that:

- financing is necessary to prepare a plan and to continue the business in the meantime;
- it is in the interest of the general body of creditors; and
- the interests of individual creditors are not affected by it.

The court authorisation will prevent the bankruptcy trustee from annulling the legal acts under Article 42 DBA if the business is later declared bankrupt.

The purpose of the amendment of Article 54 DBA is to facilitate the debtor's continued use of the current account facility during the preparation process. The credit offered to the debtor through this facility must remain within a certain range. This is done by offsetting recurring payments in the account, i.e. the debtor's income and expenditure, against each other. Article 54 offers the receiver scope to reverse offsetting that took place ahead of the bankruptcy if it was not done in good faith. The new Article 54(3) provides that where offsetting took place at the same time as the attempts to put a plan into effect and it did not seek to limit the line of credit (going 'into the red'), the party responsible for offsetting was acting in good faith. This provision seeks to prevent the provider of the debtor's current account from freezing the facility when the debtor starts negotiating a plan.

The fact that a debtor has started a process to put a plan into effect does not restrict the tax authority in its use of the tax and civil liability provisions that are available to it (including director liability). For example, provisions relating to the turnover tax liability of participants in a tax entity continue to apply to all existing tax debts, whether formalised or otherwise. The right of priority of the tax authority also continues to apply.

4. CONSULTATION AND ADVICE

Consultations took place in 2014 on an initial bill for an instrument that would enable a business to propose a plan to its creditors and shareholders as a means of restructuring problematic debts (the Continuity of Enterprises II Bill).¹⁹ Following responses to the consultation, amendments were made to the text of the draft bill and the accompanying explanatory memorandum. Consultations took place from early September until early December 2017 on this preliminary draft, now entitled the 'Act on the Confirmation of a Private Plan to prevent Bankruptcy'. In addition to the many responses from individual market participants and academics, observations were also received during that consultation from the following organisations: the Dutch Council for the Judiciary (Rvdv), the Netherlands Association for the Judiciary (NVvR), the Dutch Association of Insolvency Practitioners (Insolad), the Insolvency Law Advisory Committee of the Netherlands Bar Association (NOvA), the Dutch Banking Association (NVB), Eumedion (which represents the interests of institutional investors), the Association of Leasing Companies in the Netherlands (NVL), Factoring & Asset Based Financing Association Netherlands (FAAN), the Royal Netherlands Institute of Chartered Accountants (NBA), VNO-NCW and MKB Nederland, the trade union federations FNV, CNV and VCP, and the Pension Federation.

The response to the ACPP has been overwhelmingly positive. Several respondents noted explicitly that the ACPP must respond to calls from the sector and can contribute significantly to the capacity of financially distressed companies for reorganisation. That said, the consultation also produced various suggestions for improving the instrument or the explanatory memorandum. The main elements of the instrument remain the same. Following the suggestions, the technical details have been refined or clarified, by means of additions or otherwise. Various articles are now also renumbered.

More substantive changes were made to the following aspects of the instrument:

- The preliminary draft describes a scenario in which a business could be returned to financial health by a buyer plan and its activities continued (as a going concern). In response to a suggestion from Insolad, a second scenario has now been added. A plan can now also be used for the controlled discontinuation and wind down of a business. A condition is that it achieves a better result than in a liquidation of the business in bankruptcy. The two scenarios can also be combined. In a combination, some parts of the business are discontinued and others continue.
- A system has been introduced that provides for two procedures within which the plan can be put into effect: (1) a confidential pre-insolvency plan procedure, and (2) a public pre-insolvency plan procedure (Article 369(6)). It is also clarified that before taking a decision in either one of these procedures, the court must always determine whether it has jurisdiction; the rules on which jurisdiction can be based are also specified and explained (Article 369(7) and Article 371(2)). These changes were made at the recommendation of the NOvA and others.
- To give creditors a greater say in the restructuring and prevent the debtor from misusing the instrument:

¹⁹ <https://www.internetconsultatie.nl/wco2/details>.

- a. creditors now have more scope to initiate preparations for a plan, through the appointment of a restructuring expert (Article 371(1) and (3));
- b. the court now has the power to appoint an observer to monitor a plan process set in motion by the debtor and in that context to represent the interests of the general body of creditors (Article 380); and
- c. it is now specified that in almost every case where the court is asked to take a decision during the preparation of the plan, creditors that will be affected are first given the opportunity to express a view (Article 371(5), Article 376(11), Article 377(3), Article 378(7), Article 384 (7)).

This was in response to suggestions from the Rvdr, VNO-NCW and MKB Nederland, the NVB, Eumedion and others.

- The tasks and powers of the restructuring expert have been specified in more detail. A provision has also been included on the payment of costs in connection with his work (Article 371(6)-(13)). This takes into account remarks during the consultations from Insolad, the NVB and various individual market players.
- The following amendments have been made to give the debtor or the restructuring expert a better chance of putting a plan into effect:
 - a. The provisions concerning the order of the state (including suspending the hearing of a bankruptcy application) have been extended. This request can now be made as soon as the debtor starts to prepare a plan or a restructuring expert is appointed and need not wait until the proposal of a specific plan, as was the case in the preliminary draft. The length of the stay is four months in principle, but it can be extended to a total of eight months (Article 376).
 - b. The provisions that aim to make it easier to obtain financing have also been extended. On the basis of these provisions, the court can approve the legal acts that are needed to obtain that financing. These provisions are no longer limited to the securities that may be necessary in this context. They also cover all forms of financing (Article 42a).
 - c. Furthermore, new provisions have been included to enable the continued use of a current account facility or property encumbered by third party rights during the preparation process (Article 54 and Article 377).

This was in response to suggestions from Insolad, de NOvA, VNO-NCW and MKB Nederland, the NVB, the NBA, academics, market players and others.

- At the recommendation of the Rvdr, the court's role has been strengthened. The court assessment in the context of the request to confirm has been extended in relation to the general grounds of refusal, that are intended primarily to safeguard pure decision-making and to avoid plans that favour one or more creditors (Article 384(2)). Following suggestions on this from Insolad, the NVB and others, the matters on which the court can give an interim ruling have been extended (Article 378(1)).
- Following advice from NOvA, Insolad, the NVB, the NVL and others, the rules on the possible consequence of confirming a plan were improved in respect of:
 - a. the right of creditors to take action against third parties for payment of their claims on the debtor; and
 - b. the right of these third parties to recover payments made to the creditor from the debtor (Article 370(2) and Article 372).

- To allay the concerns expressed during the consultations by the NVL, FAAN and others that it would be too easy for the debtor to terminate agreements unilaterally under the ACPP, the provisions on this were tightened. The court must give leave for unilateral termination. Further conditions are that insolvency is imminent and that the plan must be confirmed by the court. The counterparty can ask the court to deny leave (Article 373, Article 383(8) and Article 384(5)).

Following the advice from the Advisory Division of the Council of State, the bill was further amended to bring the ACPP into line with the recently adopted Directive.

5. CONSEQUENCES FOR BUSINESS, CITIZENS AND THE JUDICIARY

The bill has no impact on regulatory pressure for *citizens*. Compliance costs for business are divided between administrative costs and costs of the substantive compliance. Administrative costs are the costs of compliance with disclosure obligations to the government under legislation and regulations. No administrative costs arise from the bill. The costs of substantive compliance are other costs incurred by business to comply with obligations under new legislation and regulations. There are no costs of substantive compliance under the bill because its consequences fall outside the definition of compliance costs.²⁰ In fact, business is likely to perceive the instrument as reducing the burden.

The ACPP will introduce new tasks for the judiciary. The cost is expected to be covered to some extent by the court fees charged under the new Article 19a of the Court Fees (Civil Cases) Act and by the reduction of workload where a bankruptcy can be averted. There is financial cover for additional costs within the budget of the Ministry of Justice and Security (up to €1.9 million from 2022). This cover is part of the price negotiations for the period 2020-2022.

²⁰ This is partly because a number of important changes concern the court procedure. Obligations in the context of court procedures fall outside the definition of compliance costs. Civil procedural law safeguards a fair and efficient proceeding. Where procedural law imposes requirements for an exchange of information with the court or the opposing party, the resulting costs are linked directly to this guarantee function. Hence the burden is not regarded as regulatory pressure. See also *Meten is Weten II: Handleiding voor het definiëren en meten van administratieve lasten voor het bedrijfsleven*, p. 33. [Manual for defining and quantifying administrative burdens for business] Civil procedural law safeguards a fair and efficient proceeding. The costs of requirements imposed by procedural law on the exchange of information with the court or the opposing party are linked directly to this guarantee function. Hence the burden is not regarded as regulatory pressure.

THE SEPARATE ARTICLES

ARTICLE I

Parts A and E

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

The new Article 3d relates to a situation in which a bankruptcy application is made, by either the debtor or the creditor, at the same time as a request to appoint a restructuring expert (Article 371). It is provided that the appointment request will be considered first and that consideration of the bankruptcy application will be suspended. If the appointment request is granted, it will start a process aimed at putting a plan into effect. To give this process a chance, the court will simultaneously order a stay. The suspension remains in force during the stay. Article 376 applies. This article is discussed below.

In part E, the addition of two new paragraphs to Article 215 DBA makes the same provision for situations where a request from the debtor for suspension of payments proceedings coincides with a request for the appointment of a restructuring expert.

Part B

Article 42a Dutch Bankruptcy Act (new)²¹

The new Article 42a is intended to encourage financing to put a plan into effect. It is not limited to financing in the form of a cash loan but also, for example, the supply of goods on credit. The Article derogates from Article 42 DBA, which includes a bankruptcy-specific provision on the annulment of voluntary legal acts by the debtor that were prejudicial to creditors (the 'bankruptcy *pauliana*'). Any such prejudicial act by the debtor ahead of a bankruptcy can be annulled by the trustee after the bankruptcy in favour of the general body of creditors. The trustee can successfully establish an *actio pauliana* under Article 42 DBA if five conditions are met: (i) the debtor must have performed the legal act before the bankruptcy was declared; (ii) the legal act was voluntary; (iii) the legal act is prejudicial to creditors; (iv) the debtor knew or ought to have known that this would be the consequence at the time it performed the legal act; and (v) this was also known or ought to have been known to the parties with whom or against whom the debtor acted.

The new Article 42a relates to a situation where an attempt was made to put a plan into effect before the bankruptcy and financing was provided in that context. Article 42a makes allowance for the debtor to seek authorisation from the court for the legal acts necessary to obtain financing. The court will grant authorisation if the following parameters cited in the article are met:

²¹ Amsterdam Court of Appeal, 29 May 2018, ECLI:NL:GHAMS:2018:1832, JOR 2018/286, with note by Ph.W. Schreurs. Amsterdam Court of Appeal, 13 February 2018, ECLI:NL:GHAMS:2018:476, JOR 2018/221, with note by Ph.W. Schreurs.

- the financing is needed to facilitate preparations for the plan and enable the business to continue in the meantime; and
- it can reasonably be assumed at the time authorisation is granted that the legal act is in the interests of the general body of creditors and that the interests of the individual creditors are not materially affected.

It is always difficult to predict what the ultimate effect of the legal act will be. The point is that at the time authorisation is requested the intended legal act is not known to be prejudicial to creditors. The debtor must perform the legal act soon after it obtains authorisation. The situation can change rapidly and new developments may later prevent what appeared to be a realistic expectation at the time authorisation was granted. The court authorisation prevents the bankruptcy trustee from annulling legal acts on the basis of Article 42 DBA if the business is subsequently declared bankrupt.

The appointment of the restructuring expert does not deprive the debtor of the right to administer and dispose of its assets. It retains control over its business and may continue to run it during the plan procedure ('debtor in possession'). By extension, the debtor also retains the exclusive power to perform legal acts. In view of this, the mechanism provided in Article 42a for seeking authorisation from the court for legal acts to obtain financing is intended only for the debtor and not for the restructuring expert.

Article 42a is in line with Articles 17 and 18 of the Directive. Essentially, they provide that Member States must ensure that interim financing or other transactions that are necessary for the negotiation of a restructuring plan are not declared void.

Part C

Article 47

The amendment of Article 47 DBA is a logical progression from the introduction of the new Articles 3d and 376. As explained in the context of Part B, a trustee may invoke the bankruptcy *pauliana* only against voluntary legal acts by the debtor (Article 42 DBA). Payment by the debtor of a debt that has *fallen due* cannot therefore be affected by invoking the bankruptcy *pauliana*. However, Article 47 DBA makes two exceptions: the payment of a debt that has fallen due (and is therefore a mandatory legal act) can nevertheless be annulled if (i) the creditor was aware of the application for the debtor's bankruptcy at the time when the debtor made payment; or (ii) the payment was made after consultation between debtor and creditor with the intention of favouring that creditor over other creditors. After the proposed amendment of Article 47, annulment owing to the creditor's awareness of a bankruptcy application will not be possible if consideration of that application was stayed under Article 3d (2) and Article 376(2)(c) because a request to appoint a restructuring expert has been submitted or granted or because the debtor has proposed or announced that it will propose a plan. This provision also falls within the category of provisions aimed at enabling the debtor to put a plan into effect. The provision seeks to ensure that the debtor can continue its business operations and make the payments that requires.

