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EDITORIAL

Towards a European Code of Conduct for Creditors' Committees

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Synopsis

If we are discussing the role of creditors in restructuring and insolvency proceedings,[1] we primarily tend to look at the right of a creditor to receive payments on its outstanding claim, be it through the channel of a (sometimes long lasting and complex) process. However, a creditor has a wider position with regard to its debtor. In matters of restructuring and insolvency in Europe many creditors have the right to be involved in a decision-making process in insolvency or restructuring proceedings. Historically, in nearly all European countries liquidation of assets is the classical goal for insolvency proceedings. At the end of the 20th century in the EU, proceedings with a different goal were in a minority. The core function of the larger number of insolvency proceedings at that time was pure satisfaction of the claims of creditors via liquidation proceedings using an efficient liquidation of the estate and the distribution of receivables amongst creditors according to their rank. In the original EU Insolvency Regulation of 2002[2] any opened secondary proceeding had to be a winding-up or liquidation proceeding and the name of the traditionally, by court appointment, involved insolvency practitioner had close to hundred different national names, however under the Insolvency Regulation he or she was termed 'liquidator'.

As by definition for a debtor being 'insolvent', the proceeds from selling the estate or its individual assets will not suffice to pay all creditors the full amount of their claims. In such a case national insolvency law may enact a choice of one of the following three options: (1) all creditors are paid equally pro rata, or (2) some creditors are paid first before others, or (3) a mixture of both options. Many European jurisdictions have taken the third path. And although many times significant divergences among Member States as to ranking of creditors in detail exist, most national laws provide for a list of ranking of claims, which presents basic similarities.[3] In 2013 Philip Wood has submitted that usually, the 'corporate ladder' comprises of at least six main ranks or rungs, in the following way: (a) super-priority creditors (with some super-super priority creditors), (b) priority creditors, (c) pari passu creditors, (d) subordinated creditors, (e) equity shareholders, and expropriated creditors. Wood, to his own amazement, has observed that sometimes there are some 60 or 70 rungs on the ladder.[4]

As an example for England and Wales, see what in the same year Lord Neuberger summarised regarding the order in which claims on the insolvent estate are discharged. In *Re Nortel GmbH* he observed: 'In a liquidation of a company and in an administration (where there is no question of trying to save the company or its business), the effect of insolvency legislation ... as interpreted and extended by the courts, is that the order of priority for payment out of the company's assets is, in summary terms, as follows: (1) Fixed charge creditors; (2) Expenses of the insolvency proceedings; (3) Preferential creditors; (4) Floating charge creditors; (5) Unsecured provable debts; (6) Statutory interest;

Notes

1 The basis for my present contribution lies in my article 'The voice of the creditor', in: Abel B. Veiga Copo (ed.), *El acreedor en el derecho concursal y preconcursal a la luz del Texto Refundido de la Ley Concursal*, Civitas/Thomson Reuters 2020, pp. 361 – 374.

2 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1 (EIR 2000). It has been replaced in 2017 by a recast version, see Council Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L 141/19 (EIR 2015).

3 The source for later details in this contribution mainly is the report: Bob Wessels and Stephan Madaus, 'Business Rescue in Insolvency Law – an Instrument of the European Law Institute' (6 September 2017). Available at SSRN: https://ssrn.com/abstract=3032309, or alternatively: http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf. The full report is available in hard copy, see Bob Wessels and Stephan Madaus, *Rescue of Business in Europe*, Oxford University Press 2020. When during the course of this contribution references to countries are made, more detail can be found in these publications.

4 P.R. Wood, 'The Bankruptcy Ladder of Priorities', in: *Business Law International* 2013, 209 et seq. For an extensive overview of some 20 countries all over the world, see D. Faber, N. Vermunt, J. Kilborn, T. Richter and I. Tirado, *Ranking and Priority of Creditors*, Oxford University Press 2016. It is evident that for England this list is obvious incomplete as no place is reserved for the prescribed part payable to unsecured creditors pursuant s.176A of the Insolvency Act 1986. In April 2020, the Insolvency Act 1986 (Prescribed Part) (Amendment) Order 2020 came into force, amending the Act and increasing the maximum amount of the prescribed part from GBP 600,000 to GBP 800,000. For a concise summary of rights and ranking of creditors, see Reinhard Bork, *Corporate Insolvency Law* (Intersentia 2020), 141 et seq.

(7) Non-provable liabilities; and (8) Shareholders.'[5] In principle, jurisdictions differentiating in these classes are also mentioned in the UNCITRAL Legislative Guide on Insolvency Law of 2013.[6] With only a few limited exceptions, ranking results in absolute priority meaning that lower ranking creditors only receive value after all superior claims are paid.

