GRR Global Restructuring Review

Europe, Middle East and Africa Restructuring Review

2026

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As well as daily news, Global Restructuring Review curates a series of comprehensive regional reviews. The ***Europe, Middle East and Africa Restructuring Review*** contains insight and thought leadership from multiple pre-eminent practitioners from across the region. Online this year you will find chapters on France, Greece, the Netherlands and Switzerland, highlighting changes in law and practice, and identifying some of the unresolved issues of the day.

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Contents

Overviews

Introduction

Helena Potts, Jessica Ling, Maria Staiano-Kolaitis

Paul Hastings LLP

First lessons to be learned from the 2021 French insolvency law reform

Saam Golshani, Anne-Sophie Noury, Alicia Bali

White & Case LLP

Liability management exercises in the Dutch market: navigating evolving legal frameworks

Ferdinand Hengst, Ryanne Elkerbout-Kok, Belle Burghout

De Brauw Blackstone Westbroek

Country by Country

Greece: Challenges and opportunities in the pre-insolvency landscape

Georgia Papathanasiou, Maria Nefeli Revela, Georgia Fezou

Kontogeorgiou Bakopanou & Associates Law Firm

Switzerland: restructuring approaches under Swiss corporate law and the DCBA

Alexander Vogel, Marc Baumberger

MLL Legal

Introduction

Helena Potts, **Jessica Ling** and **Maria Staiano-Kolaitis**
Paul Hastings LLP

Summary

INTRODUCTION: RESTRUCTURING AND INSOLVENCY IN EUROPE
FRANCE: LESSONS FROM THE 2021 INSOLVENCY LAW REFORM
OVERARCHING THEMES
OUTLOOK FOR 2026

INTRODUCTION: RESTRUCTURING AND INSOLVENCY IN EUROPE

The restructuring landscape across EMEA in 2025 has been characterised by significant advancement, and in several jurisdictions accelerating pace of change. This collection of articles, contributed by leading practitioners across key European jurisdictions charts the most significant developments affecting distressed companies and their stakeholders across those jurisdictions.

Taken together, they reveal a convergent European story: the gradual alignment of national frameworks with the principles embedded in the EU Preventive Restructuring Directive (EU Directive 2019/1023) (the European Directive) whereby the European Union imposed an obligation on its member states to offer a more attractive and flexible restructuring scheme in their respective local law, the emergence of liability management exercises (LMEs) as a growing tool in stressed and distressed situations, and a renewed focus from respective European markets on balancing the competing interests of creditors, shareholders and the going concern where stakeholders are increasingly seeking to push the envelope of what can be achieved.

This introduction summarises the salient points from each article, identifies the overarching themes running across the collection, and examines the key jurisdictional developments and impacts of the most significant changes in law throughout 2025.

FRANCE: LESSONS FROM THE 2021 INSOLVENCY LAW REFORM

Following the introduction of both the ***Wet Homologatie Onderhands Akkoord***, or WHOA and the German Act on the Stabilisation and Restructuring Framework for Businesses, or StaRUG back in 2021, France followed suit with its version of transposition of the European Directive. The new French law, contained in ordinance 2021–1193 published in the Official Journal on 16 September 2021, has applied to proceedings since 1 October 2021. As a result of cases brought under this ordinance, the French restructuring framework has undergone a significant shift, moving from a debtor-centric approach to a process that has introduced class-based voting and cramdown mechanisms, increased creditor involvement, limits shareholders' veto rights and promotes pre-pack solutions.

The article, authored by practitioners at White & Case LLP, examines the practical impact of this reform nearly five years on. The article traces the evolution of pre-pack restructuring plans in France, from the early ***Autodis*** case through to the introduction of accelerated safeguard proceedings and the landmark restructurings of ***Emeis*** (formerly ***Orpea***), ***Casino*** and ***Altice***. The ***Emeis*** case was the first use of the French cross-class cramdown tool by a listed company and was utilised in relation to several classes of affected parties, including equity holders, illustrating the weakening of the de facto right of veto previously enjoyed by shareholders.

Looking ahead, the article identifies the emergence of LMEs as a defining French market trend. With 2025 marking a departure from the natural proclivity towards ***sauvegarde,*** practitioners are now witnessing a gradual transition, with LMEs being a viable option alongside conventional restructuring tools. This trend is not limited to France: emblematic cases such as ***Selecta*** (Switzerland), ***Ardagh*** (Luxembourg), ***Hunkemöller*** (Netherlands) and ***Victoria*** (UK) demonstrate that LMEs, while still an acquired taste, are becoming more frequent balance sheet solutions across Europe.

Liability Management Exercises In The Dutch Market

LMEs have truly arrived in the Dutch market, with recent high-profile transactions enabling distressed companies to secure new financing and preserve going-concern value. However, non-participating creditors are not taking such transactions lying down and there has been a commensurate increase in challenges in this market. The Netherlands article, authored by practitioners at De Brauw Blackstone Westbroek, analyses the three principal routes through which LMEs can be implemented in the Netherlands.

The article also addresses the influence of US case law, in particular noting that, in December 2024, the US Court of Appeals for the Fifth Circuit overturned a US$200 million up-tiering transaction in the ***Serta*** case, prompting market participants on both sides of the Atlantic to reconsider non-pro rata implementation approaches. Another key feature to European LME transactions is covered in this article, namely directors' duties. De Brauw takes us through the implications of Dutch law giving the board of directors considerable flexibility in choosing which financing strategy to pursue – the board must pursue the best achievable alternative, and not only any achievable alternative, balancing competing interests rather than prioritising shareholder demands where creditors' interests are at stake.

Switzerland: Restructuring Approaches Under Swiss Corporate Law And The DCBA

The Swiss restructuring framework is governed by Swiss corporate law. The article, authored by practitioners at MLL Legal, provides a comprehensive overview of the Swiss framework as it stands following two significant sets of reforms that have been in force since 2023.

A central theme is the expansion of the range of distress triggers that may bring about the need to restructure a Swiss entity. Historically triggers under Swiss legislation (qualified capital loss and over-indebtedness) were generally considered late-stage indicators of financial distress, contributing to the perceived ineffectiveness of the former restructuring framework. Against this background, the law was revised and updated, with the current corporate law framework clarifying and supplementing the board of directors' duties and recognising imminent illiquidity as an additional distress trigger.

The article also examines the role of pre-pack transactions, which have become an increasingly important tool in Swiss restructurings. Such transactions are legally permissible, and supported and encouraged by the legal landscape, typically being implemented during a composition moratorium that prevents disgruntled counterparties or more active creditors from driving the process under the threat of exercising individual remedies.

Director liability is another significant theme, with the article noting that the corporate restructuring law framework and the applicable Debt Collections and Bankruptcy Act 2025 procedural environment mean that the board of directors is expected to act promptly and on a well-documented basis, with liability requiring a breach of duty, damage to the company or specific creditors, intentional or negligent conduct, and a clear connection between the breach and the resulting damage.

Greece: Challenges And Opportunities In The Pre-insolvency Landscape

The article authored by practitioners at Kontogeorgiou Bakopanou & Associates Law Firm provides an overview of the current pre-insolvency framework introduced by Law 4738/2020, with a particular focus on the key features of the out-of-court workout (OCW) and

rehabilitation proceedings, scrutinising their practical application to date and highlighting several contentious issues raised by both debtors and creditors.

It is noted that in Greece there is significant and growing usage of both OCW and rehabilitation mechanisms, with 129,770 OCW applications submitted in 2025 compared to 85,560 in 2024, with 50,710 applications approved in 2025 compared to 28,945 in 2024.

It also addresses notable recent legislative amendments, including those introduced by Law 5193/2025, which was passed by the Hellenic Parliament on 10 April 2025 and makes significant changes to the out of court debt settlement mechanism in Greece and amends the Greek capital market legal framework with the aim of making the Greek capital market more attractive to foreign investors.

OVERARCHING THEMES

There are five key trends emerging consistently across Europe.

Alignment With The EU Preventive Restructuring Directive

These articles demonstrate the effect of the implementation of the European Directive into national law. The French restructuring and insolvency framework was amended to transpose the Directive, although the French system already had a strong culture of encouraging preventive restructurings, so no new proceedings were created, unlike the German or Dutch approaches.

Greece transposed the Directive through Law 4738/2020, abolishing the former bankruptcy code. Switzerland, operating outside the EU, has pursued an independent reform trajectory through the 2023 Corporate Law reforms and the 2025 anti-abuse package. Speaking from our home jurisdiction, we note that the UK has not formally implemented the Directive because it was not required to do so post-Brexit. However, the UK effectively mirrored many of the Directive's key features such as cross-class cramdown by adding restructuring plans to the UK restructuring toolkit through the Corporate Insolvency and Governance Act 2020. In the UK, 2025 saw convergence in the use of restructuring tools with the EU Directive driven by judicial findings, market expectations and creditor behaviour (rather than actual implementation of statutory changes), particularly across the following themes:

- earlier intervention is being encouraged by court guidance (via the new Practice Statement)1 and commentary on debtor behaviour where timings have been unnecessarily constricted. This mirrors the EU Directive's emphasis on genuine creditor engagement before launching a process;
- UK-based companies with European subsidiaries are adopting European processes to ensure consistency across jurisdictions; and
- a shift towards debtor in possession models – the EU Directive's philosophy is influencing UK practice even despite the lack of legislative change, with insolvency statistics demonstrating that advisers are encouraging companies to use restructuring tools to restructure earlier rather than defaulting into insolvency, which can be value destructive.

The Rise Of LMEs Across Europe

The spread of US-style LME structures into European debt markets is perhaps the most significant theme – one that continues to be prevalent since the authors' last overview

chapter in 2024. LMEs have travelled from US practice into the contemplation of those who have European debt structures, allowing borrowers a greater plethora of structures by which to access liquidity and/or reduce debt burdens through contractual permissions rather than public and relatively costly formal restructuring processes. France, the Netherlands and Switzerland all record examples of LME transactions, with the French article noting the cross-border nature of this trend.

In the UK, there are several examples of creative mechanisms for companies using looser restrictions in their credit documents to raise debt capital where they might not have sufficient liquidity runway. Creditor groups are increasingly using LMEs to drive priming transactions, uptiering and debt for equity swaps. Several significant non-pro-rata LMEs have occurred in the UK market demonstrating the evolution of the tool. For example, Hunkemoller represents a watershed moment for European restructuring. The deal involved an uptier where Redwood took control via a distressed disposal enforcement. Excluded noteholders are preparing to file claims in the UK and Dutch courts against the security agent, alleging abuse of power in conducting the distressed disposal. The case is being closely watched as it represents one of the first significant instances of creditor-on-creditor violence in Europe and could set important precedents for future LME transactions.

Pre-packs

The jurisdictions in this issue have all developed or refined pre-pack mechanisms. The French framework's strong focus on preventive restructuring tools and ensuring consensus among affected parties has led to pre-pack solutions being the natural outcome of many restructuring processes, with procedural rules subsequently introduced to facilitate their implementation. In Switzerland, the Federal Supreme Court approved the practice of privately pre-negotiated pre-packs during a provisional moratorium, emphasising that these transactions can be approved by the competent court without creditor hearings and that creditors have very limited rights to appeal.

Cross-class Cramdown And Creditor Empowerment

The replacement of shareholder or unanimity-based blocking rights of individual instruments with class-based voting and cramdown mechanisms is a defining feature across this collection of articles. France, Greece and the Netherlands have each introduced or refined cross-class cramdown capabilities. In the Netherlands, the ***IHC*** case demonstrated that a court can approve a restructuring plan that amends the usual order of priority. The Supreme Court confirmed that such changes, known as ranking swaps, are allowed if the plan meets the legal requirements for approval, especially the absolute priority rule. Across the board, the passive veto right of shareholders in respect of restructuring plans has been significantly reduced, while creditors have benefited from greater involvement in the preparation of a restructuring solution.

Directors' Duties And Governance

Each article shows legal systems grappling with the appropriate balance between duties of boards of directors and the interests of creditors in distressed situations. In Switzerland, the law empowers the board of directors to respond swiftly and with great flexibility in cases of qualified capital loss and over-indebtedness, including by eliminating the mandatory requirement to convene a shareholders' meeting in cases of financial distress (unless shareholder approval is required for specific measures). In the Netherlands, directors should assess how the LME will affect existing creditors' positions and their collateral and recovery

prospects, and whether the LME transaction is in the best interest of all creditors, not only those that are affected by it.

OUTLOOK FOR 2026

Across Europe, policymakers and market participants have responded to the demands of a more complex, creditor-driven and internationally integrated debt market. The introduction of cross-class cramdown mechanisms, the increasing use of pre-packaged procedures in jurisdictions that previously would not have permitted them, the arrival of LMEs as a tool in the restructuring toolkit and the heightened duties imposed on boards of directors in financial distress are common threads that bind these systems that are otherwise significantly dissimilar.

The challenge for all jurisdictions, and one that will be tested by the expected uptick of restructuring activity driven by over-leveraged portfolios with looming debt maturities and macroeconomic headwinds, is to maintain the balance between speed and flexibility on the one hand, and fairness, transparency and creditor protection on the other. The articles that follow explore these tensions in depth, jurisdiction by jurisdiction, providing practitioners with authoritative guidance to the evolving law and emerging practice in each market that will prove invaluable in the year ahead.

1 The Revised Practice Statement on Companies: Schemes of Arrangement and Restructuring Plans under Parts 26 and 26A of the Companies Act 2006 was issued on 18 September 2025 and will apply to cases with convening hearings on or after 1 January 2026. It replaces the 2020 version and follows a May 2025 consultation aimed at improving efficiency, transparency and fairness in the restructuring process.

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First lessons to be learned from the 2021 French insolvency law reform

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Summary

IN SUMMARY
DISCUSSION POINTS
REFERENCED IN THIS ARTICLE
KEY RESTRUCTURING TOOLS
ENDNOTES

IN SUMMARY

The French restructuring framework has undergone a significant shift, moving from a debtor-centric approach to increased creditor involvement. Key reforms, including recently the 2021 Ordinance,[1] have empowered creditors in plan negotiations, limited shareholders' veto rights and promoted pre-packaged solutions. The focus now lies on early intervention, consensual agreements and economic viability, aligning the French system with international standards.

DISCUSSION POINTS

- French restructuring toolkit
- Overview of restructuring pre-packaged plans after the 2021 French insolvency law reform
- Impact of the reform on stakeholders' rights and especially shareholders
- New trends: soft restructuring

REFERENCED IN THIS ARTICLE

- Sixth book of the French Commercial Code
- Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019
- Ordinance No. 2021-1193, dated 15 September 2021
- Decree No. 2021-1218, dated 23 September 2021

Historically, the French restructuring and insolvency framework has been perceived as a debtor-friendly framework due to limited creditor involvement and extensive protection granted to the debtor and its shareholders.

Over the past 20 years, however, changes to French legislation have favoured the involvement of creditors in restructuring processes. Lately, insolvency courts have approved several lender-led restructurings, illustrating that these changes have effectively made their way into the French market.

The use of preventive proceedings has also significantly increased and is now a distinctive feature of the French system.

Most importantly, the French restructuring and insolvency framework has recently been amended to, among other things, transpose the EU Directive on Restructuring and Insolvency (the Directive) into French law.[2]

These amendments have been introduced by Ordinance No. 2021-1193, dated 15 September 2021 (the 2021 Ordinance), effective as of 1 October 2021 (subject to limited exceptions) in respect of preventive and insolvency proceedings initiated since 1 October 2021, and Decree No. 2021-1218, dated 23 September 2021 (the 2021 Decree), which implements the 2021 Ordinance.

As the French system already has a strong culture of encouraging preventive restructurings to address financial difficulties at an early stage, the procedural rules have remained largely unchanged and, as opposed to the German Stabilisation and Restructuring Framework for Businesses regime or the Dutch scheme of arrangement, no new proceedings have been created for the purpose of achieving the objectives set by the Directive.

