Client Alert

UPDATE – Changes to Final German Restructuring Legislation: UK Restructuring Plan, German Scheme and Dutch Scheme

03 February 2021

Contact

Mathias Eisen, Partner
+49 69 71914.3447
Meisen@milbank.com

Karen McMaster, Partner
+44 20 7615 3266
KMcmaster@milbank.com

Nicole Stephansen, Special Counsel
+44 20 7615 3819
NStephansen@milbank.com

Robert Kastl, Associate
+49 69 71914.3447
Rkastl@milbank.com

Robert van Galen, Partner
+31 20 71 71 677
Robert.vanGalen@nautadutilh.com

Teun Struycken, Partner
+31 20 71 71 461
Teun.Struycken@nautadutilh.com

Marc Orval, Partner
+44 20 7786 9114
Marc.Orval@nautadutilh.com

Barbara Rumora-Scheltema, Partner
+31 20 71 71 449
Barbara.Rumora-Scheltema@nautadutilh.com

Robert Woudenberg, Senior Associate
+31 20 71 71 862
Robert.Woudenberg@nautadutilh.com

The UK, Dutch and German legislatures have been focused on significant changes to their national corporate and insolvency restructuring laws. While a new Dutch restructuring procedure (the "**Dutch Scheme**") can be used since 1 January 2021, in the UK a new restructuring procedure (the "**UK Restructuring Plan**") was introduced in Part 26A of the Companies Act 2006 and became effective on 26 June 2020. In Germany, the long-awaited bill to introduce a new pre-insolvency business stabilization and restructuring regime (the "**German Scheme**") into German law has been adopted in December 2020 and the German Scheme is now also available since 1 January 2021.

The new restructuring frameworks show some interesting similarities[1], as well as some notable differences. Of course, each of the frameworks will develop its own particular characteristics as cases start being considered. Set about below is a comparison of certain key aspects of the new frameworks, noting first some observations:

[1] In respect of the European restructuring processes, the similarities are in part the result of implementation of the Directive (EU) 2017/1132 (Directive on restructuring and insolvency)

- The availability of a cross-class cram-down within the UK and European restructuring processes is a welcome development and an alternative to security enforcement as a means of disenfranchising out of the money stakeholders. Notably, however, the schemes will provide a forum for minorities to dissent and challenge plans and we accordingly expect to see more contested processes than has traditionally been the case (certainly in England).

- It will be particularly interesting to see how the different courts approach matters relating to valuation. The Dutch Scheme for example introduces the concept of reorganisation value, which is required to be distributed fairly amongst the creditors in accordance with their ranking and provides that creditors may not be worse-off than in a bankruptcy situation. Both, the UK Restructuring Plan and the German Scheme look at a reasonable likely alternative and we would expect more scope for stakeholders to put forward evidence based on going concern valuations.

- Access to the UK Restructuring Plan and Dutch Scheme is not dependent on an entity having its COMI in the jurisdiction, and may be demonstrated by establishing 'sufficiency of connection' to the jurisdiction (though there are certain benefits when it comes to recognition in particular in US Chapter 15 proceedings for the scheme entity to have its COMI in the jurisdiction). This may further reduce the prevalence of COMI shifting as a means for forum shopping, noting that any entity wanting to take advantage of the German Scheme must have its COMI in Germany[2].

- The protection afforded by a moratorium in each of the schemes is a feature borrowed from US Chapter 11 and likely to be of benefit – but the moratorium as it applies to a UK Restructuring Plan is significantly weaker than in Germany and the Netherlands. Pursuant to the EU Recast Insolvency Regulation, none of the moratoriums will however apply to the exercise of security rights against in rem assets in other EU member states and therefore reliance on intercreditor standstills will remain relevant.

- Generally, the UK Restructuring Plan is established with less legislative guidance than in the Netherlands and Germany and therefore there may be more uncertainty on how the courts will look at certain matters, in particular around class composition and application of principles of priority to value distribution.

- All three processes present a theoretic possibility for a 'cram up' of senior or super senior creditors. The German scheme provides a specific exception to the absolute priority rule where a senior class's rights are not altered in a material way – providing explicitly for an extension of not more than 18 months.

- Both the German and Dutch Schemes contain restrictions on forcing dissenting creditors to take equity and therefore restructurings will need to contemplate non-equity alternatives and/or cash out options.