Part D

Article 54 (3) (new)

Part D adds a new paragraph 3 to Article 54 DBA. This provision also falls within the category of provisions to enable the debtor to put a plan into effect. The background to Article 54 DBA is that creditors who fear that their debtor will become bankrupt may be tempted to create their own set off option by acquiring a debt or claim on the debtor. The acquired debt or claim can then be set off after the bankruptcy. The affected creditors can use this method to advantage themselves, at the expense of other creditors. Article 54 DBA seeks to limit this risk. To that end, it provides as follows. If bankruptcy is declared and the trustee succeeds in proving that the debt or claim was not acquired in good faith, Article 54 (1) DBA precludes reliance on setoff against an acquired debt or claim and the setoff off can be reversed. The Supreme Court considered that a creditor has not acquired a debt or claim in good faith if it knew that the debtor's situation was such that its bankruptcy or a suspension of payments was foreseeable.²² The same situation may arise where there is a significant time between the acquisition and the bankruptcy.²³

This interpretation prompted the addition of a new paragraph (3) to Article 54 DBA that relates specifically to a situation where attempts were made to put a plan into effect in a process prior to the bankruptcy. The amendment of Article 54 DBA is intended to facilitate the debtor's continued use of the current account facility during that process. The credit offered to the debtor through a current account facility must remain within a certain range. This is done by offsetting recurring payments in the relevant account, i.e. the debtor's income and expenditure, against each other. The new paragraph (3) now provides that where offsetting coincided with a plan attempt and its purpose was not to limit the line of credit ('in the red'), the party responsible for offsetting was acting in good faith. If the plan attempt fails and bankruptcy follows, the trustee cannot claim repayment of the offset amounts. This provision seeks to prevent the provider of the debtor's current account from freezing the facility when the debtor starts negotiating a plan.

Part F

Second Section <Confirmation of a plan> (new)

The bill on the Continuity of Companies I Act [*Wet continuïteit ondernemingen I*] introduces a new Title IV to the DBA entitled "Outside bankruptcy and suspension of payment proceedings" [*Buiten faillissement en surseance van betaling*]. As noted in the explanatory memorandum on that bill, the intention is to include this instrument and the instrument for appointing a silent administrator that is envisaged in the WCO I in two separate sections in the new Title IV.²⁴ The ACPP will be included in a new section 4.2 (Confirmation of a Plan). The instrument is divided into four paragraphs:

- Section 1 General provisions;
- Section 2 Plans: proposing and voting;

²² Supreme Court, 30 January 1953, NJ 1953/578 (*Doyer and Kalff v Bouman q.q.*) and 7 October 1988, NJ 1989/449 (*Amro v Curatoren THB*)).

²³ Supreme Court, 17 February 2012, JOR 2012/234 (*Rabobank Maashorst v Kézér q.q.*).

²⁴ Parliamentary Papers II, 2014–2015, 34 218, no. 3, p. 42.

- Section 3 Confirmation of a plan; and
- Section 4 The consequences of confirming the plan.

Section 1. General provisions

Article 369

Article 369 provides:

- a definition of the scope of application of the ACPP (paragraphs (1)-(5));
- that the ACPP facilitates a confidential pre-insolvency plan procedure and a public pre-insolvency plan procedure (paragraphs (6) and (9));
- when the Dutch court has jurisdiction to hear requests submitted in the context of the ACPP (paragraph (7));
- which court is competent (paragraph (8)); and
- that the court's decision in the context of the ACPP is not subject to any ordinary remedy, i.e. it is not open to appeal (paragraph (10)).

Paragraph 1

Paragraph (1) provides that the ACPP relates to debtors who run a business. As noted in the general part of the memorandum, the object of this bill is to create an effective and readily accessible plan instrument in the Netherlands that is useful not only for large companies but also for SMEs. It was therefore decided that where possible, the ACPP would be designed as a framework. The ACPP is then flexible enough to apply to a wide range of businesses and to put a plan into effect that is suited to the specific circumstances. The legal form of the debtor's business is immaterial.

The ACPP does not apply to banks or insurers. This is because banks and insurers have their own bailout mechanism in Chapter 3A of the Dutch Act on Financial Supervision (Wft), which also includes the prevention of bankruptcy.²⁵ The plan should not be capable of disrupting this bailout mechanism.

Paragraph 2

Paragraph 2 clarifies what is meant in the ACPP by '*creditors and shareholders with voting rights*'. These are the creditors and shareholders whose rights are amended under the plan. Those creditors and shareholders therefore have the right to cast a vote on the proposed plan (Article 381(3)). The debtor may propose a plan to all of its creditors and shareholders. However, it may also opt to limit the offer to a certain group of creditors or shareholders (Article 370(1)). This provision is therefore significant. Where Article 369(2) is taken in conjunction with the articles that apply the concept of '*creditors and shareholders with voting rights*', it is clear that under this more restricted plan, it is only the creditors and shareholders from which the debtor seeks a contribution who must be:

²⁵ The bill on recovery and resolution for insurers (34.842) is currently before the Upper House. After that act enters into force, a specific bailout mechanism for insurers will be added to the Dutch Act on Financial Supervision.

- informed about the plan (Article 381(1));
- given the opportunity to vote on the plan (Article 381(3));
- allowed to inspect the report prepared by the debtor after the vote (Article 382(2)); and
- notified of the court decision scheduling a hearing to consider the request to confirm (Article 383(5)).

Only these creditors and shareholders can ask the court to refuse the request to confirm (Article 383(8)). And only these creditors and shareholders with voting rights are bound by a plan once it is confirmed and can derive rights from it against the debtor (Article 385 *et seq.*).

Since the debtor is not obliged to include all of the parties involved in its business in the process, it can use the confidential pre-insolvency plan procedure to put a plan into effect in relative peace. This will probably enable it to avoid negative publicity about the financial difficulties and any associated adverse consequences. However, as noted in the general part of the memorandum, that does not negate the possible obligation under Article 25 of the WOR to inform employee representative bodies and give them the opportunity to publish their advice on the plan.

Paragraph 3

The ACPP may also be applied where the debtor's business is run in the form of an association or cooperative. However, these legal forms have members and not shareholders. With that in mind, paragraph (3) provides that the provisions applicable to shareholders also apply to the members of an association or cooperative.

Paragraph 4

Under paragraph 4, the plan cannot change the debtor's obligations to its employees under an employment contract. This requires a specific arrangement that is harmonised with the Dutch Work and Security Act [*Wet Werk and Zekerheid*] and the Balanced Labour Market Act [*Wet arbeidsmarkt in balans*].

Paragraph 5

Paragraph 5 provides that a debtor may not use the ACPP if it has unsuccessfully attempted to put a plan into effect under the ACPP in the preceding three years. If a debtor's plan attempt fails, creditors and shareholders can still initiate a second attempt by requesting the appointment of a restructuring expert. This restructuring expert can prepare a new plan proposal which it can then present to creditors and shareholders with voting rights. This may enable a plan to be put into effect.

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

Paragraphs (6)-(9)

As explained previously in paragraph 3.1 of this memorandum, the ACP provides for two procedures in which the plan can be put into effect: (1) a confidential pre-insolvency plan procedure; and (2) a public pre-insolvency plan procedure. This is specified in paragraph 6. The party that initiates the plan procedure opts for one of these two procedures. That is the debtor or the creditors, shareholders or the works council or workplace representation that is set up within the business, if they request the appointment of a restructuring expert under Article 371.

In the confidential pre-insolvency plan procedure, the preparations for a plan are not made public. In addition, all requests to the court are considered in judge's chambers (Article 369(9)). This procedure would therefore seem to lend itself primarily to plans that are limited to a certain group of creditors or shareholders (Articles 369(6) and 370(1)). The confidential pre-insolvency plan procedure then provides an opportunity to put a plan into effect in relative peace, avoiding negative publicity about the financial difficulties and the adverse consequences it causes.

Conversely, the process of the public pre-insolvency plan procedure is made public by publishing a notice in the insolvency register (Article 370(4)). The Commercial Registers Decree 2008 will also stipulate that application of the public pre-insolvency procedure is registered in the Commercial Register, as is current practice in other public insolvency proceedings: in other words, the declaration of bankruptcy, the granting of a suspension of payments and the application of the debt rescheduling scheme (Article 39 of the Commercial Registers Decree 2008). In addition, requests to the court are heard in public (Article 369(9)).

Once a choice has been made for one of the two procedures, the process for putting a plan into effect must be implemented entirely within the framework of that procedure. Once the procedure is underway, it cannot be changed from a confidential to a public procedure.

It must in any event be clear which procedure has been chosen before the court becomes involved in the plan attempt. Before it can take a decision on requests submitted in the course of preparing the plan, the court must establish whether it has jurisdiction to hear those requests. Paragraph (8) contains the mechanism for this.

Jurisdiction is determined in the confidential pre-insolvency plan procedure on the basis of Article 3 of the Dutch Code of Civil Procedure (DCCP). Insofar as it is relevant in this context, Article 3 DCCP provides that the Dutch court has jurisdiction in cases that are instituted by the submission of a request if:

- a. the requesting party, one of the group of requesting parties, or one of the interested parties named in the request is domiciled or has its habitual residence in the Netherlands, or
- b. the case otherwise has sufficient connection with the jurisdiction of the Netherlands.

With regard to the latter ground, circumstances which (individually) constitute sufficient connection with the jurisdiction of the Netherlands include (but are not limited to):

- I the debtor proposing the plan has its COMI or an establishment in the Netherlands²⁶;
- II the debtor that proposes the plan has substantial assets in the Netherlands;
- III a substantial part of the debts restructured under the plan stem from obligations that are governed by Dutch law or where the Dutch court was the chosen forum;
- IV a substantial part of the group of which the debtor forms a part consists of companies that are domiciled in the Netherlands; or
- V the debtor is liable for debts of another debtor over which the Dutch court has jurisdiction.

A public pre-insolvency plan procedure will be reported to the European Commission with the request that the procedure be included in Annex A of the Insolvency Regulation. The question of whether the Dutch court has jurisdiction in this procedure is consequently determined by whether the debtor's COMI is in the Netherlands. If it is, the Insolvency Regulation provides that the Dutch court has jurisdiction. Where the debtor's COMI is outside the EU or in Denmark, the jurisdiction of the Dutch court must again be determined on the basis of Article 3 DCCP.

If the Dutch court has jurisdiction, Articles 262 and 269 DCCP indicate which Dutch court is competent and where requests that may be submitted to the court in the context of a plan procedure must be submitted (Article 369(8)).

Paragraph 10

Paragraph 9 provides that unless agreed otherwise, the decision of the court in the context of this section is not subject to ordinary remedies. It therefore follows that the judgment of the court to confirm a plan under Articles 384 is not open to appeal. This is justified and necessary because the plan is put into effect amid the urgency of imminent insolvency (Article 370(1)). It must be possible to implement the plan quickly after confirmation to avert a bankruptcy. The court must take a final decision quickly.

The phrase "*unless agreed otherwise*" refers to the following. Where the choice is for the public pre-insolvency procedure and the court derives jurisdiction to hear requests submitted in the context of that procedure from the Insolvency Regulation [*Insolventieverordening*], creditors may, however, challenge this decision based on the lack of international jurisdiction (Article 371(14)). This scope for resistance stems from Article 5(1) of the Insolvency Regulation.

SECTION 2 THE PLAN: PROPOSING AND VOTING

Article 370

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

²⁶ Where one or more plans are proposed as a means of restructuring the debts of a number of legal entities that form a group, it is sufficient that at least one of the debtors has its COMI or an establishment in the Netherlands.

Article 370 is in line with Article 4(1) and (7) of the Directive. Article 4(1) of the Directive provides that *"Member States shall ensure that, where there is a likelihood of insolvency debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability [...]".* Article 4(7) further provides that the preventive restructuring frameworks shall be available on application by debtors.

Paragraph 1

Article 370(1) contains one of the key provisions of the ACPP. It provides that a debtor can propose a plan to its creditors and shareholders that amends their rights. The court can then confirm the plan (if decision-making on the plan and the content of the plan meet certain requirements (Articles 383(1) and 384(1))). Once confirmed, the plan is binding on all creditors and shareholders with voting rights (Article 385). Consequently creditors or shareholders with voting rights who did not accept the plan or did not cast their vote can nevertheless be bound by the plan.

Use of the instrument is subject to the condition that the debtor's state is such that it is reasonable to assume it cannot continue to pay its debts. The state in which it is reasonable to assume that the debtor cannot continue to pay its debts is essentially as follows. The debtor is still capable of performing its pending obligations. At the same time, it can foresee that there is no realistic prospect of averting a future insolvency if its debts are not restructured. Some time may elapse between invoking the instrument and the anticipated insolvency. For example, a debtor might predict that it will be unable to repay a loan that matures in six months' time and will become insolvent at that point. In such circumstances, the debtor must be able to act immediately by invoking the ACPP.

'Amending the rights of creditors and shareholders' means an amendment of the right of a creditor or shareholder to compel the debtor to perform its obligations. They might include:

- full or partial relief for an outstanding debt, where all or part of the debtor's payment obligation is waived and the right of the creditor to claim full or partial payment from the debtor is extinguished;
- a suspension of payments, where the debtor is given more time to perform its payment obligations and the right of the creditor to compel payment at the originally agreed time is extinguished; or
- a debt for equity swap, where part of a creditor's claim is converted into an equity interest and by extension control in the company, whilst diluting the share interest and associated control of the existing shareholders.

