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Spiralling D&O costs threaten turnaround industry

The cost of directors and officers (D&O) liability insurance has more than doubled in the second quarter of this year in the US and UK, while the same cover for boards of distressed companies has risen by over five times in some instances – threatening the very idea of corporates bringing in turnaround managers.

Maurice Moses, a UK-based independent director specialising in distressed situations who recently retired from EY, said he was worried that not enough attention was being paid to spiralling D&O costs.

"I've heard instances of premiums for D&O liability cover increasing by over 5 times this year for boards, including those with independent directors, in the distressed space," said Moses.

Average costs of D&O premiums were already on an upward path generally because of an increase in class action litigation, especially involving securities matters. Moses observed:

> "It seems to be exacerbated because of the Covid-19 crisis. As far as cover for troubled companies goes, the insurers are running for the hills."

''This unlikely issue could be a threat to the successful restructuring of many companies if the prohibitive cost of cover stops the appointment of independent directors and turnaround professionals from being appointed, just at the moment when the economy needs them most," said Moses.

"Some premiums this year have risen to five or six per cent of the cover you want. So the premium for UK£10 million of cover would cost you UK£0.5 million. Distressed companies often simply can't afford to pay that kind of sum," he said.

"In the unfortunate event of a claim, this will usually occur sometime after the event giving rise to the claim, probably after the director has vacated the role, which makes ensuring run-off cover is in place really important," said Moses.

> "Typical premiums being quoted are 200 per cent of the annual premium."

Moses added that if the market is not delivering, then maybe the profession can create an insurance captive which provides the cover at a reasonable cost. Such an approach has worked for providing cover for insolvency practitioners in the UK, he said.

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Letter from the Editor

While a combination of record low interest rates, continued quantitative easing and government support for businesses has prevented a boom in insolvencies and restructurings in this year of Covid-19, you can't help hear the clock ticking.

The flip side of that is the frenzied preparation restructuring and insolvency professionals and their firms are making to be prepared for an anticipated uptick in work, which some pencil in for the second quarter of next year.

The proposed sale of Deloitte's UK restructuring and insolvency unit led by Dan Butters is now firmly back on, with senior members pushing for a form of private equity-backed management buyout.

KPMG meanwhile appears to be edging towards a trade sale of its own UK unit to a firm like Duff & Phelps – one with deep pockets and as-yet unfulfilled European ambitions. None of the parties in this saga is commenting, as we get closer to deal time.

Meanwhile the various European jurisdictions jostle for position in a post-Brexit world, with Amsterdam leading the charge for cross-border restructuring work previously headed for London.

This is where the EU's call for member states to enact their own out-of-court restructuring mechanism's comes in (see pages 8-11). The idea is that Europe will finally be able to see off competition from England's Scheme of Arrangement and America's Chapter 11. EU Directive (EU) 2019/1023 on preventive restructuring needs to be transposed into national laws by July 2021.

It's a tight timetable, considering everyone has the Covid-19 crisis to deal with at the same time.

A clear East-West split has opened up. Most western jurisdictions, led by The Netherlands, are on track to have their 'schemes' in force by the New Year. Most Eastern European countries are now expected to request a year-long extension for enactment of their own 'super schemes' (see page 11).

Meanwhile some intriguing new factors have emerged in the race for cross-border restructuring work post-Brexit. Irish lawyers make the excellent point that US stakeholders may feel more comfortable with 'going to Dublin' simply because they share a Common Law tradition.

However good the Dutch Scheme or German Framework may be in theory, in practice a New York-based PE fund will see them as rooted in a thoroughly alien Civil Law tradition.

Also the Irish Scheme of Arrangement is very similar to its English antecedent, they add, so there's not much new stuff to learn.

We shall see. There's still plenty to play for.

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News

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Howard Morris, head of restructuring and insolvency at Morrison & Foerster in London, commented:

"Rapidly rising D&O liability premiums have become a big problem in the UK this year.

"We've seen it in workouts where companies want to bring on to their boards directors with restructuring and turnaround expertise.

"Lenders and other stakeholders welcome this approach, and the plan is to rescue the enterprise without having to resort to a formal insolvency procedure that can further erode value.

"These specialist directors are a million miles from rash risk-takers, and yet the premiums for their D&O cover has inflated to levels not seen before," said Morris.

"And our experience is exactly mirrored for similar situations in the USA. It makes it untenable for independent directors to come in to work out companies in distress."

"I don't understand how the insurance industry is coming to this pricing," said Morris.

"This is a serious threat to the turnaround industry.

"How can turnaround specialists help to rescue or work out troubled companies if their D&O insurance is too expensive for those companies to afford? Distressed companies are, by definition, short of cash."

Average premiums double

Even looking at healthy companies as well as distressed, the Covid-19 crisis appears to have turbocharged premium prices for D&O cover. Average costs of premiums in the US rose nearly 60 per cent according to insurance brokerage Marsh, and 74 per cent according to Aon.

Meanwhile in the UK most prices have doubled, according to Marsh. This general increase was caused by a rise in class actions and increased settlements, as boards were targeted over issues such as cyber breaches or alleged failures in corporate culture. This effect was boosted by the Covid-19 crisis, and in the US coincided with a rise in Chapter 11 bankruptcies this year.

D&O policies are traditionally designed to apply if directors and officers are sued in bankruptcy. Recently, however, insurance carriers have sought to impose bankruptcy exclusions when policies are renewed, and companies in financial distress may not have options other than to accept the exceptions.

Industry analysts expect D&O premiums generally to continue increasing this year. For distressed companies, meanwhile, the threat is that they will be driven out of the market completely, ending the ability to appoint specialist turnaround managers as directors.

This has prompted a search for new solutions to directors' liability, possibly using an insurance captive or some form of mutual fund.

A search for new solutions in Australia

A client note this month by two lawyers at Clayton Utz in Australia, Fred Hawke and Lucy Terracall, indicates similar problems are being seen in that country, prompting a search for new solutions.

The Clayton Utz duo engaged with clients, insurers and insurance brokers to discuss "left-field solutions" to "the D&O dilemma."

The lawyers observed that the upward pressure on D&O premiums was being driven by insurance companies trying "to replenish the premium pool." They noted that part of the Australian Government's package of measures to tackle the Covid-19 crisis included temporary relief for directors from potential personal liability for insolvent trading.

Hawke and Terracall said: "There is an expectation that once these measures are lifted there may be an onslaught of voluntary administrations, many of which will proceed to insolvency.

"This in turn will provoke attempts by investors to find grounds for claims against directors, along with any other relevantly insured protagonists, to try to recover debts or lost investments," said the Clayton Utz duo. Therefore it was unlikely D&O premiums would reduce in this area.

This D&O problem appears to be widespread around the world and getting rapidly worse. Turnaround managers must be hoping that solutions start appearing soon.

Norwegian Air enters Irish Examinership

Six Norwegian Air companies entered Irish Examinership in Dublin on 18 November to tackle US$7.4 billion of debt just six months after using an emergency Norwegian restructuring law to execute a US$1.2 billion debt/equity swap.

