The act on the confirmation of out-of-court Restructuring plans [*wet homologatie onderhands akkoord*]

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1. Introduction

The Dutch act on the confirmation of out-of-court restructuring plans (the "Act" or CERP[2]) [*Wet Homologatie Onderhands Akkoord* (*WHOA*)][3] constitutes an important addition to the insolvency proceedings provided for by the Dutch Bankruptcy Act ("**DBA**") [*Faillissementswet*]. The Act is expected to enter into force on 1 January 2021. This article outlines the main features of the Act and highlights a number of points for discussion.

1.1 *Two ways of restructuring*

Broadly speaking, there are currently two ways of reorganizing an insolvent business in the Netherlands. On the one hand, the assets of the insolvent company may be sold to another (legal) entity, leaving behind the debts; this is known as an asset sale. After settlement of the applicable expenses, the proceeds from the asset sale are distributed to the debtor's creditors. The second option is a compulsory restructuring plan, pursuant to which the creditors of the insolvent entity agree to a modification of their rights, usually a reduction or possibly an exchange of debt for shares. One particular feature of this option is that not every creditor whose rights will be affected by the restructuring plan need accept it. A majority of creditors can bind a minority, although the plan must be confirmed by the court.[4]

1.2 *Increasing importance of restructuring plans*

In the Netherlands, a restructuring plan involving the modification of creditors' rights has never been the most popular option. There are several reasons for this. First, until now, only the rights of unsecured creditors could be impaired by a restructuring plan under Dutch law.[5] Preferred creditors, such as the tax authorities, employees and secured creditors, could not be affected. However, in a vast majority of cases unsecured creditors are already completely out of the money and therefore a solution requires that also rights of the preferred and/or secured creditors are extinguished or modified. Thus, in those cases, a traditional restructuring plan is of no use. Second, in the event of bankruptcy, an asset sale can be achieved much more quickly than a restructuring plan.[6] For an asset sale, the trustee generally only

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[1] This text is based on two articles that appeared in 2020 in the Dutch law journal *Ondernemingsrecht* (nrs. 2020/39 and 2020/129).

[2] CERP stand for "Act on Court Confirmation of Extrajudicial Restructuring Plans" and is the commonly used English abbreviation.

[3] The legislative history can be found in Parliamentary Documents 35 249.

[4] Only in exceptional cases can a dissenting creditor be bound by an informal extrajudicial restructuring plan. *See* HR 12-08-2005, ECLI:NL:HR:2005:AT7799 (Groenemeijer/Payroll) and HR 24 March 2017, ECLI:NL:HR:2017:495 (Mondia/curatoren V&D).

[5] Apart from the debt-restructuring scheme for natural persons, which falls outside the scope of this article.

[6] I disagree with the statement found on page 3 of the Explanatory Memorandum to the effect that "[a]s regards the restructuring options for companies, the Netherlands is lagging far behind".

needs the permission of the supervisory judge, while a restructuring plan requires the consent of a majority of the unsecured creditors, in terms of both their number and the value of their claims. Furthermore, the court must approve the restructuring plan, and its decision may be appealed. Consequently, it may take some time before the restructuring plan can be implemented.

Another important reason for the greater efficiency of asset sales is that, in the context of bankruptcy, Article 7:666 of the Dutch Civil Code largely excludes application of the provisions on the transfer of undertakings as provided for in European directive 2001/23/EC. This directive contains rules on the automatic transfer of employment agreements in case an undertaking is transferred to another legal entity, but Article 5 of the directive allows member states to provide for an exception in case of liquidation proceedings. Article 7:666 DCC enacts this exemption. It should be noted, however, that the Court of Justice of the European Union (ECJ) recently limited the scope of Article 5 of the directive in its *Smallsteps* judgment.[7] The exact implications of the judgment are disputed,[8] and the Dutch Supreme Court has submitted new preliminary questions to the ECJ in another case. Depending on the answers to these questions, it may need to be concluded that when a bankruptcy petition is filed with a view to achieving a reorganisation, the European rules on the transfer of employees do apply. In other words, in that case there is no exemption under Article 5(1) of Directive 2001/23/EC, which forms the basis for Article 7:666 DCC.[9] The government is currently preparing a legislative proposal to amend the law. It is expected that asset sales involving employees will become more complicated.

Long before *Smallsteps*, however, the minister of justice and security announced his intention to submit a legislative proposal on compulsory restructuring plans concluded outside the context of bankruptcy,[10] preliminary drafts of which were circulated for consultation in 2014 and 2017.[11] This has led ultimately to the adoption of CERP.[12] *Smallsteps* has significantly increased the importance of this new legislation, since, in many cases, an asset sale will no longer be cheaper and quicker than a restructuring plan. There is now also a European Directive (EU 2019/1023)[13] concerning (inter alia) preventive restructuring frameworks (hereinaf-

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[7] ECJ 22 June 2017, C-126/16, ECLI:EU:C:2017:489.

[8] Note by E. Loesberg in *JAR* 2017/189; note by L.G. Verburg in *JOR* 2017/217; M.R. van Zanten, 'It takes Smallsteps to pre-pack: an analysis' in: *De Curator en het personeel*, Insolad Jaarboek 2018, 15-79; L.G. Verburg, 'Smallsteps en hoe nu verder?' in: *De Curator en het personeel*, Insolad Jaarboek 2018, 119-142; S.C.J.J. Kortmann and L.J. Kortmann, 'Doorstarten post-Estro: Smallsteps vooruit of een giant leap achteruit?' in *Nijmeegs Europees privaatrecht* (Liber amicorum Sieburgh), 2018, 31-46; N.M.Q. van der Neut, 'Pre-pack is overgang van onderneming: hoe nu verder?', *TRA* 2017/88; F.M.J. Verstijlen, 'De dubbele natuur van de herstart', *TvI* 2017/21; P.R.W. Schaink, 'The judgment of the Court of Justice regarding FNV c.s./Smallsteps', *TvI* 2017/22; J. van der Pijl, *Arbeidsrecht en insolventie*, diss. 2019, 176 *et seq.*

[9] See, in particular, para. 47 of the judgment.

[10] For example, in his letter to the Second Chamber of Parliament of 27 June 2013, Parliamentary Documents 33 695, no. 1.

[11] These have been extensively commented on by various civil organisations. An important source of information is also the thesis of N.W.A. Tollenaar, *Het pre-insolventieakkoord*, 2016.

[12] The bill forms part of the "Herijking Faillissementswet" programme.

[13] The Directive entered into force on 16 July 2019.

ter the "Directive") which obliges the Member States to adopt legislation on preventive restructuring plans and lays down rules for such plans.[14] CERP is in keeping with the Directive.[15] The CERP plan is a preventive restructuring plan.

1.3 *Early action*

The Directive[16] emphasises the importance of early intervention, in other words the promotion of measures, such as a restructuring plan, when "insolvency is impending".[17] The idea is that forcing businesses, to a greater or lesser extent, to take action at an early stage could prevent actual insolvency proceedings. Hence the emphasis on restructuring plans concluded before the opening of insolvency proceedings, such as bankruptcy. However, the Directive's premise is questionable. The fact that many insolvency lawyers and trustees in bankruptcy, who are only brought in when things have taken a turn for the worse, believe that more value could have been maintained had they been involved earlier, is not decisive in this regard. After all, for every case in which efforts ultimately failed and these specialists are called in, there may be others in which the business was saved by keeping competitors and counterparties in the dark and hoping for better days. While I am not convinced that early intervention will always yield the best solution, this does not mean the Directive is not useful. Anyway, as mentioned above, since the Directive orders the adoption of national legislation on preventive restructuring plans, the usefulness of and need for such arrangements is no longer an issue.

