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Chapter 13

Preventive Restructuring - Is Ireland a Leader in the EU?

Aoife FINNERTY*

1. Introduction

After an extensive consultation and negotiation process, the Preventive Restructuring Directive[1] (the 'PRD') was agreed between the EU institutions and published in the Official Journal of the European Union. The extensive negotiation process concerned many aspects of the PRD, but can broadly be summarised as reflecting the inherent difficulty in homogenising the different domestic approaches to insolvency, underpinned – at least in part – by the different legal cultures and traditions. There are differences in the way that insolvency and business failure are viewed and treated across Member States. As will be outlined throughout this paper, many of the key aspects of the Directive have been part of the law in Ireland since 1990,[2] whereas other EU countries, such as Germany, do not have a preventive restructuring process at present[3] and countries such as Austria, demonstrate a negligible use of theirs.[4] Arguably, there were always going to be challenges in trying to blend these very different approaches by means of a Directive, something that will be discussed in more detail in this paper.

The Irish Examinership process is viewed to have been inspired by Chapter 11 of the US Bankruptcy Code. Since its inception, its purpose in the short term has been to give insolvent companies breathing space to agree a plan with creditors and to restructure, thereby making the stay an integral part of the process. In the long term, its aim is to facilitate the successful restructure of the company and its return to viability, thereby protecting jobs. In the words of O'Donnell J in the Supreme Court case of *Re McInerney Homes*:

> Prior to [its introduction], when a company got into difficulties, the possible options open were limited and crude. A company which might have had some realistic prospect of survival if agreement could be reached with its creditors was at the mercy of the most obdurate and trigger-happy of its creditors.[5]

Since its introduction, examinership has been used to successfully rescue a significant number of companies, including high-profile examples such as Debenhams Ireland and Eircom[6]. There is a very

* Research Assistant on the JCOERE Project, University College Cork. The JCOERE Project (Judicial Co-Operation supporting Economic Recovery in Europe) is funded by the EU (EU Commission Project 800807- DG JUST- JUST-JCOO-AG-2017). Its purpose is to identify obstacles to judicial co-operation presented by existing domestic restructuring frameworks and the Preventative Restructuring Directive.

[1] 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 the amending of Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L 172/18.

[2] Companies (Amendment) Act 1990 (as amended) now Part 9 of the Companies Act 2014.

[3] It should be borne in mind that Germany does have restructuring, just not preventive restructuring.

[4] JCOERE Report 1; See also Friedrich Jergitsch and Florian Klimscha, 'Austria' in Bob Wessels and Stephan Madaus (eds), *Rescue of Business in Europe* (OUP 2020) 363.

[5] *McInerney Homes Limited & ors & Companies (Amendment) Act 1990* [2011] IESC 31 para 27 (henceforth '*Re McInerney Homes*').

[6] Eircom Limited is Ireland's largest telecommunications company. Prior to its privatisation, it was the completely state-owned 'Telecom Éireann'; *Re Eircom Ltd* [2012] IEHC 158;

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rich body of case law surrounding examinership, with 30 years of court adjudication on the various issues, including the stay and the operation of the cram-down.[7] With that said, there is a widespread perception that the process is underutilised, despite the legislative changes in 2014, which gave the Circuit Court[8] jurisdiction over the examinerships of small and medium companies.[9]

Following the economic crash in the late 2000s, both the European Parliament and Commission issued communications pertaining to insolvency and restructuring. In 2014, the Commission issued a Recommendation entitled 'A New Approach to Business Failure' to Member States.[10] Following on from the underwhelming reaction of Member States to the Recommendation, the Commission drafted a proposal for a restructuring directive in 2016, with overarching goals of harmonising key areas of insolvency law, discouraging "forum shopping" and encouraging cross-border investment and company expansions.[11]

With a view to demonstrating how a preventive restructuring process envisaged by the PRD operates in practice, this paper considers the law in Ireland in light of the Directive, with particular focus on two key features:

i. the stay of individual enforcement,
ii. cross class cram-down on dissenting creditors.