The Dublin filing came after the Norwegian Government rejected the latest request for aid from the national flag carrier, and as at least two creditors of Irish subsidiaries threatened legal action. The background to the company's troubles is of course the Covid-19 crisis, which is forecast to push the majority of airlines around the world into some form of insolvency.

The restructuring includes the airline's top company, Norwegian Air Shuttle, as well as Norwegian Air International, Arctic Aviation Assets DAC and three other leasing platforms.

"Norwegian has chosen an Irish process since its aircraft assets are held in Ireland," the company said in a statement.

The filing represents a boost for the Dublin restructuring market on the back of Nordic Aviation earlier in the summer. It also comes at a time of uncertainty over London's role as a cross-border restructuring hub following Brexit, with both recognition under the European Insolvency Regulation and under the Brussels Regulation for ordinary commercial judgments set to fall away.

Kieran Wallace appointed Interim Examiner

Kieran Wallace, KPMG

Kieran Wallace of KPMG was appointed Interim Examiner of Norweigen by Mr Justice Michael Quinn. Wallace is likely to be confirmed as Examiner when the parties return to court for the petition hearing set for 7 December.

The company is represented by Tony O'Grady, who leads Matheson's restructuring practice, together with litigation partner Brendan Colgan.

For UK issues the company is also using Hogan Lovells, led by Joe Bannister. The company has engaged a financial adviser, aviation specialist Seabury Capital, led by Alexis Fekete, who is based in London.

The Interim Examiner is represented by William Fry, led by restructuring partners Fergus Doorly and Ruairi Rynn. Deloitte put together the expert's report to enable the Examinership application, led by head of restructuring in Ireland, Ken Fennell.

Five months to restructure

Norwegian Air is famous for having reinvented trans-Atlantic budget air travel, being the biggest non-US carrier serving New York, as well as Europe's third-largest low-cost airline.

The Irish Examinership process, which blends elements of the US Chapter 11 and the English Scheme of Arrangement, will give the airline an initial five months in which to shed debt, sell assets and seek fresh capital. In the event the mechanism works, the Norwegian that emerges will probably be a much smaller, leaner airline focused on Norway and Scandinavia.

The company said in a statement on 18 November: "Based on Norwegian's current cash position and the projections going forward, the company believes it has sufficient liquidity to go through the above-mentioned process."

Geir Karlsen, the company's CFO, said it would meet with creditors and discuss how to reconstruct the debt and fleet so that Norwegian comes out of the process in a stronger position. The company's creditors are a mix of leasing firms and banks.

"We have had a good dialogue with all the big creditors since Covid-19 broke out, I don't think this will be a very big surprise," Karlsen said. "We are optimistic that we will get through this and come up with a good solution."

He said the airline still plans to have both short-haul and long-haul service.

Norwegian has scaled back its schedules drastically and is now serving domestic routes only, with six of its 140 aircraft flying. It has airline subsidiaries in Sweden and the UK, which are continuing to trade normally. It recently offloaded an Argentinian subsidiary.

Dublin restructuring market is busy

It has been a busy couple of weeks for Wallace and the Dublin market. Earlier in November he was appointed receiver over certain assets of Development Securities Properties Donnybrook Limited and Spectre (Ballymoss House) Limited.

Wallace was appointed at the request of Quadrant Real Estate Advisors, a US property lender.

Interestingly, the Irish restructuring and insolvency units of both KPMG and Deloitte are not included in the current sales talks for their UK counterparts (see page 5), and will instead remain within their Big Four parents whatever happens to their London-based counterparts.

As such the Dublin-based units might expect referrals both from the newly independent units as well as the remaining Big Four audit practices, an intriguing prospect.

Gategroup agrees restructuring with US$550 million of new money

Swiss airline caterer Gategroup (previously Gate Gourmet) has reached an agreement with its owners and creditors to a restructuring to deal with the Covid-19-inspired collapse in demand.

The deal provides US$550 million in new funding from Singapore state fund Temasek and Asian investment firm RRJ, including US$28 million in equity and a US$523 million subordinated, convertible loan.

Another US$220 million is coming from a senior secured interim liquidity facility extended by the shareholders, repayable upon completion of the transaction or at the latest six months after issuance. The deal also includes extension of the maturity of the group's syndicated loan facilities to October 2026, as well as certain other amendments.

On 13 November Gategroup Holding AG issued a statement saying "its shareholders, RRJ Capital and Temasek, and all bank lenders providing syndicated loans to the group have reached an agreement in principle, under a binding term sheet, to support a comprehensive restructuring of the group's financial indebtedness.

"The proposed transaction will provide the group with significant new liquidity to address short and medium-term needs and will help establish a stable capital structure," the Zurich-based company said.

Before the Covid-19 crisis hit, the group was serving more than 700 million passengers annually from over 200 operating units in over 60 countries across all continents.

Just two years ago Gategroup made US$5.3 billion in revenues generated by approximately 43,000 employees worldwide.

Gategroup is being represented by Allen & Overy and financial adviser is Moelis.

The company's banks are being advised by FTI, led by London restructuring partner **Duncan Turner**. Turner was one of a trio of high profile restructuring partners from PricewaterhouseCoopers who moved to the boutique, the two others being **Diederick van der Plas** and **Nick Carmichael**.

The bonds are being advised by Perella Weinberg. Coincidentally, Perella Weinberg has just announced its intention to list via a Spac (see page 5).

In April 2019 RRJ Capital became sole shareholder of Gategroup, acquiring all the shares from HNA Group. Temasek remained invested in Gategroup through a mandatory exchangeable bond.

White & Case is the long-term legal adviser to RRJ Capital.

Vikas Papriwal joins FTI to lead Middle East restructuring practice

Vikas Papriwal, FTI Consulting

FTI Consulting has hired Vikas Papriwal, formerly head of KPMG's restructuring practice in the United Arab Emirates, to lead its Middle East corporate finance and restructuring segment in Dubai.

Papriwal joined the Big Four world in 1993. After spending eleven years at Arthur Andersen and EY, he joined KPMG as a partner.

During his time in the UK, Papriwal advised on some of the largest leveraged buyout transactions in Europe, including Casema-Essent Kablecom and Multikabel, Danish, Belgium, and Swedish Posts, Com Hem, and UPC Sweden.

He relocated to the UAE in 2014, and most recently served as KPMG's head of advisory for the Lower Gulf region. Notable projects he worked on include advising on the sales of GEMS International and Drydocks Dubai.

> During this period Papriwal served on the Board of Dubai World, one of the largest government-related entities in the Middle East, as lenders' representative and advised the lenders on the US$25 billion debt restructuring.

He has also helped a group of unsecured lenders to a large UAE-based government-related entity on a consensual restructuring of its US$10 billion debt.

Simon Granger, FTI's head of corporate finance and restructuring in EMEA, said: "We have been keen to build our team in the Middle East for some time. Vikas [Papriwal] has worked on big ticket restructurings and is well connected with local governments, entities, banks and people.

"We hope to strengthen our presence in the market in the Middle East, where we see plenty of prospects for activity," said Granger.