However, the way restructuring plans are adopted within existing proceedings has undergone a significant change.

In particular, the 2021 Ordinance introduced: (1) a new concept of 'classes of affected parties', differing materially from the previous 'creditors/bondholders' committees'; and (2) the ability for an insolvency court to adopt a restructuring plan through a cross-class cramdown (while only a regular cramdown was possible under the former rules).

These changes tend to redefine the balance of the interests at stake, with the following trends observed:

- the 'passive' veto right of shareholders in respect of restructuring plans affecting their equity interests have been significantly lessened, as demonstrated by the recent restructuring operations implemented under this new framework, which often resulted in massive dilution of existing shareholders;
- 'in the money' creditors have benefited from greater involvement in the preparation of a restructuring solution, their support becoming decisive when it comes to working out a solution; and
- while debtors anticipating difficulties will retain significant control in safeguard and accelerated safeguard proceedings, creditors' 'step in' ability in reorganisation proceedings should now be more tangible (eg, affected parties will be able to submit alternative plans to be voted on by other affected parties).

Almost six years after the reform came into force, large-scale financial restructuring operations have taken place, and practitioners are beginning to get to grips with these tools.

Overall, it appears that this reform has facilitated financial restructuring by placing an economic and financial approach at the heart of the system, allowing a collective discipline based on the hierarchy of the parties to prevail. In this way, the reform has strengthened the effectiveness of the French financial restructuring framework and brought it closer to international standards.

The 2021 Ordinance has significantly limited the ability of French courts to impose the infamous 10-year term-out on dissenting creditors as part of safeguard proceedings, with the aim of ending the practice of 'hostile' safeguard proceedings that have enabled certain debtors to implement major debt restructurings on fairly aggressive terms.

The French framework's strong focus on preventive restructuring tools and ensuring consensus among affected parties has led to pre-packaged solutions being the natural outcome of many restructuring processes.

Pre-packaged solutions initially emerged from the practice of insolvency professionals. Procedural rules were then introduced to facilitate the implementation of these solutions while ensuring that the legitimate interests of the various stakeholders are sufficiently accounted for.

The idea underpinning French pre-packaged plans is that preventive proceedings should be 'continued' before an insolvency court for implementation purposes if a restructuring solution has found sufficient support among stakeholders but cannot be implemented as part of a consensual deal.

Following a brief overview of the restructuring proceedings available under French law, this chapter focuses on pre-packaging tools concerning the implementation of restructuring plans.

KEY RESTRUCTURING TOOLS

Under French law, there are two main categories of proceedings: amicable out-of-court proceedings and formal court-administered proceedings.

The first category includes mandat ad hoc and conciliation proceedings.

Mandat ad hoc proceedings are confidential out-of-court proceedings,[3] pursuant to which the court appoints a restructuring practitioner to assist a debtor in confidential negotiation with all or some of its stakeholders, under the supervision of the president of the court.

Conciliation proceedings are confidential out-of-court proceedings,[4] pursuant to which the court appoints a restructuring practitioner to assist a debtor that is solvent or has been insolvent for no more than 45 days during confidential negotiation with all or some of its stakeholders, under the supervision of the president of the court.

The second category includes safeguard,[5] reorganisation[6] and liquidation proceedings.[7]

Safeguard proceedings are formal court-administered proceedings. These are only available to debtors that are not cash flow insolvent.

Reorganisation and liquidation proceedings must be commenced if the debtor is cash flow insolvent according to the French insolvency test, defined as the debtor's inability to pay its debts as they fall due with its immediately available assets (taking into account available credit lines and moratoria). If the debtor is not facing cash flow insolvency, it has the option to request consensual proceedings or safeguard proceedings. However, a distressed debtor is required to file a petition for reorganisation or liquidation proceedings within 45 days of the date of insolvency, unless it has requested the court to appoint a conciliator. In that case, the debtor is exempted from the obligation to request the opening of a reorganisation or liquidation proceeding until the end of the conciliation proceeding. Reorganisation and liquidation proceedings can also be initiated at the request of the public prosecutor or any creditor (unless conciliation proceedings are ongoing).

If a debtor facing hardship is not cash flow insolvent, it has the option to request the initiation of either consensual proceedings or regular safeguard proceedings.

Hybrid proceedings, known as accelerated safeguard proceedings, are also available to debtors under certain conditions that are discussed below.

Out-of-court Proceedings

As a matter of principle, market practice promotes out-of-court proceedings over court-administered insolvency proceedings, which are often associated with litigation and business disruption.

Mandat ad hoc and conciliation are preventive, amicable and confidential proceedings with limited court involvement, conducted under the aegis of a court-appointed officer (mandataire ad hoc or conciliator, depending on the chosen proceeding) supervised only by the president of the court who determines the duties of the mandataire ad hoc or the conciliator within its order.

These consensual proceedings are generally opened with a view to reaching a consensual outcome.

The mandataire ad hoc or conciliator is usually appointed to facilitate negotiations with the debtor's stakeholders, but they cannot force them to accept any proposal: the restructuring agreement will consequently be negotiated on a purely consensual and voluntary basis.

Mandat ad hoc proceedings do not trigger an automatic stay of payment and enforcement actions. Creditors are not barred from taking legal action against the debtor to recover their claims, but those that have accepted to take part in proceedings usually agree to abstain from this type of action while proceedings are ongoing.

Under conciliation proceedings, no automatic stay applies, but the president of the court may: (1) stay enforcement actions and reschedule due claims for a maximum of two years with respect to creditors that have attempted to enforce their claims or that have not granted a standstill if so requested by the conciliator; or (2) reschedule claims that are not yet due and payable, for the duration of the proceedings (ie, a maximum of five months) for creditors that have not granted a standstill if so requested by the conciliator.

Generally, banks and credit funds tend to take a supportive and proactive approach in conciliation proceedings to the extent that debtors agree to provide a proper independent business review and that shareholders are open for discussions in relation to additional support or dilution.

Under amicable proceedings, the agreement of every relevant stakeholder is required to implement the restructuring solution (unless specific voting rules and majorities exist, for example, under the terms of debt documents – but these often provide for unanimous or supermajority consent in relation to important decisions such as debt deferral or write-offs).

Conciliation proceedings may be opened for a period of up to four months and can be extended by another month. Mandat ad hoc proceedings are not limited in time. In practice, debtors often combine the use of mandat ad hoc and conciliation proceedings to extend the duration of negation beyond the five-month limitation.

Mandat ad hoc proceedings are usually commenced first, as they are not subject to any time constraint. If the debtor feels that some creditors may take enforcement action or that an agreement with its creditors is about to be found, it may apply to convert mandat ad hoc into conciliation. Agreements reached in conciliation can be either acknowledged by the president of the court or approved by the court.

Where investors would be willing to provide new money, goods or services to ensure the continuation of the debtor's business, it could be necessary to convert mandat ad hoc into conciliation to enable new money providers to benefit from the 'new money' privilege granting the corresponding claims a preferential ranking in the liquidation waterfall and protection from term-out or cramdown in subsequent proceedings – the new money privilege can only be granted by the court as part of a court-approved agreement.

Formal Court-administered Proceedings

Safeguard Proceedings

Safeguard proceedings are public court-administered proceedings commenced at the request of a debtor experiencing difficulties that it cannot overcome on its own if it is not already insolvent. These proceedings aim to facilitate the continuation of the business, the protection of employment and the repayment of creditors.

In that respect, the debtor will prepare, with the assistance of the judicial administrator, a draft safeguard plan to be negotiated with and submitted to its stakeholders, either through an individual consultation with each creditor or through a class-based consultation (see below).

During these proceedings, the debtor benefits from an automatic stay on payments and enforcement for debts incurred before the opening of the procedure, which prevents creditors from suing the debtor for payment and enforcing security interests.[8]

Because these are court-administered proceedings, specific rules will apply in relation to, among other things, the management of the debtor's business (in particular, actions falling outside the ordinary course of business will have to be judicially authorised), the payment of certain creditors, the continuation of ongoing contracts and the determination of creditors' claims.

Reorganisation Proceedings

Reorganisation proceedings are commenced upon the request of an insolvent debtor, a creditor or the public prosecutor. One administrator (or several administrators beyond certain thresholds) will be appointed by the court to assist the debtor with management decisions or take over the full management of the debtor.

The administrator will prepare the reorganisation of the debtor and will produce a restructuring plan, with the assistance of the debtor (rules governing the adoption of the restructuring plan in safeguard are applicable (subject to certain exceptions, detailed below)). If a restructuring plan is not possible, the administrator may receive instructions from the court to comprehensively dispose of the business through an open bid process. Although the court can sanction either process, it is required to favour a restructuring plan over comprehensive disposal, where possible.

Liquidation Proceedings

Liquidation proceedings may be initiated by an insolvent debtor, a creditor or the public prosecutor if the debtor's recovery is manifestly impossible. A liquidator is appointed by the court and vested with the power to represent the debtor and to perform the liquidation operations that mainly consist of the disposal of the assets and the allocation of disposal proceeds to creditors whose claims have been admitted.

In that respect, the liquidator may organise a comprehensive disposal plan (in which case, certain rules relating to the continuation of the business will apply, notwithstanding the ongoing liquidation) or disposal of the individual assets.

Adoption Rules For Restructuring Plans Under French Law

Setting aside liquidation proceedings, as part of court-administered proceedings, creditors (and, if applicable, equity holders) must be consulted on the treatment that their respective

debt or equity interests would receive under the proposed restructuring plan (eg, debt write-offs, deferrals or debt-for-equity swaps) prior to the plan being approved by the court.

The rules governing consultation will vary depending on the size of the business.

Standard Consultation

Under the standard consultation process, stakeholders receive individual proposals (subject to certain rules and exceptions) and must respond within a certain time frame.[9]

Depending on the nature of the contemplated impairment, the absence of response is regarded as either consent or refusal of the proposal.[10]

Dissenting creditors may face a 10-year term-out on their claims, which may be imposed by the court.[11]

Class-based Consultation

Mandatory class-based consultation applies to debtors that, on the date of the petition for commencement of the relevant proceedings, exceed either of the following thresholds: (1) 250 employees and €20 million in net turnover; or (2) €40 million in net turnover (at either the debtor level or together with subsidiaries controlled by the debtor).[12]

Alternatively, class-based consultation can be conducted on a voluntary basis at the debtor's request (or the judicial administrator in reorganisation proceedings) and with the authorisation of the supervisory judge if the thresholds are not met.

Only the affected parties are entitled to vote on the draft plan: the creditors whose rights are directly impaired by the proposed plan and equity holders (including shareholders and holders of securities giving future rights to the share capital) if their equity interests, the debtor's articles of association or by-laws or their rights would be modified by the proposed plan.[13]

The court-appointed administrator is responsible for establishing the different classes and informing each affected party that it is a member of a class.

The court-appointed administrator must, based on objective and verifiable criteria, allocate the affected parties in classes representing a sufficient commonality of economic interest in compliance with the following conditions:

- creditors whose claims are secured by security interests in rem – in respect of those claims – and other creditors must be allocated to different classes;
- subordination agreements entered into before the commencement of the proceedings shall be complied with if they have been brought to the attention of the court-appointed administrator;
- equity holders must be separated into one or several classes of their own; and
- claims arising from employment contracts, pension rights and maintenance claims cannot be affected by the plan. In respect of creditors secured by a security trust granted by the debtor, only the amount of their claims not secured by the trust is considered.

The formation of the classes can be challenged by the dissenting affected parties. Challenges and any subsequent appeals are to be filed and ruled on within a short period of time.

Each class votes on the restructuring plan with a two-thirds majority of the voting rights (determined by reference to the amount of the claims (or rights)) being required.

If applicable, the class or classes of equity holders will vote under the rules governing shareholders' or equity holders' general or special meetings.

If the plan is adopted by each of the classes, it will be submitted to the court, which shall verify that the following conditions are met:

- the classes have been duly formed in accordance with the applicable rules;
- affected parties, sharing a sufficient commonality of interest within the same class, are treated equally and in proportion to their claims or rights;
- the plan has been duly notified to all the affected parties;
- if there are dissenting affected parties, the plan meets the 'best interests of creditors' test, which would be met if no dissenting affected party is worse off under the plan than:
    - in distribution of liquidation proceeds: in liquidation proceedings or after a comprehensive disposal of the debtor's business in judicial proceedings; or
    - pursuant to a best-alternative scenario;
- where applicable, any new financing is necessary to implement the plan and does not excessively impair the interests of the affected parties; and
- the interests of all affected parties are sufficiently protected.

The court may refuse to adopt the plan if it does not offer a reasonable prospect of avoiding the debtor's insolvency or of ensuring the viability of the business.

The judgment sanctioning the plan renders the plan enforceable against all (***erga omnes***), including the affected parties that did not vote on, or voted against, the adoption of the plan.

Alternatively, the court may sanction a plan – with the prior approval of the debtor in safeguard proceedings – despite one or several classes voting against it, subject to the following additional conditions:

- the plan is approved by:
    - a (numerical) majority of classes (necessarily including a class of secured claims or a class with a higher ranking than the unsecured creditors class); or
    - at least one class other than a class of equity holders or a class that would reasonably be expected to be 'out of the money' based on a determination of the debtor's going-concern value and if the rules governing the allocation of proceeds in judicial liquidation or as part of a comprehensive disposal plan were to be applied;
-

the plan complies with the absolute priority rule (ie, the claims of dissenting classes shall be discharged 'in full' by 'same or equivalent means' where a junior class is entitled to receive any payment or to keep any interest under the plan (with possible exceptions where necessary, at the court's discretion, and provided these exceptions do not unfairly prejudice affected parties)); and

- the plan does not permit a class to receive or retain more than the total amount of its receivables or interests.

Where one or more classes of equity holders have been formed and have not approved the plan, the plan can be imposed on the dissenting equity holders if:

- any of the thresholds triggering mandatory class-based consultation are met (ie, voluntary application of the class-based consultation will not allow a cramdown of equity holders' class or classes (see above));
- the relevant equity holders would reasonably be expected to be 'out of the money' based on a determination of the debtor's going-concern value, and if the rules governing the allocation of proceeds in judicial liquidation or as part of a comprehensive disposal plan were to be applied;
- a preferential subscription right is given to existing shareholders in relation to any share capital increase in cash contemplated by the plan; and
- the plan does not provide for the forced transfer of all or part of the rights of the dissenting class or classes of equity holders.

Adoption of a restructuring plan pursuant to the class-based consultation is broadly similar in safeguard or in reorganisation proceedings, subject to certain specificities for reorganisation proceedings where the affected parties' step-in ability is enhanced.[14]

Can a restructuring be implemented on a prepackaged basis? As highlighted above, the French system is generally a consensual system that offers efficient amicable out-of-court proceedings to debtors to enable them to remedy hardships well before they enter the zone of insolvency.

The opening of out-of-court consensual proceedings is never mandatory under French law and remains at the discretion of debtors. Nevertheless, these proceedings present numerous advantages for debtors (eg, mandated confidentiality, assistance of an experienced insolvency practitioner, reasonable costs, deterrent effect on creditors' enforcement actions, protection against ipso facto provisions and mitigation of directors' liability risk) with limited disadvantages, especially as court involvement is unobtrusive with respect to the debtor's business. As a result, debtors' first choice is often to request the opening of amicable proceedings, even if insolvent (in which case, only conciliation proceedings may be opened under strict conditions).

However, limited court involvement also implies that no solution can be implemented if the required consent is not obtained.

As such, out-of-court proceedings are often used as an initial step to initiate and prepare solutions that may need to be implemented as part of subsequent court-administered proceedings if no agreement can be found.