Finally, it considers the practical impact of Ireland decreasing court involvement in the examinership process in light of the aspiration, albeit tempered, of decreased formality expressed in Article 4 of the Directive.[12]

2. Overview: The Preventive Restructuring Directive

Although the Directive was formally agreed in 2019, its roots go back over some eight years. In 2011, the European Parliament Committee on Legal Affairs made a series of recommendations to the Commission on EU-wide insolvency proceedings. The Commission then responded to the Parliament in a document dated December 2012 entitled '*A new European approach to business failure and insolvency*'.[13] The Commission identified a number of key areas where national differences could "created legal uncertainty and an 'unfriendly' business environment".[14] Included in these differences was varying rules on the opening of proceedings, which in turn was leading to varying chances for restructuring across Member States.[15]

Over a year later, the Commission issued a Recommendation to Member States entitled '*A new approach to business failure'*.[16] The Commission expressed its belief that "the creation of a level playing field" in certain areas of insolvency "would lead to greater confidence in the systems of other Member States for companies, entrepreneurs and private individuals, and improve access to credit and encourage investment."[17] According to the Recommendation, two of the key elements of national insolvency frameworks were the availability of a stay of individual enforcement actions and that restructuring plans

[7] See generally Irene Lynch, Jane Marshall and Rory O'Ferrall, *Corporate Insolvency and Rescue* (1st edn, Butterworths 1996) and Irene Lynch Fannon and Gerard Murphy, *Corporate Insolvency and Rescue* (2nd edn, Bloomsbury 2012).

[8] The Circuit Court is a court of local and limited jurisdiction; Ireland is divided into eight circuits. The civil courts system in Ireland consists of District Courts, Circuit Courts, High Court, Court of Appeal and Supreme Court.

[9] A 'small company' is one which meets 2 of the following conditions; the turnover of the company does not exceed €8.8 million, the balance sheet total does not exceed €4.4 million and the average number of employees of the company does not exceed 50. A 'medium company' is one which meets 2 of the following conditions; the turnover does not exceed €20 million, the balance sheet does not exceed €10 million and the average number of employees of the company does not exceed 250. Companies Act 2014, s 350(5)(6).

[10] European Commission, 'Recommendation of 12 March 2014 on a new approach to business failure and insolvency' [2014] OJ L 74/65, COM (2014) 1500 final.

[11] *ibid*.

[12] PRD, art 4: Member States may put in place provisions limiting the involvement of a judicial or administrative authority in a preventive restructuring framework to where it is necessary and proportionate while ensuring that rights of any affected parties and relevant stakeholders are safeguarded.

[13] Communication from the Commission to the European Parliament, the Council, and the European Economic and Social Committee COM(2012) 742 final of 12 December 2012 on a new European approach to business failure and insolvency [2012] OJ C 271/ 55.

[14] *idem* 5.

[15] *idem* 6.

[16] Commission Recommendation (n 10).

[17] *idem*, Recital 8.

"adopted by the majority prescribed by national law should be binding on all creditors provided that the plan is confirmed by a court", in other words, cram-down.[18] The reaction of Member States to the Recommendation was almost non-existent, as evidenced by the evaluation of its success undertaken by the Directorate-General Justice & Consumers of the European Commission in 2015.[19] While the Evaluation gave some insight into the ways in which Member States were partially compliant with the Commission Recommendation, the analysis really only served to highlight the lack of engagement across the board as the countries in question already had these frameworks in place and had not made any change on foot of the Recommendation. As a result of the failure of the Recommendation to have any tangible impact on the situation across the EU, it was decided that a binding directive should be drafted. The Commission Proposal was met with mixed reactions from the various bodies including Committees of the European Parliament, the Council, some national parliaments and the European Central Bank, however despite the reservations and extensive inter-institutional negotiation, as of June 2019, the PRD is in force.

