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Chapter 9

JCOERE - Judicial Co-Operation in the European Union: Insolvency and Rescue

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1 Introduction

1.1 The JCOERE Project

The Preventive Restructuring Directive[1] passed in June 2019 has introduced a number of concepts that are new and untested throughout much of the EU. While the concepts themselves are not unfamiliar, due to their well-known usage in the American Chapter 11 procedure and in other pre-existing frameworks in a number of Member States,[2] many of the new provisions included in the PRD have created a field of controversy and debate among academics, practitioners, and policy makers as legislators begin to work toward implementation by 17 July 2021.[3] The PRD has created fertile ground for these debates, given that there are so many alternatives available within the legislative framework. Consequently, implementing legislation may generate different variations on the approach to corporate rescue and is not expected to yield a harmonised European preventive restructuring culture. These differences may also create difficulties in the coordination of cross-border preventive restructuring procedures by creating potential obstacles to court-to-court cooperation of both a substantive and procedural nature. It is in this issue of cooperation, (enhanced under the EIR Recast) which has been the focus of the JCOERE Project.[4]

The JCOERE Project has researched the question as to whether the enhanced obligations imposed on courts and practitioners to co-operate in the EIR Recast[5] will be particularly difficult in the context of

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[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 (the 'PRD').

[2] See for example the Irish Examinership process in Part 10 of the Companies Act 2014 and the French *procédure de sauvegarde* regulated by Articles L620-1 to L628-10 of the Commercial Code.

[3] PRD, art 37(1).

[4] The Judicial Cooperation in the EU Supporting Economic Recovery in Europe (JCOERE) Project (No. 800807) is funded by the European Union's Justice Programme (2014-2020). For more information about the calls and proposals in the Justice funds, see the following website: <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/programmes/just>. The content of this chapter represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains. See <https://www.ucc.ie/en/jcoere/> for more information about JCOERE.

[5] Council Regulation (EU) 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (Recast) [2015] OJ L 141/19 (the 'EIR Recast') art 84; the cooperation obligations are contained in arts 41 (insolvency practitioners), 42 (courts), 43 (practitioners and courts) with arts 56-58 respectively providing the same obligation for cases concerning groups of companies.

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the introduction of robust preventive restructuring mechanisms derived from the PRD. Within a 'big picture' context, the question of cooperation is inextricably linked to the need for mutual trust among jurisdictions and judiciaries, which the European institutions have acknowledged is closely connected to the effectiveness (or not) of European integration generally. Thus, while this Project has focused on what appears to be a narrow area of law in the cross over between the PRD and the EIR Recast in terms of court-to-court cooperation, it interfaces with the some of the fundamental principles necessary to the success of the European project. The purpose of this chapter is to provide a snapshot of some of the Project findings to date with a particular focus on a pre-existing robust restructuring process, namely the Irish Examinership procedure,[6] which, like the PRD is based (to some extent) on Chapter 11 of the US Bankruptcy Code.

This Chapter will begin with a snapshot of the JCOERE Project teasing out some implications connected to the Preventive Restructuring Directive and the cooperation obligations under the EIR Recast against the backdrop of emerging European debates. It will go on to consider how the PRD reflects a range of preventive restructuring processes that already exist in the EU with a particular focus on the Irish Examinership process. When one considers the interface between the PRD and the co-operation obligations in the EIR Recast it should be noted that not all of these processes will be covered by the EIR Recast. In Ireland, for example, there is one process that is specifically included in Annexe A of the EIR Recast (Examinership) and one that is not (Schemes of Arrangement),[7] which is modelled exactly on the UK scheme of arrangement[8] and which has been part of Irish law since at least 1948). The Chapter will continue with a focus on the Irish Examinership process and consider the substantive rules which are part of a robust restructuring framework in light of the 30 years of experience with Examinership in the Irish courts. It will consider these rules in light of significant cases by the Irish courts and this discussion will add to the theoretical debate currently being conducted in Member States regarding implementation of the PRD.

1.2 The Challenges Identified: The JCOERE Reports

Based on existing experience with restructuring (e.g. Ireland), the JCOERE Project identified particular substantive rules and procedural features often associated with preventive restructuring frameworks that have the potential to be particularly problematic in the context of the cooperation obligations under the EIR Recast.[9] The JCOERE Report 1[10] included a comparative analysis of restructuring processes in 11 selected Member States as measured against the PRD with a focus on a number of its specific provisions. Among those substantive rules identified in the PRD as being particularly problematic and included in the JCOERE Questionnaire[11] were the thresholds required to enter into a preventive restructuring procedure (Article 1(1) and 2(2), the involvement of insolvency practitioners and courts (Article 5), the

[6] Enacted in Ireland in 1990 and contained in Chapter 10 of the Companies Act 2014. Modelled on the US Bankruptcy Code Chapter 11 this was probably enacted as part of Ireland's Foreign Direct Investment Strategy sending a clear message to US multinational companies that Ireland's legal system presented with similar features to that of the United States.

[7] See Irish Companies Act 2014 Part 10 for the Examinership provisions and Part 9 for the Scheme of Arrangement.

[8] See England & Wales Companies Act 2006 Part 26 for the UK Scheme of Arrangement.

[9] Relevant obligations included in Articles 42-44 and 56 and 57 of the Regulation. Note the language is mandatory. Article 42 states that the court 'shall co-operate'… to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings'… It also details the form of co-operation:-

> For that purpose, the courts may, where appropriate, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them.
>
> 2.In implementing the cooperation set out in paragraph 1, the courts, *or any appointed person or body acting on their behalf*, as referred to in paragraph 1, may communicate directly with, or request information or assistance directly from, each other provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.
>
> 3. The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern: (a) coordination in the appointment of the insolvency practitioners; (b) communication of information by any means considered appropriate by the court; (c) coordination of the administration and supervision of the debtor's assets and affairs; (d) coordination of the conduct of hearings; (e) coordination in the approval of protocols, where necessary.'

Article 43 applies the same obligation to insolvency practitioners to co-operate with courts 'to the extent that such cooperation and communication are not incompatible with the rules applicable to each of the proceedings and do not entail any conflict of interest'. Similarly Article 56 applies the same set of obligations in a group context to insolvency practitioners and Article 57 applies a similar obligation to courts in a group context.

