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Pre-Insolvency: The Strengthening of Indonesian Corporate Preventive Restructuring through A Comparative Study of the French Sauvegarde Framework

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Abstract

A company's financial difficulties can escalate into bankruptcy if not addressed early on, potentially reducing the company's value and affecting the interests of debtors, creditors, employees, and other stakeholders. In Indonesia, the Suspension of Debt Payment Obligations (PKPU) is a formal, court-based restructuring mechanism. However, there are still limitations to mechanisms that would allow for the handling of financial difficulties at an earlier stage, in a confidential and facilitated manner, before entering formal judicial proceedings. This study aims to analyze the legal response to corporate financial difficulties by comparing the PKPU mechanism in Indonesia with the preventive restructuring mechanism (pre-insolvency) in France, as well as to assess its relevance for the development of a preventive restructuring mechanism in Indonesia. This study employs a juridical-normative method using legislative, conceptual, and comparative legal approaches. The analysis utilizes John Rawls's Difference Principle and Corporate Rescue Theory. The results show that PKPU operates through a judicial process, whereas the pre-insolvency restructuring mechanism in France allows for intervention at an earlier stage through facilitation, confidentiality, and coordination among the parties. This comparison reveals institutional characteristics in pre-insolvency restructuring that have not yet been fully accommodated within the Indonesian legal system. This study contributes to the development of a framework for preventive restructuring through state facilitation as a complement to PKPU, while still taking into account the interests of the parties involved. This framework views restructuring as more than debt settlement; it maintains business continuity and ensures equitable protection for parties facing financial difficulties.

Keywords: *Corporate Financial Difficulties; Suspension of Debt Payment Obligations (PKPU); Preventive Restructuring; Pre-Insolvency.*

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Introduction

Global bankruptcy law is currently undergoing a fundamental paradigm shift, moving from a retributive liquidation approach toward preventive restructuring and business rescue mechanisms.[1] In the context of the European Union, the modern business legal framework places early warning systems and confidential mediation as the primary tools to be used before a company or business entity effectively crosses the threshold of bankruptcy.[2] This shift is driven not only by economic rationality, but also by demands for substantive justice and humanity in order to prevent mass layoffs and protect the social ecosystem that has been dependent on the continued existence of these business entities.[3]

In contrast to this step taken by the European Union, debt restructuring mechanisms in Indonesia still rely exclusively on the Suspension of Debt Payment Obligations (PKPU) process through the Commercial Court, as regulated in Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations. This law places restructuring efforts in a reactive phase, meaning they can be initiated only when a business entity acting as a debtor is already on the threshold of actual payment default, along with several other conditions. The lack of state intervention instruments during the pre-insolvency phase forces private business entities to resolve their liquidity crises through open litigation. This situation creates uncertainty and lexposes debtors

[1] Vanessa Finch, "Pre-Packaged Administrations and the Construction of Propriety," *Journal of Corporate Law Studies* 11, no. 1 (2011): 1–31, https://doi.org/10.5235/147359711795344127; Reinhard Bork, "Pre-insolvency Frameworks: Developments in the European Union," *International Insolvency Review* 33, no. 1 (2024): 6–22, https://doi.org/10.1002/iir.1515; Stephan Madaus, "Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law," *European Business Organization Law Review* 19, no. 3 (2018): 615–47, https://doi.org/10.1007/s40804-018-0113-7.

[2] David Christoph Ehmke, "The European Union Preventive Restructuring Framework: A Hole in One?," *International Insolvency Review* 28, no. 2 (2019): 184–209, https://doi.org/10.1002/iir.1344; Ralf Knaier and Jochen Pfleger, "The Imminent Directive on Preventive Restructuring Frameworks," *European Company and Financial Law Review* 16, nos. 1–2 (2019): 190–95, https://doi.org/10.1515/ecfr-2019-0010.

[3] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on Preventive Restructuring Frameworks, on Discharge of Debt and Disqualifications, and on Measures to Increase the Efficiency of Procedures Concerning Restructuring, Insolvency and Discharge of Debt, and Amending Directive (EU) 2017/1132, Official Journal of the European Union 18 (2019), http://data.europa.eu/eli/dir/2019/1023/oj; Gert-Jan Boon, "Harmonising European Insolvency Law: The Emerging Role of Stakeholders," *International Insolvency Review* 27, no. 2 (2018): 150–77, https://doi.org/10.1002/iir.1303.

to exploitation by creditors utilizing aggressive debt recovery tactics. This mechanism actually fails to serve as a fair and balanced means of debt recovery.[4]

The absence of an executive mediation body in Indonesia's bankruptcy legal system creates an institutional vacuum that fuels structural injustice. When large-scale private business entities face a financial crisis, the PKPU ruling must be published in the State Gazette and two daily newspapers. This publicity triggers panic, supply chain disruptions, client losses, investor withdrawals, and a drop in stock value as well as the destruction of goodwill, ultimately leading to premature bankruptcy for companies that are, in fact, still viable. While comprehensive empirical data specifically isolating the economic fallout of PKPU publicity in Indonesia remains limited, business associations and market observations indicate that mandatory newspaper announcements frequently trigger immediate credit freezes and supply chain contractions comparable to documented international market reactions to insolvency publicity.[5] This situation confirms the existence of a legal loophole that undermines substantive justice. Rather than serving as a fair recovery mechanism, such a mechanism has the potential to marginalize business entities and sacrifice the economic rights of workers, thereby significantly undermining the values of substantive justice within a legal system that should be fair to all parties.[6]

Various previous studies have examined the issue of corporate financial difficulties and the restructuring mechanisms available under the Indonesian legal system, particularly bankruptcy and the Suspension of Debt Payment Obligation (PKPU). Studies conducted over the past 7 years generally fall into two main categories. First, there is a group of studies that focus on the weaknesses in the substantive requirements of the PKPU, where the simple evidentiary requirements are considered too vulnerable and at risk of being

[4] M. Hadi Shubhan, *Hukum Kepailitan: Prinsip, Norma, Dan Praktik Di Peradilan* (Kencana, 2008).

