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INSOL Europe: EC Directive Proposal on Preventive Restructuring

Reinhard Dammann

Clifford Chance; Paris

William Day

Arthur Cox; Dublin

Alberto Nuñez-Lagos

Uría Menéndez; Madrid

Stephen J. Taylor

Isonomy; London

Nicolaes W. A. Tollenaar

RESOR; Amsterdam



Proposal for a directive on Insolvency, Restructuring and Second Chance

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The European Commission is for the first time presenting a set of European rules on business insolvency today.

How do the EU Member States' insolvency frameworks currently perform?

The [2015 World Bank Doing Business Report](#) ranks countries according to the efficiency of their insolvency frameworks on a scale of 0-16. The EU average is 11.6, which is 5% below the OECD average for high income countries (12.2).

The efficiency of insolvency frameworks varies widely across EU Member States: some score below 8 in this report. World Bank indicators suggest that recovery rates vary between 30 % and 90% in the EU. Recovery rates are higher in economies where restructuring is the most common insolvency proceeding: in such economies creditors can expect to recover 83% of their claims, against an average of 57 % in liquidation procedures. The length of insolvency proceedings ranges from a few months to four years, with 14 Member States having procedures which last for two or more years.

Currently, in four Member States there is no possibility to access any type of defined procedure to restructure debts with creditors before their companies are actually insolvent or are already late with payments. In other five Member States there is the possibility to restructure before being insolvent, but under very strict access conditions.

Discharge periods for entrepreneurs in Member States range from 1 to 10 years, they are longer than 5 years in a substantial number of them and in a few Member States it is still impossible to obtain discharge at all. Discharge periods also often require repayment of a certain percentage of debts which makes the debt discharge impossible for many entrepreneurs who cannot ensure this partial repayment.

What issues will be addressed by the Directive?

With the current divergences between the EU's Member States' insolvency and restructuring frameworks, investors need to assess the impacts of different legal systems. This generates excessive costs and constitutes a barrier to cross-border investments in the Single Market.

Many viable companies are currently forced into insolvency because adequate restructuring options are not available at an early stage of a company's financial difficulties in every Member State. Restructuring also does not work for - companies operating across borders.

More efficient restructuring and insolvency frameworks can also contribute in a significant way to the efficient management of defaulting loans and avoiding the accumulation of such loans on banks' balance sheets. The high level of non-performing loans in some parts of the banking sector limits these banks' capacity to offer loans to households and companies.

A further problem is the lack or difficult access to second chance opportunities for entrepreneurs in many EU countries which prevents them from starting new activities and potentially creating new jobs.

What are the objectives of the Directive?

An EU-wide action will help all companies that are active on the EU's single market, either active in different EU countries or with different steps of their supply chains' spread out across the EU.

This initiative is a key deliverable under the Capital Markets Union [Action Plan](#) and the Single Market [Strategy](#). The Directive aims to reduce barriers to cross-border investment related to differences between the Member States' restructuring and second chance frameworks, and to increase investment and job opportunities in the single market. It will also reduce the number of unnecessary liquidations of viable companies, maximising value for creditors, owners and the economy as a whole, and increase the possibilities of cross-border restructurings. The Directive will reduce the costs and increase the opportunities for entrepreneurs to be given a fresh start. Finally, the Directive will improve the effectiveness of all restructuring, insolvency and second chance procedures with a view to reducing their length and costs.

What will be the benefits for businesses and entrepreneurs?

The Directive will ensure that entrepreneurs and businesses in financial difficulties can seek support at an early stage in order to keep their businesses going. They will benefit from a flexible and efficient restructuring framework to help them bring their company back on track. They will be able to keep control of their business and benefit from temporary breathing space from enforcement action to successfully negotiate a restructuring plan. This will support entrepreneurs and businesses in the first most challenging five years, as 50% of all businesses created in the EU don't survive in the first five years.

Under the proposed Directive over-indebted entrepreneurs will have access to full discharge of their debt after a maximum period of 3 years. This will remove the stigma of insolvency and business failure, increase the rate of self-employment and encourage entrepreneurship and innovation throughout the EU. At the same time, safeguards are put in place to avoid abuse and moral hazard.

What will be the benefits for employees?

A prime objective of this initiative is to ensure that viable businesses in financial difficulties can prevent their insolvency and liquidation and thus preserve their employees' jobs by staying in business.