[10] Since the INSOL Europe Academic Forum Annual Meeting in Copenhagen in 2019, the JCOERE Project has progressed significantly through its research. JCOERE Report 1 was submitted to the European Commission in January 2020 and is now available on the JCOERE Website in full. The full Report 1 of the JCOERE Project is available to download from: <https://cora.ucc.ie/handle/10468/9810> or chapter by chapter basis from here: <https://www.ucc.ie/en/jcoere/research/report1/report1chapter/>.

[11] The JCOERE Questionnaire is available here: < https://www.ucc.ie/en/jcoere/research/jcoere-jurisdiction-research-questionnaire/>.

stay (Article 6), plan adoption and majority rule in plan confirmation (Articles 9 and 10), the cross-class cram-down (Article 11), the protection of new and interim financing (Articles 17 and 18). These, along with a number of underlying policy and procedural questions, were posed to 11 jurisdictions, the responses of which were then incorporated into JCOERE Report 1 and converted into individual jurisdiction country reports.[12]

The JCOERE Report 2, which was submitted to the European Commission in the summer of 2020, explored the nature, understanding, and awareness of the court to court cooperation obligations under the EIR Recast in the context of preventive restructuring, but focusing more squarely on more generally applicable procedural issues. At the time of writing, the findings indicate, in short, that cooperation is conceptually challenging if one considers the various competing principles and obligations attributable to a broad range of issues from legal culture, constitutional requirements, and the demands of insolvency practise. In reality formal requests for co-operation have not become a central issue among European insolvency judges or in courts. It is hypothesised that to some extent this is due to the relative newness of the cooperation obligations, which has led the research team to project potential issues drawn from earlier cases and suggest how cases under the EIR Recast may then be handled to ensure effective cooperation and coordination. These recommendations are underpinned by existing guidelines and recommendations in judicial cooperation and a survey of judicial focus groups exploring their views and experience.[13]

These two Reports will be followed by a series of case studies focused on cooperation in insolvency and restructuring to be made available to the European judiciary in an online format.

1.3 The Irish Restructuring Context

The next section will introduce the Irish Examinership process and consider how the threshold provisions for accessing an Examinership function. Section 3 will discuss the confirmation by a majority vote of creditors (intra-class cram-down)[14] along with the possibility of a cross-class cram-down, with an interrogation of the debate around absolute priority and relative priority,[15] taking a pragmatic view within the context of the Irish experience about the practical implications of these rules. The Irish experience indicates that this debate requires clarification as to what is meant by either of these approaches and raises serious questions about the value of this debate and its outcomes in terms of 'real life' rescue. The assertion that a compromise on pre-existing priorities is part and parcel of any robust preventive restructuring framework will be illustrated by reference to significant Irish case law, including decisions of the Irish Supreme Court. The Irish courts' treatment of rescue financing and its notional protection or priority in the form of counting as certified expenses of the examiner will also be discussed.[16] The Chapter will be concluded by a discussion of some of the team's findings in relation to the judicial experience of cooperation in cross-border insolvency cases in the EU as they relate specifically to the provisions under scrutiny in the context of the Irish Examinership.

2 Irish Examinership: A *Robust* Restructuring Procedure

2.1 The Examinership Process

The Examinership process contains many (arguably all) of the features included in the PRD with (according to a taxonomy developed by JCOERE to distinguish different kinds of restructuring processes in a comparative context) a 'robust' approach to rescue. It was introduced in 1990 and was modelled largely on the Chapter 11 restructuring procedure of the United States Bankruptcy Code. It was part of a series of measures updating and modernising the entire landscape of company law in Ireland in the 1990s. It appears that this was part of an increasingly successful foreign direct investment strategy instituted by successive Irish governments aimed in particular at attracting investment from the

[12] The contributing jurisdictions included Ireland, Italy, Romania, France, The Netherlands, Denmark, Germany, Poland, Spain, Austria, and the UK. The country reports are accessible here: <https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/>.
[13] At the time of writing (July 2020) Report 2 has been submitted (in draft) and will be presented on the JCOERE Website over the summer of 2020. Please follow on Twitter @JCOEREProject for up to date information and announcements.
[14] Companies Act 2014, s 540.
[15] Companies Act 2014, s 541.
[16] Companies Act 2014, s 554(3).

US. Although a committed member of the EU in terms of legal policy, particularly as regards financial and commercial law and practise, Ireland has always posed the question internally of itself whether it is closer to 'Boston or Berlin'.[17]

Examinership is a restructuring process that confers court protection on a company in financial difficulties, with a view to facilitating the successful restructuring of the company.[18] This 'court protection' is essentially the same as the stay or moratorium,[19] which is a key aspect of any insolvency or effective restructuring procedure, providing what is often termed a 'breathing space' during which the debtor can make arrangements and negotiate a plan or deal with creditors with a view to rehabilitating an ailing company. This is a key provision under the PRD, which provides for the imposition of a stay of individual enforcement actions for up to four months.[20] The stay has been a central element of Irish restructuring for over thirty years. Once commenced, Examinership provides for a court mandated stay against enumerated enforcement actions, which will last for 70 days and which may be extended upon application to court for an additional 30 days.[21] In European debates prior to the passing of the PRD, the stay is also, perhaps surprisingly to some who view the stay as integral, a potentially controversial provision given the impact it can have on the contractual rights of creditors. Arguably, however, a collective proceeding is functionally improbable, if not impossible, without the ability to exercise control over the enforcement activities of creditors.

The restructuring under an Examinership procedure is guided by an examiner who is appointed by the court and is a recognised insolvency practitioner. He or she will lead the procedure, facilitating the rescue of the company. The company remains under court protection for the maximum period described above or some earlier date when the court approves or rejects the examiner's report.[22] The examiner's report contains *inter alia* 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] The plan will also contain the examiner's recommendations as to how the company will continue trading and return to viability.[24] Upon the court decision, the examinership is usually brought to an end, either because the restructuring plan has been approved or rejected by the court.[25] The examinership restructuring process success is therefore contingent on the court approving the examiner's plan.[26]

The following two subsections will discuss issues arising around the threshold of insolvency and plan viability as well as the stay of enforcement actions as they have arisen within the 30 years of Irish jurisprudence of examinership cases.