[2] The public process of the Dutch Scheme – as opposed to the non-public process – has an option to be, and the German Scheme, if conducted as a public proceeding which will be available from 17 July 2022 onwards, will be, recognised as insolvency processes under the EU Recast Insolvency Regulation – with the effect that a debt for equity swap may be enforceable against foreign equity post a COMI shift. This means that if creditors can get management on board to do a COMI shift, these Schemes may present a new 'stick' against a shareholder that was not previously available

1. The first steps

			
Which debtors?	Debtors (excluding certain financial institutions) 'liable to be wound up under the Insolvency Act 1986'. This includes UK incorporated entities as well as entities with a '<u>sufficiency of connection</u>', which may be <u>COMI</u> in the UK, or something less than that – for the purposes of a Scheme the fact that key debts are governed by English law is likely to be enough to satisfy the test. It is noteworthy that according to recent case law on the scheme of arrangement, a guarantor that is incorporated in England and Wales can be used as the scheme company rather than the borrower that is incorporated in another jurisdiction and may be unable to establish a sufficient connection to establish the jurisdiction of the English court. A deed of contribution entered into by the English guarantor in favour of the foreign borrower under which the guarantor assumes the position of a primary obligor, alongside the borrower, has been accepted by the court as sufficient to give it jurisdiction to sanction the scheme.[3] The court will likely allow this approach as well in relation to the UK Restructuring Plan.	All debtors (other than financial institutions) which have their <u>COMI</u> in Germany. Linking the jurisdiction to the COMI follows the principle for determining the jurisdiction for insolvency proceedings.	All debtors (other than financial institutions) with their <u>COMI</u> in the Netherlands OR an establishment[4] in the Netherlands (for the public process of the Dutch Scheme) OR <u>a sufficient connection</u> with the Netherlands (for the non-public process of the Dutch Scheme). There is clear legislative guidance that sufficiency of connection may be demonstrated by a number of factors, including governing law and jurisdiction clauses, assets or even the fact that a significant part of the overall group business is in the Netherlands.
Debtor in possession?	Yes.	Yes.	Yes.
Who can initiate the process?	The <u>debtor, a creditor or shareholder of the company</u>, a liquidator of a company being wound up or an administrator of a company in administration can apply to court for an order to convene meetings of creditors and/or shareholders to enable them to consider and vote on the restructuring plan.	<u>Only the debtor</u> is entitled to propose the restructuring plan and to submit it for adoption by its affected creditors and/or shareholders. Creditors and shareholders are not entitled to initiate the restructuring process. A pre-packed solution is, however, possible.	The process can be initiated either by a <u>debtor</u> or by one or more <u>creditors, shareholders or the mandatory employees' representation</u> of the debtor. A debtor can start the process by filing a statement with the court in which it states the intention to start preparation of a plan to be offered to its creditors. One or more creditors, shareholders or the mandatory employees' representation of the debtor can initiate the process by filing an application to appoint a Restructuring Expert with the court (see below).

[3] *Re Swissport Fuelling Ltd [2020] EWHC 1499 (Ch)*

[4] As defined in article 2 section 10 of the EU Recast Insolvency Regulation

			
When available?	A company must meet the following two conditions in order to use the UK Restructuring Plan: • the company has encountered, or is likely to encounter, financial difficulties that are affecting or will or may affect, its ability to carry on business as a going concern; and • a compromise or arrangement must be proposed between the company and its creditor or members (or any class of either) and the purpose of such compromise or arrangement must be to eliminate, reduce, prevent or mitigate the effect of any of the financial difficulties the company is facing. These conditions make it clear that the company does not have to be insolvent and the restructuring plan can be used in anticipation of financial difficulties.	Debtors with a COMI in Germany have access to the new restructuring process if they are threatened to become illiquid (imminent illiquidity) without yet being actually illiquid. A debtor is imminently illiquid if it is more likely than not (>50 per cent) that the debtor will be unable to honour all of its payment obligations which are due from time to time within the applicable forecast period (generally 24 months). Should a debtor become insolvent in the course of the restructuring process, the restructuring efforts will not necessarily be frustrated due to the occurrence of actual insolvency (illiquidity or over-indebtedness). The restructuring court is authorized not to terminate the restructuring proceedings despite the occurrence of insolvency if (i) the commencement of insolvency proceedings would, in light of the progress achieved in the German Scheme proceedings, not be in the interest of the creditors as a whole, or (ii) such insolvency was caused by the acceleration of a claim which was contemplated to be rearranged by the restructuring plan and the implementation of the restructuring plan is predominantly likely.	A restructuring plan may be proposed when it is reasonably likely that the debtor will be unable to continue to pay its debts (*state of impending insolvency*). This is generally a situation where the debtor has sufficient liquidity to meet its short-term obligations, but reasonably expects that without a restructuring of the debt, it will not be able to prevent an insolvency over time.