2. Key features of restructuring plans under CERP

A key feature of restructuring plans under CERP is that they can be binding on all creditors and shareholders. Preferred and secured creditors can thus be forced to adhere to the plan. This is an important break with the pre-existing rules on restructuring plans in the Bankruptcy Act.[18] However, while the Directive allows Member States to restrict or modify employee rights under a restructuring plan, CERP excludes this possibility.[19] Consequently, employee rights cannot be changed by means of an CERP restructuring plan. Nevertheless, in some cases, employee representatives may have a right to be consulted regarding the restructuring plan, pursuant to Article 25 of the Works Council Act.[20] Moreover, an CERP plan can be accompanied by a separate reorganisation of staff. Another feature of CERP is that it distinguishes between public and private plan proceedings. In the case of private plan proceedings, it is possible that creditors whose rights will not be impaired by the plan, remain uninformed.

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[14] Articles 5-18 of the Directive.
[15] Regarding the somewhat ambivalent relationship between the Directive and CERP, see the discussion below on whether CERP plans are available in the context of a suspension of payments.
[16] See Recital 22 to the Directive.
[17] In this sense, *see also* Tollenaar, "Het wetsvoorstel Homologatie Onderhandsakkoord onder de loep genomen, *" TvI* 2019, pp. 223 and 226-227. More critical comments, particularly regarding the lack of a standard, are given by M.L.H. Reumers, 'The Business Rescue Craze in European Insolvency Law', *Ondernemingsrecht* 2017/95.
[18] The restructuring plan under the debt-restructuring scheme may relate to preferred debts. *See* Articles 299, 329 (1) and 332 (3) DBA.
[19] Article 369(4) DBA; *see also* Explanatory Memorandum, 9.
[20] *See also* Article 375(1)(l) DBA.

The concept of a plan which is binding upon creditors with different rankings was developed in the United States and was laid down in Chapter 11 of the US Bankruptcy Code. The Dutch legislature indeed took over many aspects of the American restructuring plan. An important feature of a Chapter 11 plan is that if one or more classes[21] of creditors reject the plan,[22] it can still be confirmed by the court, thus overruling the dissenting class. This situation is referred to as a cramdown. However, an important distinction between CERP and Chapter 11 plans is that the latter are available only in insolvency proceedings in which all creditors participate and in which a high degree of transparency is sought. The US Bankruptcy Code does not provide for the possibility of preventive restructuring plans or partial private plans. This possibility exists in the UK, however, where a plan can be offered to only some creditors (for example, secured creditors) outside of bankruptcy. Such a "scheme of arrangement" must be accepted by a majority of the relevant class of creditors[23] and confirmed by the court. Until recently, under a UK scheme of arrangement, it was not possible to cram down a dissenting class. In this way, CERP combines aspects of both the US and UK systems,[24] albeit the structure of CERP plans more closely resembles the American system.

3. Scope of application

The CERP provisions have been incorporated into the Bankruptcy Act, primarily in Title IV, Section 2. It should be noted that natural persons who do not conduct an independent profession or business as well as banks and insurance companies are excluded from the scope of application,[25] in accordance with Article 1(2) of the Directive. Thus, CERP concerns only entrepreneurs and legal entities that are not banks or insurers. Incidentally, the same criterion applies to the opening of suspension of payments proceedings, provided for by Article 214(4) DBA. Article 370(1) DBA sets out the substantive criterion for an CERP plan. If it is reasonably likely that the debtor will be unable to continue to pay its debts, the debtor can propose an CERP restructuring plan. Here, too, alignment has been sought with the suspension of payments provisions found in Article 214(1) DBA. This situation is referred to hereafter as a *state of impending insolvency*.[26] Whether this criterion is met will not always be assessed when the debtor proposes a restructuring plan, as no assessment by the court takes place on this occasion. On the other hand, an assessment is always performed when confirmation of the restructuring plan is sought (Article

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[21] Creditors with different positions are placed in different classes. Each class affected by the plan votes separately on it; a class that is fully deprived of its rights does not vote and is deemed to have rejected the plan.

[22] The class is deemed to accept the plan if the holders of a majority of the claims in terms of number and a qualified majority of 2/3 of the value of the claims vote in favour of it. If one of these two criteria is not met, the class is deemed to have rejected the plan. Creditors who do not appear are not counted.

[23] A majority in number and representing 75% in terms of value.

[24] *See also* the Explanatory Memorandum, 4.

[25] Article 369(1) DBA

[26] Article 4(1) of the Directive requires that Member States ensure that debtors have access to a preventive restructuring framework if there is a likelihood of insolvency. However, the Directive does not define insolvency or the likelihood of insolvency. Therefore, "likelihood of insolvency" could include the situation in which debts that are due and payable can still be paid from current income, but shareholder equity is negative. The debtor is then in a situation in which it is plausible that it will not be able to continue to pay its debts. Thus interpreted, CERP provides for a situation of impending insolvency.

384(2)(a) DBA) and may in some cases take place earlier.[27]

Article 369(6) DBA provides that a restructuring plan may be offered in the context of either a private or public procedure outside bankruptcy. The private procedure is primarily intended for cases in which only a (small) portion of the creditors is involved and the plan is developed in "relative peace".[28] Article 369(6) DBA raises the question of whether an CERP plan can also be offered during suspension of payments proceedings. This possibility is not suggested in the Explanatory Memorandum, but the Explanatory Memorandum does not exclude that possibility either. However, it can be[29] inferred from a letter from the minister of justice and security dated 27 August 2019 that this was not the intention. The letter states that it is the intention to implement the pre-insolvency restructuring plan procedure provided for by the Directive, by aligning the rules on suspension of payments with the Directive. Thus this letter suggests that a separate plan procedure will be proposed, which can be applied in suspension of payments. Nonetheless, the *Supplementary Report in Response to the Opinion of the Council of State*[30] points out that it is CERP which constitutes an implementation of the Directive's provisions on restructuring plans. Next, CERP does not contain any provisions on the position of the trustee in the context of a suspension of payments. However the Directive does not prevent the application of its provisions to a suspension of payments. [31] In my opinion, the most important argument is provided by Article 369(6) DBA, which restricts the application of CERP plans to cases "outside bankruptcy," but not excluding the application of CERP in cases of suspension of payments. Indeed, the availability of such plans for a suspension of payments would be particularly useful, as the current suspension of payments procedure entertains a much more limited restructuring arrangement, and it is undesirable to have more far-reaching restructuring possibilities available outside insolvency proceedings such as suspension of payments proceedings than within the context of those. Incidentally, CERP includes a number of provisions relating to concurrence with suspension of payments proceedings. For instance, if an application for suspension of payments proceedings and an application for the appointment of a restructuring expert (see below) are pending at the same time, the application for the appointment of an expert will be dealt with first and no (provisional) suspension of payments will be granted for the time being (Article 215(3) DBA).[32] In addition, an application for a suspension of payments will be suspended during a moratorium provided for by CERP (Article 376(2)(c) DBA). It should be noted that if the CERP provisions are applied during a suspension of payments, an even stronger instrument of reorganization

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[27] Articles 371(3) and 378(1)(e) DBA.
[28] Explanatory Memorandum, p.31.
[29] Parliamentary Documents 33 695, no. 18.
[30] Parliamentary Documents 35 249, no. 4.
[31] M.R. Schreurs, 'Implementatie van de Herstructureringsrichtlijn: wellicht beter in de surseance dan in de WHOA?', *TvI* 2019 /33, pp. 244-256.
[32] In my opinion, this is a rather theoretical issue since, pursuant to Article 4(8) of the Directive, a restructuring expert may only be appointed without the debtor's consent in the case of a large business. If a provisional suspension of payments has already been granted and a request for a definitive suspension of payments is pending, the question arises as to whether the request can still be granted. Furthermore, the wording of the article is unclear on the question of whether, after the request to appoint a restructuring expert has been granted or rejected, a provisional suspension of payments can still be granted.

would emerge if the statutory rules with respect to those proceedings were changed by adopting the rules that apply to dismissals in bankruptcy proceedings.