[5] Anne Epaulard and Chloé Zapha, "Bankruptcy Costs and the Design of Preventive Restructuring Procedures," *Journal of Economic Behavior & Organization* 196 (April 2022): 229–50, https://doi.org/10.1016/j.jebo.2022.02.001.

[6] Guido Alpa, "The Effect of Fundamental Rights on Contract Law in a Comparative Perspective," *European Business Law Review* 30, no. 2 (2019): 301–18, https://doi.org/10.54648/EULR2019014.

misused by malicious creditors as a means of aggressive debt collection.[7] Second, a research group that specifically highlights the urgency of protecting the going-concern principle, but still limits its discussion to optimizing the roles of the supervising judge and the trustee during proceedings in commercial court.[8]

These studies have made important contributions to identifying various gaps in bankruptcy procedural law; however, a significant literature gap still exists. Previous research has tended not to address the root of the structural problem, specifically the absence of an integrated pre-insolvency regime outside the judicial system. The tendency to focus on courtroom dynamics has meant that the institutional dimension of the business rescue system has not received adequate attention, particularly regarding the institutional vacuum within the executive branch. An examination of how to fill this void becomes relevant as many business entities face a real threat of default, while there are currently no confidential state mediation instruments available to prevent the destruction of goodwill before the requirements for filing for PKPU are met through court mechanisms. In response to this gap, the novelty of this research lies in its use of a comparative study of corporate financial distress restructuring mechanisms in Indonesia and France. This comparison is useful for identifying the institutional characteristics of pre-insolvency restructuring that are relevant to the development of Indonesian law. Preventive restructuring mechanisms in France, including confidential facilitation and mediation functions, are treated as institutional references rather than models

[7] M. Hadi Shubhan, "Legal Protection of Solvent Companies from Bankruptcy Abuse in Indonesian Legal System," *Academic Journal of Interdisciplinary Studies* 9, no. 2 (2020): 142, https://doi.org/10.36941/ajis-2020-0031; Fahren Marpaung et al., "Interpretation in Simple Evidence Against Bankruptcy Matter and Suspension of Debt Payment Obligations in Indonesia," *Croatian International Relations Review* 28, no. 89 (2022): 19–38; Devi Andani and Wiwin Budi Pratiwi, "Prinsip Pembuktian Sederhana Dalam Permohonan Penundaan Kewajiban Pembayaran Utang," *Jurnal Hukum Ius Quia Iustum* 28, no. 3 (2021), https://doi.org/10.20885/iustum.vol28.iss3.art9.

[8] Elisatris Gultom and Huta Disyon, "The Implementation of the Going Concern Principle in Bankruptcy and The Suspension of Payment to Protect the Economic Rights of the Parties," *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 9, no. 3 (2022): 343–64, https://doi.org/10.22304/pjih.v9n3.a3; Itok Dwi Kurniawan et al., "Semi-Public Restructuring To Uphold Good Faith And Going Concern In Indonesian Public Company Bankruptcy," *Indonesia Private Law Review* 6, no. 1 (2025): 85–102, https://doi.org/10.25041/iplr.v6i1.4498; Rio Christiawan, "Kekuatan Perjanjian Homologasi Terhadap Kedudukan Bank Sebagai Kreditur Separatis," *Jurnal Yudisial* 15, no. 1 (2022): 99–119, https://doi.org/10.29123/jy.v15i1.490.

to be directly adopted. Based on the aforementioned background, this study poses the following research question: How can the characteristics of preventive (pre-insolvency) restructuring mechanisms in France be functionally adapted within the Indonesian legal system to strengthen the legal response to corporate financial difficulties before they escalate into bankruptcy?

This study aims to analyze the characteristics of preventive (pre-insolvency) restructuring mechanisms in France and compare them with the Suspension of Debt Payment Obligations (PKPU) mechanism in Indonesia, as well as to assess the relevance of these characteristics for the development of preventive restructuring mechanisms within the Indonesian legal system. The analysis was conducted using John Rawls's Difference Principle and Corporate Rescue Theory as analytical frameworks to assess aspects of substantive justice, protection of affected parties, and business continuity in the restructuring process.[9]

In analyzing the legal response to a company's financial difficulties, this study considers the limitations of the Creditors' Bargain Model, which prioritizes efficiency and the maximization of creditors' recovery as the primary objectives of restructuring.[10] This approach does not fully explain the importance of preserving companies as entities with broader economic value and social impact, especially when financial crises affect business entities operating within interconnected corporate groups.[11] On that basis, this study employs Corporate Rescue Theory, which identifies business continuity (going concern) and the preservation of economic value as key objectives in corporate restructuring.[12] This perspective is further supplemented by John Rawls's

[9] Finch, "Pre-Packaged Administrations and the Construction of Propriety"; John Wood, *The Value within the Failed Company BTI - The Interpretation and Value of Corporate Rescue* (Edward Elgar Publishing, 2022), https://doi.org/10.4337/9781839101403.00009; John Rawls, *Justice as Fairness*, ed. Erin Kelly (Harvard University Press, 2001), https://doi.org/10.2307/j.ctv31xf5v0.

[10] Axel Krohn, "Rethinking Priority: The Dawn of the Relative Priority Rule and the New 'Best Interests of Creditors' Test in the European Union," *International Insolvency Review* 30, no. 1 (2021): 75–95, https://doi.org/10.1002/iir.1398; Horst Eidenmüller, "Contracting for a European Insolvency Regime," *European Business Organization Law Review* 18, no. 2 (2017): 273–304, https://doi.org/10.1007/s40804-017-0067-1.

[11] Sheila C. Neder Cerezetti, "Reorganization of Corporate Groups in Brazil: Substantive Consolidation and the Limited Liability Tale," *International Insolvency Review* 30, no. 2 (2021): 169–90, https://doi.org/10.1002/iir.1410.

[12] Wood, *The Value within the Failed Company BTI - The Interpretation and Value of Corporate Rescue*; Finch, "Pre-Packaged Administrations and the Construction of Propriety."

Difference Principle to assess the distribution of protections and burdens among those affected by financial distress, particularly groups in vulnerable positions.[13] These two perspectives are used to analyze and compare the characteristics of PKPU in Indonesia with the preventive (pre-insolvency) restructuring mechanism in France, as well as to assess their relevance to the development of a preventive restructuring mechanism within the Indonesian legal system.