In our European study of 2017, mentioned earlier, Madaus and I made five recommendations to mitigate the rather strict classification system. Each and every type of a restructuring or insolvency procedure involves the legal rights of all or at least some creditors. It is the very meaning of the term 'concursus' that creditors come together. As a consequence, it seems obvious to give the body of creditors a voice in such proceedings, maybe even a dominating voice. In the end of the day, it involves their money.[7] As insolvency and restructuring proceedings frequently involve a multitude of creditors, their participation is commonly organised by convening general meetings of creditors and by establishing standing creditors' committees. These both give creditors a voice.

1. General meetings of creditors

For insolvency proceedings, a general meeting of creditors is commonly[8] convened within a specified period of time after the commencement of proceedings.[9] Additional meetings (interim meetings) may be summoned at the court's discretion or at the (qualified) request of creditors.[10] Some jurisdictions also provide for a mandatory closing meeting at the end of proceeding to have the insolvency practitioner present his final report.[11] Evidently, during COVID-19 pandemic restrictions on movement and public gatherings several governments have published guidance to allow such meetings of creditors and other meetings of members and creditors to take place.[12]

A general meeting of creditors convenes all ordinary creditors of the debtor. Creditors with secured claims or preferences are frequently barred from such meetings or at least from voting.[13] The competences of such meetings typically include the verification of claims, the replacement of insolvency administrator, the appointment of a creditors' committee, the decision about a continuation of business activity, information inquiries, and the consent to a sale of debtor's business. Many jurisdictions also assign the central task of approving a restructuring or insolvency plan to the general creditors' meeting.

The general meeting of creditors makes a decision by casting votes. Where the meeting is also authorized to vote on a restructuring or insolvency plan, specific voting rules may apply. Other issues commonly require a majority of creditors holding more than 50 percent of the aggregate claims of the creditors present and voting at the creditors' meeting.[14]

2. Creditors' committee

In several sets of international (non-binding, soft law) recommendations, it is widely recognized that the interests of relevant creditors may be best served by coordinating their response to a debtor in financial difficulty through the establishment of (at least) one representative committee of creditors.[15] The establishment of such a committee, generally, is held to facilitate two goals: (i) the active participation of creditors in insolvency proceedings,[16] and (ii) to ensure fairness and integrity of proceedings.[17] Such a creditors' committee

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5 See *Re Nortel GmbH* [2013] UKSC 52, followed by his interpretation, on the basis of rule 12.2 of the Insolvency Rules what 'expenses of the insolvency proceedings' contain.

6 Some countries provide a distinction between reorganisation and liquidation proceedings. For instance, in Belgium judicial reorganisation proceedings are not considered as a situation of 'concursus creditorum'. They are subject to bankruptcy rules only in case of transfer of the enterprise under the supervision of a court. Reorganisation does not involve a ranking of creditors. In France, ranking applicable to reorganisation resemble closely that valid for liquidation and is rarely applied in the practice, only when a particular asset is sold by competent trustee or where the business is sold as a going concern.

7 'The underlying principle is that since the estate is being administered primarily for the benefit of the creditors, they are the persons best calculated to look after their own interests', see *Cork Report, Insolvency Law and Practice – Report of the Review Committee* (Chairman, Sir Kenneth Cork) (June 1982, Cmnd. 8558), London, HMSO ISBN 0 10 185580, at par. 913.

8 Such rules reflect international standards, see *UNCITRAL Legislative Guide* (2004), Recommendation 128.

9 See e.g. Austria, Germany, England & Wales (with different deadlines for the various types of proceedings available), Greece, Hungary, Italy (for the *concordato preventivo*), the Netherlands or Sweden.

10 See e.g. Austria, Belgium, France or Germany.

11 See Belgium or Germany.

12 In general, see Bob Wessels, 'Coping Collectively with the COVID-19 Crisis', in: *International Corporate Rescue* 2020, Issue 6 (June 2020).

13 See Germany, Italy or England & Wales.

14 See e.g. Austria, Germany, England & Wales. A remarkable exception is Belgium where no formal voting procedures exist, because no formal decisions are adopted in such meetings.

15 Principles of European Insolvency Law (2003), Principle 2.4; see also INSOL International Workout Principles II (2017), Principle 4, and Asian Bankers Association's Workout Guidelines (2013) for informal workouts.