As was stated in the introduction, there are vast differences in how insolvency, rescue and bankruptcy were treated across the EU prior to the PRD. The challenges encountered in its negotiation – and perhaps even some the criticism it received – rests to some extent on these differences. Arguably, the pre-existing differences are also evidenced in some of the compromises in the final document, which it may be fair to say have allowed the chasm between the positions of certain jurisdictions to persist in certain areas.[20]

3. Overview: Examinership

Introduced in 1990 and largely modelled on Chapter XI of the US Bankruptcy Code, examinership is a legal process which, through the conferring of court protection on the struggling business, is intended to facilitate the successful restructure of the business and its return to profitability.[21] The business remains under court protection until the court approves or rejects the report prepared by the examiner (insolvency practitioner); this decision usually brings an end to the examinership, either because the restructuring plan is approved by the court or rejected.[22] In that way, the restructuring process through examinership is contingent on the court approving the examiner's plan for restructure. The examiner's report comprises *inter alia* of the list of creditors of the company and their priority, the proposals that were placed before the required meetings of creditors and the outcome of each of the required meetings, in other words, whether that class of creditors voted in favour or against the plan.[23] Naturally, it also contains the recommendations of the examiner as to how the company will continue trading and return to viability.[24] In order to give the business the best chance of restructuring, Irish law also has a type of protection or priority for interim finance –in the form of certified expenses of the examiner – and cross-class cram-down provisions, which will be discussed in more detail in section.

An interesting and occasionally controversial aspect of the examinership process is that it provides for the displacement of a 'receiver' in certain circumstances. A receiver is appointed to enforce the rights of a secured lender, usually a bank, over an asset or group of assets. He or she can either be court-appointed or appointed by a debenture holder, the latter being more common by far; where it is the latter, the terms of the debenture (contract) will dictate the circumstances that give rise to the appointment of the receiver. It is almost inconceivable in some other European jurisdictions that the holder of a fixed charge can be prevented from disposing of or controlling that asset, in order to facilitate a rescue process.[25] In order to mitigate against some of the potential interference with the rights of the

[18] *idem*, Recital 18; the recommendation was that the stay should be available for a period of no more than four months initially, in order to balance the rights of creditors; the other key elements were (i) the availability of early restructuring, (ii) the retention of control over the day-to-day business operations by the debtor and (iii) protection for new financing.

[19] Directorate-General Justice & Consumers of the European Commission, 'Evaluation of the implementation of the Commission Recommendation of 12.3.2014 on A New Approach to Business Failure and Insolvency' (2015).

[20] For example, the various options for the cross-class cram-down, which will be explained in more detail later in this paper.

[21] Court protection is another way of saying a stay against individual enforcement actions.

[22] The court may also accept the plan subject to modifications being made; Companies Act 2014, s 541(3)(b).

[23] Companies Act 2014, ss 536(f)(a)(c) respectively.

[24] Companies Act 2014, s 536(h).

[25] The effect of the appointment of an examiner on the receiver is detailed in Companies Act 2014, s 522(1)(a)-(d)

secured creditor, the timeline applicable to the displacement of the receiver by the examiner is 3 days.[26] Unsurprisingly, this short "window of opportunity" has occasionally given rise to last minute petitions by companies for the appointment of an examiner.[27]

4. The Stay: The PRD

As discussed previously, a key feature of any preventive restructuring framework, as identified by the Commission, is the stay against individual enforcement actions. In effect, it prohibits individual creditors from pursuing satisfaction of their claims; were creditors permitted to individually assert their rights in this manner, it may result in costly legal processes and a first-come-first-served depletion of the limited assets at the expense of the majority, thereby jeopardising the rescue attempt. Article 6 of the PRD pertains to the stay of individual enforcement. Article 6(1) states: 'Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework.'