The contribution of this study lies in the development of a framework for preventive restructuring in Indonesia that positions state facilitation at the stage preceding formal judicial proceedings as a complement to the PKPU. Theoretically, this study expands the body of research on corporate restructuring by linking the goal of business continuity with the principle of substantive justice for parties affected by a company's financial difficulties. In practical terms, this study offers a direction for institutional development that provides earlier and confidential facilitation and mediation, while still taking into account the interests of debtors, creditors, employees, and other affected parties.

Methodology

This study employs a normative legal methodology using a comparative legal analysis approach. Other approaches used include the statutory approach to analyze structural weaknesses in Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, as well as to examine the applicable commercial legal instruments in France. Furthermore, a conceptual approach is employed to identify differences in the characteristics of executive-based pre-insolvency frameworks, specifically the Comité Interministériel de Restructuration Industrielle (CIRI) and the Mission Interministérielle aux Restructurations d'Entreprises (MIRE) in France. The legal materials used consist of primary sources, including relevant Indonesian laws and regulations as well as French regulations, and secondary sources, including authoritative academic literature and reputable international and national journal articles.

The analytical framework in this study employs John Rawls's Difference Principle and Corporate Rescue Theory. The Difference Principle is used to assess the dimension of substantive justice in restructuring, specifically how

[13] John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Harvard University Press, 2001).

legal mechanisms distribute the protections, risks, and burdens arising from a company's financial difficulties among debtors, creditors, employees, and other relevant parties. This perspective is used to determine whether the restructuring designs in both countries provide proportional protection to parties in relatively more vulnerable positions. Meanwhile, Corporate Rescue Theory is used to assess the extent to which restructuring mechanisms are oriented toward the going concern and the preservation of the company's economic value, ensuring that restructuring is not solely directed at settling obligations to creditors but also at saving companies that still have prospects for survival.

Both perspectives are used in an integrated manner in a comparative analysis of the PKPU mechanism in Indonesia and the preventive (pre-insolvency) restructuring mechanism in France. The analysis was conducted by identifying the characteristics of each mechanism, particularly regarding the stage of intervention, whether the process is judicial or non-judicial, the confidentiality of the process, facilitation and coordination with the parties involved, as well as the focus on business continuity and the protection of affected parties. The results of the comparison were then analyzed based on these two theoretical frameworks to assess the relevance of the characteristics of preventive restructuring in France for strengthening preventive restructuring mechanisms within the Indonesian legal system. All legal materials were analyzed qualitatively through qualitative content analysis by identifying, categorizing, comparing, and synthesizing relevant legal norms and concepts to draw conclusions that address the research questions.

This normative and comparative study selects primary statutes and secondary authorities through purposive doctrinal mapping. However, several methodological limitations must be acknowledged: due to the absence of extensive empirical data isolating PKPU publicity fallout in Indonesia, the projected economic impacts rely on qualitative market observations and international comparative analogues. Consequently, the conclusions serve as a conceptual and institutional blueprint rather than an empirical evaluation of operational outcomes.

Result and Discussion

Legal Responses to Corporate Financial Distress in Indonesia: PKPU as a Restructuring Mechanism

When a company begins to face difficulties in paying its debts, Indonesian law provides a formal avenue to address this situation, through the Suspension of Debt Payment Obligations (PKPU), as regulated in Articles 222 through 294 of Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations. PKPU is a formal restructuring mechanism, the entire process of which takes place through the Commercial Court. Its primary function is to give the debtor time to formulate and propose a settlement plan to its creditors, in the form of an offer to pay part or all of the debt, allowing the company to continue its operations and avoid bankruptcy.[14]

To understand the characteristics of the PKPU, it is helpful to examine the origins of this regulation. Modern Indonesian bankruptcy law emerged after the 1997–1998 Asian financial crisis, under the strong influence of the International Monetary Fund (IMF) through its structural adjustment program. During that phase of systemic crisis, the reform of the bankruptcy regime was engineered as a macroeconomic instrument to manage the crisis cycle and mitigate the corporate debt crisis.[15] Government Regulation in Lieu of Law No. 1 of 1998 (Perppu) was issued to address this issue. Over time, the Perppu was converted into Law No. 4 of 1998 and later revised into Law No. 37 of 2004. The primary focus at that time was to provide a fast, decisive, and cost-effective means of debt collection to ensure the enforceability of creditors' claims and thereby restore macroeconomic stability. Meanwhile, individual corporate rescue was not the primary objective. Understanding this background is crucial because many characteristics of the PKPU, including its weaknesses, can only be fully understood by examining its origins.

Procedurally, the Suspension of Debt Payment Obligations (PKPU) mechanism was designed as a middle ground that can be initiated by both interested parties. The debtor seeks to preserve its business entity, while the creditor demands the fulfillment of its rights. For debtors showing signs of a

[14] Sjahdeini and Sutan Remy, *Sejarah, Asas, Dan Teori Hukum Kepailitan: Memahami Undang-Undang No. 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang, Ed. 2*, 2nd ed. (Prenadamedia Group, 2016).