To overcome the opposition of dissenting creditors preventing the adoption of a restructuring agreement negotiated in the context of amicable proceedings, practitioners initially used safeguard and reorganisation proceedings to benefit from the cramdown ability and force the adoption of restructuring plans. However, recourse to full-fledged court-administered insolvency proceedings – which are public and affect debtors' business counterparts – can prove cumbersome and risky for the underlying business, in particular when implemented only to overcome the refusal of a few creditors or aggressive holdout strategies.

The rules applicable to pre-packaged restructuring plans are further described below. This set of rules relies on the ideal that the continuity between confidential amicable proceedings – allowing for a careful preparation phase – and fast-tracked court-administered proceedings, which are initiated to enable scrutiny over the proposed solution, offer an effective framework that considers the various interests involved.

Prepackaged Restructuring Plans

The Premises Of The French Prepackaged Plan: Autodis Case

Even before the introduction of specifically designed pre-packaged proceedings, practitioners found a way to use existing proceedings – with the combination of conciliation and safeguard proceedings – to carry out prepackaged plans. The restructuring of the Autodistribution group, which took place in 2009, was the first meaningful illustration of this.

In this case, the leveraged buyout documentation provided that significant restructuring steps were subject to the unanimous consent of Autodis's lenders, which made it difficult for Autodis to implement a restructuring agreement in the context of amicable proceedings. As a unanimous vote was impossible to reach, given the plurality of creditors, the only solution was to try to obtain the agreement of a two-thirds majority of the members of (former) creditors' committees in the context of safeguard proceedings.

In this context, safeguard proceedings were opened while the terms and conditions of the financial restructuring were decided by the debtor and its main creditors before the commencement order, pursuant to a memorandum of understanding concluded under the aegis of a mandataire ad hoc. In contrast to defensive safeguard proceedings – which were traditionally opened for the purpose of an automatic stay on payment and enforcement – the main advantage of safeguard proceedings in this case was the possibility of using the cramdown mechanism to impose the adoption of the plan on the dissenting creditors.

Insofar as the restructuring plan had been prepared before the opening of the proceedings, the implementation of the plan took no longer than six weeks, with a vote in committee organised less than a month after the commencement order and a judgment approving the plan 15 days later. The efficiency of the process mitigated the value-eroding effect traditionally induced by public court-administered proceedings.

Despite the lack of dedicated proceedings available at the time, the wide range of tools offered by French law had permitted the implementation of a pre-packaged plan and brought to light its numerous advantages.

Introduction Of Specifically Designed Pre-packaged Proceedings: Accelerated Safeguard Proceedings

Following the above case, French legislation has enshrined the practice by introducing two new proceedings: accelerated financial safeguard proceedings[15] and accelerated safeguard proceedings.[16]

The 2021 Ordinance has merged accelerated financial safeguard proceedings with accelerated safeguard proceedings – for simplification purposes – but they may still be limited to financial creditors, as the safeguard plan may affect a limited number of creditors.

Opening Conditions

Accelerated safeguard proceedings are specific court-administered proceedings that can only be opened at the request of a debtor in conciliation proceedings that can demonstrate that it has prepared a safeguard plan aimed at ensuring the continuity of its business and that is likely to receive sufficiently broad support from the affected parties to allow its adoption within a short period of time, as the procedure in principle lasts two months, and cannot be extended beyond four months.[17]

Therefore, debtors may enter accelerated safeguard proceedings on an insolvent basis if less than 45 days have passed between insolvency and the request for the opening of the preliminary conciliation proceedings.

The simple threat of accelerated safeguard proceedings is sometimes sufficient to implement the contemplated restructuring outcome during conciliation proceedings. The mere possibility of implementing a cramdown of dissenting creditors is generally regarded as facilitating a reasonable consensus to emerge among creditors and incentivising the debtor to submit sensible proposals to its main creditors to obtain their support.

In regular safeguard proceedings (assuming thresholds for class-based consultation are met (see above)), the court can no longer impose a term-out on dissenting creditors if the plan is not approved (ie, there is no fallback option). This important change introduced by the 2021 Ordinance is expected to considerably lessen the appeal of regular safeguard proceedings for debtors.

As an additional condition, these proceedings are only available to debtors whose financial statements have been certified by an auditor or drawn up by a chartered accountant.

Procedural Rules And Main Advantages

The regime applicable to regular safeguard proceedings is broadly applicable to accelerated safeguard proceedings, subject to certain exceptions.

Three main differences – which are also the main advantages – should, however, be noted.

First, these proceedings only take effect in respect of parties affected by the draft plan prepared in conciliation proceedings, thus limiting disruption to trade or business counterparties of the debtor if they are not affected by the draft plan.

Second, the legal duration of accelerated safeguard proceedings is two months, which may be extended to a maximum duration of four months. This mitigates the uncertainty and value-eroding effects of court-administered proceedings.

Third, the draft plan is submitted to affected parties through a class-based consultation, regardless of any applicability threshold, thus enabling cramdown and cross-class cramdown of dissenting creditors as per the rules set out above.

Illustrative Cases

The restructuring of manufacturing company Vallourec, in 2021, may be the first significant illustration of a pre-packaged plan. In the context of mandat ad hoc proceedings, Vallourec

had secured a lock-up agreement with its main creditors on the basis that they would support the contemplated restructuring plan. This restructuring plan was then implemented in the context of subsequent safeguard proceedings after the vote of the former creditors' committees.

Since then, the use of pre-packaged plans, negotiated in amicable proceedings and implemented in the context of accelerated safeguards as provided for by the 2021 Ordinance, has become much more widespread and has found fertile ground in major financial restructurings of large-scaled companies. All major recent restructurings have been conducted through this framework, including listed companies such as Pierre & Vacances, Orpea(now Emeis), Casino, Atos and Altice, as well as significant privately held groups such as People & Baby and Bourbon.

The ***Emeis*** case is certainly the most striking example, as it has given rise to numerous disputes that have significantly contributed to the practice and has facilitated the understanding of many new legal concepts of the 2021 reform in financial restructurings that followed. This case was the first use after the reform of the cross-class cramdown over several classes of affected parties (including the equity holders) by a listed company. More generally, these cases also illustrate new trends in the market and especially the weakening of the de facto right of veto enjoyed by shareholders when equity injection or debt-to-equity swap are contemplated. Previously, most of the financial effort was carried by creditors and shareholders escaped the consequences of the restructuring as the reorganisation plan cannot be imposed on them, French law being very protective of the ownership right.

That being said, the reform contributed to removing certain gridlocks that prevented restructuring operations to the detriment of the company's interest, by giving the court broader powers to impose the reorganisation plan on dissenting parties, even when they are shareholders.

Next Trends: Soft Restructurings

The post-pandemic period saw an increased level of available liquidity in a low interest rate environment and significant competition between investors, as a result of what valuations observed on French M&A and private equity (PE) deals significantly increased, such as the debt leverage of the portfolio companies. The current climate of economic uncertainty is now driving down valuations in many sectors; those companies are overleveraged and unable to refinance their acquisition debt. We accordingly anticipate seeing more and more of those restructurings over a sustained period of time.

Portfolio companies held by PE funds approaching their maturity will obviously suffer from the market environment and require financial restructuring. Certain sectors are more exposed than others, including automotive suppliers in a context of decreasing demand by consumers, construction sector in a context of high rates and lab companies in a context where state regulations are less and less favourable to them financially. Energy-driven industries should also suffer as a result of energy prices, which remain quite high in comparison to other zones such as China or the United States.

The year 2025 marks a clear shift from the previous period, where the natural response to a distressed capital structure was a traditional restructuring plan. We are now witnessing a gradual transition from these conventional tools, with liability management exercises (LMEs) taking centre stage alongside conventional restructuring tools. LMEs are no longer just an accessory or a backup plan, they have become a core, and sometimes preferred, strategy

for restructuring and/or deleveraging. Liability management transactions can range from simple discounted debt repurchases and amendments designed to obtain covenant relief, to more complex transactions such as amends and extends, 'up-tiering' exchanges or 'priority' exchanged or 'drop-down' financings. Large-scale asset sales and dropdown transactions were, for example, central in Altice's strategy and allowed it to reclassify subsidiaries and redirect sale proceeds. In addition, this trend is not limited to France: emblematic cases such as Selecta (Switzerland), Ardagh (Luxembourg), Hunkemöller (Netherlands) and Victoria (UK) demonstrate that LMEs are becoming a preferred tool across Europe.

As LMEs become more prevalent, lenders are adapting by seeking changes to finance documentation, inspired by US market practices. Specifically, lenders are increasingly requesting the inclusion of 'LME blockers' (ie, negative covenants designed to restrict liability management tactics). The purpose of these LME blockers is to pre-emptively close the loopholes that borrowers have exploited in high-profile cases such as ***Serta*** or ***J. Crew***, where a subset of lenders collaborated with the company to structure deals that benefited them, sometimes at the expense of other lenders. The growing use of these LME blockers reflects a broader trend of lenders seeking to protect themselves from aggressive LME strategies, making their inclusion a key point of negotiation.

In parallel, lenders have begun to organise themselves through cooperation agreements, committing to oppose any borrower proposal unless it is supported by a certain majority of lenders, thereby limiting the borrower's ability to implement LME strategies (as seen in cases such as AccorInvest and, more recently, Colisée Group). In response, borrowers are increasingly seeking to include anti-cooperation clauses in their finance documentation, which may constrain lender coordination and reduce the effectiveness of such agreements, forcing lenders to adopt more nuanced strategies. These methods of organising negotiations via cooperation agreements are likely to become increasingly common in France, where liability management becomes more and more usual, in a context where the recent reform of insolvency law may sometimes encourage certain borrowers to implement a 'divide and conquer' strategy when composing the classes of parties affected in insolvency proceedings.

Liability management operations are of great interest to all stakeholders: they enable companies to gain breathing space in the hope of a market turnaround, while not having to record losses immediately for the lenders. They also have the advantage of avoiding public restructurings, the impact of which is likely to have a negative impact on the value of the business, such as the customer and supplier base. All these factors suggest that these operations have a bright future in France. There are, however, countervailing trends, and the market has not yet found a clear balance between lender coordination and borrower defensive measures.

Any views expressed in this publication are strictly those of the authors and should not be attributed in any way to White & Case LLP.

Endnotes

1 Ordinance No. 2021-1193, dated 15 September 2021. ^ Back to section

2 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. ^ Back to section

3 Articles L. 611-3 and L. 611-15 of the French Commercial Code. ^ Back to section

4 Articles L. 611-4 to L. 611-6, and L. 611-15 of the French Commercial Code. ^ Back to section

5 Articles L. 620-1 and following of the French Commercial Code. ^ Back to section

6 Articles L. 631-1 and following of the French Commercial Code. ^ Back to section

7 Articles L. 640-1 and following of the French Commercial Code. ^ Back to section

8 Articles L. 622-7 and L. 622-22 of the French Commercial Code. ^ Back to section

9 Article L. 626-5 of the French Commercial Code. ^ Back to section

10 Article L. 626-5 of the French Commercial Code. ^ Back to section

11 Article L. 626-18 of the French Commercial Code. ^ Back to section

12 Articles L. 626-29 and R. 626-52 of the French Commercial Code. ^ Back to section

13 Article L. 626-30 of the French Commercial Code. ^ Back to section

14 Article L. 631-19 of the French Commercial Code. ^ Back to section

15 Law dated 22 October 2010. ^ Back to section

16 Order dated 26 September 2014. ^ Back to section

17 Articles L. 628-1 and L. 628-8 of the French Commercial Code. ^ Back to section

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Liability management exercises in the Dutch market: navigating evolving legal frameworks

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Summary

IN SUMMARY
DISCUSSION POINTS
REFERENCED IN THIS ARTICLE
INTRODUCTION: LMES IN THE DUTCH MARKET
CONTRACTUAL IMPLEMENTATION
SHARE PLEDGE ENFORCEMENT
WHOA IMPLEMENTATION
WHOA AFTER LME COMPLETION: STRATEGIC CONSIDERATIONS
KEY CONSIDERATIONS FOR DUTCH BORROWERS WHEN CONDUCTING LMES
CONCLUSION: DEVELOPING PRACTICE IN THE DUTCH MARKET
ENDNOTES

IN SUMMARY

Liability management exercises (LMEs) have arrived in the Dutch market, with recent transactions including*McDermott*, *Selecta* and *Hunkemöller*. These attractive new tools enable distressed companies to secure new financing and preserve going-concern value, although non-participating creditors may scrutinise them. Unlike courts in the United States, which have issued rulings on LMEs, Dutch courts have not yet issued any final rulings on the legal boundaries. This article examines how LMEs are being implemented in the Dutch market and the legal questions that will shape their future development.

DISCUSSION POINTS

- Implementation of LME transactions in the Netherlands through various legal mechanisms
- How Dutch standards of "reasonableness and fairness" may apply to contractual LME implementation
- The Serta ruling's potential influence on market participants and contract interpretation approaches in the Netherlands
- Share pledge enforcement as an implementation mechanism, with court approval providing transaction certainty
- The role of the Dutch Restructuring Scheme (WHOA) in offering comprehensive judicial review for LME structures requiring legal certainty
- Practical points for market participants to consider, including fraudulent conveyance analysis under Dutch law

REFERENCED IN THIS ARTICLE

- In re Serta Simmons Bedding
- Selecta
- IHC
- Dutch restructuring scheme (WHOA)
- Dutch Civil Code
- Dutch Bankruptcy Act
- Explanatory Memorandum to the Dutch restructuring Schema
- F.J.M. Hengst, R.G.A. Elkerbout-Kok & B.P. Burghout, “Liability management in finance: Points to consider for the Dutch debt market”, GRR 2025

INTRODUCTION: LMES IN THE DUTCH MARKET

Liability management exercises or LMEs have evolved from US practice into instruments now applied in European debt structures, allowing borrowers to access liquidity and reduce debt burdens through contractual permissions rather than formal restructuring processes.[1]

For background on what LMEs are, why they are now a sought-after tool, and what form they can take (including drop-down, up-tiering and double-dip structures), we refer to our 2025 GRR article, which examined LMEs from a borrower perspective.[2] Building further on that article, we will now focus on how Dutch legal practice is implementing these transactions through various mechanisms, and what legal factors are emerging as case law develops.

The Dutch market has specific features that affect how LMEs can be implemented. While LMEs provide expedient solutions for companies requiring new financing to preserve going-concern value, Dutch law offers various mechanisms for implementation, each with different characteristics in terms of speed, certainty and stakeholder protection. Non-participating finance providers and shareholders may oppose LMEs because these often involve recovery prospects being reallocated and pushing non-participating stakeholders further back in the ranking. This creates tension that requires careful handling.

In the United States, case law has developed on the boundaries of LME transactions, particularly where it concerns fiduciary duties and fraudulent conveyance regulations.[3] US courts have generally recognised LMEs as primarily contractual matters. However, on 31 December 2024, the US Court of Appeals for the Fifth Circuit overturned a US$200 million up-tiering transaction in the ***Serta*** case, prompting market participants to reconsider certain implementation approaches.[4]

While US courts have developed a body of case law addressing LMEs, Dutch courts have yet to issue definitive rulings on how Dutch legal principles should be applied to these structures. This leaves market participants having to navigate an evolving legal landscape based on developing market practice and emerging case law.

CONTRACTUAL IMPLEMENTATION

Overview And Process

LMEs do not require a formal or informal court process but can be executed on a purely contractual basis using the provisions in financing documentation that govern amendments, exceptions and permitted transactions.[5] Financing agreements following the US private equity model, in particular, provide the flexibility needed for LME transactions through extensive baskets and qualified majority amendment provisions. A crucial provision is the amendment clause: credit agreements often require unanimity for significant amendments, while other amendments can be made with qualified-majority approval.