2.2 The Threshold Question

There has been a great deal of debate revolving around the thresholds at which companies can and should be able to access insolvency and pre-insolvency (preventive restructuring) procedures. EU Member States have adopted a range of gatekeeping approaches in this area, from the restrictive approach with explicit debt percentages at which a company *must* file, to more subjective criteria making access to procedures more flexible to the point that there is no practical threshold to overcome. The more flexible procedures have been said to open the way for abuse as they could allow companies

[17] Jim Dunne, 'Boston, or Berlin' (The Irish Times 2001) <https://www.irishtimes.com/news/boston-or-berlin-1.314552> accessed 10 July 2020: 'That is why Mary Harney says the Republic should look more to Boston than to Berlin. Low tax stimulates growth just as high tax (as France and Germany amply demonstrate), leads to low growth and high unemployment. Some business figures here privately fear that the apparatchiks in the European Commission - predominantly left-wing or, as they prefer to say, social democratic - would ram Continental European economic policies down Irish throats post-Nice. McCreevy sees the danger and so does Harney. And so, it would appear, does the Attorney General.'

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

[19] Companies Act 2014, s 520.

[20] PRD, art 6.

[21] Companies Act 2014, s 520, 534 New measures currently being considered will allow for an extension of this period in the context of COVID 19. See www.clrg.org.

[22] The legislation also provides for an independent report provided to the court at the outset which will describe the affairs of the company from a perspective which is independent of the drive towards rescue.Companies Act 2014, s. 511

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

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

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

[26] See Aoife Finnerty, 'Preventive Restructuring - Is Ireland a Leader in the EU?' in Jennifer L L Gant (ed), *Harmonisation of Insolvency and Restructuring Law in the EU* (INSOL Europe 2020).

to escape debt obligations by simply filing under the relevant procedure and subsequently holding creditors hostage to a procedural cram-down. The debate continues to rage on the moral hazard of flexible procedures;[27] thus, the threshold question is an important and sometimes divisive factor to consider, particularly as this definition is wholly up to the national law of Member States.

There are 2 threshold tests of sorts under the PRD: the threshold of insolvency which is defined as a 'likelihood of insolvency' by reference to Member State parameters, and the option of a viability test when it comes to approving a plan. The Examinership procedure covers both functional insolvency and situations where there is a likelihood of insolvency, specifying the availability of the procedure when a company is 'unable to pay its debts' or 'likely to be unable to pay its debts'.[28] In addition there must be no order or resolution for winding up.[29] No order to appoint an examiner can be made where a a receiver has been appointed for three days.[30] Finally, there must be a 'reasonable prospect for the survival of the company.'[31] The appointment of an examiner to related companies in a group structure is addressed in detail in the legislation.[32] The threshold question in Irish law reflects the option of introducing a 'viability test' under the PRD, 'provided that such a test has the purpose of excluding debtors that do not have a prospect of viability, and that it can be carried out without detriment to the debtors' assets.'[33] Whereas Ireland includes this additional viability test as a matter of course, the PRD makes this fully optional in terms of the implementation of preventive restructuring frameworks among the Member States.

The PRD also envisages a relaxation of court involvement where it is necessary and proportionate to do so while 'ensuring that rights of any affected parties and relevant stakeholders are safeguarded.'[34] There is also the potential for more than one procedure with varying levels of authoritative involvement, as well as considering the use of an administrative authority in the alternative to a court.[35] Ireland does have informal restructuring processes within this context. However, the Examinership takes place with obligatory court involvement. The court is the arbiter of the threshold questions. The question remains as to whether there may be preventive restructuring processes introduced under the PRD without court involvement. If so, the adoption of a radical restructuring process may be problematic without some kind of supervision. On the other hand, court involvement is viewed as adding considerably to the cost of the process. Amongst other problems, the cost makes it unattractive to certain kinds of companies, such as those that are small and medium sized (SMEs). The importance of court decisions on the threshold question is illustrated by the two cases discussed below. Given the radical outcomes of a robust restructuring process, this may be problematic in terms of court to court co-operation.[36] This observation is applicable across the questions of imposing a stay, implementing intra- and cross-class cram-down,[37] and operation of either an absolute or relative priority rule.

2.3 Insolvency Threshold Test Utilised in a Preventive Restructuring Procedure

There are generally 2 different tests that can be applied to determine functional insolvency in order for a company to access a collective procedure: the cash flow and balance sheet tests.[38] While the same

[27] This debate formed part of a panel discussion held by Reinhard Dammann, Christoph Paulus, and Francisco Garcimartin during the 'Directive on Preventive Restructuring Frameworks: Relative or Absolute Cramdown' session at the INSOL Europe Annual Congress on 27th September 2019, Copenhagen, Denmark; see also for example Stephan Madaus, 'Leaving the Shadows of US Insolvency Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 Eur Bus L Rev 615; Vasile Rotaru, 'The Restructuring Directive: a Functional Law and Economics Analysis from a French Law Perspective' (2019) Working Paper published by Droit et Croissance 15; Nicolaes Tollenaar, *Pre-Insolvency Proceedings: A Normative Foundation and Framework* (OUP 2019) which argue various aspects of the benefits or hazards of flexible preventive restructuring procedures, including a loose threshold at which procedures can be accessed.
[28] Companies Act 2104, s 509 (1) (a).
[29] Companies Act 2014, s 509 (1) (b) and (c).
[30] Companies Act 2014, s 512(4)
[31] Companies Act 2014, s 509(2)
[32] References to related companies and groups are made in ss 517 ff.
[33] PRD, art 4(3).
[34] PRD, art 4(6)
[35] PRD, art 4(5).
[36] In the EIR Recast, Article 2(6) states that court is defined as follows:
… (i) in points (b) and (c) of art 1(1), art 4(2), arts 5 and 6, art 21(3), point (j) of art 24(2), arts 36 and 39, and arts 61 to 77, the judicial body of a Member State; (ii) in all other Articles, the judicial body or any other competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings.
[37] It should be noted, however, that Article 11 of the PRD requires court or administrative authority approval of a compromise entailing a cross-class cram-down.
[38] Kristin van Zweiten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 134-135.