[15] M. Konrad Borowicz, "Law and Macro Finance of Corporate Debt: Managing the Business Cycle through Bankruptcy," *International Insolvency Review* 31, no. 3 (2022): 343–62, https://doi.org/10.1002/iir.1466.

decline in their ability to pay (insolvency) to settle debts that have fallen due, the PKPU essentially serves as a forum for formulating a new restructuring plan. On the other hand, creditors who identify signs of default also have legal standing to file the same petition. This petition is filed with the Commercial Court and signed by the petitioner. The court then responds by issuing a Provisional PKPU Order, followed by the appointment of a supervising judge and an administrator. There are strict time limits in this process. As stipulated in Article 225, paragraphs (2) and (3) of the Bankruptcy and PKPU Law, a debtor's petition must be decided within 3 days, while a creditor's petition is subject to a 20-day deadline.[16]

The PKPU process operates in two crucial stages. The first phase is the Provisional PKPU, a transitional period that begins when the ruling is issued and lasts until the court hearing, with a maximum duration of 45 days. At that hearing, the continuation of the restructuring process is determined through a creditor vote to assess the debtor's eligibility to receive further relief through Permanent PKPU. The total duration of the Permanent PKPU may not exceed 270 days. During this phase, the debtor is effectively granted "breathing space" amid the pressures of the crisis. All forms of debt collection are suspended and the enforcement of collateral is put on hold. These conditions provide an opportunity for rationality and negotiation to take place. However, this protection comes with restrictions on autonomy. The debtor loses full control over the fate of its entity. The debtor is prohibited from taking any management actions or transferring its assets without the administrator's approval. Although the evidentiary standard for filing PKPU petitions is formally summary under Article 222 of Law No. 37 of 2004, its practical application remains intensely contested among Indonesian legal scholars regarding its vulnerability to abuse by opportunistic creditors.[17]

The focus of this entire legal protection process actually lies in the restructuring plan. From the time the petition is filed until the PKPU period ends, the debtor is bound by strict deadlines to formulate the most rational plan for settling its obligations. This plan can only be approved if it receives the consent of more than half of the concurrent and separate creditors present, each of whom represents at least two-thirds of the total claims. However, a

[16] Shubhan, *Hukum Kepailitan: Prinsip, Norma, Dan Praktik Di Peradilan*.

[17] Ermanto Fahamsyah et al., "The Problem of Filing for Bankruptcy in Indonesian Law: Should the Insolvency Test Mechanism Be Applied?," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, June 30, 2024, 199–218, https://doi.org/10.24090/volksgeist.v7i1.10079.

majority consensus among creditors is not yet final. The court holds absolute authority through its approval ruling (homologation). The court is required to reject the homologation if the implementation of the settlement is deemed insufficiently guaranteed or if there are indications of bad faith (fraud). It is this homologated settlement that will subsequently bind all parties, serving as the legal foundation for the debtor to restructure its business with a more proportional, rational, and equitable debt structure.[18]

In fact, the PKPU is not a risk-free rescue instrument. This mechanism is, in essence, a time-limited restructuring process with the threat of asset liquidation. If a settlement agreement is not reached by the deadline, or if the court rejects homologation, legal protection immediately ceases and the debtor must be declared bankrupt by operation of law. This reality confirms three fundamental characteristics of the PKPU. The mechanism is entirely centralized in the courts, bound by strict deadlines, and directly accompanied by the threat of asset liquidation.

The normative characteristics of the PKPU regime, which grant access to restructuring based on relatively simple requirements, carry negative implications for the survival of business entities that are actually only facing the early signs of financial distress. These implications are evident in at least several aspects. First, the threshold for entering the PKPU regime is too low. The court does not require comprehensive proof of financial health but rather relies on the principle of summary proceedings.[19] The absence of an insolvency test obscures the line between entities that are fundamentally bankrupt and healthy companies that are merely experiencing a temporary cash flow bottleneck.[20] The absence of these screening instruments ultimately opens the door for large creditors to opportunistically exploit the PKPU as a forced debt collection mechanism. This situation further underscores the pro-creditor characteristics that underlie the history of the law's enactment.

Second, the PKPU framework does not provide an "out-of-court safe harbor." Debtors acting in good faith who seek to negotiate a consensual

[18] Christiawan, "Kekuatan Perjanjian Homologasi Terhadap Kedudukan Bank Sebagai Kreditur Separatis."

[19] Andani and Pratiwi, "Prinsip Pembuktian Sederhana Dalam Permohonan Penundaan Kewajiban Pembayaran Utang"; Marpaung et al., "Interpretation in Simple Evidence Against Bankruptcy Matter and Suspension of Debt Payment Obligations in Indonesia."

[20] Shubhan, "Legal Protection of Solvent Companies from Bankruptcy Abuse in Indonesian Legal System."

settlement privately are left without any protective measures, meaning such consensual efforts are constantly under threat of disruption by a unilateral PKPU petition. Third, the principle of publicity inherent in PKPU rulings is actually counterproductive. The obligation to publish provisional PKPU rulings in the State Gazette and two daily newspapers causes a company's internal crisis to be prematurely exposed to the public. Before a restructuring plan can even be formulated, market panic has already set in. Banks rushed to freeze credit facilities, strategic partners became fearful and canceled contracts, which ultimately triggered reputational damage and the destruction of the company's economic value (value destruction).[21] While comparative economic literature and business observations suggest that mandatory publication of PKPU rulings frequently correlates with credit contractions and reputational damage, these effects should be framed as projected economic risks rather than universal empirical certainties. Furthermore, preventive mechanisms must be carefully calibrated to mitigate potential moral hazard—such as strategic delays by bad-faith debtors—and account for documented instances of modest post-restructuring financial recovery. This series of events reveals a structural weakness: an institutional vacuum precisely during the early stages of financial distress, when assistance is most urgently needed.

When examined through the lens of substantive justice, the success of PKPU should not be measured solely in terms of procedural compliance or the achievement of a voting quorum. A more essential parameter is the extent to which this restructuring instrument is capable of preserving the company's going concern while simultaneously protecting the interests of vulnerable parties whose livelihoods depend on that entity. Preserving the going concern is recognized as an absolute moral foundation for maintaining the equilibrium of the economic rights of various parties caught in the vortex of bankruptcy and PKPU proceedings.