4. Jurisdiction

The question of whether CERP proceedings are private or public is relevant when it comes to determining the jurisdiction of the Dutch court. It follows from Article 369(7) DBA that, in the event of public CERP proceedings, the rules of jurisdiction in the European Insolvency Regulation[33] ("**EIR**") apply.[34] This means that the Dutch court has jurisdiction if the debtor's centre of main interests is located in the Netherlands. The intention is for public CERP proceedings to be included in Annex A to the EIR,[35] which means that the CERP plan will be recognised in other Member States on the basis of Article 32(1) EIR. If the centre of main interests of the debtor is located elsewhere in the European Union but the debtor has an establishment, within the meaning of Article 2(10) EIR, in the Netherlands, the Dutch court also has jurisdiction under the EIR.[36] In that case, however, the Dutch proceedings are limited to assets located in the Netherlands. If the debtor's centre of main interests is not located in the European Union, the EIR does not apply. In that case, the Dutch court may have jurisdiction on the basis of Article 3 of the Dutch Code of Civil Procedure (sufficient connection to the Netherlands). In this case, the EIR does not provide a basis for recognition of the plan in other EU Member States, but recognition may be granted by Member States' national law. The EIR does not apply to private proceedings.[37] In this case, the relevant provisions on jurisdiction are found in Article 3 of the Dutch Code of Civil Procedure. Plans adopted in private proceedings are therefore not eligible for recognition under Article 32(1) EIR but may be eligible pursuant to the national law of the relevant Member State. The absence of EU-wide effect for plans adopted in private proceedings could be a reason to opt for public proceedings.[38]

Article 369(8) DBA offers the possibility to bring CERP proceedings for group companies before a single court. This makes it easier to conduct parallel plan proceedings for group companies where the restructuring plans are interdependent. The Explanatory Memorandum clarifies that it is not necessary to establish for each legal entity that the Dutch court has jurisdiction. This provision thus appears to create international jurisdiction.[39] For public proceedings that fall under the EIR, this is not possible, as the EIR contains its own international jurisdiction rule. If the

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[33] Regulation (EU) No 2015/848.
[34] *See also* P.M. Veder, "Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement", *FIP* 2019/6, 53-62; W.J.E. Nijnens, "International Private Law aspects of the WHOA", *TvI* 2019/34, 257-267.
[35] Explanatory Memorandum, 6.32.
[36] Article 3(2) EIR; *see also* Article 371 (114) DBA.
[37] Article 1(1) EIR limits the scope of application of the EIR to public procedures. The Brussels I Regulation does not apply in that case either, as Article 1(2)(b) excludes restructuring plans from the scope of that Regulation; *see* Veder, *FIP* 2019/6; Nijnens, *TvI* 2019/4, 264-265.
[38] It is not possible to switch from the private to the public procedure (Explanatory Memorandum, pp 7 and 32).
[39] See note 36 to the Explanatory Memorandum; *see also* R. van den Sigtenhorst, "A hair in the WHOA soup? An exploration of the jurisdictional entrances to the WHOA, how the Gibbs Rule detracts from the effectiveness of the WHOA and possible solutions', *TvI* 2019/35, 268-276: 271 and Veder, *FIP* 2019 /6.

EIR does not apply to a foreign company and a substantial portion of the group consists of companies with their registered office in the Netherlands, the foreign debtor's case could be deemed sufficiently connected with the the Netherlands, within the meaning of Article 3 (c) of the Dutch Code of Civil Procedure,[40] so that it will not be necessary to rely on Article 369(8).

As soon as the debtor starts preparing a restructuring plan, it may file a statement to this effect with the court's registry.[41] The main consequence of such a statement is that another party can rely on set-off in good faith if set-off is made in the context of financing the continuation of the business and does not serve to limit the financing.[42] Moreover, from that point on, the court can issue an order making a new transaction avoidance-proof.[43] For a public plan, the statement must be filed with the Central Insolvency Register as soon as the court issues its first decision in CERP proceedings.[44] The intention is for public proceedings to be registered with the Trade Register as well.[45]

5. The restructuring expert

Under current law, only the debtor can propose a restructuring plan to its creditors. In some cases, however, the management is not prepared to do so, for example because it - wrongly - believes it will be able to turn the company around without a restructuring plan. The question is then whether creditors should be able to propose a restructuring plan. The main argument against this possibility is that it can be used by creditors to exert inappropriate pressure. For this reason, restrictions have been included in many systems. In the United States, for example, both the debtor and creditors may propose a restructuring plan, but only the debtor can do so for a certain period of time after the opening of Chapter 11 proceedings.[46] Under CERP, there is a very limited possibility to conclude a restructuring plan without involving the debtor. It should be noted, however, that this possibility only exists if the debtor or the group to which it belongs is not an SME. Consequently, this possibility is only relevant for a small percentage of Dutch companies.[47] Furthermore, a sieve has been created by not providing the creditors with the right to propose a restructuring plan, but to merely give them the right to petition the court to appoint a "restructuring expert" who can then offer a restructuring plan to the creditors and shareholders (Article 371(1) DBA). This right may also be exercised by sharehold-

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[40] *See* Explanatory Memorandum, 32.
[41] Article 370 (3) DBA.
[42] Article 54(3) DBA. This provision serves to enable the debtor to continue using a current account facility during the preparatory process (Explanatory Memorandum, 22 and 28).
[43] Article 42(a) DBA. It would have been consistent to make the same exception for the "ordinary" avoidance rules in Article 3:45 DCC which can be invoked by individual creditors if no bankruptcy proceedings are pending.
[44] Article 370(4) DBA.
[45] Explanatory Memorandum, pp. 6 and 31.
[46] Tollenaar argues that creditors and shareholders as well as the debtor should be able to propose a plan (diss. 2016, pp 248-250 and 340-341).
[47] SMEs are companies employing fewer than 250 people and whose annual turnover for the preceding financial year did not exceed €50 million or whose balance sheet total at the end of the preceding financial year did not exceed €43 million. *See* Article 381(2) DBA.

ers and the works council or employee representative body. If (i) a restructuring expert has been appointed at the request of one or more creditors, the works council or the employee representative body and (ii) the group to which the debtor belongs constitutes an SME, the restructuring expert can only propose a restructuring plan with the debtor's consent.[48] Moreover, Article 4(8) of the Directive prescribes that if the debtor is an SME, a preventive restructuring framework is only available with its consent.[49] This means that, in the case of an SME, a restructuring expert can be appointed at the request of a creditor, the works council or the employee representative body under Article 371(1) DBA only if the debtor agrees.[50] This consent requirement has not been included in CERP. No explanation for this can be found in the Explanatory Memorandum, and it is plausible that the Ministry overlooked this point. Interpretation in accordance with the Directive entails compliance with Article 4(8) thereof.[51] If the appointment of an expert is requested by a creditor, the works council or the employee representative body (either for a large enterprise or – for SMEs – with the debtor's consent), the court will examine whether the debtor is in a state of impending insolvency. The court will reject the request if it appears *prima facie* that the appointment of an expert would not serve the interests of the mutual creditors (see Article 371(3) DBA) but grant the request if (i) it is supported by a majority of the creditors and (ii) the court has jurisdiction.[52] In that case, the creditors will bear the costs, pursuant to Article 5(3)(c) of the Directive as implemented by Article 371(10) DBA.[53] The debtor can also submit a request for the appointment of a restructuring expert. In that case, the court will automatically grant the request if it has jurisdiction. This situation is comparable to that in which the debtor files a request for a suspension of payments, which will be granted by the court provisionally.[54] In view of the foregoing, it seems that the right of creditors and employees to request the appointment of a restructuring expert does not amount to much.[55] However, creditors can exert pressure on the debtor to make such a request, and the credit documentation may stipulate that the debtor is obliged to do so under certain circumstances at the request of the creditors concerned.