16 UNCITRAL Legislative Guide (2004), Recommendation 129.

17 World Bank Principles (2016), Principle C7.1.

also contributes significantly to the supervision of the activity of the insolvency practitioner or debtor in possession, considering the progress and quality of their work while, at the same time, avoiding wasteful interferences.[18]

Organising a creditors' committee in practice is not without some organizational complexities, may be rather time-consuming and costly. For these reasons, jurisdictions often only allow for the establishment of one committee[19] which again may be optional in smaller cases.[20] According to the recent amendments in the Greek Bankruptcy Code, the creditors' committee was excluded from the main bodies in bankruptcy procedure. However, it was maintained as an ancillary body in case the general meeting of creditors decides to appoint such a committee. Only a few jurisdictions do not allow for such a committee at all[21] while some provide for more than one committee in a case.[22]

Commonly, a creditors' committee assumes the following rights and functions:[23] (i) providing advice and assistance to the insolvency practitioner or to the debtor (in possession), (ii) assisting in the development of a restructuring or insolvency plan, (iii) appearing and be heard in proceedings, in particular concerning decisions out of the ordinary course of the debtor's business, and (iv) requesting relevant and necessary information from the debtor or the insolvency practitioner at any time during the proceedings. Overall, the basic function of such committees is of a supervisory and advisory nature.[24] Only some jurisdictions extend the committee's role to decisions on substantive matters: under English law, for instance, the committee fixes and reviews the remuneration of the insolvency administrator. Following a German law tradition, the committee's approval of decisions or transactions which are essential for the course of proceedings is required in Germany, Austria, Hungary and Italy, including a decision to sell or discontinue the debtor's business.

The members of the creditors' committee shall represent the whole body of creditors. As Madaus and I have found in our 2017 comparative research, in order to ensure a representative election of members, the appointment of committee members is either done by the court[25] or an election process in a general meeting of creditors.[26] Both appointment mechanisms are supported in international standards.[27] The number of members to be appointed must not only consider the wish for a representative group of creditors, but also aspects of cost-efficiency which has prompted most jurisdictions to limit the number of members from three to seven. Some require the representation of specific creditor groups like employees,[28] secured, preferential and ordinary creditors,[29] credit institutions or key suppliers.[30] Appointed committee members assume the duty to faithfully perform the functions of their office. In case of wrongdoing, most jurisdictions[31] allow for a personal liability[32] either based on express provisions in respective insolvency law or by applying rules of contract law[33] or rules for internal auditors.[34] The threshold of liability may vary as well.[35] In exchange for their efforts and liability risks, committee members receive a (modest) remuneration only in a few countries.[36] Most jurisdictions limit payments to the reimbursement of expenses[37] or provide for additional remuneration only in complex cases.[38]

Notes

18 EBRD IOH Principles (2007), Principle 7(b). See also Bork (2020), 39 et seq.
19 See Austria, England & Wales, Germany, Hungary, Italy, Poland, Sweden (composition proceedings).
20 See Austria, France or Germany.
21 See Belgium. Latvia and Spain. Here, private forms of creditor cooperation may exist (Latvia).
22 Under French law, two separate creditors' committee are established in bigger cases, one for financial and related credit institutions and another for the main suppliers of goods and services, with the possibility of a third committee for bondholders. In small cases, however, creditor interest is only represented by a creditors' representative appointed by the court. In the USA, in larger Chapter 11 cases, as per class of creditors different committees are established, see the contributions in: Howard Morris et al. (eds), *The Art of the Ad Hoc*, London: Law Business Research 2017.
23 UNCITRAL Legislative Guide (2004), Recommendation 133; see also World Bank Principles (2016), Principle C7.2.
24 In the Netherlands and Sweden, the role of a committee is confined to a consulting role.
25 See Austria, Germany, the Netherlands, Italy or Sweden.
26 See England & Wales, Greece and Hungary.
27 See UNCITRAL Legislative Guide (2004), Recommendation 132.
28 See Germany and Sweden.
29 See Greece, but also Germany (for the participation of secured credit).
30 See France.
31 Exceptions to this rule are found in French and Swedish law.
32 This is in line with international standards, see UNCITRAL Legislative Guide (2004), Recommendation 135.
33 See Hungary.
34 See Italy.
35 From a liability for every type of negligence (e.g. in Austria or Germany) to a liability limited to cases of malice or gross negligence (see Greece)
36 See Germany, in particular. See also Hungary or Italy where creditors need to agree on a remuneration.
37 See e.g. Austria or England & Wales.
38 See Poland.

3. A Dutch example: Imtech-group

In the Netherlands, in August and September 2015, six companies, all part of the Imtech group were declared insolvent ('faillissement', a Dutch liquidation proceeding). These companies are (in short) Imtech Group, Imtech Capital, Imtech Benelux Group, Imtech Nederland, Imtech UK Group and Royal Imtech Group. Imtech's area of business are products, technology and services in the field of electrical engineering, mechanical engineering, telecommunications and shipping and system technology. The group has over 25,000 employees and an annual turnover of around EUR 5 billion. Imtech was active in dozens of countries, including the Netherlands, Belgium, Curaçao, Germany, Luxembourg, Spain and the UK. Imtech Deutschland also represented the business interests in Poland, Romania, Austria, Finland and Russia.