	UK	Germany	Netherlands
Appointment of Restructuring Officer/Expert	Part 26A of the Companies Act 2006 does not require the appointment of a restructuring officer. The directors will remain in control of the company.	The court can appoint a so-called restructuring officer. The restructuring officer is supervised by the court and mainly responsible for reporting on certain factual and procedural prerequisites of the new German Scheme to the court. The restructuring officer can be any person which is independent from the debtor and its creditors and is qualified and suitable for the specific case. If the debtor proposes a specific person as officeholder and evidences that the restructuring is not obviously futile, the court can only abstain from appointing the proposed person if such person is evidently inept. If the court is not bound by a debtor proposal, it must follow the proposal of the creditors' committee or, if no creditors' committee is established, the joint proposal of creditors representing 25 per cent of the voting rights in each class, unless such person is evidently inept. The appointment of a restructuring officer by the court is mandatory in certain circumstances but will not be mandatory for restructurings confined to financial liabilities.	If the appointment of a Restructuring Expert is requested by the debtor or either a creditor, shareholder or employee representative body, the court will examine whether the debtor is in a state of impending insolvency. The court will reject the request if it appears prima facie that the appointment of the Restructuring Expert would not serve the interests of the mutual creditors, but grant the request if (i) it is supported by a majority of the creditors and (ii) the court has jurisdiction. If a Restructuring Expert is appointed, he can exercise virtually all powers that would otherwise be exercised by the debtor under the Dutch Scheme legislation, including the offering of a restructuring plan, but management continues to have full control over the company.

			
Court involvement	There are two court hearings. At a hearing to review the application, referred to as the “convening hearing”, the court, amongst other things, considers any issues as to the existence of the court’s jurisdiction to sanction the restructuring plan, reviews the proposed class composition and considers whether the company meets the conditions to use a restructuring plan. Once the convening order is issued by the court, all creditors and shareholders who are affected by the restructuring plan must be notified of the restructuring plan meeting or meetings. The restructuring plan will become binding if sanctioned by the court at a second hearing, referred to as the “sanction hearing”. All applications to convene a meeting or meetings of creditors and/or shareholders and all applications to sanction a UK Restructuring Plan will be listed before a High Court Judge.	The German Scheme does not necessarily require any court involvement and can theoretically be conducted as an out-of-court process. However, especially, for more complex, hostile or cross-border restructurings, debtors will require the involvement of the competent restructuring court. Upon request of the debtor, the restructuring court schedules a pre-examination hearing with seven days prior notice to discuss and inform the parties about its view on all elements of the proposed restructuring plan which are relevant for the sanctioning of the restructuring plan by the court such as, the selection of the affected stakeholders to be involved in the restructuring plan, compliance of the proposed class composition for such affected stakeholders with the legal requirements and the determination of voting rights. The pre-examination hearing gives the debtor the opportunity to adjust the restructuring plan if required in the view of the restructuring court, thereby mitigating the risk that the restructuring court refuses to sanction the final restructuring plan. The restructuring court schedules the discussion and voting hearing for the restructuring plan with at least 14 days prior notice and during such hearing the debtor and the affected stakeholders will discuss the content of the proposed restructuring plan and vote on it. In the discussion and voting hearing or shortly thereafter, the restructuring court will sanction the restructuring plan upon which it becomes effective and binding on the parties. There will be specialized restructuring courts to adjudicate on any restructuring matter.	Court involvement is limited. There will not necessarily be a court hearing about the eligibility of the debtor to propose a restructuring plan before a vote is taken. Whether the debtor complies with the relevant criteria for a cram down on dissenting creditors, will generally be tested at the confirmation hearing. In order to promote deal certainty, however, the debtor may also request the court give guidance, including to confirm its eligibility to propose a restructuring plan, or to approve certain aspects of the plan in advance, such as the proposed classes of creditors or shareholders, the voting procedure or ask the court's view on potential grounds for refusal of confirmation of the plan. Each court in the Netherlands will appoint one or more judges who will form a pool of Dutch Scheme specialists that hear cases under the Dutch Act.