The plan can cover all creditors and shareholders of the business. A plan that is limited to 'a number of them', in other words one or more groups (classes) of creditors and shareholders, is also possible. For example, a plan that focuses exclusively on restructuring debts to financiers with a security right and does not involve the claims of ordinary unsecured trade creditors. The ACPP derogates on this point from the instrument for the bankruptcy and suspension of payments plan. In a bankruptcy, the bankrupt may propose a plan to its 'general body of creditors' (Article 138 DBA) and in a suspension of payments the debtor is authorised to propose a plan to 'those

whose claims are affected by the suspension' (Article 252 DBA). The rights of a certain group of creditors that is not involved in the plan will remain exactly the same and those creditors must be paid in full. In such circumstances there is a risk that one or more of the creditor classes involved in the plan will not accept the plan and the creditors in that class will challenge the confirmation. The plan meets the conditions for confirmation only if:

- classes of creditors with the same or higher ranking accept the plan with the required majority (i.e. they consent to derogation from the priority rules for creditors enforcing claims against the debtor); or
- the debtor submits a reasonable ground for its choice to exclude certain creditors from the plan (i.e. that those creditors do not bear part of the shortfall) and shows that the interests of creditors with the same or higher ranking are not affected (Article 384(4)(a)).

It is quite conceivable that the plan proposed by the debtor would be the subject of consultation and negotiations with creditors and shareholders. This may result in adjustments to the plan. The ACP provides scope for this. The only condition then imposed is that the debtor must ultimately present a final plan to creditors and shareholders with voting rights. And it must do so within a reasonable period before the vote. This period may not in any event be shorter than eight days before the vote (Article 381(1)).

Paragraph 2

Where a creditor's right of action is amended owing to its involvement in a plan, it retains the right to take action for payment of its original claim, in the manner stipulated and at the time agreed before the plan was confirmed, against a third party (that may include a guarantor and a joint debtor) that is liable for a debt of the debtor or has provided any form of security for payment of that debt. The creditor may do so if it was forced to waive part of its claim, or also if the claim is not paid at the time originally agreed or the form of payment is different (for example, in a debt for equity swap). This is provided for in the first sentence of paragraph (2).

This is in line with Article 160 DBA, which contains the same rule for the bankruptcy plan. The provision ensures that guarantees given after the plan is confirmed are not undermined. Without this provision, changes to the original claim under the plan would frequently result in changes to rights under a surety or another form of joint liability or security. For example, if the debtor is granted a five-year suspension of payments under the plan, the payment date for the claim on the guarantor would also be suspended by five years. The surety would then be effectively worthless to the creditor.

The second sentence of paragraph (2) provides that the third party cannot enforce a claim against the debtor for the amount it pays to the creditor after the plan is confirmed. This prevents any action against the debtor for the original debt that would ultimately mean that the plan still had not resolved the financial difficulties.

The provision follows the methodology of Article 136(2) DBA. That provision essentially contains an arrangement that prevents two or more persons (i.e. the creditor

and the guarantor for example) from asserting the same debt in the bankruptcy. The other creditors would otherwise be put at a disadvantage, as it would reduce the distribution to them. Article 370(2), second sentence, states that where a creditor's claim is restructured under the plan, the guarantor cannot then institute an action for indemnification to compel the debtor to pay the original debt in full. Again, the rationale for this provision is that it must not be possible to put other creditors at a disadvantage.

The legal relationship between debtor and guarantor may also be governed by foreign law. For that reason the provision in Article 370(2), second sentence, relates not only to indemnification under Articles 6:10 and 6:13 DCC, but also under a provision of foreign law.

If and insofar as the value that the creditor receives from the third party payment exceeds the amount of its original claim on the debtor, the rights allocated to the creditor under the plan transfer to the third party by operation of law. This is provided for in the third sentence of paragraph (2). This goes some way towards compensating the loss sustained by the third party because it has no reimbursement claim on the debtor, and the creditor is prevented from receiving more than it has a right to receive on the basis of its original claim on the debtor. In paragraph 3.2 of this memorandum, two scenarios are used to illustrate how the provision works in practice.

An exception to the rule that the rights of third parties are not affected under the plan applies for the type of plan described in Article 372. This type of plan is intended to include the restructuring of guarantees, insofar as they have been issued by companies that are part of the same group. A prerequisite is that the conditions of that article are met.

Paragraph 3

Paragraph 3 provides that the debtor must submit a declaration to the clerk of the court stating that is preparing a plan as soon as the preparations start. This is the court that is competent to hear requests that may be submitted in the context of the plan procedure (Article 369(8)). The main significance of this provision is in the fact that the debtor can ask the court to make provisions to help it put a plan into effect from that point (see paragraph 3.7). These would be requests for:

- authorisation of legal acts to obtain new financing to put a plan into effect (Article 42a);
- the order of stay (including suspension of the hearing of a bankruptcy application) (Article 376); and
- measures or further provision to secure the interests of creditors or shareholders (Article 379).

As the latter group of requests illustrates, the point at which the declaration is submitted is also significant for creditors and shareholders with voting rights. One measure that the court can take in their interest, for example, is to appoint an observer. The observer's task is to monitor the process leading to the plan, with due regard to the interests of the general body of creditors. The observer must notify the court as soon as it becomes clear that the debtor will be unable to put a plan into effect or that its

actions will harm the interests of the general body of creditors (Article 380(2)). The court can also determine on the basis of Article 379 that the debtor must ensure that there is a vote on the plan within a given period and that it must provide the court and affected creditors and shareholders with regular progress reports until the time of the vote. The latter measure enables creditors and shareholders to monitor the process and obtain certainty on the feasibility of the plan within the shortest possible time. Since submission of the declaration is therefore also significant for creditors and shareholders with voting rights, it is provided that the declaration will be available for their inspection at the court after the debtor has proposed a plan. It is available until:

- the court has decided on the request to confirm, or
- the debtor has submitted the report of the vote in which it states that it will not submit such a request.

After the period for its inspection by creditors and shareholders with voting rights has ended, the court may destroy the declaration. The court will do so in any event one year after it was submitted. In that context, it is assumed that it would take no more than a year to put a plan into effect.

It should also be noted that submission of the declaration is also relevant in the framework of the new paragraph (3) that has been added to Article 54 DBA. As observed above in the explanation of Part D, the purpose of this new provision is to facilitate the debtor's continued use of a current account facility whilst attempts are made to put a plan into effect. Submission of the declaration is also a benchmark moment in that context; it marks the start of the preparation project and therefore also the moment from which the new paragraph 3 of Article 54 DBA can be applied.

Paragraph 4

Paragraph 4 relates specifically to the situation where the debtor has opted to put a plan into effect in a public pre-insolvency plan procedure. As explained previously in paragraph 3.1 of this memorandum, the Insolvency Regulation applies if the debtor in the public pre-insolvency plan procedure has its COMI in the Netherlands. In that case, the requirements of the Insolvency Regulation for the announcement of pending judicial proceedings must be observed. Paragraph 4 provides that where the debtor proposes its plan in the context of a pre-insolvency plan procedure, it must ask the clerk of the court of The Hague to report this in the insolvency registers meant in Articles 19 and 19a, and in the Dutch Government Gazette. The debtor must do so as soon as the court becomes involved in the plan attempt. The first decision taken by the court in this context marks the opening of the public pre-insolvency plan procedure. The opening date of the procedure is one of the details the debtor is required to provide under Article 24 of the Insolvency Regulation. Depending on the stage at which the court becomes involved in the process, an opening decision might be:

- the appointment of a restructuring expert at the request of the debtor (Article 371);
- the authorisation of legal acts to obtain new financing to put a plan into effect (Article 42a);
- the order of stay (Article 376);
- on measures or further provision to secure the interests of creditors or sharehol-

- ders (Article 379);
- to give an interim judgment (Article 378); or
- the decision on the request to confirm (Article 384).

Paragraph 5

Paragraph 5 relates to the situation where the debtor is a legal entity. It provides that certain rules on decision-making by the general meeting do not apply where a plan is proposed under the ACPP. Specifically, this means that the board of a legal entity can in any event propose a plan without obtaining the approval of the general meeting. If implementation of a plan that is confirmed by the court requires a resolution of the general meeting, the judgment confirming the plan acts in its place.

As explained and illustrated previously in paragraph 3.2 of this memorandum, the restructuring of debts may also require amendments to shareholder rights. The provision in paragraph 5 is related to this. It ensures that resistance from shareholders cannot block the board from starting a process that could ultimately lead to a plan. Excluding the application of rules on decision-making by the general meeting does not otherwise prevent shareholders from expressing a view on the plan. The procedure is simply different. Where the plan amends the rights of shareholders, those shareholders have the right under Article 381(3) to participate in the vote on the plan. Where the debtor submits a request to confirm after the vote, shareholders who voted against the plan can ask the court to refuse that request (Article 383(8)). They can express their views again when the request to confirm is considered.

The same applies to decision-making by holders of shares of a certain type or specification.

Article 371

Article 371 contains a provision that enables creditors, shareholders, the works council or workplace representation that is set up within the business, or the debtor itself, to initiate preparations for a plan by requesting that the court appoint a restructuring expert. This restructuring expert can prepare a plan proposal and by putting it to the vote set in motion a process that can lead to the court's confirmation of the plan. The article provides for when this mechanism can be used. It also specifies what resources the restructuring expert has and what his responsibilities are. Finally, this article specifies when an appointment ends.

The appointment of the restructuring expert does deprive the debtor of the right to administer and dispose of its assets. It retains control over its business and may continue to run it during the plan procedure ('debtor in possession').

The financial problems need not become public knowledge, certainly if the confidential pre-insolvency plan procedure is chosen. This avoids negative publicity about the financial difficulties and the adverse consequences it causes.

Article 371 is in line with Article 4(1) and (8) and Article 5(1), (2) and (3)(c) of the Directive. Article 4(1) of the Directive provides that “Member States shall ensure that, where there is a likelihood of insolvency debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability [...]”. Article 4(8) provides that Member States may also provide that preventive restructuring frameworks are available for creditors and employees’ representatives. The appointment of a restructuring expert enables the works council or the workplace representation to access the restructuring framework of the ACP.

Article 5(1) of the Directive provides that “Member States shall ensure that debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business.” It is provided in Article 5(2) of the Directive that a restructuring expert may be appointed by a judicial authority. The judicial authority must decide whether this is necessary on a case-by-case basis, except in three specific circumstances described in Article 5(3) of the Directive in the appointment of a restructuring expert is always mandatory. One of those circumstances, described in paragraph (c), is where the appointment is requested by the debtor or by a majority of the creditors.

Paragraph 1

Paragraph 1 enables creditors, shareholders and the works council or workplace representation set up within the debtor’s business to ask the court to appoint a restructuring expert.

Paragraph 1 also allows for the board of a debtor-company can also request the appointment of a restructuring expert. This prevents the board from being squeezed in a conflict of interests between shareholders and creditors. This is why the board does not need shareholder approval to submit a request to appoint a restructuring expert.

The appointment of a restructuring expert precludes the debtor from proposing a plan at the same time (Article 371(1)). This ensures that efforts to put a plan into effect are always concentrated in a single process. Plan processes cannot run in parallel.

Paragraphs 2 and 14

As explained in paragraph 3.1 of the general part of this memorandum, the ACP provides for two procedures in which the plan can be put into effect: a confidential pre-insolvency plan procedure and a public pre-insolvency plan procedure (Article 369(6)). Paragraphs 2 and 14 are related to this.

It must in any event be clear which plan procedure has been chosen before the court becomes involved in the plan attempt. That can be at the same time as the submission of a request to appoint a restructuring expert. Paragraph 2 provides that the party submitting the appointment request must indicate which plan procedure has been chosen and the reasons for that choice.

Where the request is submitted by a creditor, a shareholder, the works council or the workplace representation, paragraph (2) allows for the debtor to express a view on

the choice of procedure. If the debtor disagrees with the choice, the court will decide which procedure will be followed.

Where the appointment request is the court's first involvement in the plan attempt, it must first establish whether it has jurisdiction to hear the request before taking a decision. Paragraph 2 provides that the party submitting the appointment request must ensure that the request contains the information the court will need for this.

Where the choice is for the public pre-insolvency procedure and the court derives its jurisdiction to hear the appointment request from the Insolvency Regulation, the decision to appoint a restructuring expert can be a 'decision to open main insolvency proceedings' as meant in Article 5 of the Insolvency Regulation. In that case, paragraph (14) provides that the court must indicate this in its appointment decision. Interested creditors who have not previously had an opportunity to express their views may then challenge this decision based on the lack of international jurisdiction. This scope for objection is also provided for in paragraph (14) and stems from Article 5(1) of the Insolvency Regulation.

If the public pre-insolvency plan procedure is followed and the Insolvency Regulation applies, its requirements for the announcement of pending procedures must be observed. It is provided at the end of paragraph (2) that Article 370(4) then applies *mutatis mutandis*. Please refer to the explanation of that provision for more detail.

Paragraphs 3, 4, 5 and 10

Paragraph (3) stipulates as a condition for the appointment of a restructuring expert that the debtor's situation is such that it is reasonable to assume it cannot continue to pay its debts. Hence the appointment of a restructuring expert is also subject to the condition of Article 370(1) if the debtor intends to put a plan into effect under the ACP. Please refer to the explanation of Article 370(1) for more detail.

Where the court deems it necessary for its decision, it may ask an expert to inquire into whether the debtor's state is indeed such that insolvency is inevitable. The latter is provided for in paragraph (4).