The fact that LMEs are based on contractual provisions only helps to implement them rapidly. Amendments can be made with qualified majority approval, avoiding the need for unanimous consent. The process typically involves: (1) identifying applicable amendment provisions and permitted transaction baskets; (2) securing required lender approvals; and (3) executing the transaction documentation.

McDermott implemented an LME in the form of a drop-down in 2024, placing its valuable tanks division outside the restricted group to enable new financing. The transaction was largely executed consensually outside of formal restructuring. And it was only a non-pro rata reduction of commitments under existing credit facilities and a disenfranchisement of certain non-financing liabilities that required implementation via the WHOA and a UK restructuring plan.

Advantages To Consider

The advantages of contractual implementation include speed, flexibility, preservation of going-concern value, limited publicity and the avoidance of unanimous lender consent requirements. A purely contractual LME can be executed out of court within weeks, as opposed to a court-driven restructuring process that can take months.

Legal Framework

In practice, the question arises whether amendments in the context of an LME actually fall within the scope of amendment provisions. Most LME examples are based on US or English law documentation, and case law has developed in those jurisdictions.[6] Market participants proceed based on legal opinions and contractual analysis, with transactions being structured to anticipate potential judicial review.

Where credit agreements are governed by Dutch law, the exercise of contractual rights is subject to statutory requirements of "reasonableness and fairness".[7] The Dutch Supreme Court has held that exercising a contractual right can be unacceptable if, in view of all circumstances, this would be unacceptable according to standards of reasonableness and fairness. Contractual implementation does not eliminate process risk.

As far as we are aware, there have not been any successful challenges of LME transactions on the basis of reasonableness and fairness under Dutch law. But as the reasonableness of any application of contractual provisions is fact-specific, it remains to be seen how courts will judge the use of far-reaching contractual rights in distressed situations, where the alternative may be equally prejudicial or worse.

The *Serta Simmons* case illustrates contractual interpretation issues: the US Court of Appeals for the Fifth Circuit ruled that the "open market purchase" exception could not apply because there was no purchase on a market "generally accessible to everyone".[8] Although this ruling concerned a specific contractual element, it was seen as an important trend break. Financing documentation has been adapted in response: since *J.Crew*, the "J Crew Blocker" has become standard, and many lenders have negotiated "blanket up-tier blockers".

SHARE PLEDGE ENFORCEMENT

Overview And Process

An alternative implementation method in an LME is the regular share pledge enforcement: an old and reliable instrument that is enjoying renewed interest in the context of LME transactions.

This implementation route proceeds in three phases: (1) reaching agreement among first-ranking secured finance providers forming an instructing group, usually requiring a qualified majority of first-ranking pledgees as determined in the intercreditor agreement or security documents; (2) enforcing the pledge; and (3) implementing the new capital structure. The key issue to consider here is that the new, improved capital structure is not achieved by a change in the existing capital structure, but by selling 100% of the shares in the company to a new vehicle and building the desired capital structure in that new vehicle. The latter often involves a debt-for-equity swap to reduce leverage so the new equity better reflects economic ownership. All shares are sold and certain debt instruments are swapped for equity in the new vehicle.

Enforcement of a pledge under Dutch law typically takes one of two forms: a private sale or appropriation with court approval or with pledgor consent.[9] Where (negotiated) cooperation

from the pledgor is feasible, the consent route is easier as no court approval is required. However, in restructuring contexts, parties generally choose private sale with court approval because judicial review reduces process risk, as was demonstrated in the *HEMA*, *IHC* and *Selecta* cases.[10] The requesting pledgee must submit a valuation report enabling the court to determine if the private sale will yield higher proceeds than a public sale.

The economic rationale for a share pledge enforcement in any form is that the going-concern value is preserved. Through rapid transfer of shares to a new owner willing to provide new financing or convert existing debt to equity, a formal restructuring procedure can be avoided. Although implementation may affect the distribution of value between different groups, the reallocation follows contractual terms agreed between professional parties and the financial-economic reality.

Advantages And Points To Consider

In share pledge enforcement, several interests collide. Senior secured lenders have an interest in seeing their claim satisfied as fully as possible and, where enterprise value is lower than outstanding senior debt, in obtaining control to protect value. Having said that, under Dutch law they must consider the interests of the pledgor and other stakeholders. Unsecured subordinated creditors have an interest in the highest possible valuation and may challenge the transaction or present an alternative, in the hope of retaining some future recovery value. The same goes for the existing shareholders: they may also challenge the transaction if they believe that the valuation is too low and they should have a stake in the residual value.

Perhaps the key advantage of share pledge enforcement with court approval is that judicial review is obtained at the outset. Although this review is limited to the question of whether the pledgee has complied with its duty of care and whether the highest possible proceeds have been obtained, it is generally considered to provide senior lenders with higher deal certainty, while still enabling rapid transfer of control.

A consideration in this regard is the potential conflict of interest of senior lenders in share pledge enforcement in the context of an LME. While they are pledgees or beneficiaries with a duty of care towards the pledgor, they often have an interest in the buyer (directly or indirectly through an affiliated party). The incentive for these parties to accept a low offer price for the pledged shares – with the risk of a challenge on the basis that they were bidding with their other hat on as investor in the new vehicle – gives additional weight to the required valuation report by an independent expert. Although there are no formal requirements relating to valuation, too informal a valuation report carries the risk of the intended transaction being challenged by aggrieved shareholders or junior creditors and court approval not being obtained.

Legal Framework

The legal framework for share pledge enforcement is provided by article 3:251 DCC.[11] Dutch courts have approved share pledge enforcement in restructuring contexts in several cases, including *HEMA* and *IHC*.[12] The *Selecta* case represents a recent example of share pledge enforcement in an LME context.[13]

WHOA IMPLEMENTATION

Overview And Process

An LME can also be implemented through an arrangement of liabilities under the WHOA. The WHOA can be an attractive alternative to contractual implementation or share pledge enforcement where parties seek comprehensive judicial validation or liabilities other than financial liabilities need to be restructured.

The WHOA process involves: (1) preparation of an arrangement proposal with class composition; (2) voting by affected creditors and shareholders in classes; (3) court homologation applying statutory tests; and (4) implementation of the restructured capital structure. The procedure typically takes longer and involves more costs than contractual or share pledge enforcement-based routes, but there are benefits affiliated to the WHOA that are not available in a contractual or share pledge enforcement-based route (see further below).

Enforcing share pledges may not be feasible where minority shareholders or creditors request the appointment of a restructuring expert and a cooling-off period under the WHOA, as that automatically stays the enforcement. Accordingly, boards of distressed companies can consider whether combining LMEs with WHOA procedures better serves stakeholder interests.

Legal Framework

In a WHOA, the court reviews if the arrangement satisfies various statutory requirements, including:

- the "best interest of creditors test": no creditor may be worse off than in bankruptcy;[14]
- the "absolute priority rule": in distributing the value realised with the restructuring plan, ranking order may not be deviated from to the detriment of a dissenting class;[15] and
- reasonableness and fairness: the arrangement may not be contrary to standards of reasonableness and fairness.[16]

These tests offer broader protection to minority shareholders and junior creditors than share pledge enforcement. The court's explicit ruling that the arrangement satisfies statutory requirements provides comprehensive legal certainty.

WHOA Implementation Of LME Structures

The WHOA offers possibilities for implementing LMEs that extend beyond what is contractually achievable without formal procedure. One important possibility is the relatively wide freedom to allocate reorganisation value to providers of new money, corresponding with the underlying LME purpose of realising new financing essential for preserving going-concern value. The Explanatory Memorandum to the WHOA recognises the position of new investors and confirms that shareholders' pre-emptive rights in respect of new share issuances may be set aside by the court in circumstances of financial distress.[17]

As market practice develops, guidance will emerge on how courts apply the statutory tests to LME structures specifically.

Ranking Swaps And The Cooling-off Period

A powerful feature of the WHOA not otherwise available under Dutch law, is the possibility of forced swaps in the ranking between creditor groups, which is also an element of up-tiering transactions. The *IHC* case is illustrative: the court homologated an arrangement that altered the ranking order between creditor groups. The Supreme Court confirmed, in cassation in the

interest of law, that ranking swaps are justified if they satisfy homologation requirements, particularly the absolute priority rule.[18]

Ranking swaps can also be achieved in contractual LMEs, but may generate disputes about whether these swaps are permitted under existing documentation. The*IHC* case provides guidance, although questions remain about how courts approach ranking swaps implemented outside the WHOA and subsequently challenged.

An important difference between share pledge enforcement and the WHOA is the cooling-off period preventing creditors from proceeding with enforcement actions. The cooling-off period lasts a maximum of four months but can be extended to eight months.[19] If the court grants a cooling-off period, enforcement measures are not permitted during this period unless the court determines otherwise. Parties implementing LMEs through contractual means or pledge enforcement must therefore anticipate that dissenting creditors or shareholders might file for WHOA protection and obtain a cooling-off period, potentially affecting transaction timing.

WHOA AFTER LME COMPLETION: STRATEGIC CONSIDERATIONS

A WHOA can also be initiated after an LME has already been implemented. This scenario can occur when junior creditors or shareholders seek to challenge the completed transaction's legal validity through formal proceedings.

Another potential use case of an LME is to help a company financially in the short term while building in options for the future. Parties may consider structuring class composition such that the class expected to provide additional financing is favourably positioned in a subsequent WHOA. In US practice, creditors have strengthened their position before Chapter 11 procedures.

In the Netherlands, this could involve: (1) an up-tiering transaction where senior lenders convert debt into super-senior debt with priority over non-participating minority; (2) WHOA application where super-senior lenders are classified in a separate class; (3) cross-class cramdown where the degraded minority are bound to the arrangement despite opposition.

The consideration here is not only whether the up-tiering transaction itself satisfies legal requirements, but also whether class composition in the subsequent WHOA is appropriate. Courts may apply heightened scrutiny to class composition where an up-tiering transaction has preceded the WHOA application. In US case law, this strategy has received scrutiny, with judges examining whether up-tiering transactions executed shortly before Chapter 11 procedures were designed to manipulate outcomes. In some cases, US courts have ruled that such transactions are not permitted. There is no Dutch case law on this issue yet, but Dutch courts can be expected to examine such strategies carefully on a case-by-case basis.

Where a WHOA is initiated after completion of an LME, the question arises whether the prior transaction can still be challenged. The WHOA does not provide a general power to unwind prior transactions. If an LME has been implemented during a cooling-off period without court approval, the transaction is in breach of the Dutch Bankruptcy Act and may be annulled.[20] If the LME takes place outside a cooling-off period, creditors may still seek to challenge the completed transaction on the basis of fraudulent conveyance (***actio pauliana***) or tort, but the start of WHOA proceedings does not alter this position.

This represents an area where Dutch LME practice continues to develop. How courts respond to such strategic behaviour will become clear in future cases.

KEY CONSIDERATIONS FOR DUTCH BORROWERS WHEN CONDUCTING LMES

Fraudulent Conveyance: Analytical Framework

The Actio Pauliana Framework

Where non-participating creditors believe they have been moved backward in the ranking while still being in the money, they may consider initiating proceedings based on fraudulent conveyance claims (***actio pauliana***) to challenge completed transactions.

A fraudulent conveyance claim is based on the Dutch Civil Code outside bankruptcy and on the Dutch Bankruptcy Act in bankruptcy scenarios.[21] The potential claimant's goal would be to reverse the transaction to the extent that it has prejudiced creditors. The threshold for such claims is substantial, but, if successful, claims based on fraudulent conveyance could result in the transaction being void.

The test for fraudulent conveyance under Dutch law comprises three elements: (1) voluntary legal act: the legal act must be carried out voluntarily (without pre-existing obligation); (2) prejudicing creditors' recourse: this is determined by comparing what means of recovery dissenting lenders would have had under the existing waterfall if the transaction had not been performed with the recourse position following the transaction; and (3) actual or presumed knowledge: the parties involved knew or should have known of the prejudice towards dissenting lenders.[22]

Importantly, and different than in many other jurisdictions, the test that is applied to fraudulent conveyance under Dutch law is objective and focused on the effect of a contested transaction rather than the intent behind it.

Practical Application – Points To Consider

The application of the ***actio pauliana*** framework to LME transactions will depend on specific circumstances. Market participants must analyse if transactions satisfy the legal criteria, with particular attention to demonstrating that creditor positions have not been prejudiced when measured appropriately.

For example: where an LME preserves going-concern value and prevents bankruptcy while reallocating recovery prospects among creditor classes, the “prejudice” element requires comparing creditor positions. Robust valuation supporting the view that creditor positions have not deteriorated provides important protection.

In addition to fraudulent conveyance, a tort-based claim for damages under Dutch law may be available. An act meeting the requirements of a fraudulent conveyance claim may also satisfy criteria for a tort-based claim. An important distinction is that fraudulent conveyance claims do not require intent to produce preferential effect, whereas tort claims under Dutch law require that the act was “unlawful”.[23] This creates scope for the argument that commercially justified acts in distressed situations, even where they reallocate creditor positions, are not unlawful.

Directors' Duties And Practical Considerations

Members of the board of directors at Dutch companies, as well as the non-executives, have a duty to act in the best interests of the company and all its stakeholders. It goes beyond the scope of this article to elaborate on the weighing of those interests, but a key point is that there is no hard rule that prevents the implementation of those types of LMEs

that we discussed above. To the contrary: if an LME addresses continuity concerns at the company, the board of directors will need to consider all feasible alternatives, including an LME, even if that means that not all creditors are treated equally. That said, Dutch law gives the board of directors considerable responsibility in choosing which financing strategy to pursue. Other than, for instance, the business judgment rule in the US, the board must pursue ***the best*** achievable alternative, and not only ***any*** achievable alternative. To manage potential challenges, directors of Dutch companies should carefully consider their fiduciary duties to all creditors and other stakeholders. Directors' decisions to perform legal acts that are subsequently challenged or annulled based on the Dutch Civil Code outside bankruptcy or on the Dutch Bankruptcy Act in bankruptcy, could constitute mismanagement, potentially making directors liable towards the company and its creditors.

Directors should consider the position and impact of any proposed transaction on all creditors and evaluate available alternatives (including the various implementation mechanics) to determine which best safeguards stakeholder interests broadly. Directors should recognise that valuation involves judgment, and that non-participating creditors may have different views.

In a situation where the board of directors considers an LME to be necessary for the company's future funding, and even where an envisaged LME is permitted under existing loan documentation, directors should assess how the LME will affect existing creditors' positions and their collateral and recovery prospects, and whether the LME transaction that it is able to negotiate is in the best interest of all its creditors, not only those that are party to it.

To address potential fraudulent conveyance concerns, an obligor could consider offering participation to all lenders. By providing all lenders the choice as to whether to participate, the obligor and participating lenders are better positioned to demonstrate that there is no presumed knowledge of prejudice, particularly where fair market valuation supports the transaction's defensibility.

Where an LME with a limited number of lenders emerges as the optimal alternative in the company's and all stakeholders' best interests, thorough documentation of the decision-making process is crucial. By demonstrating that no other feasible alternative would deliver the required funding and the proposed transaction is essential to ensure continued operations (going concern), directors can substantiate their decision if challenged. Proper documentation demonstrates that directors have considered the company's and stakeholders' interests, providing protection against potential legal challenges.

These practices reflect sound governance principles and are being applied by market participants implementing LME transactions in the Dutch market.

CONCLUSION: DEVELOPING PRACTICE IN THE DUTCH MARKET

LMEs have evolved from a US instrument into an instrument also applied by companies in the European market. Although groups of creditors may challenge LMEs, the decisive consideration for management of distressed companies is often the preservation of going-concern value for as many stakeholders as possible.

In Dutch legal practice, LMEs can be implemented in various ways: (1) without a Dutch legal implementation mechanism, as in ***McDermott***; (2) through enforcing pledges on shares as with ***Selecta*** and ***Hunkemöller***; and (3) through a WHOA. The nature of LMEs means that the position of existing creditors is adjusted to make new financing possible, which can lead to

conflicts requiring careful navigation. Non-participating finance providers may initiate Dutch legal action, for example, based on ***actio pauliana*** or director liability claims.