N.W.A. Tollenaar has repeatedly argued in favour of allowing creditors to propose a restructuring plan.[56] As such a proposal must now be made through the restruc-

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[48] Article 381(2) DBA. Pursuant to Article 11(1)(b) of the Directive, the debtor's consent is also required if there are one or more classes which do not accept the plan (Article 383(2) DBA),.

[49] The Directive (Recital 29) states that where the debtor is an SME, Member States must make commencement of the procedure contingent on debtor consent.

[50] According to Schreurs, 2019, note 46, the Directive largely assumes minimum harmonisation. However, he believes that it does not follow from the Directive that the debtor's consent is required when a restructuring expert is appointed.

[51] In addition, the appointment of a restructuring expert without the consent of the SME debtor makes little sense, as the debtor's consent is in any case required to propose a restructuring plan.

[52] Article 5(3)(c) of the Directive.

[53] The intention is that, if a majority of the creditors are in favour of the appointment of a restructuring expert, the court will be obliged to appoint one, *provided* the creditors are prepared to bear the costs. Article 5(3)(c) of the Directive expresses this more clearly than CERP.

[54] No substantive assessment will be performed when a suspension of payments is provisionally granted.

[55] In the case of large companies, the complexity of the company could prove to be an obstacle.

[56] Diss. 2016 2.7.1; *TvI* 2019, p. 218, in particular pp. 223-4 and 226.

turing expert, he is not happy with the requirement that an SME debtor has to consent to the plan. The same will apply to the requirement that the SME debtor has to consent to the appointment of the restructuring expert. Tollenaar therefore argues that if the Directive would be implemented through amendment of the suspension of payments provisions, CERP plans would not have to meet the requirements of the Directive and the heightened protection afforded SME debtors under the Directive could thus be avoided. This conclusion seems incorrect to me. Indeed, the Directive prescribes not only that the Member States introduce pre-insolvency proceedings but also the conditions that such proceedings must meet. According to Recital 12 to the Directive, for example, the intention is "to establish essential minimum requirements for preventive restructuring procedures."[57] Therefore, it does not appear possible to circumvent the requirement of SME debtor consent to a proposed restructuring plan, as desired by Tollenaar.[58]

If a restructuring expert is appointed, the expert can exercise virtually all powers that would otherwise be wielded by the debtor, including the offering of a restructuring plan. The initial draft provided that when an expert was appointed, the debtor could no longer propose a restructuring plan. However, in the amendment of 11 December 2019,[59] the possibility for the debtor to propose a plan either directly or through the restructuring expert was introduced. This means that two restructuring plans can, theoretically, be submitted at the same time, one by the restructuring expert and another by the debtor (possibly through the restructuring expert). In my opinion, this is not a desirable outcome.[60] However, in practice, there are unlikely to be many cases with multiple plans given that if the restructuring expert is not appointed at the debtor's request and the debtor is an SME, the restructuring expert can only propose a restructuring plan with the debtor's consent. The remainder of this article is based on the assumption that the restructuring plan is proposed by the debtor.

The possibility of shareholder obstruction is addressed in Article 370(5) DBA. This provision aims to prevent the debtor's shareholders from hindering the functioning of the management board in the context of CERP proceedings. For further discussion on the position of shareholders, please see the article by S.C.E.F. Moulen Janssen in *Ondernemingsrecht*.[61]

6. Provisional measures

6.1 *Amendment and termination of agreements*

[57] *See also* Recitals 15 and 42 to the Directive.
[58] *See* in this respect N.W.A. Tollenaar, *TvI* 2019, p. 218.
[59] Parliamentary History 35 249, no. 7.
[60] The insertion became necessary when it became clear that in the initial draft it had been overlooked that Article 9(1) of the Directive provides that the debtor itself can always submit a restructuring plan. The Directive does not require that the restructuring expert can propose a plan, but it leaves open that possibility (Article 9(1) Directive). The Directive only prescribes that the restructuring expert may assist the debtor in the negotiation and drafting of a plan (Article 5(3) of the Directive).
[61] S.C.E.F. Moulen Janssen, 'Het dwangakkoord buiten faillissement onder de WHOA en de aandeelhouder. Onder druk worden vennootschappelijke verhoudingen vloeibaar?' *Ondernemingsrecht* 2019/147.

The debtor may propose to its co-contracting parties the amendment or termination of agreements. If the other party does not agree, the debtor may terminate the agreement prematurely, provided a restructuring plan has been proposed. Moreover, such termination of an agreement is subject to judicial consent, upon confirmation of the plan. The court will not allow termination if the debtor is not in a state of impending insolvency[62] but, in that case, the plan cannot be confirmed anyway. The court may extend the notice period set by the debtor by up to three months from the time of confirmation.[63] After termination, the other party may claim damages (Article 373(2) DBA), but this right can be limited or cancelled in the plan.[64] This is a very effective means of limiting the debtor's liabilities.[65] The termination provisions do not apply to employment contracts, which fall outside the scope of CERP proceedings.[66] Article 373(3) DBA provides that the preparation and proposal of a restructuring plan and related measures cannot constitute grounds for suspension or termination of an agreement by the other contracting party or for the modification of its obligations.

6.2 *Bespoke provisions*

The court may, at the request of the debtor or the restructuring expert or *ex officio,* impose provisions and arrangements it deems necessary to secure the interests of the creditors or the shareholders.[67] An example would be the appointment of an observer to oversee negotiation of the restructuring plan.[68] If the observer is of the opinion that there is a problem, (s)he will inform the court, which may then order the necessary measures, such as the appointment of a restructuring expert.[69] In my opinion, the possibility to appoint an observer is important as the debtor retains full disposal of its assets.[70] In particular, if creditors are deprived of their individual recovery rights by the grant of a stay (discussed below), supervision is essential. The duties of the observer should not be limited to overseeing negotiations for the restructuring plan and should extend to supervision of the debtor's assets and acts performed by the debtor. It is not the intention for a restructuring expert and an observer to be active at the same time.[71]

6.3 *Stay*

Pending the preparation of and vote on the restructuring plan, the debtor may petition the court to grant a stay for a period of no more than four months.[72] During this time, third parties may enforce their rights of recourse against the debtor's as-

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[62] Article 384(5) DBA. *See also* Explanatory Memorandum, p.45.
[63] Article 373(1) DBA.
[64] In that case, the other party is a creditor with voting rights (see Explanatory Memorandum, pp. 45-46).
[65] In the United States, there is a somewhat similar arrangement for executory contracts, which contributes to the popularity of Chapter 11 proceedings.
[66] Article 369(4) DBA.
[67] This provision is derived from Article 225 DBA (suspension of payment rules), albeit the interests of shareholders are not mentioned in Article 225 DBA
[68] *See* Article 380(1) DBA. Article 391(2) DBA does not mention the restructuring expert appointed *ex officio*.
[69] It might be that after such appointment a restructuring expert can offer a plan without the consent of the SME debtor.
[70] Article 5(1) of the Directive also prescribes that the debtor remains a debtor-in-possession.
[71] Explanatory Memorandum, p. 59.
[72] Article 376 (1) DBA.