If it is demonstrated that the debtor's state is such that insolvency is inevitable, the court will generally grant an appointment request that is submitted by one or more creditors. The court will refuse the request only where there is *prima facie* evidence that the appointment of a restructuring expert is not in the interests of the general body of creditors. That may be the case, for example, if the appointment request is clearly submitted by a creditor whose sole purpose is to frustrate or delay a restructuring process that has reached an advanced stage and has a good prospect of success, and by doing so improve its own negotiating position, when such strategic behaviour and the resulting delay will be harmful to the general body of creditors.

This follows the school of thought that the main purpose of the ACP is to represent the interests of creditors and others affected, such as employees, who are keen to see the business continue, but are confronted with a small group of creditors or uncooperative shareholders who are blocking bailout efforts. The restructuring expert is appointed in an attempt to prevent the threat of bankruptcy from becoming a

reality. The significance of this appointment for the general body of creditors and others affected is evident, certainly if the debtor does not appear to be taking sufficient action. And even if the debtor has already started to prepare a plan, the appointment of a restructuring expert may still be desirable. For example, where the impartiality of the board of a debtor-legal entity is not beyond doubt. If an external independent restructuring expert takes over the plan attempt, it may increase confidence in the process and by extension its chance of success. A court appointment of an independent restructuring expert may also allay fears of misuse. However, the more advanced the stage reached by the debtor's plan and the greater the support it has from affected creditors, the greater the interest of creditors in the debtor's speedy conclusion of its plan process. The appointment of a restructuring expert will only delay a process that has already started. The restructuring expert will always need to get up to speed. It will always be necessary to determine whether the value that the appointment of a restructuring expert adds for the general body of creditors, directly or indirectly, outweighs the cost and possible delay. Where the appointment request is submitted by the debtor itself or has the support of the majority of the creditors, it is assumed in paragraph (3) that the interests of the general body of creditors are served by the appointment of a restructuring expert and the court must grant the request. This is also in line with Article 5(3)(c) of the Directive. Article 5(3) of the Directive provides that the "Member States shall provide for the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in negotiating (...)". One of those situations, described in part (c), is where the request comes from the debtor or a majority of the creditors.

If the court agrees to the appointment, it will also determine the salary of the restructuring expert and the maximum cost of the work of the restructuring expert and any third parties the restructuring expert consults. The court may subsequently increase that amount. In principle, the debtor must reimburse these costs. However, if the restructuring expert is appointed following a request that is supported by majority of the creditors, the creditors will bear the costs. This is in line with Article 5(3)(c) of the Directive. To that end, the court may require security for costs or the transfer of an advance to the court's bank account as a condition for the appointment. This is provided for in paragraph (10).

Before deciding on the matters explained above, the court will hear the individual views of the debtor, the creditors or shareholders, or the works council or the workplace representation that requested the appointment and, if appropriate, the observer or the restructuring expert. This is provided for in paragraph 5.

Paragraphs 7 to 9 inclusive

Under paragraphs (7) and (8), the appointment of a restructuring expert implies, insofar as it is necessary to enable the restructuring expert to carry out his work effectively, that:

- the restructuring expert has access to the complete business records and all other relevant business information; and
- the debtor must provide the restructuring expert with all information and cooperation, whether solicited or unsolicited.

The latter also applies to the debtor's employees and, if the debtor is a company, to the directors, supervisory directors and shareholders. This brings the bill into line with Articles 105 and 105a DBA concerning the bankrupt's cooperation and disclosure obligations to the trustee.

If the board fails to cooperate, the restructuring expert can ask the court to compel the board's cooperation, possibly imposing a penalty for non-compliance (Article 3:296 DCC in conjunction with Article 611a DCCP). In addition, the board's refusal to cooperate can also be classified as mismanagement. If bankruptcy follows, which if it subsequently transpires was due in no small part to the uncooperative attitude of the board, the directors could be held jointly and severally liable for the bankruptcy shortfall under Articles 2:138 and 248 DCC.

To avoid the unwanted disclosure of sensitive information, paragraph (9) provides that the restructuring expert will only share the information he has obtained with third parties insofar as it is necessary to put the plan into effect. Depending on the circumstances, it may also be specified that the restructuring expert will not share information with a third party before agreeing on confidentiality with the third party under the usual conditions.

Paragraphs 6 and 11

Paragraph (6) provides that the work of the restructuring expert will be effective, impartial and independent. To achieve this, the restructuring expert must possess financial knowledge and knowledge of insolvency law. He must also have experience of restructuring business debts. In international cases the court could also, if it deems it appropriate, appoint an insolvency officer in foreign insolvency proceedings as restructuring expert (in this context see also paragraph 50 and Articles 42(3)(a) and 57(3)(a) of the Insolvency Regulation).

Paragraph (11) provides that the restructuring expert is not liable for losses resulting from the plan attempt, unless he has failed to act as might reasonably be expected of a restructuring expert with sufficient experience and expertise who carries out his task with care and diligence. This brings the instrument into line with the 'Maclou norm',²⁷ the guiding principle developed in case law for determining the liability of the bankruptcy trustee.

Paragraphs 12 and 13

Paragraph (13) provides that in principle, the appointment of the restructuring expert ends by operation of law as soon as the court has confirmed the plan proposed by the restructuring expert. However, the court can extend the appointment of the restructuring expert in the judgment confirming the plan, for example because it feels he should also oversee implementation of the plan.

Paragraph 12 allows for the possibility that the failure of the plan will be recognised at an earlier stage of the process. In those circumstances, the restructuring expert must notify the court. In principle, the court will then revoke his appointment. Before

²⁷ Supreme Court, 19 April 1996, NJ 1996/727 (*Maclou*).

taking that decision, the court will offer the debtor, the creditors or shareholders, or the works council or workplace representation that requested the appointment and the restructuring expert an opportunity to express their views (paragraph 5).

Article 372

Article 372 provides that the plan may amend the rights of creditors against legal entities that form a group with the debtor as meant in Article 2:24b DCC. These are circumstances in which in which the debtor that proposes a plan (the 'principal debtor') is part of an economic and organisational unit with other legal entities that involves group guarantees. For instance, it may have been agreed that another legal entity within the group warrants the performance of the principal debtor's obligations.

Paragraphs 1 and 2

Where a creditor's right of action is amended in the context of its involvement in a plan, it retains the right to take action for payment of its original claim, in the manner stipulated and at the time agreed before the plan was confirmed, against a third party (that may include a guarantor and a joint debtor) that is liable for a debt of the debtor or has provided any form of security for payment of that debt (Article 370(2), first sentence). Article 372 makes an exception to this rule for group guarantees issued by legal entities that are part of the same group. If the following four conditions are fulfilled, the plan can also provide for amendment of the rights of creditors against a guarantor (paragraph 1):

- the plan amends the rights of creditors that arise out of group guarantees issued by the legal entities in question or out of obligations for which those legal entities are liable with or alongside the debtor (a);
- these legal entities, like the principal debtor, are in a state such that it is reasonable to assume that they cannot continue to pay their debts (b);
- these legal entities must have consented to the proposed change or, if they did not, the plan must have been proposed by a restructuring expert as meant in Article 371 (c); and
- the court must have jurisdiction to hear a request to confirm such a comprehensive plan (d).

Article 372 permits the principal debtor to include in the plan the obligations of liable group companies only if those group companies have not already proposed their own restructuring plan for the obligations in question.

Under paragraph (2), a comprehensive plan fulfils the conditions for confirmation by the court only if decision-making on the plan and the content of the plan meet the requirements of the ACPD for all of the legal entities concerned within the group (Article 383(1) and Article 384(1)).

Paragraph 3

In the interests of transparency, it is provided that the principal debtor or the restructuring expert continues to take the lead in any comprehensive plan and that principal

debtor or the restructuring expert has the exclusive right to submit the requests described in Articles 3e, 376(1), 378(1), and 379(1) and 383(1). These are requests where the court is asked:

- to order a stay (Article 376(1));
- to give an interim judgment (Article 378(1));
- to take measures or make further provision to secure the interests of creditors or shareholders (Article 379(1)); and
- to confirm the plan (Article 383(1)).

Article 373

First, Article 373 offers the option of including pending agreements in the restructuring. This option is available not only to the debtor, but also to the restructuring expert, if appointed. This provision might, for example, cover a rental agreement that is a millstone around the neck of the business. It can be applied to all types of agreements, other than contracts of employment (Article 369(4)).

This article also provides that '*ipso facto* clauses' have no effect. These are contract provisions that automatically attach contractual consequences to the opening of a plan procedure or incidents or acts connected with it. The proposed provision is needed to ensure that valuable agreements are not lost in the restructuring. The counterparty to these agreements has no legitimate interest in withdrawing from the agreement. Its debtor will be restored to financial health after the plan is confirmed.

This provision is in line with Article 7(4) and (5) of the Directive. Article 7(4) and (5) essentially provides that Member States must provide rules to ensure that "essential contracts" remain in effect. Member States also permitted to provide that these rules also apply to non-essential executory contracts.

Paragraph 1

Paragraph (1) allows for the debtor to make a proposal to the counterparty to amend or terminate the agreement. This is already common practice where the debtor can already foresee a time when it will become unable to perform its obligations under the agreement. What is new is that paragraph (1) offers the debtor scope to terminate the agreement unilaterally if the counterparty does not agree to the proposed voluntary amendment or termination. The debtor can do so if the court:

- c. grants leave for the premature termination; and
- d. confirms the plan.

Under condition (a), the debtor's request to confirm must be accompanied by a request for leave to terminate the agreement unilaterally (Article 383(7)). Under Article 384(5), the court will grant this request if the debtor's state is such that it is reasonable to assume it will become insolvent. Hence leave for unilateral termination of an agreement is also subject to the condition of Article 370(1) if the debtor intends to put a plan into effect under the ACP. Please refer to the explanation of Article 370(1) for more detail.

Where the court grants leave for termination and confirms the plan, the agreement is terminated unilaterally by operation of law on the date of its judgment confirming the plan; the notice period suggested by the debtor will apply unless that period is deemed by the court to be unreasonable. If that is the case, the court will stipulate a notice period in its decision on the request for leave to terminate. That period will not in any event exceed three months.

The scope for restructuring pending agreements described in paragraph (1) is available not only to the debtor but also to the restructuring expert, if appointed.

Paragraph 2

The debtor may include in the plan any claim for damages the counterparty may have after the unilateral, premature termination of the agreement. This is provided for in paragraph (2). Where the debtor opts to do so, the counterparty to the agreement becomes a creditor with voting rights, with all of the rights allocated to it under the ACPP. They include the right to vote on the plan and the right to ask the court to refuse the request to confirm the plan (Articles 381(3) and 383(8)).

If the debtor does not include the counterparty's possible claim for damages in the plan, it effectively means that the claim must be paid in full after the agreement is terminated. In that case the counterparty does not become a creditor with voting rights because its right to damages has not changed. As a consequence, the counterparty also has no right to vote on the plan and cannot oppose confirmation of the plan. However, the counterparty can ask the court to refuse leave to terminate the agreement, on the ground that the state of insolvency is not inevitable (Article 384(5)). If the counterparty's request is granted, it will automatically mean that the plan cannot be confirmed. It is after all a condition of confirmation that the debtor must be in a state where insolvency is inevitable (Article 384(2) (a)).

Paragraphs 3 and 4

Paragraph (3) provides that the proposal of a plan does not create a basis for changes to commitments and obligations to the debtor, for suspension of performance of an obligation to the debtor or for termination of an agreement concluded with the debtor. The background to this provision is as follows. In principle, standard contract law will remain in force after the introduction of the ACPP. Contracting parties would be able to include in their agreements clauses (*'ipso facto'* clauses) on the basis of which a debtor's counterparty can terminate pending agreements as soon as the debtor starts to prepare a plan or a restructuring expert is appointed to take over the plan. Even if the debtor has never been in default and has indicated its ability and willingness to continue the agreement. This is now precluded. The continuation of such agreements is crucial to the survival of the business, particularly where its operations depend on certain contracts, such as those with suppliers, customers, employees and IT providers.

Under paragraph 3, *'ipso facto'* clauses are without effect. This applies both to clauses that automatically attach legal effect to the proposal of a plan and clauses that attach rights of termination. Moreover, the rule applies equally where the effect of a clause does not depend on the proposal of a plan, but on incidents or acts associated with it. For instance, negotiations on a plan proposal or the implementation of a confirmed

plan. The latter also ensures that a plan that contains a debt for equity swap cannot be blocked by a change of control provision. It also follows from paragraph (3) that the preparation, proposal or implementation of a plan cannot provide grounds for early reliance on the consequences of default under Article 6:80 DCC. Reliance on the provisions in the instrument that seek to enable the debtor or the restructuring expert to put a plan into effect (see paragraph 3.7) can also be construed as an incident or an act that is directly linked to the preparation and proposal of a plan. For example, the order of stay (Article 376). The '*ipso facto* clauses' also remain without effect in those circumstances.

Paragraph 3 applies to all creditors, i.e. including creditors whose rights are not amended under the plan and creditors who are not affected by the stay.