Each implementation route offers different balances of speed, cost and legal certainty, and the importance of preserving going-concern value must be weighed against the more extensive safeguards offered by the WHOA. It may be in the interest of creditors and other stakeholders to secure a solution in the short term rather than pursue a protracted WHOA procedure.

Nevertheless, LMEs fulfil an important function in enabling companies in financial difficulties to access new financing, with preservation of going-concern value being a material consideration. LMEs will continue to be scrutinised when creditors or shareholders have concerns.

How LMEs develop in the European market will greatly depend on how judges balance the competing interests of financial market flexibility, creditor protection and preservation of going-concern value. For Dutch legal practice, this balancing takes place according to standards of reasonableness and fairness, with the specific circumstances of each case determining the outcome.

Advisers and directors should, at an early stage in any restructuring, analyse the available implementation routes with a focus on transaction certainty and process efficiency, assess the potential for challenge, and select a strategy appropriate to the specific circumstances of the company and its stakeholders.

Dutch courts will provide guidance through their rulings as cases proceed, and market participants are managing relevant factors through careful documentation, independent valuations, broad stakeholder engagement and strategic choices among implementation routes.

* The authors practise at De Brauw Blackstone Westbroek, a law firm in Amsterdam, the Netherlands. They have each been involved in one or more of the proceedings and transactions referred to in this article. This article is written in a personal capacity, not as counsel in any other past or future LME transaction.

Endnotes

1 F.J.M. Hengst, R.G.A. Elkerbout-Kok & B.P. Burghout, “Liability management in finance: Points to consider for the Dutch debt market”, GRR 2025. ^ Back to section

2 F.J.M. Hengst, R.G.A. Elkerbout-Kok & B.P. Burghout, “Liability management in finance: Points to consider for the Dutch debt market”, GRR 2025. ^ Back to section

3 F.J.M. Hengst, R.G.A. Elkerbout-Kok & B.P. Burghout, 'Liability management in finance: Points to consider for the Dutch debt market', GRR 2025. ^ Back to section

4 *In re Serta Simmons Bedding*, L.L.C., 2024 U.S. App. (No. 23-20181) (5th Cir. 2024). ^ Back to section

5 F.J.M. Hengst, R.G.A. Elkerbout-Kok & B.P. Burghout, 'Liability management in finance: Points to consider for the Dutch debt market', GRR 2025. ^ Back to section

6 F.J.M. Hengst, R.G.A. Elkerbout-Kok & B.P. Burghout, 'Liability management in finance: Points to consider for the Dutch debt market', GRR 2025. ^ Back to section

7 Article 6:248 (2) Dutch Civil Code. ^ Back to section

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9 Article 3:251 (1) and (2) Dutch Civil Code. ^ Back to section

10 Amsterdam District Court, 11 September 2020, ECLI:NL:RBAMS:2020:4523 (HEMA); Amsterdam District Court, 13 May 2020, ECLI:NL:RBAMS:2020:2681 (IHC). Amsterdam District Court, 13 May 2025, ECLI:NL:RBAMS:2025:4217 (***Selecta***). ^ Back to section

11 Article 3:251 Dutch Civil Code. ^ Back to section

12 Amsterdam District Court, 11 September 2020, ECLI:NL:RBAMS:2020:4523 (HEMA); Amsterdam District Court, 13 May 2020, ECLI:NL:RBAMS:2020:2681 (IHC). ^ Back to section

13 Rb. Amsterdam 13 May 2025, ECLI:NL:RBAMS:2025:4217 (***Selecta***). ^ Back to section

14 Article 384 (3) Dutch Bankruptcy Act. ^ Back to section

15 Article 384 (4)(b) Dutch Bankruptcy Act. ^ Back to section

16 Article 384 (2)(i) Dutch Bankruptcy Act. ^ Back to section

17 Parliamentary papers (Kamerstukken II 2018/19, 35249, nr. 3). ^ Back to section

18 Dutch Supreme Court, 25 October 2024, ECLI:NL:HR:2024:1533 (IHC). ^ Back to section

19 Article 376 (6) Dutch Bankruptcy Act. ^ Back to section

20 Article 376 Dutch Bankruptcy Act. ^ Back to section

21 Article 3:45 Dutch Civil Code; article 42 Dutch Bankruptcy Act. ^ Back to section

22 Article 3:45 Dutch Civil Code; article 42 Dutch Bankruptcy Act. ^ Back to section

23 Article 6:162 Dutch Civil Code. ^ Back to section

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Greece: Challenges and opportunities in the pre-insolvency landscape

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Summary

IN SUMMARY
DISCUSSION POINTS
REFERENCED IN THIS ARTICLE
INTRODUCTION
OUT-OF-COURT WORKOUT
REFORM OF REHABILITATION PROCESS
ENDNOTES

IN SUMMARY

Significant reforms were introduced by Greece's Insolvency Law, Law 4738/2020, and there is also a particular focus on the key features of the out-of-court workout (OCW) and rehabilitation proceedings. Our analysis discusses the tools and instruments provided by the Law, scrutinising their practical application to date and highlighting certain issues raising several debates and challenges both for debtors and creditors.

DISCUSSION POINTS

- Non-performing loans
- New out-of-court workout (OCW)
- Cross-class cramdown mechanism
- Conclusion of rehabilitation agreement without debtor's involvement
- Tackling shareholders' hold-out
- Treatment of claims secured by the Greek state
- Stay of enforcement actions

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- Law 4738/2020 –Insolvency Code
- Directive (EU) 2019/1023 – PRD 2019
- Greek Electronic Solvency Registry statistics
- Bank of Greece statistics
- Progress report of the Greek Special Secretariat for Private Debt Management on the use of OCW
- Law 5193/2025

INTRODUCTION

The Greek Insolvency Law, Law 4738/2020 (the Insolvency Code or the Code),[1] came into effect on 1 June 2021, although it had partially entered into force on 1 March 2021. The Insolvency Code abolished the former Law 3588/2007 (the Bankruptcy Code) and transposed into the Greek legal system the 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 (the PRD 2019).

A main objective of the new legal framework, as elaborated in the explanatory note of the Code, is to prevent and avoid a debtor's insolvency, and ensure viability of its business. This objective is reflected in PRD 2019, as follows:

> Preventive restructuring frameworks should, above all, enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises. Those frameworks should help to prevent job losses and the loss of know-how and skills, and maximise the total value to creditors — in comparison to what they would receive in the event of the liquidation of the enterprise's assets or in the event of the next-best-alternative scenario in the absence of a plan — as well as to owners and the economy as a whole."[2]

Viewing the PRD 2019 as a toolbox,[3] it seems that the Greek legislator took into great consideration articles 4–19 of PRD 2019 and integrated most of the tools these provisions outline into Greek law.

This article focuses on the most significant developments related to the OCW and rehabilitation proceedings introduced by the Code, underscoring key matters of interest for the reader.

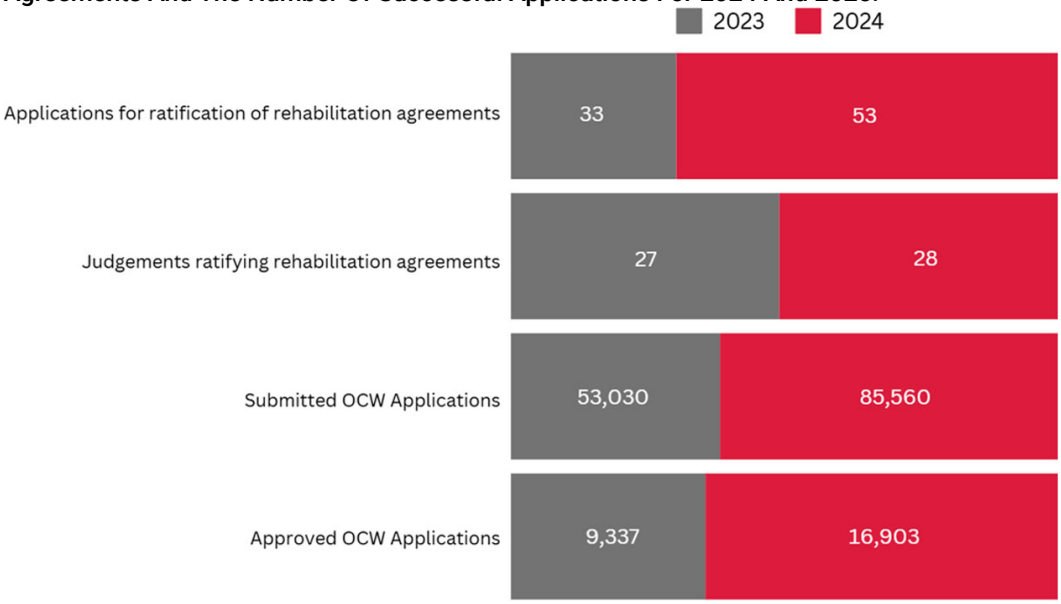
Both of the aforementioned procedures are primarily aimed at debtor's restructuring. In line with this objective, the legislative framework governing each mechanism reflects the underlying premise that a debtor's admission thereto constitutes a formal indication that the agreed restructuring is capable of securing the debtor's viability and preventing insolvency. However, they have certain structural differences. In particular, OCW applies to any natural or legal person with insolvency capacity, which implies the pursuit of an economic purpose, not necessarily of a commercial nature, as this is no longer required under the new Code (article 7, paragraph 1, in conjunction with article 76, paragraph 1), whereas the rehabilitation process is limited to entities (natural or legal persons) engaged in business activities (article 32, paragraph 1). Moreover, the debts settled through OCW are limited to those owed to financial institutions, the state and social security funds (article 6, paragraph 1, subparagraph d), whereas the rehabilitation procedure covers the restructuring of the entirety of a debtor's liabilities, including those owed to private creditors. Another key feature of the OCW is that it is an automated and out-of-court mechanism, as the application is submitted through a dedicated electronic platform, and the terms of the debt restructuring agreement are automatically generated using a calculation tool. In contrast, the rehabilitation process is not automated and requires the cooperation of both the debtor and the creditor(s) to agree on the restructuring terms, or it may be initiated by the creditor(s) without the debtor's involvement; the creditor can propose the restructuring terms if the debtor is in payment suspension. Finally, an OCW settlement extends to and releases co-debtors as well, even in cases involving the write-off of debts owed to the state and social security funds (article 22, paragraph f). By contrast, under a rehabilitation agreement, such release is not automatic but requires the creditor's explicit consent. Thus, for co-debtors to be discharged from the debtor's obligations toward the state and social security institutions, the respective creditors must expressly consent; such consent cannot be presumed (article 60, paragraph 3).

In practice, it appears that the OCW is preferred by smaller businesses or individuals who are satisfied with "canned solutions" without a court's involvement, or by businesses, which aim for a stand-alone settlement with the state and social security funds. The procedure is also attractive due to its relatively swift and streamlined nature. It is further preferred by debtors as it is more cost-effective than the restructuring process, which typically requires the involvement of multiple advisers and specialised professionals, leading to increased costs.

On the other hand, the rehabilitation procedure is more appealing to larger businesses that seek tailored solutions and "dialogue" with their critical creditor(s) (eg, financial institutions and servicers) in view of reaching a viable solution that can be validated by the court. Rehabilitation proceedings also allow for a more holistic restructuring of the debtor's obligations, as they can also cover liabilities to private creditors.

In recent years, an anticipated rise in debt restructurings has been observed in Greece, with most attributing it to the increased use of OCW. The following chart provides a comparative overview of the number of OCW applications and applications for the ratification of rehabilitation agreements, along with the number of successful applications, for 2024 and 2025.[4]

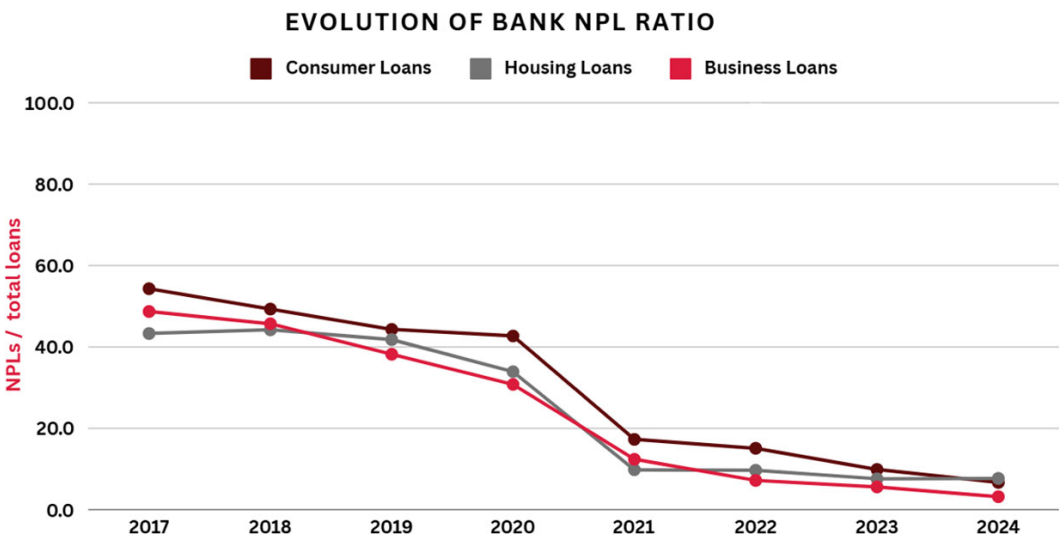
Chart 1. Number Of OCW Applications And Applications For The Ratification Of Rehabilitation Agreements And The Number Of Successful Applications For 2024 And 2025.



The data clearly indicate that the OCW mechanism significantly outweighs rehabilitation agreements in terms of use. Both submitted and approved OCW applications vastly exceed applications for, and ratifications of, rehabilitation agreements in both years examined.

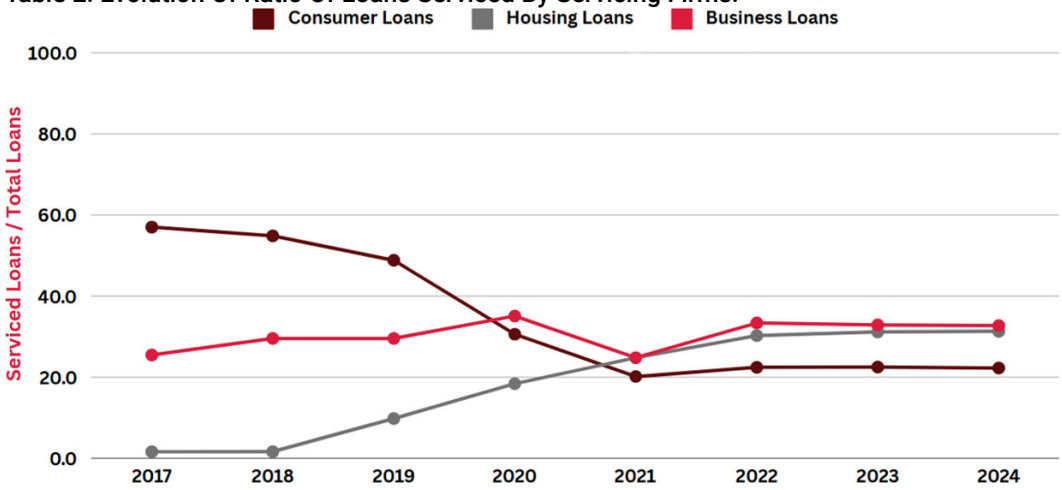
Another aspect to take into account is the evolution of non-performing loans (NPLs) in Greece over the past decade. Such evolution exemplifies significant changes in the banking sector, with a notable decline in the NPL ratio over the years. The NPL ratio against the total gross loans in Greece began increasing in 2009, peaking at 49.1% in 2016. As shown in Table 1, in late 2025 (September 2025), Greek banks recorded the lowest NPL ratio to date, even lower than in the pre-crisis period, with the ratio standing at 3.3%. However, as indicated in Table 2, this decline appears to be ascribed to the fact that most of the NPLs have been transferred to funds, with their management subsequently taken over by servicing firms, rather than being due to the success of the restructuring tools implemented.