sets and take possession of assets under the debtor's control only with judicial authorisation.[73] This provision is borrowed from the bankruptcy and suspension of payments legislation.[74] Attachments may be lifted by the court at the debtor's request. Any pending petitions from creditors for opening bankruptcy proceedings will be suspended. The same applies to applications by the debtor for a suspension of payments or the opening of bankruptcy proceedings, which will only arise if a restructuring expert has been appointed and requests the stay. Article 376(4) DBA sets out the criteria that must be met to grant the request for a stay. The stay may relate to either all third parties (a general stay) or only certain third parties.[75] It may be extended but may not exceed eight months in total.[76] The court may also take the measures referred to in Article 379 DBA (the bespoke provisions discussed above) and, when granting a general stay, appoint an observer, as referred to in Article 380 DBA (Article 376(7) DBA).[77] The debtor's co-contracting parties may request the provision of security as a condition for the performance of their obligations.[78] If, prior to announcement of the stay, the debtor was authorised to use or dispose of assets or collect receivables, it can continue to do so during the stay but must sufficiently safeguard the interests of the other parties involved. The court may terminate this authority if the debtor fails to sufficiently safeguard these interests.[79]

7. Proposal of and vote on the plan

Creditors and shareholders whose rights are affected by the restructuring plan are entitled to vote on it.[80] Other creditors and shareholders are not, even in the case of a public plan. If the creditors have different rights, a fundamental aspect of the plan will be the division of creditors into classes. The idea behind this classification is that, in the event of diverging rights or interests, a majority should not be able to bind a minority. However, if the rights are similar, the majority is deemed able to determine the interests of those creditors, provided it has been adequately informed of the debtor's situation and the consequences of the restructuring plan. If one or

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[73] Article 376(2)(a) DBA adds "provided these third parties have been informed of the announcement of the stay or are aware of the fact that a plan is being prepared." If a third party that is unaware of the stay takes recourse against the debtor's assets, this provision can prevent the enforcement being deemed invalid. The stay is not limited to creditors participating in the plan (Explanatory Memorandum, 53).

[74] Articles 63a(1) and 241a(1) DBA.

[75] Article 376(8) in conjunction with Article 241a(2) DBA. The Directive also provides that a suspension of enforcement measures may either be general and cover all creditors or limited and cover only one or more individual creditors or categories of creditors (Article 6(3)) of the Directive.

[76] Article 376(5) DBA.

[77] Article 5(3)(a) of the Directive provides that if a general suspension is announced, the court may, if necessary, appoint a restructuring expert. The reference to the general stay in Article 376(7) DBA appears to be based on this provision. The observer can be regarded as a type of restructuring expert within the meaning of the Directive. *See also* the *Supplementary Report in Response to the Opinion of the Council of State* (Parliamentary Documents 35249, no. 4).

[78] Article 373(4) DBA.

[79] Article 377 DBA

[80] Article 381(3) DBA. Such a change may, for example, consist of a full or partial waiver, a change in the substance of the debtor's obligations or a replacement of the debt with a shareholder's interest. The question is whether dilution of the shareholders, due to the issuance of shares to creditors, results in a change in their rights, so that they are entitled to vote on the change. According to the Explanatory Memorandum (page 62), they must be allowed to vote.

more classes reject the plan, the court will have to balance the interests of the classes voting in favour and those voting against. In the United States, a sophisticated system of criteria has been developed (and is still evolving) which can be used to determine the circumstances under which a cramdown of dissenting classes will be allowed. To a certain extent, this system has been adopted in the Directive and CERP.

7.1 *Classification*

Article 374(1) DBA provides that creditors and shareholders whose rights are modified and who are therefore entitled to vote on the plan shall be placed in different classes if their rights in the event of liquidation of the debtor's assets or under the restructuring plan are so different that they cannot be considered similarly situated. By comparison, §1122(a) of the US Bankruptcy Code provides that a claim or interest (such as a shareholder right) may only be placed in a certain class *"if such claim or interest is substantially similar to the other claims or interests of such class*." This means that if the rights of creditors differ, they must be categorised in different classes. The question as to whether creditors with the same or similar rights may be placed in different classes is a separate one. There is substantial case law on this topic in the United States. The common denominator that can be derived from this case law is probably that if the economic interests of creditors differ substantially, they may be placed in different classes, even if their rights are similar.[81] As indicated above, Article 374(1) DBA prescribes the classification of creditors and/or shareholders into different classes if their rights vis-à-vis the debtor differ but, like US law, this provision allows a more differentiated classification to be made, based on other factors.[82] For example, a distinction can be made between creditors depending on whether they have recourse against third parties or group companies. The interests of, for example, trade creditors and financial creditors can also differ substantially, even if their rights do not. The Directive uses "*sufficient commonality of interest based on verifiable criteria*" as a criterion to place creditors in the same class.[83]

Small creditors with claims relating to goods or services supplied to the debtor or whose claims are based on an unlawful act shall be placed in one or more separate classes if they are not offered a cash distribution under the plan amounting to at least 20% of their claim or a right with a value of at least 20% of their claim. Such creditors enjoy special protection and, if the offer made to them does not meet the aforementioned threshold, the plan must be accompanied by a statement explaining a compelling ground for the lower offer. If this class rejects the plan, the plan can only be approved if the court finds the compelling ground to be adequate. Article 9(4) of the Directive provides that the Member States must take appropriate

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[81] *See* Tabb, 2016, pp. 1104-1109.
[82] Explanatory Memorandum, p. 49.
[83] *See* Article 9(4) of the Directive. However, the Directive (Recitals 44 and 46) also indicates that this is primarily about classification based on the rights and order of priority of creditors. Article 374 DBA must be interpreted against this background. In this respect, *see also* A. Bouts and M.A. Brothers, 'Indeling in klassen: de basis en legitimatie van het akkoord', *FIP* 2019/6, pp. 22-29.

measures to ensure that the classes are formed in such a way that, in particular, vulnerable creditors, such as small suppliers, are protected. In my opinion, the above-mentioned rules on small creditors ensure, for the most part, compliance with this provision, even though they relate only to small suppliers of goods and services and not to vulnerable customers that paid in advance.

The claims of pledge and mortgage holders that are not fully covered will be split. To the extent the value of the security is lower than the claim, the claim will be split off and classified as non-preferred. The value of the security will be determined by the proceeds thereof expected to be realised in bankruptcy.[84]

The division into classes is performed by the debtor and does not form part of the plan itself. However, if the classification does not meet the requirements of Article 374 DBA, the court must refuse to confirm the plan, unless the defect could not reasonably have led to a different voting outcome (Article 384(2)(c) DBA).

Unlike in the context of a suspension of payments or bankruptcy, the deliberations and vote on the restructuring plan do not take place before the court or the supervisory judge. Rather votes are cast at a meeting, which may be a physical meeting or one held by electronic means of communication or in writing.[85]

7.2 *Provision of information*
Article 375(1) DBA provides that the restructuring plan must contain all information needed by those creditors and shareholders entitled to vote in order to form an opinion on the plan. This provision also contains a non-exhaustive list of items of information which the plan must contain, such as the division of creditors and shareholders into classes, the financial consequences of the restructuring plan for each class and the proceeds expected to be realised in the event of liquidation in bankruptcy. In addition, other information must be appended to the plan, such as lists of creditors and shareholders allowed to vote and, if applicable, a description of creditors or shareholders not covered by the plan. Again, if the plan and the documents appended thereto do not contain all required information, the court will refuse to confirm it, unless the deficiency could not reasonably have led to a different voting outcome.