Paragraph 4 relates specifically to a situation in which a stay has been ordered. Throughout the period of the stay, non-performance by the debtor prior to the stay may not then be taken as a basis for terminating, suspending or rescinding an agreement with the debtor. In contrast to paragraph (3), however, paragraph (4) does require the debtor to provide security for the performance of new obligations under agreements that are created during the stay. The instrument of paragraph (4) ensures that a stay that aims to give the debtor some time and space to put a plan into effect does not lose effect. At the same time, it adequately projects the interests of a counterparty that has already been faced with non-performance. Paragraph (3) imposes no obligation on the debtor to provide security for new obligations. This is because paragraph (3) provides for a situation where the debtor has not failed to perform. An obligation to provide security could exacerbate the debtor's existing financial difficulties and as a consequence halt or further impede the debtor's business operations. That could in turn harm the interests of the general body of creditors, when a counterparty to an agreement that has been performed promptly and fully has no grounds for withdrawing from the agreement or demanding security for its continuation. The situation is different if a counterparty has already been faced with the debtor's failure to perform.

In both cases, in paragraphs (3) and (4), the board of a debtor-legal entity is liable for new obligations if they are undertaken when the board knows or ought to know that the legal entity will not be capable of performing them (Supreme Court, 6 October 1989, NJ 1990/286 (*Beklame!*)).

Article 374

Article 374 prescribes when the plan must provide for class formation. This obligation exists if the plan includes different categories of creditors and shareholders. Article 374 provides that this is the case when the rights that creditors and shareholders have in bankruptcy or acquire under the plan are so different that their positions are not comparable. Creditors and shareholders whose positions are not comparable will typically evaluate a plan differently. It is important to take this into account. It will determine whether a plan meets the conditions for confirmation. It was explained in paragraph 3.1 of the general part of this memorandum that the plan meets the conditions for confirmation by the court only if:

- at least one class of affected creditors or shareholders supports the plan with the required majority; and
- the plan contains a restructuring proposal that is *reasonable* for the affected creditors and shareholders. This means in any event that:
 - d. the creditors and shareholders may not be significantly worse off under the plan than in bankruptcy; and
 - e. the value realised under the plan (the going concern or reorganisation value of the business) must be distributed *fairly* amongst creditors and shareholders.

Where all classes have accepted the plan in a decision-making process that was pure (i.e. there are none of the grounds for refusal listed in Article 384(2)), it may be assumed that the plan is *reasonable*. However, there may be creditors or shareholders who have not accepted the plan and who resist the confirmation. If these creditors or shareholders can show that the plan is nevertheless *unreasonable* because they will be significantly worse off under the plan than in a bankruptcy, the court will refuse the request to confirm (Article 384(3)). Where not all of the classes have accepted the plan, the deciding factor will be how the reorganisation value that can be retained or realised under the plan is distributed amongst affected classes. That distribution may not derogate from the priority rules under which creditors can enforce claims on the debtor at the expense of the dissenting class. The court also has grounds to refuse the request to confirm if a majority of creditors or shareholders in a class have voted against the plan and show that the plan does not fulfil this condition (Article 384(4)). In that case, distribution of the reorganisation value under the plan's restructuring proposal is *unfair*.

This demonstrates the importance of class formation in plans relating to different categories of creditors and shareholders. Class formation helps the debtor, or the restructuring expert, if appointed, to prepare a restructuring plan and helps creditors and shareholders with voting rights and the court to evaluate that plan. Class formation enables the debtor or the restructuring expert to illustrate how the condition that the plan must be *reasonable* has been fulfilled. Class formation enables creditors and shareholders with voting rights to verify that this is the case before the vote and to assess whether there is sufficient support for the plan after the vote. Class formation is an important fact for the court in determining whether decision-making on the plan was pure.

It follows specifically from Article 374 that:

- the distinct categories of creditors and shareholders in the plan must be placed in different classes;
- each class must be offered a proposal that meets the needs of that class (Article 375); and
- a separate vote on the plan must be held in each class (Article 381(6)).

The rights that creditors and shareholders have in bankruptcy and the rights they acquire under the plan are the guideline in class formation. Creditors or shareholders whose claims against the debtor's assets rank differently must in any event be placed in different classes. The claims may be ranked differently under Book 3, Title 10 of the DCC, another law or instrument based on it or under a contractual arrangement.

For example, class formation that is based on applicable priority rules might place creditors with a pledge or mortgage, creditors with a retention right or the unsecured creditors in different classes. Examples of contractual arrangements that specify the order in which creditors may enforce their claims include subordination agreements or intercreditor agreements. The latter is an agreement between the debtor and several creditors who jointly provide a loan. The agreement sets out what the various parties have agreed about the relationship between the various financiers and what will happen if the debtor fails to comply with the conditions of the loan.

Other factors that might affect how creditors and shareholders evaluate the plan may be taken into account in the class formation, although it is not required. They might include the different tax consequences of the plan for the affected creditors and shareholders. To keep things simple and manageable, it was decided that class formation would be prescribed only where a plan is proposed to creditors or shareholders with different existing rights (in the case of bankruptcy) or new rights (under the proposed plan). It would overcomplicate the class formation if more factors had to be taken into account. It would detract from the intended simplicity and efficiency of the instrument.

A creditor may be placed in different classes for the same claim, for instance where part of the claim is secured by a pledge or mortgage and the rest is unsecured. This creditor must be placed in a class of secured creditors for that part of the claim that is secured by the collateral. It must be placed in a class of unsecured creditors for the remainder of its claim. The creditor then votes in both classes.

The debtor is free to subdivide one category of creditors into different classes. It may also make different proposals to those classes, even if it means that one class is treated more favourably than another. However, for the plan to then fulfil the conditions for confirmation, the debtor must ensure that:

- a required majority of the class that is treated less favourably accepts the plan, and by extension the choice to make the other class a better offer; or
- that it can adduce a reasonable ground for the distinction and can demonstrate that the interests of the creditors in the class that is treated less favourably are not affected (Article 384(4)(a)).

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

Article 375

Article 375 stipulates what information must be included in the plan and what information must accompany it. The main purpose of this provision is to ensure that creditors and shareholders obtain the information they need to exercise their voting right effectively under Article 381.

The article is in line with Article 8(1) of the Directive. It provides Member States shall require that restructuring plans submitted for voting to creditors and shareholders must at least contain certain information. Member States may add further information requirements. Article 375(1)(a), (b), (i) and (l) and Article 375(2)(a), (b), (c), (d) and (e) are in line with Article 8(1) of the Directive. The other parts of Article 375 add to the information prescribed in Article 8(1) of the Directive.

Paragraphs 1 and 2

First and foremost, paragraph (1) is based on the premise that the plan must include all information that creditors and shareholders with voting rights need to come to an informed opinion before the vote on the plan takes place. Paragraphs (1) and (2) also specify what information must always be included in the plan or appended to the plan. The list of information is not exhaustive.

The information specified in Article 375(1) must always be included in the plan itself. The more comprehensive information of Article 375(2) is better suited to inclusion as an appendix to the plan. No distinction is made between the information in Article 375(1) and Article 375(2). Article 384(2)(c) provides that the court will reject a request to confirm the plan if the plan itself or the accompanying documents do not contain all of the information listed in Article 375.

The prescribed information must enable creditors and shareholders to:

- understand what consequences the plan will have for them (Article 375(1)(c), (d) and (h));
- estimate whether it is *necessary* to put the plan into effect to avert an imminent bankruptcy and whether the plan is *reasonable* (paragraph 1(c), (e), (f) and (g) and Article 375(2); and
- learn how they can obtain further information Article 375(j) and how and when they will be able to cast their vote on the plan Article 375(k).

Naturally, the debtor or the restructuring expert must be satisfied that the information provided is correct and clear. This is to ensure the purity of decision-making by creditors and shareholders on whether they can accept the plan.

Article 375(1)(e) provides that the plan must contain information on the “expected value that can be realised if the plan is put into effect”. This provision refers to the value that can be retained or realised for the creditors and shareholders if the plan is implemented. In the United States this is known as the ‘reorganisation value’. The plan could produce two scenarios: (1) the continuation of the activities of the business as a going concern; and (2) the discontinuation and wind down of the business outside bankruptcy. Another possibility is a combination. In a combination, some parts of the business are discontinued and others will continue.

Article 375(1)(f) prescribes that the plan must also include information on ‘the expected proceeds from liquidation of the debtor’s assets in bankruptcy’. This provision refers to the value that is left for creditors if the plan is not put into effect. It does not automatically mean the liquidation value of assets that are realised separately in a bankruptcy. The proceeds of a possible asset sale in bankruptcy in which some

divisions of the business are sold and then continued by the buyer will be higher than the liquidation value of the separate assets. In that case, the possible going concern value from such a sale must be stated.

Article 375(1)(g) provides that the plan must also explain how the debtor or the restructuring expert arrived at these values and in particular the accounting principles and assumptions on which they are based. This is important because creditors are then also able to verify the value calculations.²⁸ In the consultation, a number of respondents argued that the debtor should have an obligation to submit a valuation report from an independent expert. However, the cost of such an obligation would be appreciable. It would probably put the instrument out of reach to certain businesses. Particularly SMEs. As a statutory obligation, this would place a disproportionate burden on them. Particularly since there will often be no need for such reporting. There is also no such obligation in the existing plan instruments for bankruptcy and suspension of payments. Furthermore, an external adviser who is retained and instructed by the debtor cannot truly be described as independent. He will always be guided to a greater or lesser extent by the debtor as his client. In that respect, the confidence that creditors can place in his report is also relative. Creditors will have more confidence in a report from a court-appointed expert who is truly independent, in other words a report from:

- an independent expert as meant in Article 378 (5) and Article 384 (6); or
- the restructuring expert or an external adviser retained by him.

The debtor's costs could multiply if it is obliged by law to retain its own external adviser. Therefore, it was decided that submission of a valuation report would not be obligatory. However, there might be advantages to having a valuation report available when the court does ultimately become involved in the process and questions of valuation arise in the context of its decision. This is an assessment for the debtor or the restructuring expert.

The following also applies with respect to the information referred to in Article 375(1) (f). Rights may be allocated to the creditors and shareholders under the plan. They might include the right to a payment in cash or in a form other than cash, such as bonds or shares. Article 375(1)(h) prescribes that in such circumstances, creditors must be given notice of when the rights will be allocated. The intention is that the plan must state when the money will be paid out or when the bonds or shares will be issued.

Under Article 375(2)(d), information must also be provided on the financial position of the debtor. Precisely what information this involves will depend on the specific circumstances. It will often be (historical and prospective) information concerning the debtor's financial position (balance sheet), results (profit and loss account) and the cash flow position (source and expenditure of funds and the cash flow prognosis).

²⁸ S.W. van den Berg, 'Waarderingsvragen in het ondernemingsrecht en insolventierecht' (diss. 2019).

Paragraph 3

If an addendum to the list of information or further rules on the provision of information should prove necessary in the future, Article 375(3) allows for an order in council to impose further rules.

Article 376

Article 376 provide scope for the debtor or the restructuring expert, if appointed, to ask the court to order a stay for all of the creditors or any number of them. Article 376 seeks to give the debtor or a restructuring expert the chance to put a plan into effect. The article aims to prevent creditors from taking enforcement action. At the same time, the risk that a debtor will use a stay is also recognised. The purpose is not to allow the debtor to keep creditors at bay if it is not with the objective of working on a solution that is in the best interests of the creditors. With that in mind, this article also imposes a number of conditions on the order for a stay.

Article 376 is in line with Articles 6 and 7 of the Directive. The first paragraph of Article 6(1) of the Directive provides that “Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework”. The other parts of Articles 6 and 7 of the Directive provide for when a stay can be granted, its scope of operation and maximum duration and when it can be extended or must be lifted.

Paragraphs 1 and 4

Article 376(1) provides that a stay can be ordered only if a restructuring expert has been appointed or the debtor has submitted a declaration to the clerk of the court stating that it has started a process to put a plan into effect. In the latter circumstances, the debtor must also have effectively proposed the plan or undertaken to do so within two months.

Under Article 376(4), there must also be *prima facie* evidence that the order of stay is necessary to enable the debtor’s business to continue during the preparations for and negotiations on the plan. It must also be reasonable to assume at the time of ordering a stay that it will not materially prejudiced the interests of the individual creditors affected by the stay. The debtor must convince the court of this. For example, if a vote has already taken place in which all classes voted down the plan proposed by the debtor and none of the creditors or shareholders has initiated a second attempt by submitting a request to appoint a restructuring expert, there is no chance that a plan will be put into effect. In those circumstances a stay would not be appropriate.

Paragraphs 2, 5, 6 and 8

Article 376(8) declares that Article 241(a)(2) DBA applies *mutatis mutandis*. It follows from this that the stay can relate to all creditors (general stay) or a number of them (limited stay). It is important to note that a stay can relate to all of the debtor’s creditors and not merely to the creditors included in the plan (the creditors with voting rights).

Under Article 376(2), the order of stay has the following consequences. First and foremost, creditors may not enforce their rights against property that is part of the debtor's estate or seek to repossess assets from the debtor without authorisation from the court. This implies, for example, that a creditor with a retention right on delivered stock may not recover those goods without leave from the court. If the recovery of the goods would jeopardise the negotiation process, the court will not grant authorisation. Where the court has ordered a general stay, it will apply in principle to all of the debtor's creditors. Where the stay is directed at a limited group of creditors, only those creditors can institute enforcement actions. In either case, the conditions imposed that the creditors in question are given notice of the order of stay and have been informed of the preparations for a plan. The court can also lift attachments during the stay, at the request of the debtor or the restructuring expert, if appointed. Lastly, the stay also suspends consideration of an request from the debtor for a suspension of payments or a bankruptcy application from either the debtor or a creditor.