			
Moratorium	A company can apply for a moratorium under Part A1 of the Insolvency Act 1986. The moratorium imposes a 'payment holiday' in respect of certain pre-moratorium debts, and a stay on legal proceedings and security enforcement, subject to the oversight of a "monitor". The monitor is an insolvency practitioner but, in this role, performs a light-touch supervisory function, essentially tasked with monitoring that it is and remains likely that the moratorium would result in the rescue of the company as a going concern. The moratorium lasts for an initial period of 20 business days but is extendable by another 20 business days by the company. Further extensions beyond this period require creditor consent, or court intervention. Importantly the 'payment holiday' doesn't apply to financial contracts and a failure to meet liabilities will bring a moratorium to an end.	The debtor can apply for a moratorium on foreclosures and security enforcements. This also applies to guarantees and security granted by affiliates of the debtor. The restructuring court can grant such moratorium for an initial period of up to three months. An extension by one month is possible if the debtor has submitted a restructuring plan and no facts are known which would prevent the adoption of that restructuring plan in that month. The extension can be granted for up to eight months if the sanctioning of the restructuring plan by the restructuring court is pending. As long as a moratorium is in effect, counterparties are not entitled to deny performance of their contractual obligations due to payments which have been outstanding at the time the moratorium was ordered by the restructuring court. This does not apply to contractual obligations the performance of which is not required for the continuation of the debtor's business. During the moratorium, creditors are also barred from filing a creditor petition for the commencement of insolvency proceedings over the debtor's assets.	The debtor (or the Restructuring Expert, if appointed) may ask the court to order a moratorium during which third parties cannot act against the debtor or against assets in the debtor's possession, except with court approval. Such a moratorium will last four months and can, in a public process, be extended once by a further four months.
Ipso facto clauses	The UK Corporate Insolvency and Governance Act 2020 that introduced Part 26A of the Companies Act 2006 also introduced restrictions on ipso facto clauses but only for contracts for the supply of goods and services. A termination clause in a contract for the supply of goods and services ceases to have effect when the company becomes subject to the relevant insolvency procedure if and to the extent that, because the company becomes subject to the procedure, (1) the contract or the supply would terminate or "any other thing would take place" or (2) the supplier would be entitled to terminate the contract or the supply or to do "any other thing". We believe that "any other thing" refers to any other contractual right that may be triggered by or exercisable upon the commencement of the insolvency procedure. If the supplier was entitled to terminate the contract or the supply before the start of the insolvency procedure but did not exercise its right, the supplier may not terminate for that reason during the insolvency period. The rule suspends the exercise of rights in relation to pre-insolvency defaults.	The fact that a restructuring matter is pending with the restructuring court or that the debtor has applied for certain instruments under the new German Scheme as such is not capable of triggering any termination or acceleration right or rights of retention of the debtor's creditors or counterparties. Any contractual provisions to the contrary are deemed invalid. Any termination or acceleration right or rights of retention based on other grounds remain unaffected.	The Dutch Act provides that ipso facto clauses are without effect. This applies to termination clauses and clauses that automatically attach legal effect to the proposal of a plan or acts associated with it, such as negotiations on a plan proposal or the implementation of a confirmed plan, the appointment of a Restructuring Expert or the order of a stay.