During the negotiation phase of the Directive, there was considerable disagreement about the maximum duration of the stay. Within the European Parliament Committee on Legal Affairs, for example, there was a drive to reduce the initial duration from four to two months and total duration including extensions from twelve months to six.[28] Within the Council, there was also considerable difference of opinion; some Member States had a preference for short stays in the interest of creditors, while others favoured longer or indefinite stays in order to maximise the possibility of a successful restructure.[29] In the end, a period of four months initially and twelve months total including any extensions was settled on in Article 6;[30] however, once again the differences in perspectives and opinions between the Member States was highlighted.

The second key aspect of the stay as envisaged by the Directive is that it is capable of being refused and lifted. The former is contained in Article 6(1) and requires that the relevant court or administrative authority be empowered to refuse to grant the stay in certain circumstances; namely, where it is not necessary or where it would not support the negotiation of the restructuring plan. Article 6(9) requires that the relevant body be empowered to lift the stay after it has been granted in certain circumstances; namely, where the stay no longer fulfils its objective as described in Article 6(1) or where the debtor or insolvency practitioner requests that it be lifted.[31] Member States can also opt to provide that the stay can be lifted where creditors are, or would be, unfairly prejudiced by it a stay of individual enforcement actions or where the stay gives rise to the insolvency of a creditor.[32]

5. The Stay: Examinership

As articulated previously, Irish legislation has provided for a stay as part of the examinership process since the 1990s. Referred to as 'court protection', the stay becomes effective upon receipt of the petition for examinership by the relevant court.[33] Its effect is laid out in section 520(4) of the Companies Act and includes preventing the realisation of the whole or any part of a secured asset (mortgage, charge, lien, pledge, etc.) except with the consent of the examiner.[34] It is expected to last for an initial duration of 70 days with the possibility of extension for a further 30 days upon court approval. The stay will cease prior to 70 days if the petition for examinership is withdrawn by the company or if the court

[26] Companies Act 2014, s 512(4); 'The court shall not give a hearing to a petition if a receiver stands appointed … for a continuous period of at least 3 days prior to the date of the presentation of the petition.'
[27] In *Re Belohn & Merrow Ltd* [2013] IEHC 157 for example, the receiver was appointed to Merrow Ltd – the sole registered shareholder of Belohn Ltd – on a Friday. When they became aware of this on the following Sunday, the directors of Merrow Ltd petitioned the court *ex parte* for the appointment of an examiner.
[28] Committee on Legal Affairs Draft Report on the proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (COM(2016)0723 – C8-0475/2016 – 2016/0359(COD)) 30-32
[29] General Approach; Note from the Presidency to Permanent Representatives Committee and the Council dated 24/09/2018 File 2016/0359 (COD) 4.
[30] PRD, arts 6(6) & 6(8).
[31] PRD, arts 6(9)(a)(b).
[32] PRD, art 6(9)(c)(d).
[33] Companies Act 2014, s 520(2)(a).
[34] Companies Act 2014, s 520(4)(d).

refuses to appoint an examiner.[35] The extension is on application and must be approved by the court; it is contingent on the court being satisfied that the extension is necessary to enable the examiner to prepare and present his or her report.[36] On the one hand, it may be preferable for Ireland to consider extending the duration of the initial stay and extension in order to come a little more into line with the Directive and perhaps other Member States. On the other hand, given the wide and considerable impact of court protection in Irish law and the fact that Ireland previously had a longer duration for the stay and opted to reduce it in 1999 following a report of the Company Law Review Group, it seems unlikely that an upward revision of the maximum duration will be pursued by the legislature.[37]

There are procedural differences between the PRD and Irish legislation; the latter does not specifically provide for the court to refuse to grant the stay. This is because, as outlined previously, the stay becomes effective upon receipt of the petition to commence examinership, not upon the court granting that petition. In practical terms, however, an amendment to existing legislation may not be necessary. First, the time that elapses between receipt of the petition and the first court hearing related to that petition is very short. Second, refusal to grant the petition to appoint the examiner results in the end of the stay.[38] Although procedurally different, in terms of effect, this is quite similar to the court refusing to grant the stay; generally speaking, a refusal of the petition to appoint an examiner would be done on the grounds that the company does not have a reasonable prospect of survival.[39] As discussed previously, the Article 6(1) provides that the stay should be refused where it is unnecessary or where it would not support the negotiation of the restructuring plan, both of which would be the case were the company not to have a reasonable prospect of survival in the eyes of the Irish court.