Article 376(2) also provides for the maximum duration of the stay. In principle, a stay remains in place for a period of four months. Under Article 376(5), the stay can subsequently be extended, at the request of the debtor or the restructuring expert, for up to four months. However, the debtor or the restructuring expert will then be required to demonstrate in the request that significant progress has been made on preparations for the plan. If a request to confirm has already been submitted to the court, this will be assumed.

There is a single exception to this rule. Article 376(6) provides that the maximum period of the stay is four months if it is requested in the context of a public pre-insolvency plan procedure and the debtor's COMI has been moved from one Member State to another Member State in the three months prior to the time of the court's first decision under the ACPP. Please refer to Article 3(1) of the Insolvency Regulation for the definition of the concept of COMI. Article 376(6) is in line with Article 6(8) of the Directive. That article provides that where Member States choose to implement the Directive by means of one or more of the procedures under Annex A to the Insolvency Regulation, "the total duration of the stay under such procedures shall be limited to no more than four months if the centre of main interests of the debtor has been transferred from another Member State within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings". It has been noted previously that:

- the public pre-insolvency plan procedure will be notified to the European Commission with the request that the procedure be included in Annex A of the Insolvency Regulation.
- the first decision taken by the court on the basis of the ACPP marks the opening of the public pre-insolvency plan procedure.

Paragraphs 7 and 8

Section 2.1 DBA already has a rule for the stay of suspension of payments proceedings (Article 421a DBA *et seq.*). For the sake of consistency and practicability, Article 376(8) is closely aligned to this instrument. The same cannot be said of Article 241b DBA. That provision allows the holder of an undisclosed pledge to give notice of pledge on a claim, provided that it deposits the funds that are received with a de-

positary. This notice precludes the debtor from collecting the debt from its customer directly. Once notice has been given, payment must be made to the pledgee (typically the bank) rather than the debtor. The debtor's income will dry up if that happens. That in turn will prevent the debtor from complying with the obligations it must undertake in the course of its business. This will directly jeopardise the continuity of the business and the debtor will then have no opportunity to put a plan into effect. Article 376(7) therefore provides explicitly that the pledgee may not give notice. The debtor retains the right to collect debts. It must have the power to dispose of the funds collected in the normal course of its business. However, this is subject to the condition that the debtor provides the pledgee with adequate replacement security for the enforcement. This will often be more or less automatic because new claims that arise out of the continued business operations will often be pledged to the pledgee and the debtor will retain control and power of disposition throughout the process.

Paragraph 9

If the court decides to order a stay, it can at the same time make provision on the basis of Article 376(9) to secure the interests of creditors and shareholders. The court may also decide to do so at a later stage, in other words after the stay has entered into effect. The court may decide to do so on its own initiative or at the request of the debtor, the restructuring expert or one of the creditors affected by the stay.

The court may, for example, order the debtor to ensure that a vote is held on the plan within a given period and to provide the court and affected creditors and shareholders with regular progress reports until that time. The court can thus ensure that creditors and shareholders are able to monitor the process and obtain certainty on the feasibility of the plan within the shortest possible time. Another option is the appointment of an observer (Article 380). In line with Article 5(3)(a) of the Directive, referred to previously in the explanation of Article 371, Article 376(9) provides that the court will give particular consideration to the appointment of an observer where it orders a general stay. In that case, the court is intended to assess whether it is necessary to protect the creditors' interests. The observer's task is to monitor the process leading to the plan, with due regard to the interests of the general body of creditors. The observer must notify the court as soon as it becomes clear that the debtor will be unable to put a plan into effect or that the interests of the general body of creditors are affected. The court will then decide what the consequences must be. One such consequence might be the appointment of a restructuring expert to take over the restructuring process (Article 380(2)).

Paragraph 10

Article 376(10) provides that the court will lift the stay if, owing to a change of circumstances following the suspension decision, the conditions that must be fulfilled under Article 376(1) and (4) in order to justify a stay are no longer fulfilled. The court can decide this on its own initiative or at the request of the debtor, the restructuring expert or the creditors affected by the stay.

Paragraph 11

It must be possible to give a stay decision quickly (sometimes within the same day). It would be problematic if the court were first required to examine the debtor, the restructuring expert or the observer, if appointed, or the creditors. For that reason, Article 376(11) does not prescribe this. If an affected party takes the view that there are no grounds for a stay or that the stay will materially prejudice its interests, it can apply to the court to lift the stay (Article 376(9)). Examinations will then take place in the context of that application to lift the stay. The situation is different where the decision concerns the granting of authorisation to enforce rights against assets belonging to the debtor (Article 376(1)), an extension of a stay after the initial four months (Article 376(4)), provisions as meant in Article 376(9) or the lifting of the stay (Article 376(10)). In those circumstances, the court should first examine the persons described before it takes a decision (Article 376(11)).

Paragraphs 3 and 12

Article 376(2) and (12) concerns the two procedures in which the plan can be put into effect under the ACP: (1) a confidential pre-insolvency plan procedure, and (2) a public pre-insolvency plan procedure (Article 369(6)). It must in any event be clear which plan procedure has been chosen before the court becomes involved in the plan attempt. That may be the point at which the request for a stay is submitted. Article 376(3) and (12) declare that Article 371(2) and (14) apply (in part) *mutatis mutandis*. Please refer to the explanation of Article 371(2) and (14) for more detail on this provision.

Paragraph 13

Article 376(13) provides that a request for a suspension of payments or a bankruptcy application submitted by creditor or by the debtor itself, the consideration of which has been suspended, will expire by operation of law as soon as the court confirms the plan. At that point, the bankruptcy will have been averted. If the creditor who submitted the bankruptcy application was unaware of the process to prepare a plan, the court may determine that the debtor is liable to compensate the creditor for the costs of the action. The estimate of those costs will be based on the usual court-approved scale of costs.

Article 377

The rights of creditors to enforce claims against property that is part of the debtor's assets are suspended for the period of the stay. During that period the debtor can also refuse to surrender goods that are in his possession (Article 376). Article 377 supplements this instrument. The Article provides that the debtor may also continue to use, expend and/or dispose of that property during the stay if it was entitled to do so before the stay (essentially right of use). In the example cited in the explanation of Article 376, where stocks are delivered subject to retention of title, this would mean that the debtor must be able to sell those stocks to his customers. Article 377 also relates to a situation where the debtor has had a right of use but was deprived of that right briefly (for example, two weeks) before the order of stay. As soon as the court has ordered the stay, the debtor can invoke Article 377 and reinstate its right of use.

Paragraphs 1 and 2

It follows from Article 377(1) and (2) that the debtor's right of use is framed by two conditions. The debtor may continue to use the property, insofar as:

- it is necessary to maintain normal business operations (Article 377(1)), and
- the interests of third parties who have a claim on that property are adequately protected (Article 377(2)).

Essentially, the latter condition implies the following. Where the debtor expends or disposes of property, the third party's right to that property would typically also be extinguished. To ensure that the interests of secured creditors are not harmed by this, the debtor is required to provide the affected creditors with replacement security.

Paragraph 3

The court will remove or limit the debtor's right of use at the request of one or more of the third parties affected if adequate protection of third party interests can no longer be guaranteed (Article 377(3)). Before taking a decision on this, the court will hear the individual views of the third parties who submitted the request, the debtor, the restructuring expert, if appointed, and the observer, if appointed.

Article 378

Article 378 enables the debtor or the restructuring expert, if appointed, to submit to the court any disputes that arise during the run-up to the vote on the plan. As observed previously, it is an important premise of the instrument that, in principle, the court's involvement is limited before the request to confirm is submitted. The question of whether there is a ground for refusal to preclude the court from confirming the plan even if it was accepted by all classes of creditors or shareholders may, however, arise at an earlier stage of the process. If so, it is important all in the interest of 'deal certainty' that any doubts be allayed as quickly as possible. At the same time, it is important that creditors are prevented from seizing upon this with the apparent purpose of frustrating or delaying a restructuring process that has a good prospect of success with the sole aim of improving their own negotiating position. It is partly for this reason that creditors and shareholders may not involve the court at an earlier point in the process.

Paragraphs 1, 3, 5 and 6

Article 378(1) contains a non-exhaustive list of questions that the debtor or the restructuring expert may submit to the court. These questions can be grouped under the main question of whether the plan submitted to the court fulfils the conditions for confirmation by the court, or whether there may be one or more of the grounds for refusal described in Article 384(2), (3) or (4). If the court finds that this is indeed the case, the debtor or the restructuring expert still has a chance to adjust the plan and steer the process accordingly. The court will dispose of the submitted questions in a single hearing wherever possible to maximise efficiency (Article 378(3)).

Under Article 378(5) the court may appoint an independent expert to inquire into this and produce a report, if it considers it necessary in the context of the decision. It should be noted that the general rules of the law of evidence derived from the Dutch Code of Civil Procedure do not apply here (in this context, see the explanation in Part G). This also means that the court is not required to include the parties involved in the choice of expert or in formulating the questions for the expert, and can take a decision quickly.

Where the court is missing important information for its decision, the debtor or restructuring expert is given the opportunity to produce the information before the decision is taken (Article 378(6)).

Paragraphs 1(c) and (4)

Article 375(2)(b) provides that the debtor must provide a list of the names of all creditors and shareholders with voting rights. It must also state the amount of their claim or the nominal amount of their share. A joint creditor or the creditor or shareholder may subsequently question this information. In other words, the amount or even the existence of the claim or the right will be called into question. Since this information determines whether a creditor or shareholder is admitted to the vote and so ultimately the outcome of the vote, it is important that the debtor or restructuring expert is able to ask the court to take a decision on this before the vote. Paragraph 4 therefore provides that if the debtor or restructuring expert puts such a question to the court, the court will determine whether that creditor or shareholder is admitted to the vote on the plan, and for what amount. The decision on whether a creditor or shareholder is admitted to the vote, in full or in part, is a finding only on the admission to the vote. Its effect is purely procedural and it has no bearing on the establishment of the claim or the right. That must be the subject of a final decision obtained in separate proceedings. Article 378(4) declares that Article 147 DBA applies *mutatis mutandis*. This means that if this procedure shows that a claim did not exist or that the amount was higher or lower than assumed in the vote, the outcome of the vote can no longer be affected. If the court denies a creditor or shareholder admission to the vote and it examined the creditor or shareholder prior to giving its decision, that creditor or shareholder may not challenge the confirmation of the plan (Article 378(8)). However, as this establishes by law that the creditor or shareholder has no voting rights, it cannot be bound by the plan either (Article 385). Part 2.1 DBA already has a similar rule for the suspension of payments proceedings (Article 267 DBA). In the interest of consistency and practicability, that instrument was closely replicated. The situation is different where the debtor or the restructuring expert has denied a creditor or shareholder admission to the vote and the court has not been asked to provide binding confirmation of the correctness of that decision under Article 378. In that case, the debtor or creditor or shareholder may challenge the confirmation with the argument that it has voting rights and that the debtor or restructuring expert has wrongly denied it admission to the vote. The court must take a decision on this during its hearing of the request to confirm (Article 384(2)(b)).

Paragraphs 7 and 8

Before taking a decision on a matter put before it, the court will hear the individual views of the debtor, the restructuring expert or observer, if appointed, and the credi-

tor or shareholders whose interests are affected by the decision. This is provided for in Article 378(7). Article 378(8) also provides that the court's decision under Article 378 is binding only on those creditors and shareholders who had an opportunity to express their views. This is in line with the fundamental principles of our civil procedural law, namely the premise that a judicial decision is binding on parties only if the principle of the right to be heard is met.

Paragraphs 2 and 9

Paragraphs 2 and 9 concern the introduction in the ACPP of both a confidential pre-insolvency plan procedure and a public pre-insolvency plan procedure and the choice that the debtor must make between them (Article 369(6)). The choice must be made before the court takes its first decision in the context of this instrument. This may coincide with the interim court judgment under Article 378. Once the choice has been made, the court must establish whether it has jurisdiction to hear the request. Please refer to the explanation of Article 371(2) and (13) for more detail on these provisions. Paragraphs 2 and 9 provide that these provisions apply (in part) *mutatis mutandis*.

Articles 379 and 380

Article 379 allows for the court to put measures in place or make further provisions during the restructuring process to protect the interests of affected creditors or shareholders. Article 379(1) provides that the debtor may ask the court to do so after it has submitted a declaration as meant in Article 370(2) to the clerk of the court. The restructuring expert can make such a request to the court from the time of his appointment. The court can also put measures in place or make further provisions on its own initiative. Naturally, that is only from the time that it first becomes involved in the plan attempt. That may come at the same time as:

- the appointment of a restructuring expert (Article 371(1));
- the authorisation of legal acts to obtain new financing to put a plan into effect (Article 42a);
- the order of stay (Article 376(1));
- a ruling on a matter relating to the vote on the plan (Article 378(1)); or
- the decision on the request to confirm (Article 384).

Measures might include setting a deadline for the vote on the plan. The court might also stipulate that the debtor must provide creditors with regular progress reports.

A specific measure is the appointment of an observer as meant in Article 380. The observer's task is to monitor the preparations for the plan, with due regard to the interests of the general body of creditors. An observer may be appointed only in cases where the debtor is attempting to put a plan into effect (Article 380(1)). The appointment of a restructuring expert to prepare and propose a plan means that there is already an independent expert acting for the general body of creditors. That obviates the need to appoint an observer. It is a basic principle of this instrument that a restructuring expert and an observer may not be appointed simultaneously. The observer must notify the court as soon as it becomes clear to him that the debtor will be

unable to put a plan into effect or that the interests of the general body of creditors are affected. The court will then determine what the next steps must be. If there is still a chance that the plan can be put into effect, it may conclude that it is desirable to appoint a restructuring expert to take over the preparations for a plan. The court has an option, but not an obligation, to appoint the observer as restructuring expert if it deems it appropriate (Article 380(2)). The appointment of a restructuring expert automatically ends the observer's appointment (Article 380(3)).