7.3 *Early judicial decisions*
If, after the vote, at the confirmation stage, the court finds, for example, that the requirements for a division of creditors into classes were not met or that the prescribed information was not provided and therefore refuses confirmation, the plan will fail. If the plan fails at this stage, the debtor cannot propose a new plan for a period of three years (Article 369(5) DBA). For this reason, Article 378(1) DBA provides that, before the plan is put to a vote, the debtor may petition the court to rule on certain relevant issues. In this way, the debtor can obtain decisions on, for instance, the classification of creditors and/or shareholders, the question of whether

[84] Article 374(3) DBA. This provision was inserted by way of an amendment.
[85] Article 381(6) DBA.

a creditor or shareholder should be allowed to vote (in the case of a disputed claim), whether the information provided is sufficient, and whether there are grounds to refuse approval if one or more classes reject the plan (in other words, whether cramdown is possible). Creditors do not have this right, meaning they cannot delay the proceedings by submitting questions to the court prior to the vote.[86] However, Article 383(9) DBA provides that a creditor or shareholder can only petition the court to refuse to confirm the plan if it submitted an objection to the debtor within a reasonable period of time after it discovered or reasonably should have discovered the ground justifying the refusal of confirmation. The idea is to ensure that the debtor is informed of objections in good time so that it can submit disputed issues to the court pursuant to Article 378(1) DBA.[87] It should be noted that a decision on a petition submitted pursuant to Article 378 is only binding on those shareholders and creditors that have been given an opportunity to be heard by the court.

As the Explanatory Memorandum indicates,[88] there are no restrictions on the types of issues that can be submitted to the court pursuant to Article 378(1) DBA. An article written by Vriesendorp and Van Kesteren,[89] which considers CERP from the court's perspective, does not contain any suggestion that the court is entitled to refuse to take a decision on an issue submitted to it and it seems to me that the court is indeed not allowed to do so (Article 26 Code of Civil Procedure). In this regard, two types of problems can arise. First, as a consequence of the open system created by Article 378(1) DBA it is possible that questions are submitted to the court which the latter cannot properly answer at an early stage. For example, it may be difficult to render an opinion on the reasonableness of a cramdown if it is not yet known which classes will reject the plan and how large the group of dissenting creditors or shareholders will be. Second, problems may arise with regard to the binding effect of the Article 378(1) judgment if shareholders or creditors not heard on the occasion of that preliminary decision subsequently oppose confirmation of the plan on grounds on which a decision has already been rendered. These creditors or shareholders are not bound by the earlier decision.[90] Moreover, the question arises as to which extent creditors against which the court ruled in a preliminary decision can join other creditors to oppose confirmation. It would therefore have been preferable to have allowed the courts to postpone ruling on petitions submitted pursuant to Article 378 DBA until the confirmation stage, if the issue still exists at that time.

In the context of bankruptcy or a suspension of payments, the restructuring plan cannot result in a release for the benefit of guarantors or third-party security providers (Articles 160 and 272(6) DBA). However, CERP provides some relief for third parties (Article 372 DBA). The plan may provide for a modification of creditors' rights vis-à-vis the debtor's group companies, if (i) it can reasonably be foreseen that the latter will be unable to continue paying their debts and (ii) the court

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[86] Explanatory Memorandum, pp. 19 and 57. If the debtor refuses to submit a question to the court, creditors may petition the court to appoint a restructuring expert to take over the process.
[87] Explanatory Memorandum, pp. 16, 57 and 67.
[88] Explanatory Memorandum, p. 57.
[89] R.D. Vriesendorp and W. Van Kesteren, 'De WHOA en de rechter: een leidraad', *TvI* 2019/36, pp. 277-300.
[90] Article 378 (8) DBA.

would also have jurisdiction over them if CERP proceedings were filed for.

Each class of creditors and shareholders votes on the plan. A class of creditors shall be deemed to have accepted the plan if creditors representing two thirds of the total amount of the claims in that class vote in favour of the plan.[91] Absenteeism therefore does not affect acceptance of the restructuring plan.[92]

If a restructuring plan is rejected by all classes or if the court refuses to confirm the plan, the debtor cannot propose a new CERP plan for a period of three years.[93] A new plan can, however, be proposed by a restructuring expert, but the court must first decide whether such an expert should be appointed. Equally in the context of a suspension of payments or bankruptcy, no new restructuring plan can be proposed in the event the restructuring plan is rejected by the creditors or confirmation is refused. This "one shot"-rule is intended to ensure efficient and effective negotiations as both the debtor and creditors have an interest in ensuring that the plan is properly negotiated the first time around.

8. Confirmation of the restructuring plan

Once the restructuring plan has been voted upon, the debtor may petition the court to confirm it. If all classes accepted the plan, the court will confirm it unless one of the grounds set out in Article 384(2) and (3) DBA applies or if the court lacks jurisdiction.[94] Pursuant to Article 384(2), the court assesses *ex officio* whether (i) the debtor is in a state of impending insolvency, (ii) it submitted the plan to all relevant creditors and shareholders for approval, (iii) the correct information was provided, (iv) performance of the plan has been sufficiently safeguarded and (v) the plan was not accepted through the use of fraud or the unlawful preference of one or more creditors or shareholders. Article 384(2)(i) DBA is a catch-all provision which refers to “[...]other reasons for refusing confirmation."

The court will also refuse to confirm the plan if it appears *prima facie* that certain creditors or shareholders would be worse off under the plan than in the event of liquidation in bankruptcy (the so-called "best interests test").[95] However, this ground for refusal can only be applied at the request of an impaired creditor or shareholder. Article 384(3) DBA provides that, in this case, the court *may* refuse to accept the plan. In my opinion, however, the court is obliged to do so.[96] This follows from Ar-

[91] Article 381(7) DBA.
[92] Explanatory Memorandum, pp. 14 and 63.
[93] Article 369(5) DBA.
[94] Article 384(1) DBA.
[95] For bankruptcy and suspension of payments plans, a similar requirement can be found in Articles 153(2)(1) and 272(2)(1) DBA.
[96] For a different position, *see* Vriesendorp and Van Kesteren, *TvI* 2019, pp. 291-292. I believe that they interpret the provision incorrectly as they believe it should only apply if all classes accept the restructuring plan. However, the best interests test also applies if one or more classes reject the plan (and paragraph 4 is therefore also relevant). This follows from the wording of the provision. Moreover, the interpretation of Vriesendorp and Van Kesteren is incompatible with Article 10(2)(d) and Recital 52 of the Directive. In the *Supplementary Report in Response to the Opinion of the Council of State* (Parliamentary Documents 35249, no. 4), the Minister also finds

ticle 10(2)(d) of the Directive, which states that the plan must meet the best interests test if there are dissenting creditors. Under current bankruptcy and suspension of payments plans, failure to comply with the best interests test is a compelling ground to refuse confirmation.[97] Indeed, if a creditor receives, against its will, less than the liquidation value of its claim, this probably will be deemed contrary to Article 1 of Protocol 1 to the ECHR.

Finally there are the cases in which one or more classes of creditors reject the plan[98] In this regard, it should be noted that in such a case a requirement for judicial confirmation of the plan is that it has been accepted by at least one class of creditors that can be expected to receive a distribution, at least in part, in the event of bankruptcy, unless the plan pertains solely to creditors that would not receive anything in bankruptcy.[99] This requirement is derived from Article 11(1)(a)(ii) of the Directive. Furthermore, the confirmation requirements applicable when the plan is accepted by all classes continue to apply. Confirmation therefore should be refused if individual creditors raise valid objections that they would receive less than in the event of bankruptcy.

8.1 *Cramdown in the United States*

The doctrine of cramdown of rejecting classes has been developed in the United States. Section 1129(b)(2) of the US Bankruptcy Code contains the relevant provisions, which are quite detailed. These provisions are divided into two parts: §1129(b)(2)(A) pertains to the cramdown of classes of secured creditors while §1129(b)(2)(B) and (C) concern all other classes of creditors (B) and shareholders (C). Section 1129(b)(2) provides for the so-called *absolute priority rule*. In brief, in respect of classes of unsecured creditors which reject the plan,[100] this rule states that their rejection can only be overruled (crammed down) if no more junior class receives a distribution or retains value under the plan.[101] If ordinary creditors receive a distribution percentage under the plan, cramdown of a class of preferred creditors that rejects the plan is not possible. Likewise, if shareholders retain their shares, cramdown of ordinary creditors is not possible. This may be different however if the shareholders contribute new money.[102] The system entails that the plan can derogate from the statutory ranking, but only if all classes which should toler-

correctly that the best interests test must be applied whenever a creditor objects to confirmation of the plan. *See also* A. Bouts and M.A. Broeders, 'Indeling in klassen: de basis en legitimatie van het akkoord', *FIP* 2019/6 pp. 22-29.