The legislation does not specifically provide for the relevant court to lift the stay, however, section 535 of the Companies Act 2014 contains a provision enabling the examiner to apply to the court for direction if (s)he cannot reach the necessary agreements or formulate the relevant proposals.[40] The court is empowered to make any order it sees fit, which would logically extend to ending the stay, were it necessary or preferable. Additionally, the withdrawal of the examinership petition leading to the stay ending largely serves a similar function as a request by the debtor or insolvency practitioner to end the stay given as envisaged by the PRD; the result and the source of the request are the same. Be that as it may, however, it may be worth an amendment to the Companies Act in order to explicitly provide for the stay to be lifted in certain circumstances.

6. Cross-Class Cram-Down: The PRD

The cross-class cram-down is essentially a process where a restructuring plan can become binding on dissenting classes of creditors provided it is approved by other classes of creditors. The number of classes that must approve the plan in order for it to become binding on all varies considerably from Member State to Member State. Those jurisdictions with flexible and robust restructuring regimes (will) have a tendency towards requiring the approval of less classes of creditors than those with more rigid frameworks. The cross-class cram-down in the PRD is predominantly governed by Article 11, which states that a restructuring plan may be made binding upon dissenting voting classes where certain

[35] Companies Act 2014, s 520(2).

[36] Companies Act 2014, s 534(3).

[37] Company Law Review Group (1994) 'First Report' available at <http://www.clrg.org/publications/clrg-report-1994.pdf>. The Company Law Review Group (CLRG) is a statutory advisory expert body charged with advising the Minister for Business, Enterprise & Innovation on the review and development of company law in Ireland.

[38] Companies Act 2014, section 520(2)(b).

[39] Companies Act 2014, s 509(2).

[40] Companies Act 2014, s 535(1): 'If the examiner is not able to (a) enter into an agreement with the interested parties and any other persons concerned in the matter, or (b) formulate proposals for a compromise or scheme of arrangement in relation to the company concerned, the examiner may apply to the court for the grant of directions in the matter.'

conditions are met. First, the plan must comply with Articles 10(2)[41] & (3)[42] of the Directive. Second, no party can receive or keep more than the full amount of its claim.[43]

The remaining two criteria to be fulfilled are subject to derogations. First, the plan must be approved by either a majority of the voting classes, where at least one is a secured creditor class or failing that, by one of the voting classes.[44] Member States may derogate from this by increasing the minimum number of classes of affected parties – or impaired parties – required to approve the plan.[45] Second, dissenting voting classes must be treated at least as favourably as classes of the same rank and more favourably than junior classes, in other words, there must be absence of 'unfair prejudice'.[46] Member States may derogate from this by requiring that the claims of a dissenting classes are to be satisfied in full if the claims of a more junior class are to receive any satisfaction.[47]

7. Cross-Class Cram-Down: Examinership

As a robust and developed restructuring process, examinership contains a cross-class cram-down mechanism. Section 541(7) of the Companies Act 2014 provides that proposals confirmed by the court are binding on all affected (classes of) creditors. In order for a proposal to be confirmed, it must fulfil three key criteria: first, a minimum of one class of affected creditors must have voted in favour of the plan;[48] second, the proposal must be 'fair and equitable' to dissenting classes of creditors and third, the plan must not be 'unfairly prejudicial' to the interests of any interested party.[49] If these criteria are not met by the proposal, then the court is empowered to reject the plan per section 541(3).