applies to a number of existing preventive restructuring procedures, the PRD sets the 'likelihood of insolvency' as the threshold at which preventive restructuring procedures should be available,[39] which is defined by reference to Member State law[40] and may result in procedures in different jurisdictions that can be used at a diverse number of points along the stream of financial distress.[41] Article 4 of the PRD provides the rules around at what point in the 'stream' of financial distress a company may be able to avail of preventive restructuring frameworks devised under the PRD. While there is no definition in the PRD, 'a likelihood of insolvency'[42] is generally understood as being at some point prior to functional insolvency under the jurisdictional definitions in each Member State, though there are arguments that pre-insolvency is still insolvency, adding commentative confusion to the debate.[43]

The Irish experience in relation to the threshold at which a restructuring procedure is available has shown that the involvement of the court on the question of threshold to be of vital importance. The issue of whether a stay should be granted and the prospect of rescue pursued is not confined to technical questions of solvency. The considerable litigation surrounding the appointment of an examiner in *Kitty Hall*[44] is demonstrative of this point. Ultimately, the appointment came down to a specific question as to whether the preventive restructuring process ought to be or could be available even when the debtor had already entered into a binding restructuring agreement with its single most significant creditor, Deutsche Bank, which was owed 650 million euro. The application to appoint an examiner was refused in the High Court. However, on appeal, the Court of Appeal agreed to appoint an examiner and a restructuring was also ultimately approved by the High Court.

2.4 Restructuring Plan Viability Test

Judicial discretion is often a key factor when applying the viability test under Irish law, an optional test under the PRD. This discretion was exercised by the courts in *Vantive Holdings* in relation to whether a rescue was viable under the Examinership process. In *Vantive Holdings*[45] there were a series of decisions, the main issue of which concerned the question as to whether there was any real viability in the rescue proposals. *Vantive Holdings* was the holding company for a large construction group, Zoe Developments, which benefitted from a huge growth in profits during the booming Celtic Tiger years.[46] Following the financial crash, the collapse of the property market in Ireland and the collapse of the main Irish banks, *Vantive Holdings* attempted to avail of the Irish Examinership process when it faced a debt total of €1.3 billion. The independent accountant assessing the viability of the rescue plan based its recommendations upon an expected surplus of €10 million predicated on the recovery of the Irish property market. The threshold question was a significant touchstone. The optimism of the accountant assessing the plan did not persuade the court. Rather in the refusal of the application for examinership, Kelly P. remarked that '[the] degree of optimism on the part of the independent accountant borders, if it does not actually trespass, upon the fanciful.' Kelly P. went on to observe:

> I have the gravest reservations about the projections on which the independent accountant has relied in forming his opinion. They appear to me to be lacking in reality given the extraordinary collapse that has occurred and the lack of any indication of the revival of fortunes in the property market. The valuations in question are out of date and can hardly be described as truly

[39] PRD, art 1(1)(a).
[40] PRD, art 2(2)(b).
[41] See the JCOERE Consortium, Judicial Co-Operation Supporting Economic Recovery in Europe (JCOERE) Report 1: Identifying substantive and Procedural rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations (CORA 2020) < https://cora.ucc.ie/bitstream/handle/10468/9810/JCOERE_Report_1.pdf?sequence=1&isAllowed=y> accessed 10 July 2020 (hereafter referred to as JCOERE Report 1) 140. Chapter 8 of the JCOERE Report 1 can also be accessed online here: <https://www.ucc.ie/en/media/projectsandcentres/jcoereproject/bannerimages/Chapter8ProceduralaspectsofPreventiveRestructuring_FINAL.pdf>.
[42] PRD, art 4(1).
[43] See for example Tollenaar (n 27) although this author tends to be the voice of a minority devil's advocate in this position. See also Rotaru (n 27).
[44] *Re Kitty Hall Ltd and Ors and the Companies Acts* [2017] IECA 247.
[45] *Vantive Holdings Ltd v Companies Acts* [2009] IEHC 384.
[46] 'Celtic Tiger' refers to Ireland's economy from the mid-1990s to the late-2000s, a period of real and rapid economic growth fuelled by foreign direct investment. See Investopedia.com <https://www.investopedia.com/terms/c/celtictiger.asp> accessed 28 July 2020. Later on this period of economic prosperity was driven by a property bubble which collapsed in 2008 with the banking crisis and a period of austerity following thereafter.

> independent. I am not satisfied that the petitioners have discharged the onus of proof of showing that there is a reasonable prospect of the survival of the companies.[47]

The application was refused and on appeal this was confirmed.[48] The Irish experience with regard to the application of a combination of threshold tests including questions of insolvency or likelihood of insolvency, a viability test and an area of judicial discretion exercised in this context demonstrates that this interpretative discretion is actually central to the functioning of the Examinership procedure. Admittedly, judges in Ireland who hear insolvency and restructuring cases have a long experience exercising judicial discretion in the performance of their decision-making, which may well differ from the courts and judges of other Member States.

3 Creditors' Rights in a Restructuring Process

3.1 Introduction

The PRD provides a variety of provisions that are felt to be common across effective restructuring procedures (the Examinership and Chapter 11, and in some areas the English scheme of arrangement and French *sauvegarde*, for example) but can also be contentious in terms of the impact they may have on creditor contractual entitlements as well as perceived issues of fairness and potential moral hazard. The PRD tries to allay fairness issues by introducing tests to apply under circumstances in which a whole class of creditors is bound to a plan due to a majority of other voting classes approving it (a cross-class cram-down). However, the PRD offers a menu of choices to ensure fairness, which has introduced uncertainty in implementation and conflict among academics, practitioners, and national policy makers in terms of what test is the right test for a particular jurisdiction's legal cultural circumstances. These tests are included in Article 11 of the PRD and include an 'absolute priority rule' (art 11(2), a European style 'relative priority rule' (art 11(1)(b), and the application of an 'unfair prejudice test' (art 11(2) 2nd para). The first two of these tests have led to considerable debate among insolvency academics in particular, while the pragmatic approach exemplified by the Irish experience (and the US experience) indicates that the distinction between the two tests is not so clear as the debate seems at times to presume.