As a creditor of these Imtech companies, Rabobank requests the establishment of a creditors' committee. The appointed insolvency practitioners (IPs) of Imtech do oppose the request. In an interim decision, followed by a final decision, the District Court of Rotterdam[39] assesses the request for the establishment of a creditors' committee with regard to Royal Imtech Group. At the time of this interim decision, the court did not have enough information to make a decision. The court does express its opinion on the necessity of drafting a Protocol, a written record of the working method of a creditors' committee. Note, that at that time, the Dutch Bankruptcy Act did not provide a basis for such a protocol (a provision in that regard was enacted as per 1 January 2019, see below), which the court explicitly mentions, however it opines that in the present case such a protocol is necessary for the creditor's committee in the bankruptcy liquidation of Royal Imtech.

The court offers the following guidelines (in short) for the Creditor's committee (CC):

1. the CC will have to establish a protocol in due course in consultation with the IPs;
2. it is reasonable for this to be submitted to the judges-commissioners before it is established;
3. it is obvious that a provision will be added to the protocol holding that documents and information relating to (the investigation into) possible detrimental actions of (one or more) financiers are excluded from the obligation to provide information and advice;
4. it is conceivable for the protocol to include, that costs incurred by the member sitting on behalf of the financiers in the CC in his capacity as a member of the CC are not borne by the estate but by the financiers;

By its final decision the Rotterdam Court granted the request to set up a CC with regard to Royal Imtech Group. As to the protocol the court also expects:

5. that a provision on conflicts of interests is included;
6. that a confidentiality clause is included, also towards the former director of Royal Imtech, and that violations of this clause are arranged for in the protocol, while
7. it can also be arranged to what extent the representatives of three members of the CC can be accompanied by others;
8. that members of the CC have technical and/or commercial knowledge.

The court then finds for each company that the estate is either (now) virtually empty or that there is insufficient interest in setting up a CC, because the bank syndicate of which Rabobank is a part, together with the tax authorities and bondholders, are the only creditors. For these reasons, the court rejects the other requests for the other five Imtech-companies.[40]

I will make some remarks related to these ad hoc Rotterdam guidelines below.

4. Developments in USA's Chapter 11

USA's Chapter 11 procedure[41] is both in practice and conceptually the most important insolvency procedure worldwide and many countries look at Chapter 11 for inspiration in revising their own insolvency laws. In 2014 the American Bankruptcy Institute (ABI) issued breaking news for the restructuring and insolvency community in the USA when it presented its voluminous Final Report and Recommendations.[42] The report itself only has the status of a recommendation, and is not a draft legislative bill. Its proposals are still under

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39 District Court Rotterdam 18 December 2015, ECLI:NL:RBROT:2015:9476, and District Court Rotterdam 17 March 2016, ECLI:NL:RBROT:2016:2013 respectively.

40 District Court Rotterdam 26 April 2016, ECLI:NL:RBROT:2016:3184.

41 Chapter 11 of the U.S. Bankruptcy Code is the US reorganisation procedure, aimed at rehabilitation of a business. Chapter 7 provides for liquidation and chapter 13 for individuals. A complicating factor is that often liquidation takes place in chapter 11, by means of a so called 363 sale (referring to its basis in section 363 of the U.S. Bankruptcy Code), selling all or most of the assets, followed by liquidation of the legal entity.

42 See for a link to the full report, titled '2012-2014 Final Report and Recommendations' ('Report'): https://abiworld.app.box.com/s/vvircv5xv83aavl4dp4h. It is 395 pages long (including Appendices), contains 241 recommendation and 1225 footnotes.

consideration.[43] What does the ABI-Commission have in mind for creditors' committees?