Table 1. Evolution Of Bank NPL Ratio.



Source: Bank of Greece, Data on the Evolution of Unified Non-Performing Loans in Greece

Table 2. Evolution Of Ratio Of Loans Serviced By Servicing Firms.



Source: Bank of Greece, Data on the Evolution of Loans Serviced by Servicing Firms

OUT-OF-COURT WORKOUT

A OCW currently in force has been incorporated into the Code (articles 5 to 30), replacing the previous one regulated by Law 4469/2017, which expired on 30 April 2020. Recently, OCW legal provisions were amended by Laws 4818/2021, 5024/2023, 5072/2023,5104/2024, 5193/2025 and 5270/2026and further particularised by several Ministerial decisions, each introducing notable changes and enticing debtors to deploy such tool.

The objective of the OCW is to provide participating creditors with a functional environment to formulate proposals for the restructuring of a debtor's debt through a 'haircut' or debt restructuring (thereby avoiding the risk of insolvency), either upon the debtor's request or on the creditors' initiative.

The significant novelties of the OCW scheme currently in force are:

- it is an out-of-court process running exclusively on an electronic platform;
-

it covers debt owed to financial institutions, the state (and third parties whose claims are payable through the state) and social security funds, excluding debt owed to private creditors;

- it does not have an expiration date;
- the appointment of a coordinator is optional;
- the terms of the restructuring agreement may be determined by an automated tool (an algorithm); and
- any breach of the restructuring agreement does not trigger its termination but the loss of the settlement towards the bound creditor.

The main benefits of the new OCW for the debtors are:

- long-term settlements (term up to 35 years); up to 240 instalments' debt settlements to the state and social security funds, and up to 420 instalments' settlements to the financial institutions;
- significant haircuts of principal debt, interest, fines and surcharges;
- provision of tax and social security clearance certificate;
- out-of-court settlement of loans guaranteed by the Greek state;
- stay of all enforcement actions provided that the debtor is not in default;
- no-cost application – free of court fees; and
- grant of a five-year monthly state subsidy to vulnerable debtors for the loan instalment, under specific terms and conditions.

Below is a summary of key data points sourced from the progress report on the use of OCW dated December 2025, as provided by the Greek Special Secretariat for Private Debt Management, covering the course of 2025 (the OCW Progress Report 2025):

- 129,770 submitted applications, comprising a total debt equal to €58.31 billion (compared to 85,560 submitted applications, comprising a total debt of €40.12 billion, in 2024);
- 57.49% of debtors are natural persons merchant applicants, 21.9% are natural persons non-merchant applicants and 20.61% are legal entities;
- 71.6% of the total debt in OCW is owed to financial institutions;
- majority of the applications (38.4%) concern the settlement of debt ranging from €50,000 to €200,000;
- 57.8% of the total debt in OCW corresponds to liabilities exceeding €1 million;
- the average term for public debt settlements is 16 years, while the average settlement term of debt to financial institutions is 15 years;
- the average write-off rate for debt owed to the state is 14%, whereas for debt to financial institutions it is 30%;
- 48.4% of the settled debt to financial institutions received a haircut greater than 30%;
- the total amount of debt written off is tantamount to €5.02 billion (compared to €2.94 billion in 2024); and

- 80% of settlement proposals have been approved, in average, by financial institutions (compared to 68.1% in 2024).[5]

The main latest changes that have been incorporated into the OCW platform over the past year are the following:

- debts to municipalities and their entities exceeding €10,000 are now treated as public debts eligible for the OCW debt settlement mechanism, even if enforcement or precautionary measures have already been imposed. If a restructuring agreement is reached through the platform, enforcement is lifted; if not, municipalities may resume enforcement;
- the scope of application of presumed creditor consent has been expanded. It now applies beyond the "vulnerable debtors" of article 217(a) of the Code to all debtors who: (1) meet double the income and asset eligibility thresholds (annual income ≤ €14,000; bank deposits ≤ €14,000; real estate property ≤ €240,000); (2) have non-performing loans ≤ €300,000; and (3) have debts overdue ≥ 90 days as of the Law's entry into force, namely from its publication in the Government Gazette on 11 April 2025*;*
- in respect of the above amendment, debtors whose previous OCW applications were rejected may resubmit within two months of the Law's entry into force if they now meet the expanded eligibility criteria*;*
- within the same two-month period, legal entities that previously received a debt restructuring proposal based on a reasonable profit margin but lost it due to non-payment of at least three instalments may reapply*;*
- an amendment of article 25, paragraph 5 of Law 1882/1990 on the stay of criminal prosecution for debts to the state expands and clarifies its scope; establishes a detailed procedural framework; and explicitly suspends the statute of limitations for the relevant criminal offence for the duration of the restructuring arrangement and for one year thereafter*;* and
- in relation to the suspension of seizure in the hands of third parties, debtors are now required to have filed income tax and VAT returns for the preceding five years – even if submitted late – provided such filings are completed prior to the submission of the OCW application. Under the previous regime, filings were required within three months of the expiration of the submission deadline, a strict time frame that operated as a procedural obstacle.

REFORM OF REHABILITATION PROCESS

Enhancement Of Creditors' Involvement

The Code introduced changes for the requisite majority of creditors, who ought to consent to the conclusion of a rehabilitation agreement to subsequently ensure the consent of each class of creditors. In accordance with the former law, a rehabilitation agreement needed to be concluded by the debtor and creditors representing 60% in value of total claims against the debtor, including 40% in value of secured claims; however, pursuant to the Code (article 34, paragraph 1), for a rehabilitation agreement to be ratified, consent should be provided by the affected creditors representing, on the one hand, more than 50% in value of the claims with special privilege and, on the other, more than 50% in value of the rest of the

claims of those affected by the rehabilitation agreement. As it appears, two new classes have been formed: creditors of special privilege (eg, creditors with secured claims) and all other creditors without special privilege (eg, the state, social security funds, employees and remaining unsecured creditors). The objective of such classification, as enshrined in Recital 44 of PRD 2019, is:

> To ensure that rights which are substantially similar are treated equitably and that restructuring plans can be adopted without unfairly prejudicing the rights of affected parties, affected parties should be treated in separate classes which correspond to the class formation criteria under national law. 'Class formation' means the grouping of affected parties for the purposes of adopting a plan in such a way as to reflect their rights and the seniority of their claims and interests. As a minimum, secured and unsecured creditors should always be treated in separate classes.

This minimum requirement seems to have been adopted by Greek law, as described above, by the formation of two separate classes, that of the secured creditors and the remaining creditors.

Cross-class Cramdown Mechanism

In transposing article 11 PDR 2019, a cross-class cramdown mechanism has been introduced to the Code addressing any collective action problems. Specifically, if the aforementioned requisite majority of affected creditors (50-50) cannot be reached, the rehabilitation agreement may still be confirmed through a cross-class cramdown. In other words, when a rehabilitation agreement has not been approved by more than 50% in value of claims with special privilege, as well as more than 50% in value of the remaining claims, it can be ratified by the court and bind the dissenting class, provided that the following conditions are cumulatively met (article 54, paragraph 2):

- it has been approved by creditors representing more than 60% in value of total claims against the debtor and more than 50% in value of claims with special privilege;
- non-consenting affected creditors are treated more favourably than each creditor whose claims have a lesser repayment priority, as demonstrated by their ranking in insolvency liquidation; Although the explanatory memorandum presents the provision as implementing article 11, paragraph 1 PRD, the text itself is framed in terms of individual creditors instead of creditor classes. This divergence raises the question whether the Greek legislator intentionally avoided committing to either the absolute or the relative priority rule, or whether the transposition does not entirely align with the Directive's conceptual framework.[6]
- under the rehabilitation agreement, no class of affected creditors receives a higher amount than its total claim against the debtor; and
- with respect to microenterprises under Law 4308/2014, the agreement has been proposed by the debtor or has obtained the debtor's consent.

Conclusion Of A Rehabilitation Agreement Without The Debtor's Involvement

The Code providesthat the approval of a rehabilitation agreement without the debtor's involvement is possible if such debtor is in a state of payment suspension at the time the rehabilitation agreement is concluded (article 34, paragraph 2).

Prior to its current form, the above-mentioned article set out the following conditions for the ratification of a rehabilitation agreement concluded only by creditors holding more than 50% in value of the claims with special privilege and more than 50% in value of the rest of claims, without the debtor's involvement:

- the debtor was in suspension of payments at the time of the conclusion of the rehabilitation agreement;
- the debtor's equity was lower than one-tenth of the share capital and no measures for restoration had been adopted; or
- the debtor had not submitted their financial statements for two consecutive financial years.

Following amendment to the article in July 2021, two of the three original conditions were removed, with only the requirement that the debtor shall be in a state of payment suspension at the time of the agreement's conclusion. It seems that the Greek legislator promptly addressed the previous inadequate requirements, permitting creditors to set the debtor aside, based on reversible circumstances (eg, due to failure to submit two consecutive years of financial statements).

Considering that the application reasoning is based on the debtor's suspension of payments, the creditors are required, under penalty of inadmissibility, to submit an insolvency petition for the debtor in tandem with the application for the ratification of the rehabilitation agreement.

For a rehabilitation agreement concluded only by the creditor(s) to be ratified by the court, either the debtor's consent to the ratification must be obtained by the hearing of the application, or it must be justified in the application itself and the expert's report that the agreement does not deteriorate the debtor's legal and financial position compared to what it would have been without the agreement (article 54, paragraph 3, item e). The debtor's consent is presumed to have been granted if, until the hearing of the application, the debtor has not intervened and requested its rejection.

It should be emphasised that, contrary to the abolished Code, the new Code accepts the possibility of bypassing the debtor's non-consent even in the case of a transfer restructuring.

Currently, there is no Greek jurisprudence ratifying a rehabilitation agreement without the debtor's consent. It will be of particularly interest to observe the approach by case law, if the debtor argues that their financial and legal position is deteriorating as a result of the rehabilitation agreement, while the contracting creditor(s) and the expert appointed by them assert the opposite.

Tackling Shareholders' Hold-out

While shareholders' legitimate interests should be protected, it should also be ensured that they cannot unreasonably prevent and obstruct the adoption and confirmation of a rehabilitation plan that would render the debtor viable.[7] In this respect, by derogation from the abolished Bankruptcy Code, under which the rehabilitation agreement should have been approved by the debtor's shareholders' meeting, either upon submission of the application

for ratification of the rehabilitation agreement or as a condition precedent for the execution of the rehabilitation agreement, the new Code demands that the rehabilitation agreement be approved by the debtor's management body (if the debtor is a legal entity), unless the approval of the shareholders' meeting is explicitly required under applicable corporate law provisions. In cases where the conditions for overriding the debtor's consent are fulfilled (article 54, paragraph 3, item e), the shareholders' consent may also be bypassed, even if such consent is required under corporate law provisions.

While the approval of the management board increases flexibility and streamlines the process, it could also give rise to conflicts between the management board and (minority) shareholders. These shareholders may argue that the rehabilitation agreement exceeds the scope of ordinary management decisions. Furthermore, some have raised concerns that excluding shareholders from such a crucial company matter could be seen as a violation of provisions in the Greek Constitution, particularly regarding the right of shareholding ownership.[8]

Cases of non-consenting shareholders, where shareholders' consent is required, may be resolved through the court's appointment of a special agent with the power to convene a shareholders' meeting and exercise the rights of the non-consenting shareholders, including those of attendance and voting.

Finally, a degree of protection for non-consenting shareholders is somewhat afforded by their option to claim compensation from the company and the creditors, if it is proven in the context of a diagnostic trial that, after liquidation, they would have a residual claim (article 35, paragraph 3 item c). The issue of debate created is that, if shareholders are not given the opportunity to be heard in rehabilitation proceedings, it is highly likely that no party will raise the argument of the existence of residual value for them. As a result, the court ratifying the rehabilitation agreement may conclude that no residual claim exists for such shareholders, effectively eliminating their prospects of seeking compensation in a subsequent trial.

Presumed Consent Of The State And Other Public Bodies

As a general rule, the state, public entities, public services and enterprises, and social security funds (together, public bodies) may explicitly consent to the conclusion of a rehabilitation agreement, even when the agreement involves the waiver of privileges, collaterals and legal remedies. However, the scope of such consent is limited by the potential deterioration of their position compared to their position's state in the scenario of the debtor's bankruptcy.

One of the most significant reforms introduced to the Greek pre-insolvency landscape is the presumed consent of public bodies to the conclusion of a rehabilitation agreement, even if they do not sign it.

Under the previous regime, public bodies were frequently reluctant to enter into rehabilitation agreements and participate in the relevant proceedings, regardless of whether their position would be adversely affected. To address such issue, the Code introduced the presumption of consent from public bodies. Accordingly, public bodies are deemed to have consented to a rehabilitation agreement if the following conditions are met cumulatively (article 37, paragraph 2):

- the principal certified debt (excluding interest or other surcharges due to late repayment) of the debtor against each public body at the time of signing the rehabilitation agreement does not exceed €15 million;

- according to the expert's report, the public body should not, due to the implementation of the rehabilitation agreement, be worse off in comparison with the position it would be in, the case of insolvency; and
- according to the expert's report, the certified claims of all public bodies at the time of signing the rehabilitation agreement are less than the total sum of claims of private creditors.

For the purposes of forming this assessment, the expert is provided with debt certificates issued by the competent authorities specifically for the needs of the rehabilitation agreement, which must have been issued within one month prior to the filing of the rehabilitation application.

While the consent of public bodies may be presumed as present when the foregoing conditions are met based on the expert's report, such does not prevent public bodies from challenging the existence of these conditions before the court or arguing that the conditions for ratifying the rehabilitation agreement are not fulfilled. When the debtor has outstanding liabilities to public bodies, it is mandatory for such bodies to be summoned to court during the hearing of the application for ratification of the rehabilitation agreement.

As a matter of fact, with explicit or presumed consent from public bodies, in recent years, there have been rehabilitation agreements ratified by Greek courts that contained a partial write-off of the principal with a settlement of the remaining amount, a payment plan in 240 instalments and a 120-instalment plan with a write-off of the surcharges. In late 2024, the Multi-Member Court of First Instance of Athens ruled that any claims of the state arising from the repayable advances granted to the debtor by the state during the covid-19 pandemic can be subject to restructuring under a rehabilitation agreement based on the reasoning that such an agreement may encompass the restructuring of all types of the debtor's assets or liabilities. However, there is substantial opposing jurisprudence ruling that these claims cannot be restructured under a rehabilitation agreement, as they must be repaid according to the decision granting the repayable advances. It will be interesting to follow whether future courts will uphold the recent ruling of the Multi-Member Court of First Instance of Athens or if its viewpoint will be overturned by the Court of Appeal.

To encourage the participation of public bodies in rehabilitation agreements, the Greek legislator has ensured that officers of public bodies shall bear no civil, criminal or disciplinary liability for signing a rehabilitation agreement or voting in favour of it by electronic voting or for their presumed consent (article 38).

Finally, it is underlined that if the rehabilitation agreement provides for a limitation of the rights of public bodies against guarantors and co-debtors, as well as limitation of their rights to the property of third parties, the consent of the public bodies must be explicit; otherwise resulting in this provision's nullity (article 60, paragraph 3).