The legislation does not provide detail on what is meant by the 'fair and equitable' standard and 'unfair prejudice' or on how these should be assessed. This has perhaps led to the accusation that 'it's all just random then';[50] in other words, that the outcome in a particular case is completely unpredictable and somewhat whimsical. While it is fair to say that the outcome of a particular case may have some uncertainty – were the outcome certain, then there would be no point in one or other side taking or pursuing a defence in the case in the first place – the general principles that will be applied are quite clear. The Irish courts have developed this area of law and provided much needed clarity, particularly in the area of unfair prejudice. For example, in assessing fairness and unfair prejudice, the Irish courts have demonstrated a preference for using the 'next-best-alternative scenario' in confirmation hearings; therefore, Ireland's approach is in line with the PRD.[51] This is as distinct from requiring that creditors must always be better off in examinership than they would be in a liquidation (winding up). It is worth bearing in mind that in the case of unsecured creditors, liquidation is the alternative against which examinership will be considered; secured creditors, by contrast, may have other options. In *Re McInerney Homes*, for example, the court refused to confirm the restructuring plan because dissenting creditors – in this case, a banking syndicate – could demonstrate that they would be better off if they

[41] 'Member States shall ensure that the conditions under which a restructuring plan can be confirmed by a judicial or administrative authority are clearly specified and include at least the following: (a) the restructuring plan has been adopted in accordance with Article 9; (b) creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim; (c) notification of the restructuring plan has been given in accordance with national law to all affected parties; (d) where there are dissenting creditors, the restructuring plan satisfies the best-interest-of-creditors test; (e) where applicable, any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors. Compliance with point (d) of the first subparagraph shall be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground.' Article 9, referred to in subsection (a), pertains to voting rights, majorities, classification of creditors, judicial or administrative body oversight of the process, etc.

[42] 'Member States shall ensure that judicial or administrative authorities are able to refuse to confirm a restructuring plan where that plan would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business.'

[43] PRD, art 11(1)(d).

[44] PRD, art 11(1)(b).

[45] PRD, art 11(1)(d).

[46] PRD, art 11(1)(c).

[47] PRD, art 11(2).

[48] Companies Act 2014, s 541(4)(a).

[49] Companies Act 2014, ss 541(4)(b)(i)(ii).

[50] This was a comment received during the questions and answers part of the YANIL presentation in relation to the common law tests.

[51] PRD, Article 10(2)(d). PRD, Recital 52: Satisfying the 'best-interest-of-creditors' test should be considered to mean that no dissenting creditor is worse off under a restructuring plan than it would be either in the case of liquidation, whether piecemeal liquidation or sale of the business as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not to be confirmed.

could avail of a long-term receivership.[52]

The Supreme Court judgment in *Re SIAC* gave definitive context and clarity to the unfair prejudice standard.[53] The factual background to the case was considerably complex and the case was viewed to have come before the court in 'highly exceptional circumstances'.[54] Be that as it may, the court gave clear guidance on the issue. 'Unfair prejudice' was explained as having two elements, prejudice and unfairness.[55] The court was of the view that insolvency results in all creditors suffering some prejudice, irrespective of what proposals are advanced.[56] Thus, *unfairness* was the key and could be explained by way of reference to two factors: 'the general notion of injustice and the more specific one of unequal treatment'.[57] Accordingly, unfair prejudice was explained as comprising of two tests or considerations: first, whether or not the *objector* is being treated unfairly when compared with how it would be likely to fare in a liquidation.[58] Secondly, the court must consider the treatment of the objector vis-à-vis other creditors.[59] Fennelly J was unequivocal in relation to the appellant:

There can be no question, on the facts of the present case, of the appellant being the victim of unfairly prejudice by reference to the outcome of a liquidation. It must, for this purpose, be regarded as being an unsecured creditor. Assuming the appellant to be a creditor, the position is simple. It would, like all other unsecured creditors, recover nothing in a liquidation.[60]

Furthermore, the court held that '[i]f the proposals were clearly less favourable to an objector than the alternative of a winding up', to court would be entitled to conclude that such proposals were unfairly prejudicial.[61] In quoting with approval the Supreme Court delivered by O'Donnell J in *Re McInerney Homes*[62] and the opinion of Lynch Fannon and Murphy in *Corporate Insolvency and Rescue*,[63] Fennelly J explained the aspects to be considered by the court as wide-ranging and its role as balancing complex rights, benefits and losses in the context of more than one predicted outcome.