In the USA the concept of a committee of creditors formed to monitor the debtor and its reorganization efforts has a long history, going back to the late 1800s, the Bankruptcy Act of 1898. Although it has met criticism through the years (danger of too close and arguably collusive relationships with the debtor), Congress in 1978 nevertheless recognized the value in the committee structure, both in terms of their oversight functions and the dynamic tension that their presence and participation adds to business restructuring negotiations. Section 1102 of the Bankruptcy Code provides that '... the United States trustee shall appoint a committee of creditors holding unsecured claims' that '... shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee.' A committee of creditors can play many roles in a Chapter 11 case. Originally the idea was to give unsecured creditors a stronger voice in the reorganization process. The unsecured creditors' committee has been viewed not only as necessary to protect the interests of the many unsecured creditors unable to participate directly in the process, but also to further monitor the actions of the debtor in possession during the Chapter 11 case. The appointment of a committee of unsecured creditors is mandatory in Chapter 11 cases, but cases do proceed without committees in certain circumstances. The U.S. Trustee must (try to) form a committee '... as soon as practicable after the order for relief.' In practice, shortly after the petition date, the U.S. Trustee actively solicits interest in committee service from the debtor's unsecured creditor body. It typically solicits the debtor's 20 largest unsecured creditors, but may expand its search to the top 30 if warranted by the case. Although many committee formation meetings are held in person, the U.S. Trustee also constitutes committees through telephone interviews, particularly in smaller cases. The U.S. Trustee's specifically gauges a creditor's genuine willingness to serve on the committee for legitimate reasons and the committee members' obligation to act as fiduciaries to the entire unsecured creditor constituency. Once appointed, the unsecured creditors' committee serves in a fiduciary capacity with respect to the other unsecured creditors it represents and is granted certain powers under section 1103 of the Bankruptcy Code. The committee may, among other things, meet with the debtor, investigate the debtor's affairs, participate in the plan formulation process, and request the appointment of a trustee or examiner. The committee may also retain professionals to represent it in the Chapter 11 case. The expenses of committee members and the fees and expenses of the committee's counsel and other professionals are generally paid from the estate.

The mandatory nature of the committee of unsecured creditors has been discussed at length in the ABI-Report. The ABI-Commission recommends to retain the mandatory appointment of a committee of unsecured creditors in all cases, except in small and medium-sized enterprise cases. The main reasons: the value in the traditional 'watchdog' function of the committee, not only as a check on the debtor in possession, but also as a check on other stakeholders and the allocation of the estate's value among stakeholders. The Commission noted that the Bankruptcy Code does not mandate any minimum return for general unsecured creditors (other than that they receive more than they would in a chapter 7 liquidation), unlike secured or administrative creditors whose claims must be paid in order to confirm a plan. The Commission, nevertheless, found merit in the argument that a committee should not be appointed if its constituents have no need for representation in a specific case (for instance, their claims are out of the money or are being paid in full). The Commission agreed that this standard should be part of a 'for cause' standard that would, if established by evidence at the hearing, allow the court to direct the U.S. Trustee not to appoint, or to disband, an unsecured creditors' committee.[44] The Commission concluded that the court and the U.S. Trustee are both well positioned to address on a case-by-case basis any tactics of by a committee to increase costs (by inviting professional advice) and delays in the resolution of a case or a material transaction in a case as well as any problematic conflicts of interest that may arise.

5. Dutch legislation as per 2019

Since 1 January 2019, as part of a larger package of legislative changes to modernize Dutch insolvency proceedings, a new Article 75a(1) has been included in the Dutch Bankruptcy Act. It stipulates that the court or the supervisory judge (a day to day examining magistrate) when setting up the provisional or final creditors' committee may establish '... regulations ... about the

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43 See Bob Wessels and Rolef de Weijs, 'Revision of the iconic US Chapter 11: its global importance and global feed back', in: 5 *International Insolvency Law Review* 4/2014, pp. 441-445, and Bob Wessels and Rolef de Weijs (eds.), *International Contribution to the Reform of Chapter 11 U.S. Bankruptcy Code*. European and International Insolvency Law Studies 2, The Hague: Eleven International Publishing 2015.

44 The recommendation reads: 'The term "cause" should include that such an appointment would not be in the best interests of the estate or that the interests of general unsecured creditors do not need representation in the particular case because, for example, they will not receive any distributions in the case or their claims will be paid in full.' Report, 38ff. In addition, the court sua sponte, the U.S. Trustee, or a party in interest should be able to initiate a hearing to determine whether the appointment or continuation of an unsecured creditors' committee would be in the best interests of the estate. Report, at 39.

working methods of the creditors' committee'. These regulations will be published in an appropriate manner. I will not discuss this last arrangement further. The decision pursuant to Article 75a(1) by the court or examining magistrate) is not open to appeal. The joint interests of the creditors in the expeditious and efficient settlement of the insolvency have been judged by the legislator to be higher on this point than the interest of an individual creditor in being able to lodge an appeal.[45]

The Dutch legislator explains that 'working methods' allows to set rules with regard to 'all kinds of subjects', providing as examples rules regarding the confidentiality of company-sensitive information, the consequences of a conflict of interest of one or more creditors, substantive criteria regarding an appointment, dismissal and expense allowances of committee members. The possibility to lay down some general rules regarding the committee's working method meets, the Dutch Minister of Legal Protections explains, a wish that lives in practice.[46]