"Vikas brings with him extensive strategic and leadership acumen and an extensive network at what is an exciting time of growth for our corporate finance and restructuring practice."

Ian Williams becomes consultant to Ritchie Brothers

UK-based restructuring professional Ian Williams has become a consultant to Ritchie Brothers (RBA), one of the world's biggest auctioneers of heavy equipment, as it seeks to expand its appeal to insolvency and restructuring professionals in Europe.

Williams set up his own consultancy WCI when he left RSM last year, and he will continue his restructuring work alongside his new role with RBA. RBA was launched sixty years ago in Canada and now has a market cap of US$3.5 billion.

In 2019, RBA sold US$5.1 billion of heavy earth-moving equipment and the like through its auction sites, its online auctions and multiple sales platforms around the world.

Last year, RBA received nearly 10 million bids on assets and 24 million searches on their App.

Williams said: "RBA has made the strategic decision to get involved in the restructuring and insolvency market in the UK and Europe and has asked me to assist them in this endeavour.

> "I'm looking to connect with insolvency practitioners (IPs) and restructuring professionals as the RBA offering is blue chip and offers access for placed equipment to buyers in 160 countries, maximising value and validating the process."

Ian Williams

Williams is well-known to many readers of Global Turnaround as the main organiser of the ABI's annual International Insolvency Symposium, the sixteenth of which was held online this year on 18-20 November (see page 11).

Williams added that RBA has sophisticated support services and 2,200 staff and is keen to hear from insolvency and restructuring professionals who have equipment to sell.

RBA also has valuation services that can handle other types of assets through its global network of subcontractors.

Christian Sonneville, RBA's Netherlands-based Strategic Accounts Manager Europe, said: "We're glad to have Ian on board to help us to get the message out to IPs, restructuring professionals and finance companies that we can add a layer of value for assets through our live and online products. Our international clientele is the game-changer in terms of realisations.

> "We're looking forward to working with Ian and gaining access to his UK and international contacts so that they can take advantage of our services," said Sonneville.

Paul Hoffman joins BCLP in Chicago

Paul Hoffman, a finance lawyer who handles the full gamut of lending work as well as advising lenders on restructurings, has joined BCLP in Chicago from Vedder Price.

Paul Hoffman, BCLP

Hoffman was formerly assistant general counsel at cycling and fitness equip-ment maker Roadmaster Industries.

Jim McAlpin, global leader of BCLP's banking group, commented: "We work with banking clients around the world, and Paul's background and experience will be a huge benefit to our team and clients."

"His experience with complex banking issues makes him an excellent addition to our team and will provide added depth for our clients firmwide," said McAlpin.

BCLP's global restructuring practice is led by Brian Walsh in St. Louis/Atlanta, where he focuses on representing lenders, workout bankers and real estate financiers.

The EMEA side of the restructuring practice is led by Ben Jones in London.

BCLP's restructuring practice also has a strong presence in Germany, led by Till Buschmann in Frankfurt, who advises funds like Centerbridge and Oaktree, as well as corporates.

Perella Weinberg to list via Spac

Perella Weinberg Partners (PWP), a boutique investment bank which has become increasingly influential in restructuring work in the US and Europe, is in talks to take its advisory business public using a special purpose acquisition vehicle (Spac) and valuing the business at US$1 billion.

The firm's asset management business will remain independent.

Spacs have grown popular in recent years as a way of companies to go public without the costs and unpredictability of an IPO. The identity of the company PWP will merge with has not been divulged.

PWP was launched in 2006 by veteran rainmakers Joseph Perella and Peter Weinberg, and is hoping to list as early as the first quarter of 2021. The firm would be following other boutiques including Evercore, Greenhill, Lazard and, most recently, Moelis in going public.

PWP's restructuring unit is led by is Bruce Mendelsohn, who is based in New York and who joined the firm four years ago from Goldman Sachs, where he had been head of the Americas restructuring group.

In 2019 PWP made key hires in London to build out its European restructuring team. These included Clinton Ray and Guy Morgan from Goldman Sachs and Romain Lanier from PJT Partners. Ray previously led Goldman's restructuring business in Europe, the Middle East and Africa for about three years.

The New York office includes Kevin Cofsky, another leading restructuring partner, who joined from Evercore in 2007, and Mike Genereux, who joined from PJT this April.

Spacs have become one of the hottest products on Wall Street this year, with a record US$55 billion raised. The vehicles use money raised on the stock market to hunt for private companies to take public.

Phillip Taylor joins Alston & Bird

Restructuring partner Phillip Taylor has left Sidley Austin in London after 21 years there to join Alston & Bird.

Taylor joined Sidley as a trainee in 1999 and was deputy to Patrick Corr, who himself left for Faegre Drinker's London office earlier this year.

Alston & Bird's global restructuring practice is led by Gerard Catalanello, based in New York. Catalanello focuses on bankruptcy and creditors' rights law. He represents lenders, funds, financial institutions, liquidation trusts, equity holders, debtors, indenture trustees, and acquirers of assets of troubled companies in formal bankruptcy proceedings as well as in out-of-court workouts.

For instance, Catalanello, Jim Vincequerra, and Geoff Williams have recently represented Qatar Airways in a US$1.15 billion debtor-in-possession financing plan for LATAM Airlines.

Ian Benjamin leaves BCLP for Stephenson Harwood

Ian Benjamin has joined Stephenson Harwood in London as a partner in the restructuring and insolvency practice, after nearly seventeen years with BCLP and previously its legacy firm Berwin Leighton Paisner.

Benjamin, who specialises in non-contentious insolvency work, originally trained with Dechert in 2001-3. He has experience in retail, hospitality & leisure, real estate, financial services, automotive and healthcare.

Deloitte's sale of its UK restructuring arm is back on

Deloitte restructuring and insolvency (R&I) staff in the UK were informed on Friday 6 November that the Big Four's global partnership has given the green light for a sale, reversing an earlier apparent veto of a sales process.

Deloitte's 30 UK (R&I) restructuring partners and 350 staff are led by Dan Butters, and are understood to be pressing hard for a form of PE-financed management buyout. A trade sale to another firm has not been ruled out, however.

Separately, it has emerged that KPMG's UK-based restructuring and insolvency practice, which is also up for sale, is now more likely to be sold to another firm such as Ankura or Duff & Phelps rather than to a Private Equity (PE) firm, as originally anticipated.

Deloitte, KPMG, Ankura and Duff & Phelps declined to comment.

In September there was confusion when news emerged that Deloitte's UK unit was up for sale, only for the global partnership to announce that it was not.

It appears early sales discussions leaked to the media. Now the search for a deal is definitely back on.

As for KPMG, news of the proposed sale of the UK restructuring unit led by Blair Nimmo burst into the media on 22 October. A PE-funded deal was the favourite theory, but now it appears a trade sale of its UK-based practice is more likely.

KPMG's UK practice has 22 partners and 475 staff, making revenue of around UK£100 million a year.

Both units would be selling into a period when formal insolvencies in Europe are forecast to boom, due to the Covid-19 crisis and the inevitable winding down of government support for businesses.