2. The restructuring plan

	UK	Germany	Netherlands
Release of third-party guarantees	It is well established that a scheme of arrangement is capable of affecting the rights of creditors against third parties. A scheme may operate to release or modify the obligations of guarantors. It is likely that the court will follow this approach in relation to the UK Restructuring Plan.	The German Scheme can restructure guarantees and security granted by affiliates of the debtor, i.e. any upstream, downstream and/or sidestream guarantee and/or security granted by a member of the debtor group, its shareholders or their affiliates (in each case, whether foreign or domestic) can be restructured.	The Dutch Scheme allows the effective restructuring of guarantees provided by group companies (foreign or domestic), even if such group companies are not involved in restructuring proceedings, provided that the Dutch courts have jurisdiction if the guarantor would have offered a restructuring plan to its creditors and would have requested court confirmation thereof and the guarantor is in a state of impending insolvency (i.e. meets the conditions to propose a restructuring plan).
Liabilities that cannot be included	Certain creditors are excluded from the UK Restructuring Plan: (1) creditors in respect of debts incurred during the moratorium under Part A1 of the Insolvency Act 1986 and (2) certain priority pre-moratorium debts (including in respect of goods and services supplied during the moratorium) if the restructuring plan is proposed within a 12 week period following the end of the moratorium.	Employment and pension obligations cannot be compromised or rearranged by way of a restructuring plan. Consequently, a restructuring plan is not capable of facilitating any lay-offs, adjustments of pension schemes or reduction of pension obligations. Claims resulting from intentional tort liability and monetary fines also cannot be compromised or rearranged by way of a restructuring plan.	The Dutch Scheme cannot release or reduce liabilities arising from employment contracts.
Debt-to-equity swap	The UK Restructuring Plan can include a debt-to-equity swap. There are no special rules regarding debt-to-equity swaps.	The German Scheme can include a debt-to-equity swap, and in addition any other applicable equity capital measures, including squeeze-outs of minority shareholders, share transfers, changes to the legal form and capital increases (and reductions) with an exclusion of subscription rights. A debt-to-equity swap cannot be forced onto creditors, but requires the consent of each affected creditor for such creditor to become a shareholder. Any change of control rights of third parties triggered by a debt-to-equity swap or other changes in the shareholding structure resulting from the restructuring plan are deemed invalid.	The Dutch Scheme can include a debt-to-equity swap. A debt-to-equity swap requires the consent of affected financial creditors with a security right and cannot be forced onto them. If such a creditor is part of a dissenting class of financial creditors and refuses to exchange its debt for equity, it must have the option to receive a non-equity instrument.
Executory (ongoing) contracts, e.g. leases	Part 26A Companies Act 2006 does not have a special regime governing executory contracts. However, the new restrictions on ipso facto clauses in supply contracts apply (see above).	The German Scheme does not provide the possibility to amend or terminate executory contracts. Any termination of executory contracts is only possible within insolvency proceedings.	The debtor (or the Restructuring Expert, if one has been appointed by the court) can request the counterparty to agree to a modification or termination of any agreement (except employment agreements). If the counterparty does not agree, the agreement can be terminated subject to confirmation of the plan. The debtor will have to pay

			damages resulting from the premature termination, but those damages can be affected under the plan. A reasonable notice period for termination, which will not exceed three months, shall be ordered by the court. This provision aims to enhance the viability of the debtor in the long run, for example by bringing conditions under a lease agreement more in line with changed market conditions.