A significant part of the 1.7 million jobs which are lost to insolvency every year is expected to be saved. Moreover, it is estimated that offering a true second chance to entrepreneurs to restart business activities would create 3 million jobs across Europe.

Throughout the preventive restructuring procedures, workers will enjoy full labour law protection of their rights as guaranteed by the existing EU legislation. Where their claims and interests are affected by a restructuring plan, workers will have the right to vote on it. Where a restructuring plan entails decisions likely to lead to substantial changes in work organisation or in contractual relations, the workers' rights to information and consultation guaranteed by [Directive 2002/14 on the information and consultation of employees](#) remain untouched. Rights of collective bargaining and collective action are also guaranteed by the Charter of Fundamental Rights. Workers' outstanding claims, such as wages, are fully protected during restructuring. Workers are in principle exempted from the stay of enforcement. That way, workers can continue to enforce their claims against the employer throughout the restructuring period.

Member States only have the possibility to apply a stay of enforcement where they protect workers' claims by other means. For example, under current EU law, Member States have to put in place guarantees of the payment of workers' claims in the event of the employer's formal insolvency proceedings. Where Member States choose to extend the coverage of such guarantees also to preventive restructuring procedures they could apply the stay for as long as the guarantee lasts, but only up to the amount that the guarantee covers.

What will be the benefits for consumers?

The proposal does not create obligations for Member States in the area of consumer insolvencies. However, Member States may, apply the provisions on debt-discharge for entrepreneurs to consumers. This is a non-binding provision, but the Commission encourages them to do so. Insolvent private individuals could then benefit from a discharge period of a maximum of three years, encouraging debt repayment without hindering the right to a decent life. Consumer discharge has an impact not only on consumer welfare, but also on economic productivity. Consumers that are locked in debt for sustained periods of time will not be able to significantly contribute to the economy, neither in production, nor consumption.

What will be the benefits for investors?

Investors will benefit from this initiative in several ways. First, recovery rates should increase once mechanisms to detect financial difficulties and restructure at an early stage are in place. Second, the proposed harmonisation measures will reduce the burden of risk assessment when considering investing in another EU country or in several Member States. This will incentivise cross-border investment. Finally, the reduction of the length of procedures will increase predictability for investors.

What will be the benefits for the banking sector in the context of their non-performing loans?

The level of non-performing loans, which increased rapidly in most Member States following the economic crisis, remains high. High levels of non-performing loans have a direct consequence on banks' capacity to support growth. The resilience of non-performing loans in the European Union shows that further action needs to be taken. Measures to increase the effectiveness of restructuring, insolvency and second chance frameworks would contribute to a more efficient management of defaulting loans. They would also reduce accumulation of non-performing loans on bank balance sheets. Finally, they can also serve to avoid future build-up of non-performing loans. In this way, reforms of insolvency laws can complement other ongoing reforms at EU level in the banking sector and as regards capital markets.

What should the role of courts be in insolvency procedures?

Involving courts in restructuring may raise costs and as a consequence discourage restructuring. The proposed framework only involves courts or administrative authorities to the extent necessary to protect the interests of creditors and other interested parties. This will help reduce the length and costs of procedures for debtors as well as creditors. It will also reduce the workload of courts in EU countries where insolvency proceedings are very cumbersome.

The reduction of court formalities will not have an impact on creditors' rights since the confirmation of the restructuring plan by a court or an administrative authority is always ensured when dissenting parties' rights are affected and where the restructuring plan provides for new financing.

Will the proposal harmonise core aspects of the insolvency frameworks?

The proposal sets common principles and, where necessary, more targeted rules. It focuses on the key priorities of making sure that effective frameworks for preventive restructuring, insolvency second chance frameworks, as well as discharge procedures are available. In addition, it introduces measures to increase the efficiency – and in particular reduce the length – of all insolvency procedures.

The proposal does not harmonise core aspects of formal insolvency procedures such as conditions for opening insolvency proceedings, definitions of insolvency or ranking of claims. This minimum approach is important since some Member States already have well-functioning systems in place. The proposal gives Member States the flexibility to achieve the objectives by applying the rules in a way that is suitable in their national contexts so it can be integrated into existing social security frameworks, financial regulations and business law.

What is the scope of the proposal?