3.2 Negotiating Creditors' Rights: The Absolute v Relative Priority Rule Debate[49]

While the term 'absolute priority' seems to have an accepted definition derived from American restructuring law, in practice this is viewed only as a starting point, which can be diverted from if the outcome would be better for the collective of creditors.[50] This is a similar approach to what is taken in the Irish Examinership as this default position is a starting point from which the restructuring process takes place. A restructuring plan will be adopted by the court if it complies with the conditions set out in the legislation.[51] In the European context, Mennens states that: 'The 2016 proposal contained an "absolute priority rule" (APR), which is similar to its US counterpart. This rule essentially requires that a dissenting class of creditors is paid in full before any value can be distributed to a lower ranking class. The APR ensures that priority is respected.'[52]

The European concept of the RPR reflects pre-existing practise in some Member States. In Ireland, for example, Examinership provides for a cross-class cram-down. The outcome of many successful Examinerships reflects a flexible approach to consensual negotiations in the interests of producing a plan that will preserve value, investment, and employment. As with the US Chapter 11, the starting

[47] *Vantive Holdings*, per Kelly P in relation to the 'Independent Accountant's Report'.
[48] The important role of the courts in this regard is expanded upon in Irene Lynch Fannon, 'The End of the Celtic Tiger: an Irish Case Study on the Failure of Corporate Governance and Company Law' (2015) 66(1) NILQ 1.
[49] Much of the following text has been published in the International Insolvency Review between delivery of this paper at the INSOL Copenhagen Academic Forum in 2019 and the time of writing. Please see Irene Lynch Fannon, 'Guest Editorial' (2019) 28(3) International Insolvency Review 297.
[50] Ignacio Tirado, 'Relative vs Absolute Priority' Keynote Address, INSOL Europe Academic Forum, 26th September 2019, Copenhagen Denmark.
[51] See Irish Companies Act 2014 ss 534-543 for the conditions under which a plan will be confirmed and adopted. For a description of the operation of this procedure in Ireland, see generally Irene Lynch Fannon & G Murphy, *Corporate Insolvency and Rescue* (Bloomsbury 2012) chapters 12 and 13.
[52] Anne Mennens, 'Puzzling Priorities: Harmonisation of European Preventive Restructuring Frameworks' (Oxford Business Law Blog March 25th, 2019) <https://www.law.ox.ac.uk/business-law-blog/blog/2019/03/puzzling-priorities-harmonisation-european-preventive-restructuring> accessed 15 July 2020.

point is an absolute priority rule pre-existing the examinership process. Negotiating the rescue plan and reaching what is generally called a 'scheme of arrangement' is done with full recognition and management of pre-insolvency entitlements. Any settlement or scheme must be approved by the court before it is effective. This stage (as is similarly envisaged in Article 11 of the PRD) allows for a consideration of all objections from dissenting creditors measured against what is in fact a 'best interests of the creditors' test,' and an 'unfair prejudice test', which is defined in the Directive.[53]

The introduction of the European version of the RPR reflects the diverging objectives pursued by the many contributors to the drafting of the PRD. Its introduction caused considerable consternation in some quarters, claiming that it will lead to arbitrary results and value destroying uncertainty.[54] These criticisms have been roundly rebuffed by the authors of two reports[55] along with a number of other respected commentators in the field. On the one hand, if the aim is to create proceedings that better safeguard the interests of all stakeholders who must together negotiate a plan in an optimal setting for such negotiation, then an RPR in the way it is drafted in the PRD seems understandable. On the other hand, it has been viewed as blurring the initial bargaining positions of creditors. The argument continues that the existence of an RPR approach broadens the scope of agreements beyond what can reasonably be discussed under time pressures as each creditor has an incentive to try and win a bit more from the agreement as the priority rules become a subject for negotiation.[56] Thus, there remains challenging issues of perspective and even terminology that mean this debate continues to rage during the implementation period of the PRD. As such, an examination of the American context, from which the test is derived, is instructive.[57]

3.3The United States and Absolute Priority

It seems there is some transatlantic misunderstanding as to whether US Chapter 11 does indeed have an APR rule. In both Chapter 11 and variations of it such as the Irish Examinership process the absolute priority rule applies as a starting point from which creditor agreements and compromises begin. Similarly, the APR applies as a default floor from which the question of 'unfair prejudice' or the test as to the creditors' best interest applies. It has been said that the US Chapter 11 procedure has an APR rule, but it is observed more in the breach of that rule than in an strict compliance with it. Despite the debate in some European quarters it is not possible to have rescue without a departure from the APR. Quite simply it does not make sense that this would or even could be the case should complex negotiated restructurings be realistically achievable. As noted by Lubben:

> [T]here is no absolute priority rule of the kind described in the literature under current law. It is not clear there ever has been such a rule…[a]nd even if there were, adopting such a rule would be inconsistent with chapter 11, or any other sensible system of reorganization. That is, chapter 11 will not work under the kind of rigid absolute priority rule many academic commentators promote, and thus the rule would be certainly flouted. [58]

Lubben's observations are reflected in the assertion in this paper that a compromise on pre-existing priorities is part and parcel of any robust preventive restructuring framework. This is reflected in Irish case law.

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[53] See Irene Lynch Fannon & G Murphy, *Corporate Insolvency and Rescue* (Bloomsbury 2012); J O'Donnell J and J Nicholas, *Examinerships* (2nd edn, Lonsdale 2016); ad Irene Lynch Fannon, 'Examinership: Approval of Schemes — Re SIAC Construction Ltd and in the Matter of the Companies (Amendment) Act 1990 (as Amended)' (2015) 22(1) Commercial Law Practitioner 3.

[54] R L de Weijs, A L Jonkers, and M Malakotipour, 'The Imminent Distortion of European Insolvency Law: How the European Union Erodes the Basic Fabric of Private Law by Allowing 'Relative Priority' (RPR)' (March 11, 2019). Centre for the Study of European Contract Law Working Paper No. 2019-05. Available at <SSRN: https://ssrn.com/abstract=3350375> or <http://dx.doi.org/10.2139/ssrn.3350375> 17.

[55] Bob Wessels, Stephan Madaus, and Gert-Jan Boon, *Rescue of Business in Insolvency Law* (European Law Institute 2017) and Lorenzo Stanghellini, Riz Mokal, Christoph G Paulus, and Ignacio Tirado, *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer 2018).