3. Voting and sanctioning

			
Class composition	Creditors or shareholders form a class for purpose of voting on the restructuring plan if their rights against the company are "not so dissimilar" as to make it impossible for them to consult together in relation to the proposed compromise or arrangement. However, under scheme of arrangement law debtors were often incentivised to minimise class distinctions and the opposite may be trued of UK Restructuring Plans. It is likely that courts will be live to questions of 'gerrymandering' or splitting otherwise similar classes for the purpose of creating a consenting class. The decision as to whether the class constitution is correct is taken by the court at the convening hearing. Case law on class composition developed for schemes of arrangement is followed for the UK Restructuring Plan. The UK Restructuring Plan does not require secured creditors to be put in an unsecured class to the extent of their deficiency claim.	Creditors which are in a similar position, i.e. creditors which would have similar rights in an insolvency of the debtor, form a creditor class. The same applies to shareholders if the restructuring extends to the equity. Typically, separate classes will have to be formed at least for secured creditors, unsecured *pari passu* creditors, subordinated creditors, small claims creditors and shareholders. The same applies to beneficiaries of group guarantees and security (see above, section 2 (*The restructuring plan*), "Release of third-party guarantees"). A further separation based on economic interests is possible. The criteria for further distinguishing the classes must be appropriate and be described in the restructuring plan. In each class, the respective stakeholders in that class must be treated equally.	Creditors must be divided into separate classes if their positions differ. Such differences could exist both in the rights they would have if the debtor was liquidated in bankruptcy, as well as in their treatment under the plan. Creditors that have a different statutory ranking must be in separate classes. In addition, small creditors (i.e. small or medium sized companies in terms of balance sheet assets and net turnover[5] with no more than 50 employees) must be in one or more separate classes if they receive less than 20 per cent of the amount of their claim under the plan. Further, if the amount of the claim of a secured creditor exceeds the liquidation value of the collateral then they must be placed into two separate classes: one higher ranking class for the amount that is secured by the collateral and one lower ranking class for the remainder. Except for these general rules, the debtor (or the Restructuring Expert, if applicable) can differentiate as much or as little as it believes conducive to the success of the plan.
Majority threshold	The voting majority is 75 per cent in value of creditors or shareholders present and voting (in person or by proxy) in each class. In contrast to the existing scheme of arrangement, the UK Restructuring Plan does not require that at least 50 per cent by number of creditors votes in favour.	The acceptance by a class requires a majority of 75 per cent of the voting rights. All voting rights of the relevant class are counted for determining the majority and not only the voting rights of stakeholders which participate in the voting. A headcount majority is not required. For unsecured creditors, the voting rights are determined in accordance with the nominal amount of such creditors' claims. For secured creditors and beneficiaries of guarantees and security by affiliates of the debtor, the voting rights are determined by the value of such security interests or guarantees. The voting rights of shareholders are determined by their respective participation in the equity.	A class is deemed to accept the restructuring plan if a 66 2/3 per cent majority in terms of total debt or equity, as the case may be, participating in the vote, votes in favour. For the purpose of assessing whether the 66 2/3 per cent threshold is achieved, any claims from creditors (or shareholders) not participating in the voting (no-shows) are not counted. The Dutch Scheme does not require a majority in headcount.

[5] A company with (a) balance sheet assets of not more than € 4,400,000 and (b) net turnover for the financial year of not more than € 8,800,000, as further provided in articles 2:395a and 2:396 of the Dutch Civil Code.