Preventive (Pre-Insolvency) Restructuring Mechanisms in France

France has a philosophical foundation that is significantly different from Indonesia. The drafting of Livre VI Code de commerce (Des difficultés des entreprises) is based on the principle that a business entity experiencing

[21] Jonathan McCarthy, "A Class Apart: The Relevance of the EU Preventive Restructuring Directive for Small and Medium Enterprises," *European Business Organization Law Review* 21, no. 4 (2020): 895–913, https://doi.org/10.1007/s40804-020-00192-x.

difficulties must be saved, as such entities are economic drivers that employ a large workforce.[22] A cross-national comparative study has identified France's bankruptcy law as one of the regimes that is most sympathetic to the viability of debtors and the protection of workers, significantly surpassing the rigid approaches in the United Kingdom and Germany.[23] This concern is clearly evident in the opening section of Livre VI, which explicitly advocates for the "prevention of corporate difficulties" (prévention des difficultés des entreprises).[24] At this point, France put a safety net in place before the financial crisis led to bankruptcy. This humanistic framework ultimately resonated and aligned with Directive (EU) 2019/1023, which positions preventive restructuring as a first line of defense when insolvency can still be avoided to ensure business continuity.[25]

This safety net stems from a highly proactive early-warning system. French law adopts a proactive approach without waiting for a debtor to default. When signs of a financial crisis begin to emerge from specific documents or events, the president of the commercial court (tribunal de commerce) has the authority to summon the company's management to discuss the company's actual condition in a closed and informal setting (procédures d'alerte).[26] At the regional level, the authority to detect crises early and assist companies in finding solutions rests with the Commissaires aux Restructurations et à la Prévention des Difficultés des Entreprises (CRP),

[22] Cour de Cassation (Chambre Commerciale), Arrêt N° 18-10.688, Pub. L. No. N° 22-24.068 (2019); Ana Maria Fagetan, "Corporate Insolvency Laws in Selected Jurisdictions: US, England, France, and Germany—A Comparative Perspective," *Laws* 14, no. 2 (2025): 21, https://doi.org/10.3390/laws14020021.

[23] Sergei A. Davydenko and Julian R. Franks, "Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany, and the U.K.," *The Journal of Finance* 63, no. 2 (2008): 565–608, https://doi.org/10.1111/j.1540-6261.2008.01325.x.

[24] *Code de Commerce* (Dalloz / Légifrance, n.d.), accessed October 30, 2026, https://www.legifrance.gouv.fr/.

[25] *Directive (EU) 2019/1023*; Emilie Ghio, "Transposing the Preventive Restructuring Directive 2019 into French Insolvency Law: Rethinking the Role of the Judge and Rebalancing Creditors' Rights," *International Insolvency Review* 30, no. 1 (2021): 54–74, https://doi.org/10.1002/iir.1401; Jessica Schmidt, "Preventive Restructuring Frameworks: Jurisdiction, Recognition and Applicable Law," *International Insolvency Review* 31, no. 1 (2022): 81–100, https://doi.org/10.1002/iir.1447; F. Javier Arias Varona et al., "Discharge and Entrepreneurship in the Preventive Restructuring Directive," *International Insolvency Review* 29, no. 1 (2020): 8–31, https://doi.org/10.1002/iir.1369.

[26] Cour de Cassation (Chambre Commerciale), Arrêt N° 18-10.688.

which prioritizes ensuring the survival of industrial companies with 50 to 400 employees.[27]

Once financial distress has been established, the French legal system provides two pre-litigation avenues that serve as the primary instruments for restructuring. The first is the ad hoc mandate. Upon the request of a debtor acting in good faith, the presiding judge may appoint an ad hoc representative to facilitate restructuring efforts, and the debtor is even granted the privilege of proposing a mediator whom they trust.[28] This procedure is flexible and does not restrict the parties to a rigid negotiation format. The role of the mandataire is as an independent facilitator who assists the debtor in formulating a restructuring plan and negotiating with creditors or other interested parties.

The second instrument is conciliation, which is designed to be slightly more structured. This mediation mechanism is available to businesses facing economic or financial difficulties, whether these difficulties are already evident or are just beginning to emerge, provided that the company's operations have not ceased (cessation des paiements) for more than forty-five days.[29] For the purpose of this mission, the presiding judge appoints a conciliator to serve a four-month term, which may be extended to a maximum of five months. If these talks result in a settlement, the settlement may be further secured through the court's approval of the homologation.[30]

There is one fundamental principle underlying both of these mediation instruments: the guarantee of absolute confidentiality. Every party involved in either an ad hoc mandate or conciliation proceeding, or having knowledge of such proceedings by virtue of their official capacity, is bound by a legal obligation to maintain absolute confidentiality. This obligation is strictly enforced by the state. The Cour de cassation, in its June 13, 2019, decision No. 18-10.688, explicitly affirmed the principle that anyone who discloses the secrets of these preventive negotiations may be subject to legal sanctions in the form of civil liability.[31] The rationale behind this provision is that a company

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[27] Sandrine Anstett and Pascal Theveniaud, "Comprendre Le Fonctionnement Des Écosystèmes Économiques Territoriaux et s'y Insérer : Une Dimension Essentielle Du Rôle Des CRP," *Annales Des Mines - Réalités Industrielles* Février 20, no. 1 (2023): 72–76, https://doi.org/10.3917/rindu1.231.0072.

[28] *Code de Commerce.*

[29] *Code de Commerce.*

[30] *Code de Commerce*; Ghio, "Transposing the Preventive Restructuring Directive 2019 into French Insolvency Law."

[31] Cour de Cassation (Chambre Commerciale), Arrêt N° 18-10.688.

undergoing financial restructuring could face premature bankruptcy due to negative market sentiment. If news of the crisis leaks, customers will flee, suppliers will halt shipments, and creditors will react before an agreement can be reached. An empirical study of France's preventive framework demonstrates that the escalation of bankruptcy costs is largely determined by how early the crisis is addressed and how strictly the confidentiality of the resolution process is maintained.[32]

If these closed-door negotiations fail to reach an agreement, France provides a subsequent formal mechanism that remains prevention-oriented, namely the "sauvegarde" procedure. Unlike redressement judiciaire, which requires a company to be effectively insolvent (cessation des paiements), the sauvegarde is designed to serve as a protective measure for debtors who still have operational capacity but are facing complex difficulties they can no longer bear on their own.[33] For debtors who have previously initiated conciliation proceedings, a fast-track mechanism is also available through the "sauvegarde accélérée" procedure to expedite the rescue process.[34] The literature on corporate crisis management emphasizes just how vital this dividing line is. Companies that are addressed too late and are forced into the redressement judiciaire phase have been shown to experience a drastic decline in asset value and have a much lower probability of survival compared to entities that were rescued earlier through preventive mechanisms.[35]

To ensure that this regulatory framework functions effectively, France has established a proportional protective institutional framework under the Ministry of Economy and Finance (Bercy). At the top of the hierarchy, the Comité Interministériel de Restructuration Industrielle (CIRI) acts, at the request of the board of directors, as a neutral mediator for large corporations

[32] Anne Epaulard and Chloé Zapha, "Bankruptcy Costs and the Design of Preventive Restructuring Procedures," *Journal of Economic Behavior & Organization* 196 (April 2022): 229–50, https://doi.org/10.1016/j.jebo.2022.02.001.