This may make them attractive to a financial backer, with one proviso: what is your exit? Once the immediate economic fallout from the Covid-19 crisis has been cleaned up - which may take several years – what price would a PE firm get for a big R&I practice in the UK?

Huge pressure from regulators

The Big Four accountancy firms are under huge pressure from UK regulators and legislators to separate their audit from non-audit operations over the next four years.

This follows widespread perceptions of conflict of interest and a series of high profile corporate scandals, such as the collapse of one of the UK's biggest outsourcing companies, Carillion.

In October, the Big Four auditors had to submit plans to the UK's Financial Reporting Council (FRC) demonstrating how they intended to 'operationally separate' their audit and consulting arms by 2025.

Meanwhile the flow of senior restructuring professionals from the Big Four in the UK to independent firms continues.

The head of Deloitte's alternative capital team in London, Floris Hovingh, has resigned to join Alvarez & Marsal (A&M). He follows a number of other Deloitte restructuring professionals based in the UK heading to A&M recently, including Michael Magnay, Dario Bortot, Christian Ebner and James Dervin.

Hovingh was head of the Big Four firm's alternative capital unit and sat within the debt advisory team, which works closely with the firm's restructuring business.

Reforms to European insolvency laws needed for 1.4 trillion euro NPL boom

The European Commission (EC) is set to call for reforms to insolvency and debt-recovery frameworks next month in order to deal with a "severe but plausible" scenario where non-performing loans (NPLs) at eurozone banks reach 1.4 trillion euro.

These will also include measures to further develop secondary markets for NPLs.

There is also a lively debate going on at the moment over whether to launch a pan-European asset management company or 'bad bank' to handle this surge in NPLs, or a network of such companies.

The European Central Bank (ECB) has floated such an idea.

It would enable a bad bank to access funding at ECB rates, as well as achieving economies of scale. The bad bank could then go to market in a co-ordinated and large-scale way.

However Elke König, chair of the Single Resolution Board (SRB), the EU's agency responsible for winding down failing lenders, has rejected such an approach for the moment.

> One big objection to a pan-European approach is that national insolvency regimes clash.

It might be better therefore to tackle NPLs on a national level.

König is against a European bad bank. She told journalists this month that banks doing their "homework" was the easier way forward.

"The entire debate . . . always lacks one component: who is footing the bill," she said.

König added that "it feels sometimes as if this is the magic system," one where losses are supposed to evaporate, something "that is not going to happen".

Banks need to "get the full transparency" of these portfolios, she said. "They need to be able to separate a portfolio and to set out how they would like to service it, what would be their idea, how would they deal with it."

She added that in the current crisis there was still a market for bad real estate and corporate loans.

When it comes to loans to small and medium-sized enterprises and retail customers, these are traditionally "professionally managed by a bank as an ongoing relationship".

> König warned that while NPLs are about to surge, the agency is still working with an incomplete system of EU bank-crisis rules which must operate over a patchwork of different national arrangements.

König said it was too soon to know how bad the situation with NPLs would get, because this would depend on the nature of the downturn and recovery. Current actions by governments, such as state guarantee schemes, were "shielding" the lenders, she added.

But she said that non-performing loans could start coming through in the first and second quarters of next year. In light of this, her message to banks was "be aware NPLs are coming and the best thing to do is address them early . . . That is the best thing we can do for the time being, and then it is steering through the fog."

A new pre-liquidation tool

One step she has called for is the creation of a "pre-liquidation tool" allowing her agency to intervene earlier in a crisis to save the good part of a bank, preventing needless destruction of value.

The SRB and the broader system it oversees has been fully up and running since 2016, and in that time has handled one bank failure: Spain's Banco Popular.

> One ongoing problem, she said, was that the conditions attached to banks put through national insolvency proceedings differed from those attached to interventions by her agency.

This issue flared up in 2017 when two regional Italian banks received state aid as part of bankruptcy proceedings while their senior creditors were shielded from losses.

This prompted complaints at the time from Berlin and some other capitals that the measures amounted to a loophole allowing nervous governments to get around the principle adopted by the EU in the wake of the financial crisis that investors, including senior creditors, should face losses before the taxpayer.

König underlined the extensive work that has been done since the dark days of the eurozone crisis to strengthen the resilience of banks, and to ensure that they can be safely wound down if they fail.

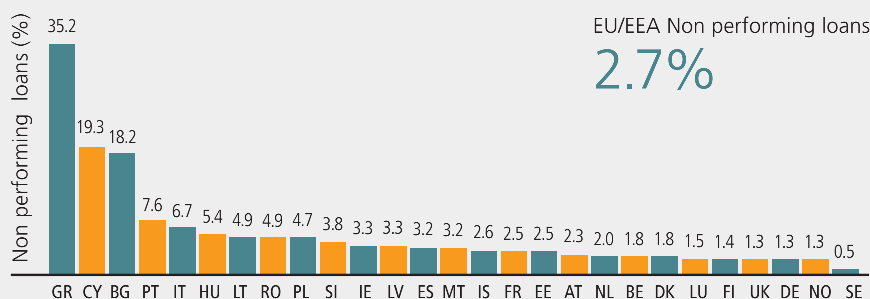
> This work has included making sure money can be raised by wiping out bank bondholders, so shielding taxpayers from footing the bill.

She noted that one of the tools available to her agency was an "asset separation" power to strip bad loans out of broken banks' balance sheets.

But she emphasised that the EU system for handling failing banks was still a work in progress.

The European Commission is set to review the bank resolution system next year.

European NPLs by country



Source: European Monetary Authority (EMA)

European NPL market recovers after March ‘standstill’

The European market for non-performing loans (NPLs) came to a standstill in March due to the Covid-19 crisis, but deal flow has restarted, albeit at a lower level (see Table 1).

Greece, Portugal and Spain have led the recovery in activity, according to Ajay Rawal of EY, who participated in a recent presentation with SmithNovak, an NPL consultancy (see Table 2).

“The European NPL market has been pretty busy since September,” said Rawal, EY’s global banking and capital markets restructuring leader, who is based in London.

Unlevered internal rates of return (IRR) had fallen to 6-7 per cent with selling banks and investment banks providing high levels of leverage.

During the Covid-19 crisis the bid ask spread widened, with stability, performance data and provisions needed to facilitate market activity.

“Governments all over Europe have supplied liquidity to small businesses,” he observed. For instance, in Germany the State-controlled KFW bank guaranteed 100 per cent of small business loans. Support schemes existed in France, Switzerland and the UK, he said, often involving loans.

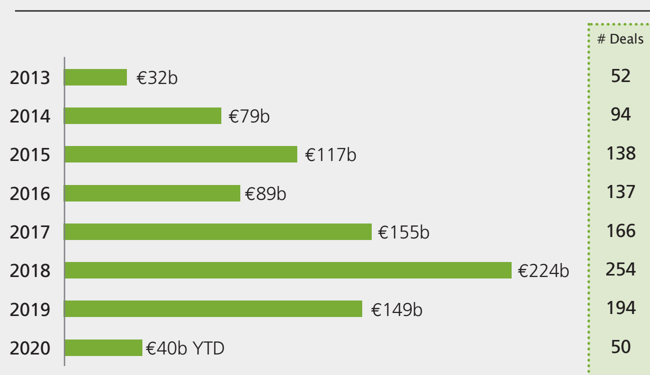
“One big question is, who will collect the debt?” said Rawal. “There is a lively debate on this subject.”