Cross-class cram-down	The UK Restructuring Plan enables the compromise of claims of one or more classes that voted against the plan if the following conditions are met: 1. The court is satisfied that none of the dissenting classes are any worse off under the plan than they would be in the event of the "relevant alternative". The "relevant alternative" is whatever the court considers would be "most likely" to occur in relation to the company if the restructuring plan were not sanctioned; and 2. The plan has been agreed by a number representing 75 per cent in value of a class of creditors or members, present and voting (in person or by proxy), who would receive a payment, or have a genuine economic interest, in the event of the relevant alternative. This condition seems to allow the court to approve a restructuring plan that has been rejected by a senior class but approved by a junior class. In theory, if the class of equity can convince the court that they are an "in the money" class, they could cram down one or more classes of creditors, provided that the requirements to protect these classes are met. The court is not bound to sanction the restructuring plan at the sanction hearing when these conditions are met and is likely to scrutinize the plan, especially when the plan proposes to implement a cross-class cram down. According to the explanatory notes to Part 26A of the Companies Act, the court has absolute discretion over whether to refuse to sanction and it will draw on "well-established principles" in schemes of arrangement. These principles include whether the court is satisfied that the votes of each class are fairly representative of the class as a whole and a hypothetical intelligent and honest member of the class would reasonably have approved the proposal. Part 26A of the Companies Act does not contain an absolute priority rule albeit we expect plans which do not respect insolvency priorities to be closely scrutinized and potentially vulnerable on fairness grounds.	The restructuring plan is deemed to be accepted by a class despite a negative vote of that class if: 1. the members of that class are likely not to be placed at a disadvantage by the restructuring plan compared to their situation in the absence of such restructuring plan ("no worse-off test"); 2. the majority of classes have accepted the plan, provided that if there are only two classes, the acceptance by the other class is sufficient and provided further that accepting classes must not exclusively be constituted by classes of shareholders and/or subordinated creditors; and 3. the members of that class participate appropriately in the economic value the restructuring plan provides for the affected stakeholders. As regards the third requirement, a class of creditors is deemed to participate appropriately in the economic value if: • no other creditor receives economic value in excess of the full (nominal) amount of its claim; • neither any subordinated creditor nor the debtor or any of its shareholders receives any economic value (other than any economic value compensating a corresponding contribution into the debtor's estate) – so-called absolute priority rule; and • no creditor ranking equal with the creditors of that class is awarded any preferential treatment by the restructuring plan, whereas a class of shareholders is deemed to participate appropriately in the economic value if: • no creditor receives any economic benefits exceeding the full (nominal) amount of its claim; and • no shareholder ranking equal with the shareholder of that class is awarded any preferential treatment by the restructuring plan. As a deviation from to the absolute priority rule set out above, an appropriate participation of creditors in the economic value is also possible if: • a deviation from the absolute priority rule is appropriate in view of the nature of the economic difficulties to be	The Dutch Scheme allows the compromise of claims of one or more classes that voted against the plan. However, there are two situations where the court can refuse confirmation if a creditor invokes certain specific refusal grounds. 1. Any creditor or shareholder who has voted against the plan can ask the court to refuse confirmation if it is summarily shown that he would be in a better position if the debtor were liquidated in a bankruptcy ("best-interest-of-creditors" test). Relevant considerations will include the difference between the payment under the plan and the expected payment in case of a bankruptcy, the number and type of creditors that have approved the plan, and the consequences of a confirmation of the plan versus a bankruptcy for employees of the debtor. 2. A creditor or shareholder who is a member of a class that has rejected the plan, and who has voted against the plan, can invoke a number of other refusal grounds which, if shown, must lead the court to withhold confirmation of the plan. These other refusal grounds are: • small creditors get less than 20 per cent (in cash or rights) of their claim, unless there an important reason not to do so; • a lower ranking class receives or retains rights under the plan before a higher-ranking class is paid in full, unless there is a reasonable ground to do so, and the interest of the relevant class is not harmed ("absolute priority rule with a Dutch twist"); • creditors do not have the possibility to opt for an amount in cash equal to what they would receive in a bankruptcy. • There is one mandatory refusal ground specifically applicable to secured financial creditors: these creditors do not have the right to opt for a