[97] Articles 153(2)(1) and (272)(2)(1) DBA.

[98] Article 383 (4) DBA provides that if the debtor submits a request for confirmation whereas not all classes have accepted the plan, the court will appoint an observer, unless an observer or restructuring expert has already been appointed. Article 5(2)(b) of the Directive prescribes the appointment of a restructuring expert, but the observer can be considered a restructuring expert within the meaning of the Directive. *See also* Vriesendorp and Van Kesteren, *TvI* 2019, p. 283.

[99] The wording is somewhat different, but this is what it boils down to. The rights of the class of creditors at issue here are impaired, otherwise this class would not vote on the restructuring plan. However, if only shareholders vote on the plan, the rules are different.

[100] Please note that a class will only be entitled to vote if it is affected by the plan. A class which will be fully paid will therefore not have the opportunity to reject the plan.

[101] *See* Tabb, 2016, pp. 1134-1150.

[102] The case law is not unambiguous in this regard.

ate a more junior class receiving something under the plan, without being fully satisfied themselves, accept the plan. There may be good reasons for such a derogation, for example, to allow the debtor to obtain financing and distribute more or to retain other advantages for the business. In that case, the higher-ranking class will receive more value than if, for example, the business were to be liquidated. However, the question of whether a derogation from the ranking is beneficial to a particular class of creditors is answered by the class itself, which must approve the decision by a qualified majority. If this majority is not reached, derogation from the statutory ranking is not possible. The idea that emerges from the German literature[103] – a system similar to Chapter 11 has been adopted in Germany – is that a higher-ranking dissenting class can be crammed down if the absolute priority rule has been observed, because the rejection amounts to abuse of law if the other confirmation requirements are met (such as the best interests test and the feasibility test). If the absolute priority rule has not been observed the rejection does not amount to abuse of law, because a class of creditors is not obliged to accept derogation from the statutory ranking order. It follows from the absolute priority rule that a junior class may object to the plan if more senior creditors would receive more than the value of their claims[104] and that creditors also can object if creditors of equal rank are treated differently. In general, the absolute priority rule is intended to ensure legal certainty in that the question of whether cramdown can take place does not depend on the discretionary power of the court or on a valuation of the business, but rather on whether the rule has been observed. Thus the possibility of derogation from the statutory ranking will depend on whether all classes accept the plan.

Tollenaar argues that the purpose of the absolute priority rule is to ensure distribution of the so-called reorganisation value in accordance with the statutory and contractual ranking.[105] Cramdown of a higher-ranking class in favour of a more junior one would supposedly only be forbidden if the higher ranking class would be a beneficiary in a distribution of the reorganisation value, if such distribution would take place in accordance with the ranking. If, however, such a class would be out of the money in this situation, it should not be allowed to rely on the absolute priority rule, according to Tollenaar. This argument is not supported, however, by US case law and legislation,[106] according to which a higher-ranking class can rely on the absolute priority rule regardless of whether it would be in or out of the money based on any calculation and therefore no calculation need be performed.[107] In my opin-

[103] S. Madaus, *Der Insolvenzplan*, Tübingen 2011, 259 and 280.
[104] Extensive discussion regarding the value of claims, in particular the interest component, is possible.
[105] Diss. 2016, 6.16.6; TvI 2019, p. 225. *See also* S.W. van den Berg, W.G.M. Holterman and H.T. Haanappel, 'De reorganisatiewaarde onder de WHOA', *TvI* 2019/10, pp. 81-90.
[106] Tabb, 2016, 1150, 1168-1169. In particular, under the US system, if, for example, there are three classes with an ascending ranking (A, B and C), a plan can never be approved if the highest class (C) relinquishes value in favour of the lowest class (A), while the intermediate class is curtailed and rejects the plan. *See also* C. Spierings and J.V. Kolthof, 'De absolute priority rule in de WHOA: achtergrond, uitwerking en probleem', *TvI* 2017/40, pp. 36-43.
[107] In a certain sense, however, an exception is assumed if a shareholder, for example, contributes new money. In this case, the shareholder may retain an interest related to the value of the new contribution. However, the starting point is that the class that retains an interest provides a contribution, not whether the more senior class is in

ion, this is a sensible approach as calculation of the reorganisation value of an insolvent company is a shot in the dark, especially if the DCF method plays an important role, as Van den Berg *et al*. argue.[108][109]

In the US Bankruptcy Code, therefore, the absolute priority rule - as interpreted by two old judgments of the Supreme Court - applies in full[110] if a class rejects the plan. The beauty of the American absolute priority rule is that it helps to avoid disputes and discussion: if a class accepts the plan, it is deemed to have valued its interests in a sensible manner, even if the plan derogates from the statutory ranking, while if it rejects the plan, it may not be forced to agree to a derogation from the statutory ranking.[111]

The absolute priority rule does not work in the same way for secured creditors, whose priority is limited to part of the assets. That's why – unfortunately –the assets they have been given as collateral must be valued. In essence this is not different from an asset deal in bankruptcy. Under US law, such creditors can be crammed down if, putting it somewhat simplified, they receive or retain the value of their security under the plan. Furthermore, the claim is to that end split into a secured part and an unsecured part (as is currently provided for by Article 374(3) DBA). This division may give rise to valuation issues. Indeed, there are many court cases in the United States regarding such valuations.

8.2 *Cramdown in the Directive*

The Directive has opted for a different system. Article 11 of the Directive concerns cramdown. Article 11(1)(c) provides that approval is possible if each class of rejecting creditors is treated as favourably as any other class of the same rank and more favourably than each lower-ranking class. This rule is referred to as the relative priority rule. Contrary to the absolute priority rule, it is possible to derogate from the statutory ranking, as it is conceivable for a lower class to receive a percentage payment and a higher class to receive a higher percentage without being paid in full. Article 11(2) gives Member States the option to apply the absolute priority rule instead of the relative priority rule.[112]

8.3 *Cramdown in CERP*

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or out of the money. Continued management by a shareholder does not yield new value (Tabb, 2016, pp. 1154, 1178-1190; Supreme Court 308 U.S. 106 (1939) *Case v. Los Angeles Lumber Products Co*).

[108] According to Van den Berg *et al*. 2019, the reorganisation value is derived from the enterprise value, using the DCF method. For a company in financial difficulty, determination of this value is an impossible exercise. Moreover, it should be noted that the reorganisation value is not a fixed figure which only needs some calculation, but on the contrary it is influenced by uncertain future factors. Therefore, the reorganisation value of a company is not equal to the sum of the market value of debts and shares. See also T.P de Jong, 'Waarderen met de WHOA', *FIP* 2019/6, pp. 17-21, which discusses the uncertainties surrounding and subjective nature of determination of the reorganisation value.

[109] *See also* Tabb, 2016, p. 1173.

[110] *See* 228 U.S. 482 (1913) *Northern Pacific Railroad Company v. Boyd* and 271 U.S. 445 (1926) *Kansas City Terminal Railway Co v. Central Union Trust Co*. In this respect, *see* Tabb, *op cit*., pp. 1152-1153, and ABI report 2014, p. 213.

[111] Regarding this right of creditors, *see also* Vriesendorp and Van Kesteren, *TvI* 2019, pp. 287-288.