The appointment of an observer does not deprive the debtor of the right to administer and dispose of its assets. The debtor retains control over its business and may continue to run it during the plan procedure ('debtor in possession'). This is in line with Article 5(1) of the Directive. It provides that "Member States shall ensure that debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business".

With the power to make further provisions, the court can set aside provisions that apply to preparations for a coercive plan or adjust them to suit a specific situation. Section 2.1 of the DBA already has this arrangement for suspension of payments proceedings (Article 225 DBA). In the interest of consistency and practicability, that instrument was closely replicated.

Article 379(2) concerns the two procedures for putting a plan into effect under the ACP: (1) the confidential pre-insolvency plan procedure, and (2) the public pre-insolvency plan procedure (Article 369(6)). It must in any event be clear which plan procedure has been chosen before the court becomes involved in the plan attempt. That may come at the same time as the debtor's submission of a request to apply Article 379. Please refer to the explanation of Article 371(2) and (14) for an explanation of Article 379(2). These provisions are declared to apply (in part) *mutatis mutandis*.

Article 381

Article 381 stipulates how long before the vote the debtor or the restructuring expert must present the final plan to creditors and shareholders with voting rights; it also provides rules for the vote on the plan and who may participate in it, and prescribes how the ballot result is determined.

Article 381(1), (3), (4), (6) and (7) are in line with Article 9(1), (2) (4) and (6) of the Directive. Essentially, it provides that Member States must ensure that:

- a plan can be submitted for adoption by the affected parties (Article 381(1));
- the affected parties have the right to vote on the plan (Article 381(2));
- the distinct categories of affected parties are placed in different classes and that a separate vote on the plan is held in each class (Article 381(4)); and
- a plan is adopted if it is supported by a group of affected parties in each class who together represent at least the majority of the total amount of claims belonging to parties within that class (Article 381(6)).

Recital 47 of the Directive also provides, *inter alia*, that Member States should be able to lay down rules in relation to parties who do not exercise their right to vote in the correct manner.

Article 381(2) stems from Article 4(8) of the Directive. This provision is explained specifically below.

Paragraph 1

Article 381(1) provides that the final plan must be made available to creditors and shareholders with voting rights for a reasonable period of no less than eight days before the vote. As the provision explicitly prescribes, the aim is to allow creditors and shareholders with voting rights sufficient opportunity to come to an informed opinion on the plan before the vote takes place. The point is that creditors and shareholders with voting rights must be given sufficient opportunity to study the final draft of the plan. Precisely how much time is needed will depend on the specific circumstances. It may require longer than the stated eight days.

The debtor may specify how it will inform the creditors and shareholders with voting rights. It may opt to send the plan and accompanying documents by post or electronically. It may also publish the plan and accompanying documents on a website that is accessible to creditors and shareholders with voting rights and notify them of this, electronically or otherwise.

Paragraph 2

Article 381(2) is in line with Article 4(8) of the Directive. Article 4 of the Directive provides that “Member States shall ensure that, where there is a likelihood of insolvency debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability [...]”. Article 4(8) of the Directive then allows that Member States may also decide to make the preventive restructuring frameworks available to creditors and workplace representation. If the debtor is an SME, this is subject to the condition of the debtor’s consent.

The ACP provides creditors and the works council or workplace representation set up within the debtor’s business scope to initiate preparations for a plan. To that end, they can request the appointment of a restructuring expert (Article 371(1)). Under Article 381(1), this restructuring expert can put a plan to the vote. Article 381(2) provides that if the debtor is an SME, the restructuring expert may do so only with the consent of the debtor. A parallel was drawn here with the European definition of an SME.²⁹ Where the debtor is a legal entity, the consent of the board must be obtained. Shareholders may not unreasonably prevent the board from giving its consent. This is in line with Article 12(2) of the Directive, which provides that “Member States shall also ensure that equity holders are not allowed to unreasonably prevent or create obstacles to the implementation of a restructuring plan”. If a dispute should arise, the court can be asked to give judgment (Article 378(1)(g)).

This enables the works council or the workplace representation to access the restructuring framework of the ACP. At the same time, it is provided that if the debtor is an SME, they may use it only with the consent of the debtor.

²⁹ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124 dated 20.5.2003, p. 36).

Paragraph 3

Article 381(3) provides which creditors and shareholders may vote on the plan. They are the creditors and shareholders whose rights are amended under the plan. For instance, creditors who are asked to accept a suspension of payments or a partial waiver of outstanding debts. Or shareholders who are asked to cooperate in the issue of new shares so as to realise a debt for equity swap. This will dilute their share interest and the control linked to it. Creditors and shareholders whose rights remain the same do not have voting rights. The final plan need not be presented to them.

Paragraphs 4 and 5

As touched on in paragraph 3.3 of the general part of this memorandum, there may be situations in which a party other than the legal owner has most if not all of the economic interest in a debt. Where a plan that is put into effect under the ACPP provides for a suspension of payments or partial relief for that debt, the financial consequences are borne by the beneficial owner. This is a reason for giving the beneficial owner an opportunity to vote on the plan. There are various ways of giving beneficial owners a right to vote. It can be indirect, through the legal owner. The legal owner then votes in accordance with instructions from the beneficial owner. It can also be direct, by giving the beneficial owner a direct right to vote and excluding the legal owner from the right to vote. The circumstances will dictate which is most suitable. That is the reason for the flexibility on this point in Article 381(4). The debtor may, but is not required to, invite the beneficial owner (instead of the legal owner) to the vote. If invited, the beneficial owner acquires not only a voting right but also the other rights conferred by the ACPP on creditors with voting rights, in particular the right to ask the court to refuse a request to confirm the plan (Articles 381(3) and 383(8)). The legal owner then ceases to have those rights.

A similar arrangement applies under Article 381(5), where the shareholder transfers the economic interest in a share, i.e. all of the benefits from that share, to another party (the depositary receipt holder) but retains the legal rights attaching to the share, including the right of control or voting rights.

Paragraph 6

Where the plan makes provision for class formation, Article 381(6) prescribes that there must be a separate vote on the plan in each class. Furthermore, the debtor will decide when and how the vote will take place. The vote may be cast in writing. The debtor may also decide to organise a meeting, electronically or otherwise. All that is important in that context is that the debtor complies with the relevant content of the plan, in accordance with Article 375(1)(k).

Paragraphs 7 and 8

Article 381(6) and (7) prescribe how the ballot result is determined. First and foremost, it is important that only votes actually cast are counted. Creditors or shareholders will perhaps not take the trouble to participate in the vote, particularly where their claims are small or their rights of limited value. If votes that were not cast were also included in the count, the absence of creditors or shareholders would in itself preclude the plan from confirmation. To avoid this, it is prescribed that the ballot

result will be based solely on a count of votes actually cast. It is therefore essential that Article 381(1) be applied effectively, so that creditors and shareholders with voting rights are aware of the plan and of their right to cast a vote, and precisely when and how this can be done. The court will assess whether it was applied effectively in its consideration of the request to confirm. If the debtor has fallen short of what is expected, the court will refuse to confirm the plan unless creditors and shareholders who were not properly informed confirm their acceptance of the plan (Article 384(2)(b)).

The outcome is determined not so much by the number of individual creditors or shareholders who voted in favour of the plan as by the financial interest that the votes in favour represent. A class of creditors is deemed to have accepted a plan if it is supported by a group of creditors who jointly represent at least two-thirds of the total amount of the claims of creditors who cast their votes in the class. The same rule applies to a shareholder class, except that the deciding factor in that case is whether the plan is supported by a group of shareholders who jointly represent at least two-thirds of the total amount of the issued capital belonging to the shareholders who cast their votes in that class.

Article 382

Article 382 prescribes that the debtor or the restructuring expert must draw up a report after the vote and make it available immediately to the affected creditors and shareholders.

Paragraph 1

Article 382(1) provides that the report must indicate not only the ballot result, but also which creditors and shareholders voted and whether they voted for or against the plan (Article 382(1)(a)-(c)). This information enables creditors and shareholders to verify the debtor's report of the ballot result.

Where the debtor or the restructuring expert submits a request to confirm after the vote, the creditors and shareholders who did not accept the plan can use the report to gauge whether there is value in opposing the confirmation. If they do ask the court to refuse the request to confirm, the information in the report can be used to substantiate their challenge to the confirmation.

Paragraph 2

Where the debtor submits a request to confirm, paragraph 2 prescribes that it must submit the report to the clerk of the court that will consider the request. The report will be made available there free of charge for inspection by creditors and shareholders with voting rights until the court has decided on the request to confirm.

It is in the debtor's interest to submit the report as quickly as possible. It is provided that the hearing to consider the request to confirm will be held within eight to fourteen days, not only after submission of the request to confirm but also the availability of the report on the vote for inspection (Article 383(4)).

SECTION 3 CONFIRMATION OF THE PLAN

Article 383

Article 383 provides for when a request to confirm the plan may be submitted and the timeframe within which the court will hear this request. This article also specifies the cases in which creditors and shareholders are still able to challenge the confirmation and how they can do so.

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

- Article 5(3) of the Directive provides that the “Member States shall provide for the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in negotiating (...)”. One of those cases, described in Article 5(3)(b), is a situation where the court is asked to confirm a plan that is not accepted by all classes of creditors.
- Article 10 of the Directive prescribes the minimum requirements for court confirmation of the plan in order for the plan to become binding on all affected parties. Essentially, it prescribes that:
 - a confirmation request must be dealt with efficiently so that a decision can be delivered expeditiously (Article 10(4));
 - court confirmation of the plan is in any event required if not all of the affected parties have accepted the plan and if the plan provides for new financing (Article 10(1));
 - the conditions under which a plan can be confirmed by the court must be clearly specified (Article 10(2)); and
 - it is a minimum requirement that:
 - a. the plan has been adopted (Article 10(2)(a));
 - b. the plan provides for class formation if different categories of parties are affected by the restructuring measures (Article 10(2)(b));
 - c. all affected parties have been properly notified of the plan (Article 10(2)(c));
 - d. if it is disputed, the plan satisfies the best-interest-of-creditors test (Article 10(2)(d));
 - e. any new financing must be necessary to implement the plan and does not unfairly prejudice the interests of creditors (Article 10(2)(e)).
 - The court may refuse to confirm a plan where the restructuring plan “would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business” (Article 10(3));
- Article 11(1) of the Directive provides that Member States shall ensure that a plan which is not approved by all classes may be confirmed by the court. In that context, the following minimum requirements apply:
 - the plan fulfils the above conditions of Article 10(2) and (3) of the Directive (Article 11(a));
 - during the vote:
 - a. the plan was approved by a majority of the classes, including at least one class of secured creditors or creditors who are senior to the ordinary unsecured creditors class; or

- b. the plan was approved by at least one class that consisted of creditors who would not receive payment in the event of a liquidation bankruptcy insolvency of the debtor or ensuring the viability of the business" (Article 11(3)(b));
- the creditors in dissenting classes are treated at least as favourably as any other class of the same rank and more favourable than any junior class (Article 11(3)(c)); and
- no class of creditors can receive or keep more than the full amount of its claims claim on the debtor and the plan (Article 11(3)(d)).

These conditions were inspired by two parts of the United States Chapter 11 procedure: the 'best interest of creditors' test' and the 'absolute priority rule'. It is important that Article 11(2) of the Directive allows Member States to derogate from these conditions where it is "necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties".

Where the debtor is an SME and not all classes have accepted the plan, a request to confirm the plan may be submitted to the court only with the consent of the debtor (Article 11(1)).

- Article 14 of the Directive prescribes that:
 - the plan is challenged by dissenting party on the grounds of the "best-interest-of-creditors test" or the "absolute priority rule" (Article 14(1));
 - in that context, Member States shall ensure that for the purpose of taking a decision on such a valuation, the court may appoint or hear properly qualified experts (Article 14(2)); and
 - with a view to this, dissenting parties must be able to lodge a challenge if the court is called upon to confirm the plan (Article 14(3));

Paragraphs 1 and 2

Article 383(1) provides that a request to confirm the plan may be submitted if it is clear from the vote that at least one class has accepted the plan. This class must be made up of creditors who expected to receive a cash payment in the debtor's bankruptcy. The latter requirement does not apply where a plan is only for creditors who did not expect payment in a bankruptcy.

Under Article 383(2), an extra condition applies if the request seeks confirmation of a plan that was not accepted by all classes and the debtor as an SME. In that case, the debtor's consent must be obtained to submit the request to confirm. A parallel was drawn here with the European definition of an SME.³⁰ Where the debtor is a legal entity, the consent of the board must be obtained. Shareholders may not unreasonably prevent the board from giving its consent. This is in line with Article 12(2) of the Directive, which provides that "Member States shall also ensure that equity holders are not allowed to unreasonably prevent or create obstacles to the implementation of a restructuring plan". If a dispute should arise, the court can be asked to give judgment (Article 378(1)(g)).

³⁰ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124 dated 20.5.2003, p. 36).

Article 383(1) and (2) are in line with Article 11(1) of the Directive described above.