Treatment Of Claims Secured By The Greek State

Law 5193/2025[9] constitutes the most significant recent reform of the Code with regard to rehabilitation agreement provisions. Through article 179, it introduces a new framework governing rehabilitation agreements and state guarantees granted to financial institutions, by inserting paragraphs 6 to 9 into article 34.

The newly inserted provisions expressly confirm that, irrespective of the terms of the rehabilitation agreement, state guarantees remain in full force and effect, without any quantitative increase in the state's guarantee exposure. They further provide that, from the date of the filing of the ratification application and for as long as the rehabilitation agreement remains in force, limitation periods and statutory deadlines for submitting guarantee call requests by the financial institutions are suspended.

Furthermore, where the ratified rehabilitation agreement provides for a write-off of debtor's liabilities, financial institutions may request from the Greek state a lump-sum payment corresponding to the guaranteed portion of the written-off amount. In such case, the Greek State discharges its obligations as guarantor in respect of the principal amount written off in full, without certifying that amount as revenue of the Greek State against the natural or legal person before the competent service of the Independent Authority for Public Revenue, and by mutatis mutandis application of article 101, paragraph 6, points (b), (c) and (d) of Law 4549/2018.[10]

In the event that the rehabilitation agreement is annulled, the guaranteed debt revives to its pre-rehabilitation amount and becomes immediately due, entitling the financial institution to call upon the state guarantee for the outstanding balance.

Stay Of Enforcement Actions

According to the Code (article 50, paragraph 3), the initial duration of the stay of individual or collective enforcement actions against the debtor is limited to four months starting from the submission of the application for ratification of the rehabilitation agreement (the automatic stay). The total duration of such a stay, including all extensions and renewals, may be exceeded up to 12 months at the application of any interested party (article 52, paragraph 1). The purpose of this stay is to prevent creditors from opting out of the collective rehabilitation process and to protect the debtor's 'asset pool' from actions that could deplete its value during such period.[11]

We often face the paradox that, although no judicial decision has been issued on the ratification of the rehabilitation agreement within 12 months of the submission of the application, the stay of enforcement actions expires. This leaves the debtor vulnerable to aggressive actions by its creditors, which could jeopardise the rehabilitation process pending a judicial ruling on the ratification of the rehabilitation agreement. Although the last sentence of Recital 35 of PRD 2019 provides that "Member States should be able to decide whether a short interim stay pending a judicial or administrative authority's decision on access to the preventive restructuring framework is subject to the time limits under this Directive", the Greek legislator chose to limit the duration of the stay to 12 months. Henceforth, it may be argued that the stay of enforcement actions beyond a period of 12 months can be granted in accordance with the applicable provisions of the Greek Code of Civil Procedure.

Aside from the automatic stay that the debtor benefits from upon the submission of the application, they are also entitled to request a stay of enforcement actions at an earlier stage. Precisely, this can be requested prior to the application's submission, but after entering into negotiations with a key creditor (or more than one) who represents at least 20% of the debtor's total liabilities (article 53, paragraph 1). This stay is limited to four months, but it can be exceptionally extended subject to a duly justified occasion in the following cases: (1) when there is progress in negotiations; (2) the continuation of the stay does not unjustly affect the rights of any affected party and no insolvency petition against the debtor has been

heard; and (3) the total duration, including all extensions and renewals, does not exceed six months.

Endnotes

1 Government Gazette 207 A'/27 October 2020. ^ Back to section

2 Recital 2 of PRD 2019. ^ Back to section

3 Boon, Koster & Vriesendorp, Implementation of the EU Preventive Restructuring Directive, Part I, BLRN No 1, 2023, page 185. ^ Back to section

4 The data related to OCW has been sourced from the OCW Progress Report 2025, while the data on the rehabilitation tool has been extracted from the Electronic Solvency Registry. ^ Back to section

5 https://minfin.gov.gr/wp-content/uploads/2026/01/Dec-2025_gr_full-upd-version-final_2-1.pdf. ^ Back to section

6 Boon, Koster & Vriesendorp, Implementation of the EU Preventive Restructuring Directive, Part I, BLRN No 1, 2023, page 104. ^ Back to section

7 Recital 57 of PRD 2019. ^ Back to section

8 Evanghelos Emm Perakis, Insolvency Law, 4th ed, The new Law 4738/2020 on insolvency as amended by Law 4818/2021, 2021, pages 101–102. ^ Back to section

9 Government Gazette A' 56/11.04.2025. ^ Back to section

10 Government Gazette A' 105. ^ Back to section

11 Paulus/Dammann, European Preventive Restructuring, article 2, mn 22. ^ Back to section

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Switzerland: restructuring approaches under Swiss corporate law and the DCBA

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Summary

IN SUMMARY
DISCUSSION POINTS
REFERENCED IN THIS ARTICLE
INTRODUCTION
THE CORPORATE LAW AND ITS EFFECT ON THE CORPORATE RESTRUCTURING LAW
CORPORATE RESTRUCTURING LAW – DUTIES OF THE BOARD OF DIRECTORS
PRUDENT FINANCIAL GOVERNANCE
IMMINENT ILLIQUIDITY
QUALIFIED CAPITAL LOSS
OVER-INDEBTEDNESS
POPULAR RESTRUCTURING MEASURES
LIABILITY OF THE BOARD OF DIRECTORS IN THE AFTERMATH OF RESTRUCTURING AND FINANCIAL DISTRESS
PREREQUISITES FOR LIABILITY OF THE BOARD OF DIRECTORS
PITFALLS DURING RESTRUCTURINGS

THE DCBA, COMPOSITION PROCEEDINGS, PRE-PACKAGED TRANSACTIONS AND RESCUE COMPANIES

COMPOSITION PROCEEDINGS

PRE-PACKAGED TRANSACTIONS

RESCUE COMPANIES

ANTI-ABUSE PACKAGE AND RESTRUCTURING PLANNING

IN SUMMARY

The Swiss restructuring framework is governed by Swiss corporate law (the relevant sections of the Swiss Code of Obligations (CO)) for out-of-court restructurings and by the Swiss Debt Collection and Bankruptcy Act (DCBA) for court-supervised restructurings. Under Swiss corporate law, the board of directors must act promptly when facing statutory distress indicators such as imminent illiquidity, qualified capital loss and over-indebtedness. This requires strong liquidity planning, timely escalation and a defensible governance record.

This article aims to provide a high-level overview of selected restructuring topics from a corporate law perspective, focusing on out-of-court restructurings, pre-packaged transactions and directors' liability. It also highlights practical implications that have gained increasing importance since the Federal Act on Combating Abusive Bankruptcy came into force in January 2025, including public law claims and spillover effects on restructuring planning and execution.

DISCUSSION POINTS

- Swiss corporate law distress triggers and board of directors' response (imminent illiquidity, qualified capital loss, over-indebtedness)
- Out-of-court restructuring under Swiss corporate law
- DCBA proceedings and execution (composition moratoria and proceedings, bankruptcy proceedings, pre-packaged sales and rescue structures)
- Director liability and practical risk management (defensible governance record, equal treatment of creditors)
- Measures to combat abusive bankruptcies (anti-abuse package)

REFERENCED IN THIS ARTICLE

- Swiss Code of Obligations of 30 March 1911, as of 1 January 2025 (CO)
- Swiss Code of Obligations of 30 March 1911, as of 1 January 2022 (old legislation)
- Corporate Law (in particular articles 552–926 CO)
- Corporate Restructuring Law (in particular, articles 725–725c CO)
- Swiss Debt Collection and Bankruptcy Act of 11 April 1889, as of 1 January 2025 (DCBA)
- Federal Act on Combating Abusive Bankruptcy of 18 March 2022, as of 1 January 2025

INTRODUCTION

Swiss corporate law provides detailed provisions on imminent illiquidity, capital loss (whereby only qualified capital loss is relevant from a restructuring perspective) and over-indebtedness, together with clear rules on the consequences of these situations. These provisions reflect the corporate law regime in force since 1 January 2023, which

introduced a more nuanced and practical approach to indicators of financial stress and their consequences compared to the previous framework.

Alongside corporate law, the DCBA regime in force since 1 January 2025 has become an integral part of restructuring planning, particularly because liquidity pressures can quickly translate into formal enforcement risks. Notably, outstanding public law claims, such as unpaid taxes and Federal Old Age and Survivors' Insurance (OASI) contributions, can be enforced against debtors registered in the commercial register through the bankruptcy, which replaced the former attachment route for taxes and levies. The possibility of pursuing public law claims through bankruptcy proceedings represents a significant expansion of bankruptcy enforcement and increases the risk of companies entering bankruptcy proceedings, particularly those with tight liquidity conditions. Thus, where a company's situation can no longer be stabilised out of court, the DCBA becomes crucial alongside the CO. In particular, composition proceedings provide an avenue for financially distressed companies to restructure while continuing operations under the supervision of a court-appointed administrator rather than ceasing operations entirely.

The current corporate law framework also empowers the board of directors to respond swiftly and with great flexibility in cases of qualified capital loss and over-indebtedness, including by eliminating the mandatory requirement to convene a shareholders' meeting in scenarios of financial distress (unless shareholder approval is required for specific measures). The primary responsibility for initiating and coordinating restructuring measures rests with the board of directors. The defined statutory grace period enhances clarity in out-of-court restructuring procedures. At the same time, the duties of care imposed on the board of directors increase the practical relevance of civil liability exposure against members of the board of directors by creditors, shareholders and the company itself pursuant to article 754 et seq CO, namely when a restructuring later ends in bankruptcy.

THE CORPORATE LAW AND ITS EFFECT ON THE CORPORATE RESTRUCTURING LAW

Switzerland's out-of-court restructuring law is primarily set out in Swiss corporate law, itself part of the CO, while the court-supervised restructurings are subject to the provisions of the DCBA. While the corporate law contains the indicators triggering a restructuring as well as the out-of-court procedures and instruments available for corporate restructuring processes, the DCBA focuses primarily on the prerequisites and procedures for court-supervised restructuring and bankruptcy procedures, as well as the safeguarding, recovery and distribution of the remaining assets in the course of such procedures.

A central element of the corporate restructuring framework is article 725 et seq CO, which addresses the restructuring of companies in financial distress. While the provisions of article 725 et seq CO, located in the 26th title of the CO (Ltd/AG), primarily pertain to corporations, their principles also apply to other legal entities under the CO, including, notably, the limited liability company (LLC/GmbH). Compared to the prior framework (status as of 1 January 2022), the current corporate restructuring regime is designed to facilitate earlier and more effective interventions by the board of directors.

Under the old corporate law framework, only two statutory indicators of financial distress were expressly recognised: a qualified capital loss and over-indebtedness, both outlined in article 725 CO (old legislation). A qualified capital loss arose when, based on the latest annual balance sheet, the company's assets no longer covered its share capital and legal reserves. In such a case, the board of directors, which is legally responsible for monitoring the company's

financial health, was obliged to convene an extraordinary general meeting (extraordinary shareholders' meeting) to propose restructuring measures to the shareholders. In the case of (suspected) over-indebtedness, the board of directors was required to prepare two interim balance sheets audited by a Swiss certified public accountant: one reflecting a going-concern valuation of the assets and the other reflecting a liquidation valuation of the assets. If the creditors' claims exceeded the value of the assets under either valuation, the board of directors had to notify the court of the company's financial distress and, as a consequence, insolvency proceedings were typically initiated, subject to limited exceptions (eg, credible restructuring prospects supported by effective subordination measures), which did not relieve the board of directors from taking further steps.

Both triggers under the old legislation (qualified capital loss and over-indebtedness) were generally considered late-stage indicators of financial distress, contributing to the perceived ineffectiveness of the former restructuring framework in practice. Against this background, the current corporate law framework clarifies and supplements the board of directors' duties in financial distress and recognises imminent illiquidity as an additional indicator. This aligns the corporate law framework more closely with restructuring practice, where liquidity pressure frequently precedes balance-sheet insolvency and often determines whether a restructuring can be achieved out of court.

CORPORATE RESTRUCTURING LAW – DUTIES OF THE BOARD OF DIRECTORS

Under the corporate restructuring framework set out in articles 725–725b CO, the board of directors is subject to defined duties once a company is in financial distress and requires restructuring. These duties (as outlined below) are designed to ensure that the board of directors acts at an early stage and with reasonable urgency to prevent further deterioration of the company's financial situation.

The main duties of the board of directors if a company is in financial distress are:

- monitoring the company's overall financial health and maintaining proper accounts;
- planning and monitoring of the company's or group's liquidity;
- planning, evaluating and – if necessary – adopting necessary restructuring measures; and
- notifying the court promptly in the event of over-indebtedness.

In addition to these corporate law duties from the CO, the DCBA framework entails procedural realities that a board of directors must factor into restructuring planning, particularly with respect to outstanding public law claims such as unpaid taxes and OASI contributions. For commercial register debtors, these claims can be pursued via the bankruptcy route, which can materially accelerate enforcement pressures in distressed scenarios. Moreover, article 725b CO allows for the subordination of creditor claims (including interest) to avoid bankruptcy filing, provided there is a reasonable prospect of restructuring within 90 days. In practice, the silent moratorium has also developed into a relevant tool to manage liquidity constraints discreetly while stabilising operations and preparing a broader restructuring solution.

PRUDENT FINANCIAL GOVERNANCE

The duty to monitor the financial situation is part of the general duties of the board of directors (see article 716a CO). In addition to these general duties in article 716a, article

725 et seq CO outline specific responsibilities in cases of financial distress. A key duty is the obligation to supervise the company's financial affairs (see article 725 paragraph 1 CO). This includes establishing and maintaining a comprehensive accounting and reporting system, as well as regularly monitoring the company's financial development, and acting urgently in situations of foreseeable or imminent illiquidity. Consequently, the board of directors must rely on several indicators to identify potential financial distress and, if necessary, act as early as possible.

The corporate restructuring law framework set out in the CO distinguishes three scenarios, each of which entails specific obligations for the board of directors: imminent illiquidity (article 725 CO), capital loss (whereby only qualified capital loss is relevant from a restructuring perspective) (article 725a CO) and over-indebtedness (article 725b CO). Although articles 725, 725a and 725b CO are contextually related, the obligations they impose are independent of each other. In practice, these scenarios may not occur simultaneously, and companies may experience them in varying sequences. However, in the event of over-indebtedness as per article 725b paragraph 3 CO, the legal consequences take precedence, and control over the proceedings is withdrawn from the company.

In addition to the three scenarios, the CO contains clear rules regarding the revaluation of real estate and participations (article 725c CO). These provisions ensure that asset valuations reflect market conditions, which enhances transparency and reduces the risks of overstating balance sheets.

IMMINENT ILLIQUIDITY

According to article 725 CO, the board of directors has a specific duty to monitor liquidity and to react once illiquidity becomes foreseeable or is suspected. While article 716a CO requires the board of directors to monitor the company's overall financial health, including liquidity, at all times, article 725 CO specifically imposes obligations for situations in which illiquidity is foreseeable or imminent. The law does not prescribe specific methods for monitoring liquidity, which leaves the choice of tools and systems to the board of directors' discretion, underlined by the business judgment rule.

Once a risk of illiquidity is identified, the board of directors must act with reasonable urgency once illiquidity is foreseeable or imminent and take measures to ensure solvency and liquidity. This may include implementing further restructuring measures independently, seeking shareholder approval at an extraordinary general meeting where required, or taking measures independently of the general meeting. In the worst-case scenario, the board of directors may apply for a composition moratorium as an ***ultima ratio*** to protect against imminent illiquidity if other measures fail. From a business perspective, illiquidity can arise for various reasons, such as an inventory build-up caused by declining sales or rapid growth, or a deterioration in the company's profitability. Under article 725 CO, illiquidity is presumed if the company is unable to meet its financial obligations due within the next 12 months and clear indicators suggest that refinancing is unlikely.