[33] Fagetan, "Corporate Insolvency Laws in Selected Jurisdictions."

[34] Ghio, "Transposing the Preventive Restructuring Directive 2019 into French Insolvency Law."

[35] Christophe Andre and Lilas Demmou, *Enhancing Insolvency Frameworks to Support Economic Renewal*, vol. 1738, OECD Economics Department Working Papers (2022), https://doi.org/10.1787/8ef45b50-en; Venier Macorig and Francine, "La Prévention Des Difficultés Des Entreprises : Domaine Des Relations Privilégiées Entre Droit et Gestion," in *Mélanges En l'honneur de Bruno Sire*, ed. Chanfreau Dizel and Martine (Presses de l'Université Toulouse 1 Capitole, 2019).

with more than 400 employees.[36] For entities with fewer than 400 employees, government intervention is carried out by CODEFI, which is further supported by the Mission Interministérielle aux Restructurations d'Entreprises (MIRE) to detect crises early and serve as a coordinator for the CRP network in various regions.[37] Comprehensively, this institutional architecture demonstrates that state institutions act as facilitators during the early stages of a crisis (early-stage distress). The courts are only called upon when their legitimacy is truly needed, such as to ratify an agreement, and only assume a full role once the crisis escalates into a formal judicial process. It is essential to distinguish between the strictly confidential preliminary negotiation phase (ad hoc mandate and conciliation) and the subsequent formal ratification. Even under the post-2021 framework of sauvegarde accélérée, while negotiations retain strict confidentiality, judicial homologation inherently introduces a degree of public record to bind third parties, ensuring that out-of-court consensus ultimately transitions transparently into judicial enforceability. This protective architectural framework will be examined in greater detail through a theoretical approach in the following subsection.

To systematically map the fundamental differences between the restructuring frameworks in Indonesia and France, a comparison of the normative and operational aspects of these two jurisdictions can be synthesized using the following comparative matrix:

Table 1. Comparison of Restructuring Characteristics in Indonesia and France

Analysis Parameters	Indonesia (Law No. 37 of 2004)	France (*Livre VI Code de commerce* and administrative procedures)
Intervention Orientation	Settlement of debt obligations through the PKPU and bankruptcy	Business rescue, prevention of financial difficulties, business continuity, and job protection.[39]

[36] Décret N° 82-379 Du 4 Mai 1982 Relatif Au Comité Interministériel de Restructuration Industrielle, Journal officiel de la République française ___ (1982), https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000329063/; Cédric Garcin, "Le Comité Interministériel de Restructuration Industrielle," *Annales Des Mines - Réalités Industrielles* Février 20, no. 1 (2023): 36–38, https://doi.org/10.3917/rindu1.231.0036; Guillaume Cadiou et al., "Introduction : Prévenir et Traiter Les Difficultés Des Entreprises," *Annales Des Mines - Réalités Industrielles* Février 20, no. 1 (2023): 5–7, https://doi.org/10.3917/rindu1.231.0005.

[37] Anstett and Theveniaud, "Comprendre Le Fonctionnement Des Écosystèmes Économiques Territoriaux et s'y Insérer : Une Dimension Essentielle Du Rôle Des CRP."

[39] Fagetan, "Corporate Insolvency Laws in Selected Jurisdictions."

	mechanisms, with the protection of creditors' interests as one of the primary objectives.[38]	
Process Startup Parameters	Two or more creditors and at least one debt that is past due and collectible; proof is provided through summary proceedings.[40]	*Cessation des paiements*, the inability to cover current liabilities with available assets for the judicial reorganization process.[41]
Pre-Trial Interventions	There is currently no integrated national preventive restructuring mechanism outside the judicial process.[42]	Preventive and pre-trial mechanisms are available, including ad hoc mandates and conciliation.[43]
Confidentiality	There is no general equivalent for the confidential administrative restructuring mediation mechanism prior to PKPU.[44]	It is crucial to distinguish between strictly confidential out-of-court mechanisms—specifically the ad hoc mandate and conciliation under Article L. 611-15 of the French Commercial Code—and subsequent judicial proceedings like sauvegarde and homologation, which inherently

[38] Shubhan, *Hukum Kepailitan: Prinsip, Norma, Dan Praktik Di Peradilan*; Sjahdeini and Sutan Remy, *Sejarah, Asas, Dan Teori Hukum Kepailitan: Memahami Undang-Undang No. 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang, Ed. 2*.

[40] Shubhan, *Hukum Kepailitan: Prinsip, Norma, Dan Praktik Di Peradilan*.

[41] Davydenko and Franks, "Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany, and the U.K."

[42] Hudyarto, "Perbandingan Kepailitan Antara Badan Hukum (Perseroan Terbatas) Dengan Non Badan Hukum (FIRMA)," *The Juris* 3, no. 2 (2019): 167–80, https://doi.org/https://www.ejournal.stih-awanglong.ac.id/index.php/juris/article/view/77.

[43] Thomas Mastrullo, "Between Modernity and Prudence: The Transposition into French Law of Directive (EU) 2019/1023 of 20 June 2019 on Restructuring and Insolvency," *European Insolvency and Restructuring Journal*, ahead of print, May 24, 2023, https://doi.org/10.54195/eirj.14825.