In December 2020 the first decision on a request to set up a provisional creditors' committee concerns the bankruptcy of European Credit Partners N.V. (ECP). The petition is filed on behalf of a group of 24 bondholders of ECP and the Foundation ('Stichting') for the Interest of Victims ECP. After an investigation by a third party into ECP in the spring of 2020, it turned out that major chaos was encountered at ECP and that approximately EUR 30 to EUR 40 million of the financing made available to the Group has probably disappeared. The latest estimate is that it may not be possible to collect more than EUR 10 million from customers and debtors of (subsidiaries of) ECP, with the deficit at group level rising to more than EUR 45 million. The group involves bondholders who risk losing more than EUR 1 million. In this case, the appointed IP was a 'warm supporter' of setting up a provisional creditors' committee.[47] This was rather different in the Imtech case, but I am disregarding those considerations now. After some debate regarding the number of members, their experience and possible issues of conflict of interest, the court decided to have a committee set up. The judgement does not mention anything regarding a protocol or code conduct of these members of the committee. The indirect directors of ECP are against a committee, mentioning amongst other possible conflicts of interest, which are (i) inherent to every insolvency process and (ii) need further specification as to which specific interest is meant and where about the conflict lies.

Another Dutch case is of early 2021 and relates to the establishment of a creditors' committee in the bankruptcy of Life insurance company 'Conservatrix' NV. In this case there is EUR 780 million in total debts of the company with a wide variety of types of insurance policies, concerning approximately 70,000 policy holders. The appointed IP has pointed out the importance of fixed drafting regulations, now that '… in any case the matter of 'secrecy' will have to be regulated'. The supervisory judges in this case propose – to the court in first instance – that they will determine the regulations for the provisional creditors' committee to be set up. The court decides that in view of the offer of the supervisory judges to establish regulations for the creditors' committee, which they have the power to do under the law, the court will not do it itself. This assumes that the creditors' committee will only be able to start the actual work after the regulations have been adopted.[48]

I consider it advisable in all cases that a protocol is established when a creditors' committee is set up. In his commentary to the Rotterdam case, Hummelen then prefers that, unlike in the ECP case, the IP bankruptcy and the applicants agree on a draft protocol prior to submitting the application to set up a creditors' committee and that this draft is submitted to the court when the application is submitted. If there is time to do so, this would give the court the opportunity to assess the draft protocol and, on the basis of Article 75a (possibly with changes) to determined it. With Hummelen I agree that as a result, the protocol gains legitimacy and it also prevents ambiguity and discussion after a committee has been set up.

6. ELI Recommendations

In our European study Madaus and I are of the opinion that creditors should play a crucial role in insolvency and restructuring proceedings. It is not only 'their money' which is at stake. It is certainly conceivable that the creditors would receive a higher or lower payoff on

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45 See Explanatory Memorandum, Parliamentary Documents II 2016/17, 34 740, no. 3, p. 23.

46 See Explanatory Memorandum, Parliamentary Papers II 2016/17, 34 740, no. 3, p. 24ff, acknowledging that it is appropriate that 'Recofa' (the informal group of supervisory judges providing non-binding guidances for insolvency proceedings in the Netherlands) develops 'standard regulations', which will be established in consultation with the insolvency law practice. The idea apparently is that the judge can make the necessary adjustments to the regulations in appropriate cases '… or provide for its own protocol, if the special nature of a bankruptcy gives cause for this.' Creditors can also propose a protocol which is subsequently determined by the court, with or without amendments. In the case of relatively simple bankruptcies, regulations can be waived, even if a creditors' committee is established', thus the Memorandum.

47 District Court Rotterdam 11 December 2020, ECLI:NL:RBROT:2020:11834; JOR 2021/99, comments by Hummelen.

48 District Court Amsterdam 3 March 2021, JOR 2021/189. District Court Noord-Holland 22 April 2021, ECLI:NL:RBNHO:2021:3382, sits over the bankruptcy of D-reizen, a travel agency and employer of 1150 people, with over 300 creditors, heavy losses and over EUR 43 million of travel vouchers. Like the Amsterdam court, this court will not establish rules for the provisional creditors' committee, rather follows the suggestion of the supervisory judges at the hearing that regulations can be drawn up in mutual consultation between the committee and the appointed IPs. If the court then wishes to adopt the regulations, the trustees or the provisional committee can still request this, the judge adds.

their claims if proceedings are run well or badly. The widespread practice of respecting the common creditors' interest by establishing creditors' committees (or mandating a general meeting) is capable of securing a direct involvement of creditors in proceedings. However, the establishment of a creditors' committee would not seem efficient if the overall costs of their involvement is not justified by the economic relevance of their decisions. Overall, a distinguished approach would seem best fitted.