Should it be the bank? The Government? Should collection be subcontracted? How would all this play out politically?

Rawal praised the efforts of the ECB in leading efforts to debate how this NPL surge should be dealt with, in contrast to foot-dragging after the global financial crisis of 2007/8.

Table 1

The NPL market came to a standstill

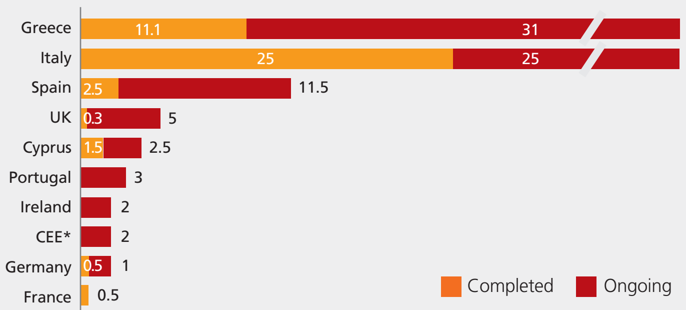


Sources: EY, European NPL activity 20132019 (includes announced deals for 2020)

Table 2

Starting to see some activity return but at lower levels

Figures in €b-total volume of closed and ongoing deals YTD (Oct-2020)



*CEE: Central and Eastern Europe. Sources: EY on various sources

Private credit to the rescue! BlackRock tips alternative lenders to power restructuring boom

BlackRock, the world’s largest fund manager, has warned that scale of corporate restructuring globally could exceed the previous peak that followed the 2008 global financial crisis.

The company’s research arm, BlackRock Investment Institute, declared in a note last month : “We see a historic opportunity for the private markets to fund post-Covid-19 corporate restructuring.”

The amount of outstanding debt with ratings below investment grade, including loans and private credit, has more than doubled to US$5.3 trillion since 2007 (see chart).

“One big reason is the significant growth in sub-investment grade debt,” said BlackRock.

As the overall cost of borrowing fell, companies loaded up on debt. This has left many vulnerable as their revenues came under pressure from Covid-19-related disruptions.

BlackRock isn’t the only one warning of the risks of company failures. Despite low rates, US corporate bankruptcies posted their worst third quarter ever.

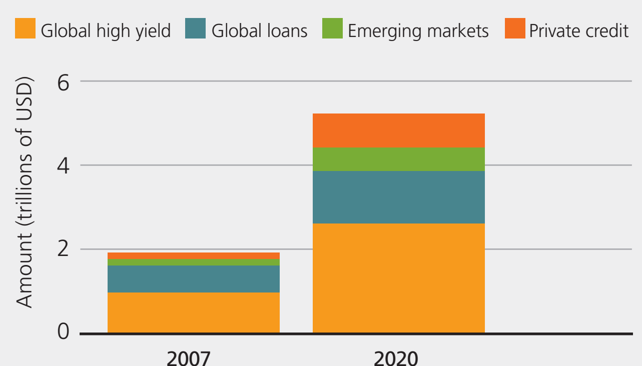
While supportive fiscal and monetary policies have helped companies raise capital and lower borrowing costs, “not all borrowers have benefited equally” and smaller firms have lacked access to the public markets, BlackRock said in the note.

Many companies may need to turn to private credit to restructure post Covid-19, according to the asset manager, and this offers potential return diversification for investors.

Since 2007, private credit has been especially fast-growing, expanding to US$850 billion by financing companies that would previously have looked to banks or the public high-yield market, it added.

Firms will probably have to evolve their business models amid the pandemic, and BlackRock sees a “wave of restructurings” and room for private credit to cater to smaller borrowers.

Sub-investment grade debt outstanding: 2007 and 2020



New European restructuring tools will boost mid-market distressed deals

By Wolf Waschkuhn, Managing Director at One Square Advisors and Felix Schaffner, an Associate

Wolf Waschkuhn, One Square Advisors

Felix Schaffner, One Square Advisors

The impending deadline for the EU Preventive Restructuring Directive to be transposed into the national laws of the 27 member states halfway through next year is rightfully being heralded as a paradigm shift for the restructuring market in many of those jurisdictions.

Every EU country will have its own pre-insolvency restructuring proceeding enabling it to do things only previously possible via an English Scheme of Arrangement or a pre-pack Chapter 11 in the US.

The unveiling in September of ambitious proposals for a German Restructuring Framework is the latest example, joining the already announced Dutch Scheme. One of the biggest hopes for the proposed German mechanism is that it will make it worthwhile for the first time to do mid-market deals, in terms of management time as well as cost.

Previously, under Germany's unwieldy insolvency code, only stakeholders in large companies could afford to pay for relocating the business's COMI to the UK or US to avail of their more user-friendly reorganisation systems. The German Framework should open the door for smaller companies to do the same.

These opportunities in Germany should be further improved by the Framework's clarification of directors' fiduciary duties when nearing insolvency, or entering the so-called 'zone of insolvency'. It was previously extremely unclear how and when directors' responsibilities shifted from shareholders to creditors under Germany's corporate law.

This should lead to more creditor-led restructurings that can compromise existing equity holders, if necessary, by means of cram-down.

All of this is good news for distressed companies and investors in distressed situations. But the Framework faces the same hurdles as any new piece of legislation – it needs plenty of use before people will be convinced of its usefulness and predictability. Nobody likes to 'go first'. This could make take-up quite slow at first.

The US and UK systems are long-established as well as being flexible. The new Dutch Scheme, although not enacted yet, has been longer in development than its new German rival.

Thus, as far as the German Framework is concerned, we should expect to see mainly debtor-led pre-insolvency restructurings at first, together with a few cases led by courageous and opportunistic distressed debt funds.

Once the first precedents have been established and found to be to the liking of the community, and sufficient liquidity has developed in the secondary market for bank debt of mid-size EU companies, we should see more distressed debt funds getting involved in Europe's biggest economy.

Let's embrace the German Restructuring Framework!

Michael Thierhoff,

Michael Thierhoff, who heads the restructuring practice in Europe and Germany inside the re-launched Andersen global network, fulsomely welcomed Germany's proposals for a Restructuring Framework: "The proposed Framework is a great tool. I think we should embrace it, apply it, use it creatively.

"We should help develop it in the 'running-in' period," said the veteran restructuring professional. All new bankruptcy regimes take time to 'bed in', he said. For example the US Chapter 11 legislation was enacted in 1979 but took many years for it to attain its present state of efficiency.

Thierhoff added that another reason the Framework would take time to bed in was that the proposed procedure was "straightforward, but not simple."

The Framework has a lot of checks and balances written into it, he said, which could tempt non-consenting parties to "play games".