In this ruling – and to an extent in others that came before – the court demonstrated the wide variety of issues that must be considered and the flexibility necessary in order to assess a claim of unfair prejudice. What is necessary is a considered balance of the restructuring plan against a claim of unfair prejudice in the context of likely predicted outcomes. Arguably, *Re SIAC* demonstrates in the clearest sense why it is undesirable and impractical for the legislation to have a prescribed list of what is and is not unfair prejudice and why court discretion is both necessary and hugely valuable.[64] To have a prescribed list would be detrimental to both troubled companies and dissenting creditors; depending on the circumstances, the former may be denied a real and legitimate chance to recover, thereby also generating negative outcome for consenting creditors and the former may suffer unfair prejudice based on the common law notions of fairness and equity, but be unable to advance that claim if the legislature omitted (inadvertently) the specific circumstances in an exhaustive list.

[52] *Re McInerney Homes* (n 5).
[53] [2014] IESC 25.
[54] *idem*, para 59.
[55] *idem*, para 69.
[56] *ibid*.
[57] *ibid*.
[58] *idem*, para 65. The court referred to liquidation given the nature of the claim asserted by the appellant. During the course of the judgment of Kelly J in the High Court, which is referred to in the course of the Supreme Court judgment, he refers to either liquidation or receivership as the alternative. Accordingly and in view of the judgment in *Re McInerney Homes* (n 5), it can be inferred that receivership is a relevant comparative alternative, depending on the nature of the claim of the objectors.
[59] *ibid*.
[60] *idem*, para 66.
[61] *idem*, para 67.
[62] [2011] IESC 31 para 29: 'It is very unlikely that a comprehensive definition of the circumstances of when a proposal would be unfair could be attempted, or indeed would be wise. The fact that any proposed scheme must receive the approval of the Court means that there will be a hearing. The Act of 1990 appears to invite a Court to exercise its general sense of whether, in the round, any particular proposal is unfair or unfairly prejudicial to any interested party, subject to the significant qualification that the test is posed in the negative: the Court cannot confirm the scheme unless it is satisfied that the proposals are not unfairly prejudicial to any interested party.'
[63] Irene Lynch Fannon and Gerard Nicholas Murphy, *Corporate Insolvency and Rescue* (2nd edn, Bloomsbury Professional 2012).
[64] See also, O'Donnell J in *Re McInerney Homes Limited* (n 5).

8. Decreased Formality: PRD and Examinership

An aim of the PRD was the idea of flexible restructuring processes with minimal court involvement, as it was believed that decreased formality would lead to decreased costs, which in turn would lead to an increase in rescue. This aim was to be achieved through Article 4(6), which provides that Member States *may* put in place provisions to limit judicial or administrative authority involvement to where it is 'necessary and proportionate' while ensuring that rights of any affected parties and relevant stakeholders are safeguarded. It is worth nothing that in the Commission Proposal, this Article was phrased as 'Member States *shall*…';[65] therefore, there was a distinct change in tone, arguably making the Article aspirational rather than directive and consequently unlikely to effect change to domestic provisions in the long run. Furthermore, while the aim of having flexible procedures leading to lower costs and promote rescue is undoubtedly a good one, it is questionable if such an Article is really necessary. While many restructuring processes have heavy court involvement, there is generally nothing precluding a debtor from renegotiating contract terms or negotiation a payment plan with a creditor, aside from the agreement of that creditor. Such a practice has no court involvement and minimal cost and because it is largely a private law matter, its prevalence is unclear. The ability of a robust preventive restructuring framework to function with decreased court involvement is questionable, however, as will be demonstrated below using the example of the Irish examinership procedure.