[44] Shubhan, "Legal Protection of Solvent Companies from Bankruptcy Abuse in Indonesian Legal System."

		involve public oversight to ensure third-party enforceability.[45]
Executive Actor	No specific executive agency has yet been established to comprehensively carry out the functions of early detection, mediation, and coordination of restructuring.[46]	MIRE at the national level, CRP at the territorial level, and CIRI and CODEFI in providing assistance to companies within the scope of their respective authorities.[47]
Intervention Points	Restructuring interventions primarily take place after a case enters the PKPU judicial process.	Interventions can be initiated at the early stages of difficulty, prior to judicial proceedings, through administrative and preventive mechanisms.[48]
Company Size Criteria	No pre-insolvency institutional differentiation exists based on the number of employees.	CIRI works with companies that have more than 400 employees. At the regional level, CODEFI works with companies with fewer than 400 employees. CRP assists CODEFI in supporting the recovery of companies in the labor-intensive industrial sector with 50 to 400 employees.[49]
Purpose of Restructuring	Deferral of payments and the development of a restructuring plan under the PKPU framework.	Crisis prevention, debt restructuring, business continuity, and job preservation.[50]

Source: Compiled by the Author (2026)

[45] *Code de Commerce*; Cour de Cassation (Chambre Commerciale), Arrêt N° 18-10.688.

[46] Sjahdeini and Sutan Remy, *Sejarah, Asas, Dan Teori Hukum Kepailitan: Memahami Undang-Undang No. 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang, Ed. 2*.

[47] Cadiou et al., "Introduction : Prévenir et Traiter Les Difficultés Des Entreprises."

[48] Macorig and Francine, "La Prévention Des Difficultés Des Entreprises : Domaine Des Relations Privilégiées Entre Droit et Gestion."

[49] Garcin, "Le Comité Interministériel de Restructuration Industrielle"; Anstett and Theveniaud, "Comprendre Le Fonctionnement Des Écosystèmes Économiques Territoriaux et s'y Insérer : Une Dimension Essentielle Du Rôle Des CRP."

[50] *Directive (EU) 2019/1023*.

Strengthening Preventive Restructuring in Indonesia: Lessons from France from the Perspectives of Corporate Rescue and Substantive Justice

Grounded in the foundational principles of modern insolvency economics (building upon collective debt resolution frameworks akin to Jackson's analytical constructs), Corporate Rescue Theory posits that corporate survival is economically justified only when a debtor's going-concern value demonstrably exceeds its liquidation value. Concurrently, applying John Rawls's Difference Principle identifies employees and micro-suppliers as the 'least advantaged' groups because their primary source of income and economic security are structurally tied to enterprise continuity, lacking the diversified risk portfolios of institutional secured creditors. A comparison between Indonesia's PKPU regime and France's pre-insolvency system reveals structural gaps in the handling of corporate financial crises. To address these gaps, strengthening Indonesia's restructuring laws does not require a complete replication of the French system; rather, it suffices to adapt the relevant institutional characteristics.

There are three key characteristics that can be integrated. First, early intervention. French law facilitates negotiations before a company experiences absolute default. This addresses the reactive nature of the PKPU system, which stems from the absence of an insolvency test at the early stages of the application process.[51] Second, the state's role as a neutral facilitator. By adopting the functions of the CIRI in France, the involvement of state institutions in the early stages can balance the bargaining power between debtors and creditors.[52] Third, confidentiality guarantees. The obligation to maintain confidentiality in the ad hoc mandate instrument directly addresses the issue of premature publicity of provisional PKPU rulings, which is mandated by law.

These three characteristics are consistent with the principles of Corporate Rescue Theory. This theory emphasizes that the value of an operating business entity (going concern value) including its supply chain, employee expertise, and commercial reputation is economically far higher than

[51] Ermanto Fahamsyah et al., "The Problem of Filing for Bankruptcy in Indonesian Law: Should the Insolvency Test Mechanism Be Applied?," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, June 30, 2024, 199–218, https://doi.org/10.24090/volksgeist.v7i1.10079.

[52] Garcin, "Le Comité Interministériel de Restructuration Industrielle."

the value of its assets liquidated separately.[53] To this day, restructuring practices dominated by the Creditors' Bargain Model have tended to treat bankruptcy law merely as a collective mechanism for debt collection.[54] In fact, developments in modern insolvency law require the preservation of business continuity.[55] Without a confidential mediation process in the early stages of financial distress, a corporation's economic value is vulnerable to market reactions. Empirical studies show that companies whose cases are not resolved at the preventive stage and are forced to go through open court proceedings experience a significant decline in asset value and have a very low probability of successful restructuring.[56]

The successful outcome of a debt restructuring cannot be measured solely in terms of economic efficiency or creditors' debt recovery rates. Substantive justice demands protection for those most affected by a company's financial crisis. In this context, the Difference Principle, as proposed by John Rawls, is relevant as a foundation for analysis. This principle requires that economic and social structures be arranged to provide the greatest benefit to the most vulnerable or disadvantaged groups (the least advantaged).[57] In a corporate crisis, this group generally consists not of large-scale financial institutions, but rather of employees facing layoffs and SME business partners whose business survival depends heavily on the debtor's smooth operations.[58] The urgency of protecting workers is also in line with the direction of legal

[53] Finch, "Pre-Packaged Administrations and the Construction of Propriety"; Wood, *The Value within the Failed Company BTI - The Interpretation and Value of Corporate Rescue*.

[54] Thomas H. Jackson, "Worker Ownership and Section 8(a)(2) of the National Labor Relations Act," *The Yale Law Journal* 91, no. 5 (1982): 857–907, https://doi.org/10.2307/795932.

[55] Thim Wai Chen, "Theories of Corporate Insolvency: A Philosophical Analysis of the Corporate Rescue Mechanisms Under the Companies Act 2016," *UUM Journal of Legal Studies* 12 (2021), https://doi.org/10.32890/uumjls2021.12.2.8.

[56] Andre and Demmou, *Enhancing Insolvency Frameworks to Support Economic Renewal*, vol. 1738; Macorig and Francine, "La Prévention Des Difficultés Des Entreprises : Domaine Des Relations Privilégiées Entre Droit et Gestion."

[57] Rawls, *Justice as Fairness: A Restatement*.