This is a different take from some other commentators, who think that the Framework's powers for cross-class cramdown will weaken the ability of minority stakeholders to form blocking positions and hold-outs. Again, Thierhoff stressed, it would take time to see how the Framework deals with these challenges in practice.

There is also a question mark over how quickly and enthusiastically Germany's banks will embrace the new Framework, he said. "Our banks are very shy in applying something really new. They don't embrace change, they love the beaten track."

Another constituency that might be less than forthcoming in embracing the new restructuring mechanisms were Germany's insolvency judges, Thierhoff added.

Germany has over 100 regional bankruptcy courts in 16 states, the idea of limiting the competence for the Framework to only some 20 may not necessarily meet the approval of the states, which have the say when it comes to courts. And it will take time and a decent number of cases for judges to get used to supervising the new framework.

Is COMI shifting in Europe over?

One big result of the Framework will be the end of a type of forum shopping that appeared after the European Insolvency Regulation was enacted in 2002, reckons Thierhoff.

A series of large German corporates like Schefenacker 'went to London' in order to utilise the UK's more user-friendly insolvency laws. Thierhoff thought that these deals were the exception to the rule anyway, since they only really suited large companies which could afford the high costs involved. Even these would no longer be tempted to go to London because the German framework provided an adequate solution, he said, adding: "They won't be going to Amsterdam either."

There had been much speculation in German restructuring circles whether big German corporates might be interested in the new Dutch Scheme due to be introduced coincidentally on the same day as the German Framework – 1 January 2021.

How will all these new European restructuring systems fit together?

The European Union's Preventive Restructuring Directive required all its member states to have in place by halfway through next year an out-of-court restructuring mechanism at least as efficient as, if not superior to, the English Scheme of Arrangement.

Now that the UK has Brexited, that leaves a patchwork quilt of 27 different local 'super schemes' to deal with. Some are ready to go, like the Dutch Scheme. Others are being hurried through, like the German Framework. Are there any plans to co-ordinate them in some way?

In particular, how will these new restructuring mechanisms be recognised by, or listed in, the European Insolvency Regulation?

Until now, all member state insolvency mechanisms have been listed in one of the Annexes to the Regulation, thus giving them automatic recognition across all 27 member states.

It remains to be seen whether these new out-of-court mechanisms will be listed in the Regulation's Annexe.

Sven Schelo, Linklaters

Sven Schelo, a restructuring partner with Linklaters in Frankfurt, said:

"This is the last missing piece of the puzzle; how will the remaining mechanisms [that haven't been announced so far] work? And how will they fit together?"

"Will there be another European Regulation covering this area? I doubt it," said Schelo.

"And will there be inter-Governmental agreements on how all these new schemes will fit together? Again, I doubt it."

"My suspicion is that cases under the new German Framework that are made public will be covered by the Regulation's Annexe, and we will live with the status quo."

As for the ambitious timetable to enact the German Framework on 1 January 2021, Schelo said: "I think it's realistic.

"I can't see any roadblocks or headwinds from critics that can delay it."

There have been some criticisms from the banking industry and some insolvency administrators, said Schelo, but it was difficult to see how the latter in particular could hold up the process. He did observe however:

"I think insolvency administrators are very worried; they think it will take any last remaining business from them. On the other hand, given the broad spectrum of services they have on offer, they shouldn't be worried to find new roles under the new law."

"We need cases!"

One of the biggest challenges to launching any new restructuring mechanism is getting people to use it. No one likes 'going first'. So it will be vital to have a reasonable number of cases for the new framework to be used on. For comparison, the English restructuring reforms under this year's CIGA legislation were immediately enthusiastically taken up and used in the restructurings of Virgin Atlantic and PizzaExpress.

A big challenge Germany faces in this respect, said Schelo, is the sheer lack of local restructuring cases to test the new Framework out on. "German insolvencies are running at their lowest rate for 30 years. There are hardly any cases."

In order to 'bed in' the framework, he said, "we need to have cases!"

Distressed investors will only enter the market when businesses start work again as the Covid-19 crisis recedes, said Schelo, and when they can sell the businesses on.

Is restructuring coming home?

Now that it looks like Germany will possess a well-designed restructuring tool, does this mean forum-shopping is over for German distressed corporates? Schelo issued a cautious 'yes'. "If the company has German liabilities it might as well stick with German law and language – this would appear to be more cost effective."

The important exception to this would be where the corporate has New York law or English law bonds. This can happen even with mid-market companies, said Schelo.

"One question will be, how do you bind in overseas liabilities using German restructuring tools? Legal practice will find an answer to that question."

Will the Dutch Scheme beat the German Framework?

Christof Schiller, a restructuring partner with Anchor in Mannheim, commented on the different ways the EU Restructuring Directive was being transposed into local legislation in Germany, with the Restructuring Framework, and The Netherlands, with 'the Dutch Scheme".

"I think that it will be very interesting to watch the competition between the restructuring regimes in The Netherlands and Germany," said Schiller. "Personally I would put my money on the Dutch scheme. One simple reason is that their legislators are faster.

"I see no way that the new German regulation will become effective on January 1st, 2021.

"There is still a lot of debate going on about the contents of the law and the new restructuring courts have yet to be established," said Schiller. "In the past, the German judiciary was never famous for its speedy reaction to a new legal environment – to put it mildly.

"So I assume that the Dutch will be able to attract the first cases and develop a track-record faster than the Germans."

Christof Schiller, Anchor

Schiller also referred to the current situation in the UK where Deloitte and KPMG have both put their national restructuring and insolvency businesses up for sale.

"I also do not feel very hopeful for the English restructuring business," said Schiller.

"The pressure on the Big Four to separate their restructuring arms from the rest of their business deprives them of a tremendously important competitive advantage: the international set-up.

"When I was with PricewaterhouseCoopers one of the most amazing things was that you could have a restructuring expert from almost every country on the phone within hours.

"And Brexit will not help either," Schiller added. "Even if these wounds are self-inflicted – accounting scandals and Brexit – it is a sad development."

Framework 'no use for auto industry'

"The German Framework is a financial restructuring tool, not an operational one," cautioned Renate Müller, a restructuring partner with Andersen in Leipzig. "It won't help for auto industry cases, for instance, where you need to reorganise operations and significantly cut employment.

"For that, you will still need to rely on the formal insolvency process," said Müller.

This view was echoed by Heiko Tschauner, a restructuring partner with Hogan Lovells in Munich. "I don't think the Framework will help with the auto sector, auto companies don't just have balance sheet problems."

German trade unionists launch 6 billion euro vulture fund

KKR, Apollo, Blackstone and other investors have a brand new PE rival for investing in distressed companies in the German auto sector – a fund owned and operated by some of Germany's largest trade unions.

The Best Owners Group (BOG) is aiming to acquire a portfolio with a turnover of up to 6 billion euro.

This Summer German workers launched the BOG in response to the likely fallout from the German auto industry's transition from petrol and diesel to electric and autonomous cars. They believe they can buy stakes in profitable autoparts makers, or even whole businesses, and continue to run them for a decade or more as the demand for parts to petrol and diesel cars declines.