In addition, the board of directors may also notify the court to apply for a composition moratorium, although the notification is not mandatory. The decision to proceed with such an application is guided by the business judgement rule and is another option to address liquidity concerns. The growing use of ***silent moratoria*** has provided companies with an option to discreetly address imminent illiquidity while maintaining stakeholders' confidence.

This tool allows companies to stabilise operations without immediate public disclosure, though confidentiality may be challenging to maintain.

Furthermore, the board of directors must remain vigilant to mitigate potential liability exposure under the DCBA framework, particularly as outstanding public law claims (such as unpaid taxes and OASI contributions) for commercial register debtors can be pursued via the bankruptcy route, which can materially increase enforcement pressure in distressed scenarios.

A key 2025 practical point emerging from recent practice is that, once a moratorium is sought, the quality and credibility of the liquidity narrative and funding plan can be decisive. In a recent decision (BGer 5A_660/2025 from 5 November 2025), the Federal Supreme Court addressed the early revocation of a provisional moratorium and confirmed that bankruptcy can be opened before the scheduled hearing where it becomes obvious that no restructuring prospects remain. This underscores the need for boards to prepare (and continually update) a defensible restructuring thesis and funding evidence when using DCBA tools to ***buy time***.

QUALIFIED CAPITAL LOSS

In cases of financial distress, equity (net worth) erosion occurs in stages, ultimately resulting in a capital loss. The extent of this erosion, which reduces the company's equity cushion, is critical. If the net assets no longer fully cover 100% of the share capital and non-distributable (ie, blocked) reserves (within the meaning of article 653p CO), there is a capital loss, which must be strictly monitored by the board of directors. A qualified capital loss arises only when the net assets fall below half of the sum of the share capital and the non-distributable reserves, at which point the board of directors is formally required to address such capital loss through concrete restructuring measures.

Thus, if the latest annual accounts show such a qualified capital loss, the board of directors must act with reasonable urgency to eliminate the loss. The selection of measures remains within the professional judgement of the board of directors and is guided by the business judgement rule. The board of directors is not obliged to test for a qualified capital loss outside of the preparation of the annual financial statements in line with article 725a paragraph 1 CO. It is necessary neither to convene a general meeting nor to inform shareholders of the qualified capital loss, unless the measures proposed require shareholder approval.

Furthermore, once a qualified capital loss is identified, the most recent financial statements must be reviewed by an auditor before being approved at the next general meeting, even if the company had previously opted out (ie, chosen not to appoint an auditor). The only exception is where the board of directors initiates a composition moratorium after discovery of the qualified capital loss.

OVER-INDEBTEDNESS

Third, and irrespective of the annual financial statements, if there is a reasonable concern of over-indebtedness, the board of directors must act immediately and without delay. A company is over-indebted when its net assets no longer cover its liabilities. If there are reasonable grounds for concern that the company's liabilities are no longer covered by its assets, the board of directors must immediately prepare interim financial statements at both going-concern and fair-value assessments. Interim financial statements at going-concern value may be omitted if the going-concern assumption is met and they do not indicate

over-indebtedness. If the going-concern assumption does not apply, the fair-value interim financial statements alone are sufficient.

If both interim balance sheets confirm over-indebtedness, the board of directors is required to notify the court immediately. Should the board of directors fail to do so, the auditors have a subsidiary duty to notify the court. However, notwithstanding the over-indebtedness of the company, the notification may be waived if:

- the creditors of the company agree to subordinate their claims (including interest claims) to the extent of at least the existing over-indebtedness alongside all other creditors of the company; or
- there is a reasonable prospect of restructuring without court intervention within 90 days of the date on which the interim balance sheets are available to the board of directors (see article 725b paragraph 4 number 1 and 2 CO).

The corporate restructuring law framework is quite explicit on both the timing expectation (without delay) and the limited statutory avenues to avoid immediate court notification. At the same time, the court is not permitted to suspend bankruptcy proceedings after notification, even if financial restructuring appears possible. However, the court retains the authority to grant a suspension if immediate restructuring or a composition agreement is imminent.

POPULAR RESTRUCTURING MEASURES

The board of directors has a wide range of tools at its disposal to meet its legal obligations in the case of financial distress. While corporate restructuring law provides occasional guidance on possible measures, these examples are not exhaustive and must be assessed and tailored to the specific circumstances of the company. Swiss practice has developed several commonly used measures to ensure compliance with the board of directors' duties, including:

- stand-still agreements with creditors;
- subordination or waiver of debt;
- debt-to-equity or equity-to-debt swap transactions;
- use of the revaluation reserve (requires shareholders' approval);
- *à fonds perdu* injections; and
- capital cut or harmonica transactions (require shareholder approval).

LIABILITY OF THE BOARD OF DIRECTORS IN THE AFTERMATH OF RESTRUCTURING AND FINANCIAL DISTRESS

In the event of a breach of any statutory duties, the board of directors may be held jointly and severally liable to the company, shareholders and creditors for the damage caused by such a breach of duty. This liability is particularly significant in the aftermath of restructurings and financial distress that have ended in bankruptcy, where creditors and shareholders frequently take action against their board of directors and seek compensation for damages resulting from a perceived breach of duty on the part of the board of directors and the entrusted management. The general legal basis for civil liability of members of the board of directors is set out in article 754 et seq CO. These provisions provide that all members of the board of

directors, as well as people entrusted with the management or liquidation of a corporation, are liable for damages resulting from an intentional or negligent breach of their duties.

From a practical perspective, the corporate restructuring law framework and the applicable DCBA procedural environment mean that the board of directors is expected to act promptly and on a well-documented basis in situations of financial distress. In particular, the obligation to respond decisively to liquidity pressure (article 725 CO) and to address over-indebtedness (article 725b CO), requires heightened diligence of the board of directors.

PREREQUISITES FOR LIABILITY OF THE BOARD OF DIRECTORS

The liability of the board of directors requires:

- a breach of duty;
- damage to the company or specific creditors;
- intentional or negligent conduct; and
- a clear connection between the breach and the resulting damage.

Courts have held directors liable in cases of financial distress, in particular where statutory requirements were not complied with, such as the obligation to report the company's over-indebtedness to the court. In such instances, damages often include increased loss incurred from the point in time at which members of the board of directors should have recognised the company's distress and failed to take appropriate action until the declaration of bankruptcy.

Further civil liability risks may arise from mismanagement or in connection with transactions that may be challenged, particularly if they disadvantage certain creditors or stakeholders. In addition, Swiss social security law provides for strict civil and criminal liability of directors and officers for non-payment of certain social security contributions, as outlined in article 52 OASI. The competent social security institutions actively pursue claims in such scenarios.

PITFALLS DURING RESTRUCTURINGS

Given the liability risks faced by the board of directors and management, especially during a restructuring or when the company is in financial distress, measures taken to address liquidity problems (such as rapid sales of assets and businesses at favourable prices) or to satisfy individual creditors (debt or asset swaps, etc) must be critically assessed. It is imperative to refrain from actions that may disadvantage certain creditors or weaken the liability base. Particularly in the face of imminent illiquidity, the board of directors and management should not prioritise the satisfaction of certain creditors who may recognise the company's financial distress earlier than others or who are likely to take more aggressive action against the distressed company. In addition, repaying maturing obligations at a time when funds are needed to meet outstanding debt obligations, or when there is a reasonable concern of over-indebtedness, may result in liability claims against the board of directors and management.

THE DCBA, COMPOSITION PROCEEDINGS, PRE-PACKAGED TRANSACTIONS AND RESCUE COMPANIES

In contrast to out-of-court restructuring procedures governed by Corporate Restructuring Law, court-supervised restructurings in Switzerland are governed by the DCBA. The main restructuring procedure under the DCBA is the composition proceeding, as outlined

in article 293 et seq DCBA. Once a composition proceeding is opened, the court appoints a composition administrator for the duration of the proceeding. The composition administrator will oversee the composition proceeding (articles 293b and 295 DCBA).

The Swiss composition proceeding bears similarities to the US Chapter 11, which is typically initiated by the debtor to obtain temporary relief from creditors and avoid liquidation by restructuring or selling the business. Likewise, the Swiss process aims to protect operations and maintain business continuity, though it has not reached the same level of popularity as Chapter 11. Swiss law nevertheless provides mechanisms for composition or bankruptcy proceedings, and where appropriate, the sale of an operating business in insolvency in a timely and efficient manner, while ensuring appropriate creditor involvement. Although these tools are used less frequently than some international counterparts, they can deliver pragmatic results when applied with clear planning and disciplined execution.

COMPOSITION PROCEEDINGS

Composition proceedings are generally initiated by the composition court at the request of the debtor itself, although creditors of the distressed company may also request the opening of such proceedings under certain circumstances (article 293 paragraph 1 lit a and b DCBA). Composition proceedings aim to protect financially distressed companies from creditor enforcement and provide a framework either for negotiating a court-approved debt restructuring agreement with its creditors (composition agreement), or for restructuring without such a court-approved debt restructuring agreement. After a composition process is initiated, the court will decide within four months whether the company can be restructured or whether bankruptcy proceedings should begin. Following this decision, the court-appointed administrator has an additional four to six months to negotiate a composition agreement with the company's creditors (article 294 paragraph 1 DCBA). This period may be extended by the court in the case of complex restructurings (article 295b DCBA).

A composition agreement can be structured either as an ordinary composition agreement or as a composition agreement with assignment of assets (articles 314–318 et seq DCBA). Under an ordinary composition agreement, the debtor and creditors agree on a payment schedule, a haircut, or a combination of both, with the aim of enabling the company to continue. By contrast, a composition agreement with assignment of assets involves the transfer of the debtor's assets to the creditors for realisation by a liquidator chosen by the creditors, ultimately leading to the dissolution of the distressed company.

PRE-PACKAGED TRANSACTIONS

Pre-packaged transactions (ie, a pre-negotiated sale of a company or its assets) have become an increasingly important tool in Swiss restructurings, even though case law remains relatively limited. While pre-packaged transactions are not explicitly regulated, they are legally permissible and are typically implemented during a composition moratorium. Such sales require the consent of the court-appointed administrator (and, depending on the structure, the liquidator) as well as court approval.

There are currently no categorical restrictions on the involvement of related parties. However, the administrator and the court must review the terms of the proposed pre-packaged transaction to ensure that it is conducted at arm's length and does not disadvantage the debtor's creditors. In practice, pre-packaged transactions often involve two key steps. First, the relevant assets, liabilities and contracts are transferred to a newly formed subsidiary

in a process known as hive-down. Second, the subsidiary's shares or assets are sold to a buyer, subject to approval by the court and the court-appointed administrator. This approval process is intended to ensure that the transaction is fair and benefits creditors, while helping to minimise claw-back risks if the moratorium ultimately ends in bankruptcy.

Swiss case law has confirmed the admissibility of such pre-packaged restructurings. The Federal Supreme Court validated the practice of privately pre-negotiated pre-packs during a provisional moratorium, emphasising that these transactions can be approved by the competent court without creditor hearings and that creditors have very limited rights to appeal (BGer 5A_827/2019 from March 18, 2021). The Federal Supreme Court highlighted that confidentiality, speed and value preservation can justify this approach when negotiations with a buyer are advanced and a better outcome for creditors is expected than in bankruptcy. These principles remain highly relevant in practice, where pre-packs continue to serve as an efficient restructuring tool, particularly when combined with silent moratorium and governance safeguards. For boards of directors and bidders, the decision underscores the importance of defensible valuations and demonstrates arm's-length terms to minimise claw-back risks and liability exposure.

From a buyer's perspective, pre-packaged transactions offer an opportunity to acquire viable parts of a business while reducing exposure to claw-back claims compared to less structured distressed scenarios. To be competitive, buyers typically need to submit fully funded bids with limited conditions and conduct rigorous due diligence to address any uncertainties.

RESCUE COMPANIES

Rescue companies are sometimes used in Switzerland to restructure a financially distressed company during composition proceedings, whether alongside out-of-court measures or within court-supervised procedures. The use of rescue companies may be considered in situations where the DCBA provides only limited possibilities to support a distressed company and safeguard the company as a legal entity, and where a rescue structure is used to preserve value and enable a continuation solution.

In scenarios where a company cannot realistically be restructured despite having profitable business segments – either because a composition agreement with creditors cannot be achieved or because it is de facto impossible to split off the profitable parts from the distressed entity – rescue sales may be considered (albeit often cautiously in Swiss practice) to avoid unnecessary redundancies and to protect the claims of creditors. If a rescue sale is considered during the composition procedure, the competent court must approve it, as can be inferred from article 298 paragraph 2 DCBA. The provision itself does not set out detailed requirements, modalities, or a dedicated sale procedure, rather, it provides that the debtor may dispose of fixed assets only with authorisation of the court (or, where applicable, the creditors' committee), in whole or in part.

Therefore, to carry out a rescue sale, the distressed company typically submits to the relevant court a detailed restructuring plan outlining the sale of the business to a rescue company together with the application for a provisional debt-restructuring moratorium to the court. This means that the request to approve the sale of the business is submitted at the same time as the request for the provisional moratorium. The filing must explicitly explain why an immediate sale is in the creditors' best interest and why the transaction is urgent.

To protect the interests of creditors, it is crucial to demonstrate that the sale price is consistent with the market value (ie, by providing expert valuations and/or presenting multiple bids). If the request is well founded, the judge may approve the rescue sale with immediate effect in urgent cases, particularly where an interruption of business associated with the moratorium would threaten to destroy enterprise value and jeopardise creditor claims.

However, the use of a rescue company is not as straightforward as an ordinary sale. This is largely due to specific legal aspects such as article 333 CO, which provides for joint liability of the successor for the claims of employees. In addition, VAT succession risks may become relevant depending on the transaction and structure. Swiss practice and case law on VAT succession (including discussions around BGE 146 II 73) are often cited as reasons to diligence and allocate historic VAT exposures carefully in rescue acquisitions and hive-down structures.

ANTI-ABUSE PACKAGE AND RESTRUCTURING PLANNING

Under the Federal Act on Combating Abusive Bankruptcy, a set of measures applies across several areas of federal law (including the CO, the DCBA, the Commercial Register Ordinance and the Federal Act on Direct Federal Taxation) with the aim of reducing abusive bankruptcies and strengthening creditor protection. In restructuring practice, these rules have become relevant beyond purely insolvency-driven scenarios.

A central element for restructurings is the treatment and enforcement of public law claims. For debtors registered in the commercial register, taxes and levies are pursued through the ordinary enforcement framework, including the bankruptcy route (article 39 DCBA), rather than through the former attachment mechanism. In practical terms, this reinforces that public law arrears must be addressed early and transparently in liquidity planning and restructuring negotiations, as enforcement pressure may escalate more quickly and with greater procedural consequences for registered companies. More broadly, the current framework is designed to make it harder to shed liabilities to the detriment of creditors and affected parties. In particular, bankruptcy mechanisms should not be used to avoid financial obligations such as wage payments or other debts, nor should they enable strategic behaviour that disadvantages creditors. Likewise, bankruptcy proceedings should not serve as a tool for unfair competition, for example by voluntarily entering bankruptcy to avoid debt and social security claims while competing against compliant businesses.

The Swiss corporate restructuring law framework is today largely established and provides a comprehensive toolbox under the CO and DCBA. 2025 represented the first year in which the anti-abuse package operated as part of the baseline enforcement and compliance environment in distressed situations, and practical spillover effects have become increasingly relevant for restructuring planning. In 2026, further refinement is expected through emerging practice and case law, particularly at the interface between CO duties in financial distress (board of directors' governance and documentation) and DCBA tools (eg, composition moratoria and distressed sales). The development of case law is expected to continue to consolidate practical standards, especially regarding (1) evidentiary expectations in moratorium applications, (2) the governance record that a board of directors should maintain to withstand later liability scrutiny, and (3) the execution mechanisms of pre-packaged transactions within Swiss procedural safeguards.

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