Paragraph 3

Article 383(3) concerns the two procedures for putting a plan into effect under the ACP: (1) the confidential pre-insolvency plan procedure, and (2) the public pre-insolvency plan procedure (Article 369(6)). It must in any event be clear which plan procedure has been chosen before the court becomes involved in the plan attempt. That may come at the same time as the debtor's submission of a request to apply Article 379. Please refer to the explanation of Article 371(2) and (14) for an explanation of paragraph 2. These provisions are declared to apply (in part) *mutatis mutandis*.

Paragraphs 4-7

Paragraphs (4)-(7) provide as follows. If the debtor or restructuring expert decides to submit a request to confirm, the court will give a decision as quickly as possible scheduling a hearing to consider the confirmation. As provided in Article 383(1), a plan that is not accepted by all classes can nevertheless be confirmed by the court. However, this is subject to the condition that a restructuring expert or an observer is involved in the process. If that is not the case when the request to confirm is submitted, the court will appoint an observer. The court will do so in a decision in which it schedules the date for the hearing to consider the request to confirm. This is provided for in Article 383(4) and is in line with Article 5(3) of the Directive.

The debtor or the restructuring expert must notify creditors and shareholders with voting rights of this decision immediately. The court will verify this on its own initiative when it considers the request to confirm. Where the debtor or the restructuring expert has fallen short, the court will refuse to confirm the plan unless creditors and shareholders who were not properly informed confirm their acceptance of the plan (Article 384(2)(b)).

The hearing will in any event be held within 8 to 14 days after submission of the report on the vote and the request to confirm.

Where the debtor or the restructuring expert also wishes to take advantage of the mechanism in Article 373 to terminate an agreement unilaterally, Article 383(7) provides that the request to confirm must be accompanied by a request for leave for that termination.

Paragraphs 8 and 9

Under Article 383(8), all creditors and shareholders with voting rights may submit a request in writing before the date of the hearing asking the court to refuse the request to confirm. They can base this request on the *general* grounds for refusal or the *supplementary* grounds for refusal in Article 384(3) and (4) respectively. The main purpose of the general grounds for refusal is to safeguard pure decision-making. The aim of the supplementary grounds for refusal is to ensure that the restructuring proposal in the plan is *reasonable*.

Only creditors or shareholders who have not accepted the plan may rely on the supplementary grounds for refusal (Article 384(3) and (4)). Furthermore, Article 383(9) provides that creditors or shareholders may not invoke general or supplementary grounds for refusal if they were already aware of the applicability of such grounds but failed to raise their objections with the debtor. Hence creditors and shareholders are encouraged to report any objections to the structure of the decision-making process or the content of the plan in good time, i.e. prior to the vote. This gives the debtor the opportunity to seek a solution before the vote, whether through court intervention or otherwise (Article 378(1)). If necessary, the debtor can also implement changes and remove any obstacles to the confirmation. This will avoid continuing a process that has no prospect of success and needlessly incurring costs.

Article 384

Article 384 specifies when the court can confirm the plan or when it must refuse the request. As noted above, Article 384 and Article 385 are in line with Article 10 and Article 11 of the Directive.

Paragraphs 1 and 5

Article 384(1) provides that the court must take a decision as quickly as possible on the request to confirm and, where appropriate, the request for leave to terminate an agreement unilaterally. Absent one or more of the grounds for refusal described in paragraphs (2)-(5), the court will grant the request.

Please refer to the explanation of Article 383 for more detail on Article 384(5) concerning the granting of leave for unilateral termination of the agreement.

Paragraph 2

The court will refuse the request to confirm if one of the general grounds for refusal of Article 384(2) exists. It may do so at the request of a creditor or shareholder with voting rights. However, if it is immediately clear to the court that one of the grounds for refusal exists, it can also refuse the request to confirm on its own initiative and need not await a request to that effect from creditors and shareholders.

Most of the general grounds for refusal correspond with the grounds for refusal that currently apply in confirmation of suspensions of payment and bankruptcy plans (Article 384(2)(e), (g), (h) and (i)). Whether or not a plan can be confirmed depends largely on the support for the plan, and it is therefore crucial that the decision-making process is pure. In that context, it is in any event significant whether:

- all creditors or shareholders that are affected by the plan have been given proper notice of the plan, have had the opportunity to cast a vote and have been informed of the date of the hearing to consider the request to confirm (Article 384(2)(b) and (c));
- the information contained in the plan and the appendices is adequate (Article 384(2)(c)); and
- the creditors and shareholders are correctly subdivided into classes and whether

they are placed in the relevant class for the correct amount (Article 381(2)(c) and (d)).

The following also applies with respect to the ground for refusal referred to in Article 384(2)(e). It is provided that the court will refuse the request to confirm if performance of the plan is not adequately safeguarded. Where the plan provides for the conversion of an outstanding claim into share capital or new loans, the court will be forced to refuse the request to confirm if there are indications that conversion cannot or will not take place on the promised date. Article 384(2)(e) does not go so far that the court must inquire into whether the certainty of future performance of obligations under the loan is proposed in the plan.³¹ It is for the affected class of creditors to assess the plan and decide whether or not it can be accepted. If it is clear from the vote that the affected class of creditors supports the plan, and by extension the proposed conversion, with the required majority, the court may assume that a reasonable offer has been made.

Where the court has no reason to assume that one of the general grounds for refusal exists, and none of the creditors or shareholders has relied on the supplementary grounds for refusal to challenge confirmation, it will grant the request to confirm. The court will conduct a more in-depth assessment of the plan only if a challenge is raised (Article 384(3) and (4)).

Paragraph 3

The court may still refuse a request to confirm a plan that has been accepted by all classes of creditors and shareholders if it is shown that there are creditors and shareholders who will be significantly worse off under the plan than in bankruptcy. The court may do so at the request of one or more of these creditors or shareholders, provided they did not accept the plan. This is specified in paragraph 3.

Paragraph 4

Where not all of the classes have accepted the plan, the court will reject the request to confirm if the plan contains a restructuring proposal under which the reorganisation value that can be retained or realised under the plan is not distributed *fairly* amongst affected creditors and shareholders. For example if the distribution derogates from applicable priority rules under which creditors can enforce claims on the debtor, at the expense of the dissenting class, and the debtor:

- cannot provide a good reason for that derogation; and
- cannot demonstrate that the interests of the creditors or shareholders who raised the challenge are not affected (Article 384(4)(a)).

The restructuring proposal is also unreasonable where the class that did not accept the plan is made up of creditors who can expect a cash payment in bankruptcy and

³¹ In this context, see also the decision of 11 June 2018 in which the Court of Amsterdam followed this line in its confirmation of the plan in the bankruptcy of OI Brasil Holdings Coöperatief U.A. The decision can be found on the website where information on the bankruptcy was published: <http://oibrasilholdingscoop-administration.com/court-and-administrator/court-decisions>.

who are not offered a choice under the plan of a cash amount that is equal to the cash amount they would have expected to receive in a bankruptcy (Article 384(4)(b)).

The court can reject a request to confirm on the basis of Article 384(4) only if it receives a request to that effect from a creditor or shareholder that was placed in a class that did not accept the plan and the creditor or shareholder did not accept the plan.

Paragraphs 6 and 7

Under Article 384(6) the court may appoint an independent expert to inquire into this and produce a report, if it considers it necessary in the context of its decision. This provision is in line with Article 378(5), which provides for consulting an expert in the context of an interim court judgment. Please refer to the explanation of Article 378(5) for more detail on Article 384(6).

In addition, Article 384(7) also provides that before taking a decision, the court will hear the individual views of the debtor, the restructuring expert, if appointed, the observer, if appointed, and the creditor or shareholders and the counterparty who submitted a request to refuse the confirmation request.

Paragraph 8

Where the choice is to put the plan into effect within the public pre-insolvency procedure and the court derives its jurisdiction to hear the request to confirm from the Insolvency Regulation, the decision to confirm the plan can be a 'decision to open main insolvency proceedings' as meant in Article 5 of the Insolvency Regulation. In that case, Article 384(8) provides that the court must report this in its confirmation decision. Interested creditors who have not previously had an opportunity to express their views may then challenge this decision based on the lack of international jurisdiction. This scope for resistance is provided for in Article 384(8). Article 371(14) is also declared applicable *mutatis mutandis*. This instrument stems from Article 5(1) of the Insolvency Regulation.

SECTION 4. THE CONSEQUENCES OF CONFIRMATION

Articles 385, 386 and 387

Articles 385 to 387 inclusive define the consequences of confirming the plan. Article 385 provides that once the plan is confirmed by the court, it becomes binding on the debtor and all creditors and shareholders with voting rights. This implies that the plan is also binding on creditors and shareholders who voted against it. The identity of those creditors and shareholders can be determined easily from the list provided in accordance with Article 375(2)(b). Under Article 381(4) or (5) it is possible for a party other than the creditor or shareholder (the beneficial owner) to cast its vote on the plan. For the avoidance of doubt, Article 385 explains that the plan is nevertheless binding on the creditor or shareholder (Article 385). That is a logical effect of the instrument contained in Article 381(4) and (5).

Article 385 is in line with Article 15 of the Directive, which covers the consequences of court confirmation of the plan.

Article 386 provides that the court judgment confirming the plan creates an enforceable title. That means that non-performance or late performance by the debtor of its obligations under the plan gives creditors and shareholders with voting rights that have a claim on the debtor the right to rely directly on the judgment to compel performance.

Furthermore, the debtor is liable under Article 387 to compensate creditors and shareholders with voting rights for damage resulting from its non-compliance or late compliance with the plan. No prior notice of default is required. In such circumstances, creditors or shareholders may also have a right to cancel the plan. The plan can exclude that right, however. That would be logical where the plan contains elements that are difficult to reverse, such as a debt for equity swap in which the claims of certain creditors have already been converted into shares in the company.

Part G

Article 362 DBA is amended in part G. Given the specific nature of the insolvency procedure, this article provides that the general title for application proceedings in the Dutch Code of Civil Procedure does not apply to requests made under the Bankruptcy Act (Article 362(2) DBA). An important characteristic of insolvency law proceedings is the need for expediency. In principle, there is no room to apply the general rules of law of evidence. Because the focus of procedural law in insolvency is to expedite the legal process, the insolvency court's decision is based on whether facts and circumstances are sufficiently plausible. The insolvency court must be able to take a decision after a short and simple inquiry in which it is not bound by the general rules of law of evidence (Van der Feltz I, p. 270). Those basic premises of procedural law in insolvency are relevant and apply equally to this instrument. A special exception to the general exclusion of the general title for application proceedings in Article 362(2) DBA is made in Part G for Articles 262 and 269 DCCP in connection with the special rule for the relative competence of the court to hear requests that are based on this bill (Article 369(8)). The further exclusion of the general title for application proceedings in the Dutch Code of Civil Procedure does not otherwise change the fact that in certain circumstances the provisions under this title can be applied analogously, insofar as the special nature and the expediency required of the proceedings under this instrument do not militate against it (cf. Supreme Court, 6 June 2014, ECLI:NL:HR:2014:1338, NJ 2014/299).

ARTICLE II

Under Article 3(2) of the Court Fees (Civil Cases) Act, court fees will be charged to:

- a. the debtor for the submission of a request to confirm and for the submission of a request for leave to terminate an agreement unilaterally (Article 383(5) and (6));
- b. creditors and shareholders with voting rights for the submission of a request to reject the requests described in the preceding subparagraph (Article 383(8)); and
- c. the debtor, a creditor or shareholder with voting rights or another interested party for the submission of one of the other requests in the context of a public pre-insolvency plan procedure or a confidential pre-insolvency plan procedure.

Court fees will be charged to the debtor for the requests submitted by the restructuring expert, the works council or employees' representatives.

The requests in subparagraph (c) concern:

- the authorisation of legal acts to obtain new financing to put a plan into effect (Article 42a);
- the appointment of a restructuring expert (Article 371(1));
- the order of stay or lifting of a stay (Article 376(1));
- the removal or restriction of the debtor's right of use (Article 377(3));
- a ruling on a matter relating to the vote on the plan (Article 378(1)); and
- measures or further provisions to secure the interests of creditors or shareholders (Article 376(7) and Article 379);

Article II inserts a new Article 19a in the Court Fees (Civil Cases) Act, relating to the amounts of court fees. This provides that the court fee charged for submitting a request to confirm is the fee applicable, according to the table in the Court Fees (Civil Cases) Act, for cases concerning claims or requests that exceed €100,000. This is based on the premise that the economic interest behind such a request will also exceed that amount. For natural persons, the amount is €1,599 and for legal entities the amount is €4,030 (see the Annex to the Court Fees (Civil Cases) Act). The amount of the court fee charged to a creditor or shareholder with voting rights for the submission of a request to reject the request to confirm is determined by the amount of their claim or the nominal amount of their share.

The background economic interest cannot be established so clearly for the other requests. Therefore, the court fee charged for the submission of those requests is the fee applicable, according to the table in the Court Fees (Civil Cases) Act, for claims or requests of indeterminate value. For natural persons, the amount is €297 and for legal entities the amount is €639 (see the Annex to the Court Fees (Civil Cases) Act).

This brings the bill into line with the existing instrument for court fees based on the Court Fees (Civil Cases) Act. The new Article 19a merely clarifies how that instrument must be applied in the context of the ACPP to put a plan into effect outside bankruptcy.

ARTICLES III AND IV

Article III is the customary provision on entry into force. Article IV contains the official title.

The Minister for Legal Protection,