[56] This debate was discussed in detail in Chapter 4 of the JCOERE Consortium, Judicial Co-Operation Supporting Economic Recovery in Europe (JCOERE) Report 1: Identifying substantive and Procedural rules in preventive restructuring frameworks including the Preventive Restructuring Directive which may be incompatible with judicial co-operation obligations (CORA 2020) <https://cora.ucc.ie/bitstream/handle/10468/9810/JCOERE_Report_1.pdf?sequence=1&isAllowed=y> accessed 10 July 2020, 54-57. Chapter 4 of the JCOERE Report 1 can also be accessed online here: <https://www.ucc.ie/en/media/projectsandcentres/jcoereproject/bannerimages/Chapter4FINALPDF.pdf>.

[57] For an updated discussion of these issues, please see Irene Lynch Fannon, 'Guest Editorial' (2019) 28(3) International Insolvency Review 297.

[58] Stephen J Lubben, 'The Overstated Absolute Priority Rule' (2016) 21(4) Fordham Journal of Corporate & Financial Law 581, 583.

It is not clear whether the use of the term 'absolute priority' or 'APR' is understood in the same way across the board. Assuming that all domestic frameworks have a system of priorities that are applied in post insolvency distributive systems (liquidations for example), the issue is to what extent domestic preventive restructuring frameworks as they exist move from accepted creditor priority ground rules to facilitate rescue. As Garciamartin observes, the APR is 'the shadow under which the compromise is made.'[59] For example, the Irish system specifically addresses receivership (based on significant rights *in rem* holdings) as is best illustrated by decisions such as *Re Holidair,*[60] in which departure from the agreed status quo is facilitated by the legislative framework. This case illustrates how, even at the outset, secured creditors with significant agreed priorities can be affected by a robust rescue process.

In *Holidair*, (which was the holding company of a specialised construction group called MF Kentz) Allied Irish Banks (AIB) had appointed a receiver subsequent to a pre-existing loan agreement and by implementation of what is called a deed of appointment. The appointment of a receiver in this context is associated with the right *in rem* connected to the secured loan. The debtor company then applied for an examiner to be appointed. Following a High Court order, the examiner was appointed and the receiver ordered by the court to cease to act. The examinership process proceeded including the examiner availing of assets that had been subject to the charges imposed by AIB and the company was rescued. In addition, interim rescue financing was given priority in repayment under the examinership, which aligns with Article 17 of the PRD. The examinership rescue was successful with the company having recently (2015) been sold to a Canadian conglomerate. *Holidair* is an excellent example of how the secured creditors rights were affected from the outset and compromised all through the preventive restructuring process.

3.4 Pursuing the Compromise and Approving the Cram Down

3.4.1 Should Absolute Priority be Respected? The Irish Context

A second question relates to how the accepted priority system can be compromised during the rescue. The question is to what extent the legislative framework providing for rescue will permit derogation from accepted priorities and furthermore how this is achieved. On her Oxford Law Blog, Anne Mennens concludes that:

> [T]he final text of the Restructuring Directive contains an APR with somewhat softer edges, allowing for derogations from the priority rules when (i) necessary to achieve the aims of the restructuring plan and (ii) such derogations do not unfairly prejudice the rights or interests of any affected parties.[61]

She continues on to observe that it is accepted that 'at a fairly late stage of the legislative process, in addition to the APR a "relative priority rule" (RPR) was introduced. This standard was advocated by the *CODIRE* research group[62] in their final report published July 2018.'[63] The introduction of the European version of relative priority has, however, been criticised and treated reluctantly by a number of European academics and commentators.[64] Mennens does not support the introduction of the European RPR, stating that the:

> RPR enables the redistribution of value, allowing for the reshuffling and curtailing of pre-existing rights in a manner that is unpredictable. This is incompatible with the desire to create legal

[59] Francisco Garcimartin, 'Directive on Preventive Restructuring Frameworks: Relative or Absolute Cramdown?' Panel Presentation given at INSOL Europe Annual Congress in Copenhagen, 27 September 2019.
[60] *Re Holidair* [1994] I IR 416.
[61] Anne Mennens, 'Puzzling Priorities: Harmonisation of European Preventive Restructuring Frameworks' (Oxford Business Law Blog March 25th, 2019) <https://www.law.ox.ac.uk/business-law-blog/blog/2019/03/puzzling-priorities-harmonisation-european-preventive-restructuring> accessed 15 July 2020
[62] The CODIRE research group provides the following definition of the RPR in its Final Report July 2018. 'The relative priority rule provides a more realistic alternative, ensuring fairness for dissentients by protecting their relative position against all other affected stakeholders but without creating hold-out incentives. The relative priority rule also makes it more feasible for plans to be approved that permit equity holders to retain a stake in the debtor or its business, which in turn is likely to incentivise greater and more timely use of restructuring proceedings and the option of drawing on equity's debtor-specific knowledge, expertise, and goodwill.' The rule also provides a measure of protection against improper 'loan-to-own' strategies by which acquirers of distressed debt seek to acquire a share of debtor's equity greater than the present economic value of their debt claims.'
[63] Mennens (n 61).
[64] See for example de Weijs, Jonkers, & Malakotipour (n 54). See also for a description of this debate Ignacio Tirado and Riz Mokal, 'Has Newton Had His Day? Relativity and Realism in European Restructuring' (2018/19) Winter Eurofenix 20.