	UK	Germany	Netherlands
		resolved by the restructuring plan and the individual circumstances of the case whereas any deviation is deemed inappropriate and thus outside the scope of this deviation from the absolute priority rule if the crammed-down class represents more than half of the voting rights of the creditors of the affected rank; • economic value is provided to the debtor or any of its shareholders, if the involvement of the debtor or its shareholders is required for the continuation of the debtor's business to achieve the added value of the restructuring plan, provided that the debtor and/or its shareholders have committed to such continuation and to (re-)transferring the economic values received if their involvement ceases for reasons attributable to them within five years or any shorter period stipulated by the restructuring plan; or • the claims of such creditors are only affected in a non-material manner, in particular if neither the nominal amount is compromised nor the maturity of such claims is extended by more than eighteen months. Beneficiaries of guarantees and security provided by affiliates of the debtor must always receive appropriate compensation for any compromise of their rights against the relevant guarantor or security grantor. Otherwise, no cram-down of the class of beneficiaries of group guarantees and security may occur.	cash amount. However, secured financial creditors are entitled to a different kind of distribution <u>if the restructuring plan entails a debt-for-equity swap to which such creditors do not want to ascribe</u>.

4. Cross border aspects

Cross-border issues	The UK Restructuring Plan falls outside the scope of the EU Recast Insolvency Regulation. The procedure and its effects are therefore not given automatic recognition in all EU member states under the EU Insolvency Regulation. It has never been completely determined whether the provisions of the EU Recast Regulation on jurisdiction of the English court apply to schemes of arrangement. The usual practice of the court of assuming without deciding that these provisions apply to schemes, has been applied to the UK Restructuring Plan[6]. Whether the UK Restructuring Plan will be recognised in other jurisdictions will depend on the private international laws of the state in which recognition is sought, including (if applicable) the implementation of the UNCITRAL Model Law on Cross-Border Insolvency and interpretation of the EU Recast Judgments Regulation.	The recognition approach for the German Scheme twofold: • If the restructuring proceeding is conducted as a public proceeding which will be available from 17 July 2022 onwards, recognition will be awarded under the European Insolvency Regulation. Recognition under the European Insolvency Regulation by the EU member states (other than Denmark) only requires that the debtor has its COMI in Germany. • If the restructuring proceeding is non-public, recognition will not be awarded under the European Insolvency Regulation. Insofar, the rules on jurisdiction and the recognition and enforcement of judgments under the EU Recast Judgments Regulation apply ensuring that a sanctioning verdict on a restructuring plan by a German restructuring court will be recognised and enforced in accordance with the EU Recast Judgments Regulation by the EU member states.	The public version of the Dutch Scheme will be recognised as insolvency proceedings under the EU Recast Insolvency Regulation and therefore a plan sanctioned and confirmed under this process will benefit from automatic recognition in the other EU member states. However, the Regulation's provisions and limitations with respect to inter alia rights in rem, reservation of title and contracting relating to immovable properties will also apply.[7] The non-public version will be given effect to outside of the Netherlands to the extent the private international laws of the state in which recognition is sought, provides for such recognition. It is uncertain whether the EU Recast Judgments Regulation will apply. It is likely that the Dutch Scheme is eligible for recognition under the UNCITRAL Model Law on Cross-Border Insolvency, which is implemented into national law by inter alia the United States and the United Kingdom.
Cram down of foreign equity	It is uncertain if a cram down or alternation of rights of the shareholders of a non-UK company under the UK Restructuring Plan will be recognised by a court in another jurisdiction.	The German Scheme is applicable to legal entities which have been incorporated or established in a non-German jurisdiction but have their COMI in Germany (see above, section 1 (*The first steps*), "Which debtors?"). Insofar, the German Scheme is capable of restructuring the equity and impairing or disenfranchising shareholders of foreign entities whose COMI is in Germany, subject to recognition of the courts in the jurisdiction in which such recognition is sought. We believe that, within the scope of the European rules of international recognition (see above, "Cross-border issues"), any equity measures will have to be recognized and registered in the relevant corporate registers in the jurisdiction of incorporation or establishment of the debtor.	A cram-down or alteration of rights of the shareholders of a non-Dutch company is possible under the Dutch Scheme, and we believe such a measure in the public process is eligible for automatic recognition under the EU Insolvency Regulation. A cram-down or alteration of rights in the non-public process is subject to recognition of the courts in the jurisdiction in which such recognition is sought. In both cases it is likely that foreign corporate law formalities need to be adhered to for the implementation of the foreign equity measure, provided that under the Dutch Scheme, the approval of shareholders is not required for the execution of the restructuring plan.

[6] *Re Virgin Atlantic Airways Ltd [2020] EWHC 2191 (Ch)*
[7] Articles 8, 10 and 11 respectively of the EU Recast Insolvency Regulation.

Milbank Financial Restructuring Contacts

London | 10 Gresham Street, London EC2V 7JD

Nicholas Angel	nangel@milbank.com	+44 20.7615.3008
Jacqueline Ingram	jingram@milbank.com	+44 20.7615.3251
Karen McMaster	kmcmaster@milbank.com	+44 20.7615.3266
Yushan Ng	yng@milbank.com	+44 20.7615.3341
Sinjini Saha	ssaha@milbank.com	+44 20.7615.3814

Frankfurt | Neue Mainzer Straße 74, 60311 Frankfurt am Main

Mathias Eisen	meisen@milbank.com	+49 69.71914.3447
Thomas Ingenhoven	tingenhoven@milbank.com	+49 69.71914.3437

Munich | Maximilianstraße 15, 80539 Munich

Martin Erhardt	merhardt@milbank.com	+49 89.25559.3666
Sebastian Heim	sheim@milbank.com	+49 89.25559.3717

NautaDutilh Contacts

Amsterdam | Beethovenstraat 400, 1082 PR Amsterdam

Gaike Dalenoord	Gaike.Dalenoord@nautadutilh.com	+31 20.7171.429
Robert van Galen	Robert.vanGalen@nautadutilh.com	+31 20.7171.677
Barbara Rumora-Scheltema	Barbara.Rumora-Scheltema@nautadutilh.com	+31 20.7171.619
Teun Struycken	Teun.Struycken@nautadutilh.com	+31 20.7171.461
David Vietor	David.Vietor@nautadutilh.com	+31 20.7171.464
Robert Woudenberg	Robert.Woudenberg@nautadutilh.com	+31 20.71 71.862

London | 2 Copthall Avenue, London EC2R 7DA

Marc Orval	Marc.Orval@nautadutilh.com	+44 20.7786.9114

Please feel free to discuss any aspects of this Client Alert with your regular Milbank or NautaDutilh contacts.

This Client Alert is a source of general information for clients and friends of Milbank and NautaDutilh. Its content should not be construed as legal advice, and readers should not act upon the information in this Client Alert without consulting counsel.