As alluded to previously, the examinership process has considerable court involement from beginning to end. First, the the petition to appoint an examiner must be lodged with the relevant court and that court will decide on the application. All restructuring plans, irrespective of content, are subject to court confirmation after approval by the required classes of creditors. The extension to the stay is subject to court approval and there are provisions in place for the examiner to seek direction from the court in a number of other areas such as use of assets[66] and expenses.[67] While there are undoubtedly benefits associated with decreased formality – the process would likely become more accessible to SMEs and it would likely become more efficient were it unencumbered by multiple court hearings – Ireland is unlikely to decrease court involvement in examinership. Critically, examinserhip is a very flexible process with potential for the considerable curtailment of the rights of creditors. To decrease the court oversight of such a process may open it up to abuse to the clear detriment of creditors. The formality of the examinership process, such as the requirement for the court to be presented with an independent report – detailing *inter alia* the financial affairs and position of the company, its reasonable prospect of survival, any investment required for the continuation trading – at the same time as the petition for examinership is onerous.[68] It is fair to say that such formality is also necessary to ensure that rescue processes, with the potential for interference with the rights and interests of creditors, are not entered into lightly or on a whim. Furthermore, as articulated previously, court oversight is specifically required by the PRD where certain mechanisms are being used, notably the cross-class cram-down, thereby demonstrating clear recognition that court oversight plays a critical role via-à-vis some of the more robust aspects of preventive restructuring.

9. Conclusion

Examinership has all of the hallmarks of a well-developed and robust preventive restructuring framework. It combines a level of curtailment of the rights of creditors, which is necessary in order to rescue a failing company, with considerable court oversight to protect those creditors. Furthermore, it is already broadly in line with the PRD in areas such as the stay, court confirmation of restructuring plans and the cross-class cram-down. That said, so are and will be the approaches of a number of other

[65] Commission Proposal COM (2016) 723 final for a directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU [2016], art 4(3).

[66] Companies Act 2014, s 530.

[67] Companies Act 2014, s 554.

[68] Companies Act 2014, s 512. In exceptional circumstances, the petition may be presented without the independent report. Section 513(1) states: If a petition is presented and the court is satisfied— (a) that, by reason of exceptional circumstances outside the control of the petitioner, the report of the independent expert is not available in time to accompany the petition, and (b) that the petitioner could not reasonably have anticipated the circumstances referred to in paragraph (a), and, accordingly, the court is unable to consider the making of an order under section 509, the court may make an order under this section placing the company concerned under the protection of the court for such period as the court thinks appropriate in order to allow for the submission of the independent expert's report.

jurisdictions, which are markedly different to Ireland's, something that it is argued may undermine the goal of the PRD to create a level playing field and engender a sense of safety and certainty for companies wishing to expand into other Member States. Ireland's existing broad compliance with the PRD does not mean, however, that there are not areas of Irish law that could stand to be improved; first, it may be worth amending the Companies Act 2014 to explicitly provide for a court to lift the stay in line with the criteria in the PRD. The present power of the court in this regard is not completely clear and an amendment would bring some much-needed clarity. Second, the Irish legislature may consider codifying the 'unfair prejudice' and the 'best-interests-of-creditors' tests, as developed at common law, but with the retention of judicial discretion in their application. This may assist in making the position of Irish law on these matters clearer, while simultaneously retaining the judicial discretion that has proved vital in cases such as *Re SIAC*.[69] Third, while there is a perceptive that examinership is under-utilised and while increased flexibility within the process may increase its use, it is the suggestion of this paper that the correct balance is already struck between flexibility and accountability.

[69] *Re SIAC* (n 53).