[58] Karca D. Aral et al., "Buyer's Bankruptcy Risk, Sourcing Strategy, and Firm Value: Evidence from the Supplier Protection Act," *Management Science* 68, no. 11 (2022): 7940–57, https://doi.org/10.1287/mnsc.2021.4270; McCarthy, "A Class Apart: The Relevance of the EU Preventive Restructuring Directive for Small and Medium Enterprises."

reforms regarding corporate restructuring in Europe, which are beginning to prioritize workers' rights as a key element of a preventive framework.[59]

Based on this Rawlsian approach, the establishment of a confidential preventive restructuring forum can minimize the risk of market panic, which often accelerates corporate bankruptcy. Nevertheless, the confidentiality of the pre-litigation process also carries its own risks. Closed-door negotiations between a debtor and the majority of its creditors have the potential to result in a debt-reduction agreement (haircut) where the burden of adjustment is shifted to workers or small suppliers who were not involved in the negotiations. Therefore, if this out-of-court preventive mechanism is adopted into the Indonesian legal system, regulations must provide legal safeguards. These safeguards serve to ensure representation and the fulfillment of workers' right to information while the restructuring plan is being formulated.[60] Protection for vulnerable stakeholders should not be left solely to the discretion of companies, but must be institutionalized as legally binding restructuring governance rules.[61]

Based on the conceptual framework outlined above, the direction for strengthening restructuring laws in Indonesia can be formulated more concretely. First, it is necessary to establish an administrative body to serve as an early-stage mediator, for example under the coordination of the ministry responsible for economic affairs or business entities, adopting the facilitative functions of CIRI and CODEFI. Second, this mediation process must be protected by confidentiality rules subject to specific time limits to prevent bad-faith debtors from abusing the negotiation process. Third, this preventive mechanism is not intended to replace the role of the Commercial Court but is positioned as a preliminary (pre-insolvency) stage. If a restructuring agreement is successfully reached out of court, the settlement document can be submitted to the court through the PKPU mechanism to obtain homologation, thereby

[59] *Directive (EU) 2019/1023*; Andrea Pilati, "The Protection of Employees in the Early Warning Tools and Preventive Restructuring Frameworks: The EU Directive 2019/1023 ('Insolvency Directive') and the Italian Crisis and Insolvency Code (Legislative Decree No. 14/2019)," *Italian Labour Law E-Journal* 18, no. 1 (2025): 113–28, https://doi.org/10.6092/ISSN.1561-8048/22157.

[60] Pilati, "The Protection of Employees in the Early Warning Tools and Preventive Restructuring Frameworks."

[61] David Rönnegard and N. Craig Smith, "A Rawlsian Rule for Corporate Governance," *Journal of Business Ethics* 190, no. 2 (2024): 295–308, https://doi.org/10.1007/s10551-023-05333-z.

ensuring it has strong legal binding force.[62] This integration model is similar to the implementation of "sauvegarde accélérée" in France.[63] With this integrated restructuring scheme, Indonesia's bankruptcy legal framework is expected to preserve the economic value of companies while distributing the burden of restructuring proportionally and fairly. To ensure operational effectiveness without generating bureaucratic delays, this executive mediation body could be placed under the coordination of the Ministry Law and Human Rights or the Ministry of Economic Affairs, operating under a strict statutory time limit of three to four months—analogous to France's conciliation timeframe—to prevent bad-faith debtors from exploiting confidentiality as a dilatory tactic.

Conclusion

Strengthening the corporate restructuring system in Indonesia is urgently needed to address structural gaps in the Suspension of Debt Payments (PKPU) mechanism, which has thus far been reactive and has neglected the pre-litigation resolution phase. To address this gap, the national legal framework must adopt three fundamental characteristics of the French pre-insolvency mechanism: provisions for early intervention before an absolute default occurs; the presence of a state institution acting as a neutral facilitator in the early stages; and the enforcement of absolute confidentiality during negotiations. These three characteristics can be integrated through the establishment of a special administrative agency under government coordination that functions as a preliminary mediator. This mechanism is not designed to replace the role of the Commercial Court but rather operates as a complementary instrument, whereby the results of these confidential agreements are ultimately channeled into the PKPU to obtain legally binding homologation.

The preventive restructuring design proposed in this study is developed through the complementary application of Corporate Rescue Theory and John Rawls's Difference Principle. Corporate Rescue Theory is used to determine the orientation of the restructuring mechanism, specifically maintaining the going concern and preserving the economic value of a company that still has prospects for recovery. Based on this perspective, the restructuring mechanism needs to allow for intervention at the early stages of financial difficulties through structured negotiations and measured confidentiality. Confidentiality

[62] Christiawan, "Kekuatan Perjanjian Homologasi Terhadap Kedudukan Bank Sebagai Kreditur Separatis."

[63] *Code de Commerce*; Ghio, "Transposing the Preventive Restructuring Directive 2019 into French Insolvency Law."

is intended to preserve room for resolution before the formal restructuring process begins, while also reducing the risk of negative impacts from premature disclosure on the company's reputation, business relationships, and operational continuity. Its implementation must still take into account legal disclosure obligations as well as the rights and interests of affected parties.

Meanwhile, the Difference Principle is used to assess whether a restructuring plan distributes the benefits, risks, and burdens of recovery fairly, particularly for parties with relatively limited bargaining power or economic capacity. In this context, workers and business partners in the MSME sector require special attention, as the company's financial difficulties can impact their income, job security, and business sustainability. Therefore, the restructuring design must take into account the protection of rights, access to relevant information, and mechanisms for representation or the articulation of the interests of affected parties during the negotiation process. The confidentiality of the process should not serve as a basis for disregarding these rights.

The integrated application of both theories positions business sustainability and substantive justice as considerations that must be evaluated together in the formulation of preventive restructuring mechanisms. Corporate Rescue Theory focuses on saving the company and preserving economic value, while the Difference Principle provides a perspective for evaluating the distribution of protection and burdens among affected parties. Based on this framework, the development of preventive restructuring mechanisms in Indonesia must consider state facilitation in the stage preceding formal judicial proceedings, with adequate safeguards for the interests of debtors, creditors, workers, and business partners. Thus, restructuring is not only aimed at settling financial obligations but also at preserving viable businesses without neglecting fairness toward the parties bearing the impact of the company's financial difficulties.

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