[112] Albeit modification of the rights of the dissenting class is permitted without meeting the relative priority rule, provided this does not adversely affect them.

In CERP, the absolute priority rule is paramount,[113] but with a difference. The restructuring plan may be confirmed even if the absolute priority rule is derogated from to the detriment of a rejecting class, provided there is a reasonable ground for the derogation and the interests of the relevant class of creditors or shareholders are not harmed. In addition, the following special rules apply:

(a) The court will reject the application for confirmation if a class of small suppliers that rejected the plan will not receive, without a compelling reason, at least 20% of the value of their claims or rights worth at least 20% of the value of their claims.[114]
(b) The court will reject the application for confirmation if creditors in a class that rejected the plan are not entitled to opt for a cash payment in the amount they would be expected to receive in the event of liquidation in bankruptcy.
(c) The rule set out under (b) does not apply to secured creditors that have extended commercial credit to the debtor in the course of ordinary business. However, if they are offered shares or depositary receipts, they should be able to opt for a distribution, which is not necessarily a distribution in cash.

With regard to the cramdown rules, the following should be noted:

(i) By introducing the aforementioned reasonableness test, the Dutch legislature opted for a different approach than the US and German legislations and abandoned the view that, in the event of a derogation from the statutory ranking, it is up to the impaired class of creditors to determine whether acceptance of the plan is nevertheless in its interest.[115] Likewise, in its opinion, the Council of State maintained that the courts have insufficient commercial knowledge to be able to assess a plan.[116] This escape hatch will prove particularly worrisome if a system is nevertheless introduced in which cramdown may take place if the dissenting class is deemed to be *out of the money* based on the reorganisation value.
(ii) This escape hatch also undermines the negotiating dynamics. If the debtor wishes to derogate from the statutory ranking, there is less pressure on it to obtain the approval of all (senior) classes, as it could believe that the court will nevertheless confirm the plan. It is important in this regard to note that once a plan has been submitted for confirmation, the court is under substantial pressure to confirm it. The restructuring plan can no longer be amended and, if confirmation is refused, bankruptcy and liquidation will follow. The court must therefore take

[113] *See also* Explanatory Memorandum, 5 point 4b.
[114] This provision was inserted by way of an amendment, which may explain why it is not stated that this ground for refusal only applies if the small creditors constitute a dissenting class (this requirement is however mentioned in the explanatory notes on the amendment). Article 374(2) DBA provides that these small creditors are placed in a separate class. As mentioned above, this special class relates to small suppliers of goods and services, not to small customers.
[115] The Explanatory Memorandum uses the criterion of whether the restructuring plan is "fair", a rather vague concept. *See e.g.* MvT, pp. 17, 48 and 69.
[116] Parliamentary Documents 35 249, no. 4.

its decision whether derogation from the absolute priority rule is reasonable under considerable pressure, because refusal of the confirmation will lead to liquidation. A debtor that wishes to create such pressure will therefore not request decisions prior to the vote,[117] and a class of creditors which will be crammed down cannot do so.

(iii) One of the advantages of the US system is that if a plan is accepted by all classes or the absolute priority rule is observed, there is a high degree of certainty regarding confirmation. This means that the parties know what they should focus on in negotiations. In my opinion, certainty is a major advantage of the US system.

(iv) It is not clear that the Dutch rules are entirely in line with the Directive. After all, the Directive requires at least "relative priority" for a cramdown,[118] while under CERP, if the absolute priority rule is derogated from pursuant to the reasonableness test, there is no such requirement.

(v) If secured creditors that have extended credit in the course of their business are treated differently under the restructuring plan than other secured creditors, to such an extent that they are not in a comparable position, they will need to be placed in separate classes (see Article 374(1) DBA).

(vi) In many cases, the CERP plan will be a partial one, especially when it comes to private plans. This means that some creditors (and shareholders) will be excluded from the plan. For example, a partial plan may be used to make arrangements for finance creditors, in which case trade creditors will be left out of its scope.[119] If, under these circumstances, a class rejects the plan, confirmation is not possible pursuant to the absolute priority rule. Under US law, this question does not come into play as Chapter 11 proceedings and the related plan always concern all creditors. In my opinion, the solution is to obtain the consent of all classes in the case of a partial plan.[120] Otherwise, in the event of cramdown, higher-ranking classes may be obliged to relinquish a portion of their claims while lower-ranking creditors retain their rights.[121] The Directive's relative priority rule is also difficult to apply in the context of a partial plan since if a lower-ranking class receives a lower percentage, it cannot remain outside the plan. [122]

(vii) One argument raised to justify derogation from the absolute priority

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[117] Article 378 DBA.

[118] In other words, the dissenting class must be treated more favourably than the lower classes (Article 11(1)(c) of the Directive).

[119] *See* the Explanatory Memorandum, 11.

[120] This is already a major step forward compared to the previous situation, as individual creditors can be outvoted by a qualified majority in their class. The consent of each individual creditor is therefore no longer required (HR 12 August 2005, NJ 2006/230).

[121] It may also be found that the ranking bestowed on certain creditors is unjustified, in which case the ranking rules should be changed.

[122] The Directive appears to apply the cramdown rules only with regard to creditors subject to the plan. This would mean that a dissenting class of higher creditors will be easier to cram down if lower-ranking creditors remain entirely out of the plan and thus retain their rights than if they are included in the plan and lose a portion of their claims. The Explanatory Memorandum (page 34) makes clear that under CERP, the absolute priority rule also extends to lower classes of creditors and shareholders that are not involved in the plan.

rule is that maintaining this rule would make Dutch schemes less attractive than schemes from other member states. In other words, now that the Directive has created more possibilities for cramdown, we have to join in. This argument is not particularly convincing, however. The Directive also bestows broader powers to intervene in employment contracts, but these are entirely excluded from the scope of CERP.

A judgment confirming an CERP plan cannot be appealed to either an appellate court or the Supreme Court.

9. Conclusion

An CERP restructuring plan is binding on the debtor and all creditors and shareholders with voting rights (Article 385 DBA). This raises the question how to define these groups.[123] Creditors whose rights will be changed by the plan are entitled to vote (Article 381(3) DBA). The debtor must submit the plan to all creditors with voting rights (Article 381(1) DBA). However, it should be noted that it is not clear what happens if, for example in the case of a private plan, the debtor does not submit the plan to certain creditors whose rights it intends to modify. Will they be bound by the plan, even if they did not know about it? If not, their rights will not be changed by the plan, and they do not fall under the definition of creditors with voting rights.[124] According to the Explanatory Memorandum, the rule is that disputed creditors that are excluded from voting on the plan[125] are not bound by it,[126] but the Memorandum of Amendment of 11 December 2019[127] takes a different view. If such a creditor subsequently succeeds in having its claim established at law, can it claim the full amount or will its rights be limited by the plan? Under suspension of payments and bankruptcy plans, the solution is that all unsecured creditors are bound by the plan.[128]

Furthermore, CERP does not provide for the case of an open or unknown group of creditors. It may therefore be difficult to offer a plan to all parties injured, for example, by an environmental offence.

In conclusion, the Act could have benefited from further refinement as regards determination of the creditors bound by an CERP plan. Such clarification is also important for recognition of the restructuring plan abroad.

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[123] For the sake of simplicity, only creditors are discussed here.
[124] Recital 64 to the Directive appears to indicate that such creditors are indeed not bound by the restructuring plan.
[125] Explanatory Memorandum, p. 59.
[126] The Explanatory Memorandum (page 59) wrongly suggests that the same applies to a suspension of payments plan.
[127] Parliamentary Documents 35 249, no. 7.
[128] Articles 157 and 273 DBA. However, bankruptcy and suspension of payments proceedings are always public. *See also* Tollenaar, *TvI* 2019, p. 237.