These considerations led to two recommendations, being: (i) that the establishment of a creditors' committee is only an option in order to structure complex workout negotiations, and (ii) that Member States should secure the involvement of a creditors' committee in formal restructuring or insolvency proceedings provided that there are sufficient assets in the estate to justify the additional costs. Such a creditors' committee should not only have a supervisory function, but also be competent to approve decisions in the administration of the estate that may have a significant effect in the later distribution (except the decision about a restructuring or insolvency plan which is governed by separate rules).

7. European Restructuring Directive

After intense debate in the European Parliament and with Council working groups, the 'Directive on Restructuring and Insolvency' ('Restructuring Directive') was adopted in 2019.[49] EU Member States are – many of them after having had extended the implementation period till June 2022 – in full swing to implement the Directive in their respective national laws. The Restructuring Directive does establish several basic principles for a discharge of former entrepreneurs and for the way insolvency courts and practitioners shall be treated under national law. It does, however, not even attempt to harmonize traditional substantive insolvency law. Instead, the Restructuring Directive focusses on the establishment of a common legal framework in the EU that prevents formal insolvency proceedings under national law. Pre-insolvency court procedures shall be made available across Member States in which troubled businesses find support when negotiating a debt solution that would allow them to avoid formal insolvency proceedings. As these procedures need to fit within the existing national insolvency and restructuring laws, Member States were able to secure a wide range of optional provisions in the Restructuring Directive. As a result, not many Member States may actually need to undertake a substantial law reform when implementing the Directive. Some, however, especially those with no pre-insolvency procedures in their law at all (as e.g. Germany or the Netherlands) will see relevant changes to their legal framework.

Notably, the Directive itself lacks a provision related to creditors' committees. The existence of a creditors' committee is, however, not overlooked, but it only plays a marginal role in two themes, i.e. financing and the governance of the proceedings.

The Directive defines 'new financing' as any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan and that is included in that restructuring plan.[50] In contrast, 'interim financing' means any new financial assistance with a specific origin, during a certain period and with a specific goal. It is (interim) finance '… provided by an existing or a new creditor, that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business.[51] Recital 68 provides that the Directive should not prevent Member States from introducing an ex ante control mechanism for interim financing. Member States should be able to limit the protection for new financing to cases where the plan is confirmed by a judicial or administrative authority and for interim financing to cases where it is subject to ex ante control. An ex ante control mechanism for interim financing or other transactions could be exercised by a practitioner in the field of restructuring, by a creditor's committee or by a judicial or administrative authority. Protection from avoidance actions and protection from personal liability are minimum guarantees that should be granted to interim financing and new financing. However, encouraging new lenders to take the enhanced risk of investing in a viable debtor in financial difficulties could require further incentives such as, for example, giving such financing priority at least over unsecured claims in subsequent insolvency procedures. These last matters (protection from avoidance actions and protection from personal liability and 'incentive' priority for new lenders) typically are matters to deal with in national law. A creditors' committee could (as one of the three or a combination of them) function, in the eyes of the European legislator, as an ex ante controlling group. The protection from avoidance actions ('safe harbor') is also desirable in subsequent insolvency proceedings. A true promotion of a rescue culture that encourages

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

50 Article 1(7).

51 Article 1(8).

early preventive restructuring (the heart of the Directive) makes it desirable that transactions which are reasonable and immediately necessary for the negotiation or implementation of a restructuring plan receive said protection, see Recital 69. The recital continues by expressing that judicial or administrative authorities should be able, when determining the reasonableness and immediate necessity of costs and fees, to check these. As an example is given the costs and fees to consider projections and estimates submitted to affected parties, a creditor's committee, a practitioner in the field of restructuring or the judicial or administrative authority itself. This would not include any fees paid to members of a creditors' committee themselves.

Finally, Recital 88 envisages a role for a creditors' committee when a Member State wishes to include a system which provides that practitioners are chosen by a debtor, by creditors or by a creditors' committee from a list or a pool that is pre-approved by a judicial or administrative authority. It makes sense that the recital leaves some room for discretion: in choosing a practitioner, the debtor, the creditors or the creditors' committee could be granted a margin of appreciation as to the practitioner's professional expertise and experience in general and the demands of the particular case. After rightfully stressing that in cases with cross-border elements, the appointment of the practitioner should take into account, among other things, the practitioner's ability to comply with the obligations, under the EU Insolvency Regulation (Recast) ((EU) 2015/848), to communicate and cooperate with insolvency practitioners and judicial and administrative authorities from other Member States,[52] as well as their human and administrative resources to deal with potentially complex cases, the recital ends with the determination that Member States should be able to decide on the means for objecting to the selection or appointment of a practitioner or for requesting the replacement of the practitioner, for example through a creditors' committee.