The managers at BOG even think the fund can turn a profit by doing so, and at the same time preserve jobs for a lot longer than purely financial investors would be prepared to.

> The idea is that it will be a 'win-win' – good for investors, good for workers.

The BOG founders claim the fund will help ensure the maintenance of the automakers' supply chains, while also facilitating the elimination of 'overcapacity' or the shutdown of entire businesses.

The fund's founders include IG Metall, Germany's biggest trade union with around two million members, and its counterpart in the chemical industry, IG Bergbau, Chemie, Energie (IG BCE), with about half a million.

The BOG certainly has credible management. It is headed by the former head of Germany's Federal Work Agency, Frank-Jürgen Weise, and Bernd Bohr, who previously led the vehicle division at Bosch. They are assisted by Andreas Zielke, a senior figure in McKinsey's German auto practice.

Weise said that the fund initially plans to acquire five to eight companies or corp-orate divisions with a sales volume of up to 6 billion euro.

"Basically, we're talking about medium-sized automotive suppliers, that is, classic medium-sized companies with around 1,000 or 2,000 employees," said Weise, who used to work as a manager in the automotive supplier industry.

Below this limit, the task would be too small-scale, he said, and above that corporations would already have good access to the capital market. The BOG fund prefers complete takeovers, but at least wants to secure a majority stake in companies.

The BOG does not want to get involved in restructuring cases, said Weise.

"We will invest in profitable companies and generate stable returns over many years," he said.

"In contrast to the classic private equity business, there is no resale in the BOG model," he added.

'The good vultures of IG Metall'

The trade unions have launched BOG in order to soften the upheaval for their members in the auto industry, and as such, it represents an interesting blend of business and social aims. The fund will be able to issue loans to provide companies with capital at reasonable rates, for instance.

This means that PE funds aiming to buy distressed German auto parts companies cheaply will have competition, as the BOG model gathers pace.

One German newspaper has even dubbed the BOG 'the good vultures of IG Metall.'

The BOG is aiming for a long-term rate of return of 5 per cent. Hopes for profits are high, since the BOG model eliminates major overheads such as development costs and new investments.

The unions have invested a couple of hundred thousand euro of their own funds to seed the new vehicle, and aim to raise a total of 500 million euro from wealth managers, private investors and hedge funds, as well as from foundations, producers, business families and the Government.

Meanwhile BMW, one of Germany's largest automakers, has already welcomed "the fund's basic idea." Stock purchasers from the company are already "in contact" with the BOG fund, BMW said.

German auto insolvencies pick up

Insolvencies in the German auto industry have picked up this year, and accelerated since the summer break, due to growing Chinese competition, the transition from petrol to electric, and the impact of the Covid-19 virus.

Heiko Tschauner, a restructuring partner with Hogan Lovells in Munich, said: "Many auto parts suppliers will completely disappear. Others will survive for years to supply spare parts for the declining number of petrol cars.

"There is going to be a big consolidation," said Tschauner. "We will see some bigger insolvency cases next year."

Some of the automotive cases breaking this year

1. **Nanogate SE**, which makes components and surfaces for the auto sector, has entered Self-Administration and is currently negotiating with new investors. The company's supervising trustee is Günther Staab, of Staab & Kollegen.

2. **Maier Präzision Gesellschaft mit beschränkter Haftung**, a car components manufacturer, has entered Self-Administration. The company's supervising trustee is Dr. Dirk Pehl of Schultze & Braun.

2. **Schlemmer Münchingen GmbH & Co. KG** has entered insolvency, and the Administrator is Dr. Hubert Ampferl, a partner with Dr. Beck & Partner. The Schlemmer Group is an international manufacturer of complex plastic parts in extrusion and injection moulding for the automotive industry. The Administrators have sold six companies in the group with operations in Germany, Romania, Russia, Spain, Italy, Morocco and Tunisia to French auto supplier Delfingen Industry.

   Dr Beck & Partner has worked with a number of auto suppliers including HAAS, RFP, Jacob Plastics Group, Takeo, Plastal and Sellner Group.

4. **WAFA Germany GmbH**, a specialist maker of chrome-plated plastic car-parts, entered Self-Administration in the district court of Augsburg. The company's supervising trustee is Wolfgang Müller of Müller Rock, based in Kempten.

Michael Thierhoff, a restructuring partner with Andersen in Frankfurt, said: "We will see a whole lot more cases in the German auto sector.

"This is due to a combination of the paradigm shift in the car market from petrol to electrical, coupled with the Covid-19 crisis, which has created a whole lot of new problems."

President Bill Clinton calls for another round of 'significant' Covid-19 aid

Former President Bill Clinton gave a rousing keynote speech to the ABI's sixteenth annual International Insolvency Symposium on 18 November, calling for more Federal aid to combat the Covid-19 crisis, a return to trust in politics and at the same time a renewed drive for a greener environment.

Clinton mourned the loss of trust both on a national and international level in the last four years.

But he denied that it was impossible to deal with the economic shock of Covid-19 and a pivot to more environmentally friendly policies at the same time. The US could and should do both, he told his online audience.

Clinton was presented with questions by Bill Brandt, a principal with restructuring boutique Development Specialists, Inc (DSI) and a long term supporter of the ABI's international conference.

Clinton spoke of the loss in trust over recent years, trust and confidence being vital components of any corporate restructuring. He also acknowledged the important role restructuring professionals could play in rebuilding the shattered global economy following the Covid-19 crisis.

The London restructuring market braces itself for Brexit

Following former President Clinton's keynote, a panel at the ABI Symposium discussed some of the issues thrown up by his address, as well as some other topics. One was how far London's status as a cross-border restructuring hub might be damaged by Brexit, even as other centres like Dublin and Amsterdam look forward to picking up such work.

These expectations might be over-stated, according to one of the panel members based in London, Adam Gallagher, a restructuring partner at Freshfields.

Gallagher accepted that following the completion of the UK's transition period from the European Union at the start of next year, the automatic recognition of UK judgments across the EU's 27 remaining member states is expected to fall away.

Automatic recognition of UK insolvency procedures under the European Insolvency Regulation will also lapse unless agreement is reached for it to continue.

On the other hand, said Gallagher:

"I don't think Brexit will have much of an impact on London's status as a restructuring hub at least in the short to medium term. Perhaps ever."

"The predictability underpinning things like the English Scheme of Arrangement is a huge advantage. Other European jurisdictions have made great strides in insolvency and restructuring law reform recently, such as at the Dutch Scheme and the German Restructuring Framework. But neither of them are tried and tested.

"The UK might have been left behind if it hadn't kept up with these innovations," said Gallagher. "But this year's CIGA legislation, introducing the Restructuring Plan, a sort of 'super Scheme', means that you can now use cross-class cram-down in the UK, for example.

"Even after Brexit, we will still have the advantages of parties' preference for English law, predictability of our judges, the local ecology of restructuring lawyers, accountants and financial advisers, the English language and the timezone – halfway between New York and Hong Kong/Singapore.