> certainty for investors. This uncertainty will hamper the free flow of capital, thereby undermining the Commission's pursuit of a true capital markets union.[65]

However, although Member States are free to opt for the APR or RPR, there is also a general derogation that in fact mirrors the Irish legislation:

> Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not *unfairly prejudice* the rights or interests of any affected parties (emphasis added).[66]

This derogation essentially introduces an 'unfair prejudice test', which has long been a fixture of the Irish court's fairness interpretations in relation to examinership rescue plans. The Irish examinership process requires that before a compromise is approved that includes a cross-class cram-down, there must be consent from at least one class of impaired creditors; that the court is satisfied that the compromise is equitable as regards any class of members or creditors that have not accepted the proposals; and that the scheme does not unfairly prejudice any creditor interests.[67] An application of this test by the Irish Supreme Court in *McInerney*[68] in which the Supreme Court approved the High Court's refusal to approve the compromise is instructive: [69]

> In essence, the issue on the confirmation hearing was whether the proposal was unfairly prejudicial to the banks. In this regard the judge adopted a test with which the parties agreed. He considered (at para. 4.3) that 'it would require exceptional circumstances before a court could approve a scheme of arrangement where secured creditors could be shown to be worse off under the scheme than under the alternative methods by which the value of the secured creditors' security could be realised.'[70]

The court continued:

> The judge pointed out that under this proposal, as under many if not all examinership proposals, the unsecured creditors would be paid an amount which was calculated as being more than that which they would receive under a liquidation. He suggested that if such a proposal nevertheless required that another class of creditors (in this case the secured creditors) receive something less than they would receive under receivership or liquidation, then that would by itself be a reason to conclude that there was unfair prejudice to the creditors, unless the disparity was justified by strong reasons. This approach was not contested on this appeal.[71]

Applying this approach, the compromise was *not* approved on the basis that it unfairly prejudiced a class of impaired creditors.

In contrast, in the Irish decision of *SIAC*[72] the High Court and the Supreme Court approved the scheme despite objections from a Polish creditor and others that they were being unfairly prejudiced. Fennelly J, delivering the judgement of the Supreme Court, stated at para 71:

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[65] Mennens (n 61).
[66] PRD, art 11(2) subparagraph 2.
[67] Companies Act 2014, s 541
[68] *McInerney Homes Limited & ors & Companies (Amendment) Act 1990* [2011] IESC 31.
[69] The Irish legislation provides in section 24(3) as follows:-
'At a hearing under subsection (1) the court may, as it thinks proper, subject to the provisions of this section and section 25, confirm subject to codifications, or refuse to confirm the proposals.
(4) The court shall not confirm any proposals –
(a) unless at least one class of members and one class of creditors whose interest or claims would be impaired by implementation of the proposals had
accepted the proposals, or
(b) if the sole or primary purpose of the proposals is the avoidance of payment
of tax due, or
(c) unless the court is satisfied that –
i) the proposals are fair and equitable in relation to any class of member or members or creditors that has not accepted the proposals on whose interests or claims would be impaired by implementation, and
ii) the proposals are not unfairly prejudicial to the interests of any interested party.'
[70] *McInerney Homes* [12].
[71] *ibid*.
[72] *Re SIAC Construction Limited and Ors and the Companies (Amendment) Act 1990 (as amended)* [2014] IESC 25.

> I would also approve the following helpful passage in *Corporate Insolvency and Rescue*, by Irene Lynch Fannon and Gerard Nicholas Murphy (2nd edn, Bloomsbury Professional 2012) at paragraph 13.43: 'While the court can take into account the prejudice an individual may suffer if the scheme is implemented, the prejudice must be unfair; the court will also consider the prejudice that will be caused to other creditors and employees if the scheme is not approved by the court and weigh both considerations in the balance when deciding whether or not to confirm the scheme of arrangement.'[73]

The judgement continues at para 72:

> The court will need to assess any claim of a creditor to be unfairly prejudiced by proposals from all angles. There will be a wide range of potentially relevant elements in the factual circumstances of the company, some affecting the creditor adversely and some favourably. As can be seen from the cases, a court will take note of the fact that some creditors, while losing heavily in the write-down of their debts, are likely to benefit if the company is able to resume trading. A party may claim to be prejudiced by the loss of an advantage, right or benefit. On the other hand, it may be relevant to note that the same party is in a position to retain a right or benefit which is not available to other creditors.[74]

What can be drawn from these examples is that while an effective rescue process might begin from an absolute priority position, deviations are common and the tests available and applied by the courts help to prevent creditors from being treated unfairly, and are considered against the backdrop of priority rules. It could be said that the Irish system reflects the fact that in approving restructuring, judges are able to look at the circumstances on a case-by-case basis and determine, based on argument, evidence and precedent whether or not the plan devised is appropriate under the circumstances, allowing for ultimate flexibility in negotiation and, arguably, a greater likelihood of efficient restructuring success.

3.3.2 Absolute Priority in the English Context

The UK Scheme of Arrangement,[75] another often successful restructuring procedure often utilised by foreign companies due to relative ease of access to the English courts, also utilises a similar test to ensure fairness for creditors whose rights have been affected by a restructuring plan. The scheme of arrangement, as set out in Part 26 of the Companies Act 2006, does not provide for a cross-class cram-down, however, the courts have approved schemes where votes have not been given to 'out-of-the-money' creditors.[76] The lack of statutory cross-class cram-down in the UK has been a topic of interest for some time.

Payne, for example, concedes that in order for a cram-down to be universally accepted, it needs to include protection for creditors.[77] In relation to a proposed restructuring plan[78] mooted in 2016, Payne noted that the UK government's proposals for reform reflect a similar framework to the current scheme of arrangement, along with the requisite high level of confirmation thresholds (75% by value), although also including a cross-class cram-down including the same high thresholds. While this approach was criticised, the UK Government went on to propose that 'at least one class of impaired creditors will need to vote in favour of the scheme and the absolute priority rule must be followed'.[79] Although semantically embracing absolute priority in its proposal, the Government went on to immediately allow for deviations from it:

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[73] *idem*, para 71.
[74] *idem*, para 72.
[75] UK Companies Act 2006, Part 26.
[76] See *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch).
[77] Jennifer Payne, 'The Government Announces Radical Changes to the UK Debt Restructuring Regime' (Oxford Law Blog 11 September 2018) <https://www.law.ox.ac.uk/business-law-blog/blog/2018/09/government-announces-radical-changes-uk-debt-restructuring-regime> accessed 15 July 2020.
[78] See 'A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform (Insolvency Service May 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency_Framework.pdf> accessed 15 July 2020.
[79] Payne (n 76).