8. Enhancing rescue culture in EU

Restructuring and insolvency law many times focusses on just matters of insolvency, overlooking the basis and substance of many issues of that area of law, which is general private law. Often a negotiation of the rescheduling of debt or to include a third party with new financing – in contractual terms – results (or converts an existing contract) in a multi-party agreement. It is an agreement of a certain nature, with one debtor on the one hand and a multiple number of creditors on the other. It is rather specific, however, as it is an agreement. And it is an agreement that – especially in civil law jurisdictions – does not fall down from the blue sky. All creditors will already have, sometimes from far before the financial difficulties, an individual agreement with the debtor. If such an individual contract contains a renegotiation provision, the basis in the initial agreement is all the more obvious. If the individual contract is silent on the matter, general national rules will apply, such as rules regarding change of circumstances ('material adverse change' clauses and the like) or an even more general rule regarding the additional function of (parties acting) 'in good faith' (in Dutch: '*redelijkheid en billijkheid*', in German: '*Treu und Glauben*', in Spanish: '*buena fe*'). Parties cannot just 'hold-out' and say 'no' to an offer, as they are expected to act in accordance with good faith. They also can not overcharge their interest, as the rules of good faith (or rules regarding abuse of right) poses, be it in exceptional circumstances, limitations. On this basis of general private law in a European context best practices or recommendable guidelines could be discussed.

It is suggested that it is timely and necessary that a non-binding code of conduct should be used to establish a culture of trust building workout negotiations amongst repeat players (like banks, suppliers, union representatives, insurers etc.). Such a code should follow the example of existing codes and provide for standstill agreements, confidentiality agreements, the way to organise and control a full disclosure (including the flow of information), for rules how to conduct negotiations (including an option to involve third parties to act as supervisors or mediators) and rules to deal with conflicting interests (including an assessment of which 'interest' (financial, tactical, commercial) is being considered and what 'conflict' is being guaranteed against). The market should take the lead, however national governments are not excluded. European Member States should ensure that the relevant professional bodies (insolvency practitioners, turn around professionals, judges) are consulted and involved in the creation of such soft law instruments and that they take into account best practices as set out in principles and guidelines developed or adopted by European and international non-governmental organisations active in the area of restructuring and insolvency.[53]

Further study of a creditors' committee should be encouraged. In the near future the area in which creditors may have a role widens, whilst the envisaged grouping of classes of creditors will have its own dimension. As to the wider role, it could be helpful that already in a very early stage when financial difficulties are rather far away, creditors discuss the establishment of an (informal) pre-committee of creditors. Within

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52 Article 4.2 European Communication and Cooperation Guidelines for Cross-border Insolvency ('CoCo Guidelines') from 2007 provides: 'A liquidator is required to act with the appropriate knowledge of the EC Insolvency Regulation and its application in practice.'

53 The suggestion is based on Recommendation 1.21 in the Wessels/Madaus report 2017.

the scope of the Restructuring Directive will fall the change of circumstances and actions needed, which also decide the aim of a creditor's committee from the perspective of the debtor, for instance (i) the debtor looking for short term stability, making it necessary for the debtor's management to disclose information and try bridge-financing before more final solutions come into effect, (ii) the debtor ready to discuss a work-out and its details, and (iii) a post-restructuring committee with a monitoring role over the debtor. As to the forming of classes of creditors it may very well be – see Wood's classification in the beginning of this contribution – that the interest of creditors will be so different that two or more creditor's committees will be established. Evidently, a court can use the stick of discipline and guard against complexity, costs and time-spilling.

Although it certainly may be the case that national legislation exists regarding the establishment and role of a creditor's committee, as these rules are not subject to harmonisation efforts of the Restructuring Directive, it may be advisable to think about a European Code of Conduct for Creditors' Committees. The consideration of setting up a committee raises many questions: number of members (in connection with the representativeness of its members and effectiveness of the committee, purpose of the committee, available budget for the involvement of experts, mapping of financial, legal, strategic and tactical interests and the question of whether and, if so, in what way these contrast with each other, forces a curator to prepare and make a careful and well-considered decision. As from the recent example given by the Rotterdam court in the Imtech case follows, also a tool like a Protocol may be useful. Matters for discussion would be, amongst many others, the system of electing members of a creditors', applicable conditions to them and rules for resignation, the existence of a fiduciary relationship between a committee's members, the way of information sharing, including rules on confidentiality and legal privilege and decision making process on several ad hoc matters or the committee's final decision regarding the restructuring. With guidance from several soft law documents and some comparative research into a number of protocols used in cases all over Europe, time certainly is ripe to draft a European Code of Conduct for Creditors' Committees.

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