"For any loan agreements governed by English law the Gibbs Rule will serve as a tether to England for any restructuring," Gallagher added.

Covid-19 crisis: an opportunity for significant reform?

- The EBRD is currently carrying out an Assessment of insolvency laws aimed at identifying gaps and weaknesses in reorganisation procedures.
- The Assessment will provide an up-to-date map of restructuring frameworks across the EBRD regions in Europe, Asia and Africa.
- Results of the assessment and a report summarising its findings will be made publicly available online in the first quarter of 2021.
- This study is being carried out in partnership with the International Development Law Organisation (IDLO), INSOL Europe and INSOL International and in cooperation with the European Commission (EC).

For further details, go to: ***www.ebrd-restructuring.com***

At least half of EU states will not hit Preventive Restructuring deadline

There is a good chance that at least a half of the European Union's (EU) 27 member states will apply for a year-long postponement next July from having to introduce local versions of the EU's Preventive Restructuring Directive.

The EU Directive (EU) 2019/1023 on preventive restructuring needs to be transposed into national laws by July 2021.

The Directive requires each member state to design and launch their own out-of-court restructuring mechanism, equal to or better than the English Scheme of Arrangement.

While The Netherlands is on track with its Dutch Scheme for 1 January 2021, and Germany has advanced plans for a Framework (see pages 8-10), the vast majority of Central and Eastern European (CEE) countries have not announced plans for their own mechanisms so far.

A clear East-West divide has opened up; with the former wanting a delay and the latter ready for an early launch.

Catherine Bridge Zoller, senior counsel for the EBRD's legal transition team based in London, told ABI Symposium attendees: "I think at the moment the Netherlands has transposed the Directive into national legislation, while the CIGA legislation in the UK passed earlier this summer is substantially in line with the EU Directive, but the UK is Brexiting.

"There is a good chance that a lot of member states will use an extension provision by a year – at least a half [of the 27 member states]," said Bridge Zoller.

She acknowledged that Latvia and Hungary appeared to be on track. But others in CEE were lagging. "A lot of the countries we are working with are really struggling," she said. "People have been redirected to Covid-19-related work. It requires a big change to existing legislation."

UK pre-packs get new controls

The UK jurisdiction is rightly famous for its user-friendly insolvency legislation, but London's status as a global restructuring hub is under threat from Brexit. Now the UK Government has introduced new rules for pre-packaged Administrations, one of the jurisdiction's key restructuring tools.

How will these new rules work? **Edward Downer**, a restructuring partner with Willkie Farr & Gallagher in London, explains the proposed regulations.

Edward Downer, Willkie Farr & Gallagher

Pre-packaged sales in UK Administrations continue to attract attention and criticism, in spite of measures introduced following the 2014 Graham Review.

On 8 October 2020 the UK Government published a further report: "Pre-pack sales in Administration", to analyse the effectiveness of the measures introduced by the Graham Review and to propose further reforms.

These new proposals will continue to permit pre-packs, but introduce significant new controls on how pre-packs can transfer insolvent businesses to 'connected persons'.

> One of the greatest challenges facing any business rescue is the need for speed.

Many businesses in crisis, such as retail, can unravel very quickly if news gets out that they are entering 'the zone of insolvency'.

Pre-packs permit the 'day one' sale of a business or assets of an insolvent company by a licensed insolvency practitioner through a pre-arranged contract of sale.

The oft-stated rationale is to mitigate value-destruction on the saleability of a company's business brought about by the public becoming aware of its insolvency.

The conundrum of pre-packs is that their usefulness relies on the secrecy of the company's insolvency, which draws criticism by creditors for a lack of transparency, particularly where the purchaser and seller are connected persons.

> The proposed Draft Regulations seek to strike a balance between the need for secrecy, while responding to the pressure for enhanced transparency.

The Draft Regulations would prevent an Administrator from making a disposal of all or a substantial part of a company's assets to a connected person in the first eight weeks of an administration in either one or a series of transactions, unless either (i) creditor approval has been obtained, or (ii) an independent written opinion has been given.

Connected Party

'Connected person' is broadly defined as 'a relevant person in relation to the company, or a company connected with the company. It includes those with a significant prior connection to the insolvent company, such as directors and shareholders.

In a footnote to the Report regarding the breadth of 'connected party', the Government sought to exclude from enhanced scrutiny those pre-pack sales to 'secure lenders with voting rights in the normal course of business of a third or more'.

However the Draft Regulations do not account for this. The Graham Review recommended that in circumstances where a secured lender may have voting rights associated with their debt, a carve-out to the definition of 'connected party' would overcome unnecessary value-destruction in the restructuring of large companies/groups.

We anticipate further discussion about the definition of 'connected party' to clarify whether loan-to-own transactions will face the enhanced scrutiny of prior creditor approval or a written opinion.

The creditor approval process requires an Administrator to report on the proposed pre-pack to creditors in the Administrator's proposals to creditors. While approval by creditors is by a simple majority in value, this route is both public and time consuming. As a result, its utility to authorise pre-packs to connected parties is thought to be limited.

Written reports

The option likely to be used most frequently is for the purchaser to procure one or more written report(s) prepared by an evaluator in respect of the proposed substantial disposal.

The Written Report(s) must include a statement that either the evaluator is or is not satisfied that the consideration provided and the grounds for the substantial disposal are reasonable in the circumstances. In making this statement the evaluator is required to provide their reasons for making the statement, a summary of the evidence relied on and that such evidence is sufficient.

The Written Report will then be furnished to the administrator who will form a view as to whether or not the substantial disposal can be made, and in doing so, opining on whether: (i) the relevant property, (ii) the terms of the substantial disposal, or (iii) any circumstances relating to the substantial disposal, have materially changed since the date of the Written Report.

The statement given in the Written Report uses comparable language to the Fairness Opinion which can be given under the Loan Markets Association recommended form of intercreditor agreements (ICA) to facilitate distressed disposals, and may well take the form of a Fairness Opinion in practice. However the process is notably different in that:

- The Administrator can depart from the statement made in the Written Report provided that the administrator disseminates a copy of the Written Report to creditors, alongside a statement setting out why the administrator choose to depart from the statement. A security agent has no such power in the context of an ICA.
- A copy of the Written Report and the proposal to creditors is to be provided to (i) all creditors and (ii) the registrar of companies, excluding any sensitive or confidential information. No such right would usually accrue to creditors under an ICA.
- Unlike the LMA ICA, which requires an opinion from an "independent, reputable and internationally recognised" bank, accounting practice or third party, the Draft Regulations only require that the individual believe they have the requisite knowledge and experience, and are independent. The evaluator will be "independent" provided (i) they are not a connected party and have not provided restructuring advice to the company or connected companies within the preceding 12 months of the Written Report; (ii) they are not "excluded" from doing so (e.g. bankruptcy); and (iii) are not the Administrator, an associate of the Administrator, or connected with a company with which the Administrator is connected.

If the UK Parliament approves the Draft Regulations in good time, the UK Government would then apply them to administrations commencing on or after the day on which the regulations come into force. The target date is June 2021 at the latest.