> The Government's proposals …[allow] the court to confirm a restructuring plan even if it does not comply with the absolute priority rule where that non-compliance is (i) necessary to achieve the aims of the restructuring and (ii) just and equitable in the circumstances (para 5.164).[80]

Clearly even at this early stage in propsals for reform, the Government and those involved in developing the proposals for a new restructruing plan that would include a cross-class cram-down recognised that absolute priority should only ever be a starting point against which negotiations can be commenced. Payne surmised that these reform proposals were likely driven at least in part by a need to keep pace with changes happening in insolvency and restructuring in the rest of the world, including in particular what is now the Preventive Restructuring Directive, which at the time of Payne's blog was in proposal form.[81]

Since the time of the presentation to which this paper relates in September 2019, much has changed in the world and in the restructuring and insolvency industry as a result of the impact of the COVID-19 pandemic.[82] The changes mooted in the 2016 consultation in the UK and the response that followed[83] has been largely superseded by rapidly passed legislation, although the results align fairly closely to the changes intended following that consultation process.[84] A new restructuring plan that aligns in many respects to the PRD has been introduced, including a cross-class cram-down. It is a debtor in possession procedure aimed to help financially distressed companies (their companies or shareholders) to propose a plan to rescue the company (or one or more of its businesses), facilitating 'complex debt arrangements to be restructured and support the injection of new rescue finance.'[85] While there is a cross-class cram-down, its approval by the court is contingent on a finding that it is 'fair and equitable' with the court satisfied that dissenting creditors would be no worse off in an alternative procedure.[86] There is no explicit reference to adherence to any type of priority rule in the legislation, though it does offer a sweeping up provision that states a plan may be confirmed 'if the court is prepared to sanction a Restructuring Plan'.[87]

It is not yet clear whether the new plan will be internationally recognised in similar fashion to the classic scheme of arrangement – it is similarly included in company law rather than insolvency law and will become Part 26A in the Companies Act 2006, therefore it is likely to be similarly covered by the Judgments Regulation, although this position may also change post-Brexit as like the EIR Recast, the Judgments Regulation may also no longer apply. Payne in particular notes the potential significant impact that Brexit may have on the popularity of the UK as a restructuring destination: 'In light of Brexit it is important that the UK does not fall behind in the area of restructuring.' It is therefore not surprising that the new restructuring plan introduces a far more *robust* framework than was previously set out under Part 26, and the lack of explicit priority rules will likely mean greater flexibility for free negotiation and agreement contingent on court confirmation and approval. However, as noted by Jennifer Marshall in Brussels in June 2019, a the impact of Brexit may make English courts hesitant to sanction a foreign company to utilise the scheme of arrangement, and likely by extension the new restructuring plan. There are complicated reasons why establishing jurisdiction may become problematic, but it is sufficient to note that in the event of a 'hard Brexit' the certainty of recognition and enforcement will be lost, as a result of which a court may exercise its discretion and choose not to make an order in vain.

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[80] *ibid*.
[81] *ibid*.
[82] See the Corporate Insolvency and Governance Act 2020 <http://www.legislation.gov.uk/ukpga/2020/12/contents/enacted> accessed 15 July 2020.
[83] Insolvency Service (BEIS), *A Review of the Corporate Insolvency Framework* (May 2016); *Summary of Responses: A Review of the Corporate Insolvency Framework* (September 2016); and *Insolvency and Corporate Governance: Government Response* (August 2018).
[84] See the Corporate Insolvency and Governance Act 2020 <http://www.legislation.gov.uk/ukpga/2020/12/contents/enacted> accessed 15 July 2020. Schedule 9 of that Act contains the provisions for the new restructuring plan.
[85] Eugenio Vaccari, 'The New Corporate Insolvency and Governance Act 2020 – An Extraordinary Act for Extraordinary Times? A Quick Look at the Act's Long-Term Statutory Reforms' (Essex Law Research Blog 1 July 2020) <https://essexlawresearch.blog/2020/07/01/the-new-corporate-insolvency-and-governance-act-2020-an-extraordinary-act-for-extraordinary-times-a-quick-look-at-the-acts-long-term-statutory-reforms/> accessed 15 July 2020.
[86] Corporate Insolvency and Governance Act 2020 schedule 9 para 901G.
[87] David Ampaw and David Manson, 'The New UK Restructuring Plan' (DLA Piper Publications 2 July 2020) <https://www.dlapiper.com/en/uk/insights/publications/2020/06/the-new-uk-restructuring-plan/> accessed 15 July 2020

4 Conclusion

The JCOERE Research has revealed much about the difficulties of having an identical collective understanding of similar terms and concepts associated with restructuring processes. The Irish experience with its robust preventive restructuring procedure, Examinership, and to a lesser extent the English experience with the scheme of arrangement as a less robust, but highly popular procedure, has helped to highlight these disconnects. This Chapter has explored two areas of particular interest and potential conflict that could eventually arise between competing restructuring procedures, namely, the issue of thresholds at which a restructuring process should be available as well as the use of a viability test by courts to assess restructuring plans. In addition, this chapter has examined how the rights of creditors are protected or may be protected under new procedures implemented under the PRD. It has been highlighted that there is a clear disconnect between the understanding of 'absolute priority' in the United States compared to the rules introduced under Article 11 of the PRD, and that this has created confusion and conflict in the insolvency academy in Europe which tends to further muddy the practical reality, which is that in order for a restructuring procedure to be widely successful, it must be permitted to negotiate within the priority waterfall, which includes habitually deviating from the rule that senior creditors should be repaid in full before any junior creditors receive anything. The Irish Examinership procedure adopts this flexible approach including a 'best interest of creditors test' and 'the unfair prejudice test, which has been used to good effect since the procedure was introduced in 1990.

Finally, it is interesting to note that the English system has introduced a new restructuring plan procedure which is clearly intended to be a *robust* procedure that reflects most of the PRD framework, but it does not specifically refer to any of the priority rules set out in the PRD. Rather it requires that the approval of the court and that dissenting creditors would be no worse off in an alternative scenario, clearly reflecting a 'best interests of creditors' test similar to the Irish approach. Whether Brexit will affect the popularity of the English scheme, or indeed see greater numbers of companies flock to Ireland for its well-developed Examinership process is yet to be seen. It is sufficient to conclude, however, that the EU Member States could do well to have regard to those jurisdictions experienced in restructuring when implementing frameworks under the PRD taking a more pragmatic and practical approach that has served Ireland and the UK well in the insolvency and restructuring industries.