The proposed Directive will apply to entrepreneurs, be they incorporated or not. It will apply both to large, medium, small or micro-enterprises engaged in business, trade or other professional activities. The proposed Directive will not apply to financial institutions since these are subject to dedicated sectorial rules. The proposal will also not interfere with purely contractual restructurings based on the agreement of all parties involved which take place outside a specific restructuring procedure.

What is the link between this proposed Directive and the Insolvency Regulation?

The [Insolvency Regulation](#) focuses on resolving the conflicts of jurisdiction and laws in cross-border insolvency proceedings and ensures the recognition of insolvency-related judgments across the EU. It does not harmonise the substantive insolvency laws of the Member States. The proposed Directive focuses on harmonising the principles of restructuring proceedings and second chance frameworks. The two instruments will complement each other.

Will all entrepreneurs be discharged of their debts after a maximum period of 3 years?

over-indebted entrepreneurs will have access to automatic discharge of their debt after a maximum period of three years. Any disqualifications from taking up or pursuing a business linked to the over-indebtedness will also end on this date. Member States may put in place adequate safeguards to prevent abuse, such as excluding access to discharge or laying down longer discharge periods or disqualification periods in justified circumstances, for example where the debtor acted dishonestly or in bad faith. Longer or indefinite disqualification periods may also apply where ethical rules of a profession have been violated or in cases of criminal convictions.

Member States will be able to impose repayment obligations as a condition for obtaining a full discharge. But any such partial repayment obligation must take into account the individual situation of the entrepreneur and must be proportionate to his or her disposable income during the discharge period.

What does the proposal foresee to help detect financial difficulties? ?

The proposal aims at developing a culture of resorting to preventive restructuring as early as possible. Under the proposal, Member States will have to give businesses access to early warning tools, which can detect financial difficulties in order to take appropriate action at an early stage. These tools may include accounting, reporting and monitoring duties, as well as early warning mechanisms by third parties.

Will the proposal create a new procedure for early restructuring?

The proposal aims at putting in place common core elements for preventive restructuring frameworks. These frameworks can consist of one procedure or of several procedures or measures that can be combined by the business owner in financial difficulties. EU countries which have such a procedure in place may choose to amend their existing framework without the need to create an entirely new procedure. Member States which do not have such a procedure in place will have to implement one.

Does the proposal contain any principles for facilitating the continuation of debtor's businesses while restructuring?

The proposal sets up a 'debtor in possession' procedure. It allows a business owner in financial difficulties to remain in control of the assets and the day-to-day operation of their business. The appointment of an administrator will not be obligatory in all cases. In either case businesses will continue to operate while being restructured.

Will it be possible for creditors to enforce their individual claims during the restructuring process?

The proposal gives a debtor a time-limited "breathing space" (stay) from enforcement actions to successfully achieve the negotiations on a restructuring plan. However, creditors will be able to lift the stay under certain conditions.

The stay can initially be no longer than four months. It can be extended under certain conditions if there is sufficient progress in the negotiations on a restructuring plan but the maximum total duration of the stay cannot exceed 12 months.

Will dissenting minority creditors be able to block a restructuring procedure?

Dissenting minority creditors and shareholders will not be allowed to obstruct the adoption of restructuring plans of a viable business ("hold-out"), provided that their legitimate interests are protected. The proposal sets out the conditions under which a judicial or administrative authority can confirm a restructuring plan that is not supported by all classes of creditors.

Does the proposal provide any kind of protection for new financing and interim financing?

New financing (i.e. financing which is necessary to implement the restructuring plan) and interim financing (allowing the business to continue to operate during the negotiation of the restructuring plan) will be protected under specific conditions in order to support the restructuring process of the company while negotiations are ongoing. This incentivises new lenders to financially support a restructuring plan and should ensure that a restructuring plan can successfully be implemented.

Does the proposal include any rules on courts or insolvency practitioners?

The proposal provides that judges and practitioners in the field of restructuring and second chance must receive the proper training. The members of the judiciary in charge must have the necessary expertise and specialisation. Practitioners must be appointed in a transparent way, must be subject to appropriate oversight and their remuneration should incentivise a timely and efficient resolution of procedures. This should enhance the effectiveness of the insolvency procedures and reduce their costs and length. The proposal does not create or regulate a profession of insolvency practitioners.

Does the proposal include any rules on reducing the length of insolvency procedure?

The proposal provides for flexible preventive restructuring frameworks and reduces court formalities where necessary and appropriate for safeguarding the interests of all stakeholders. It contains several concrete provisions aimed at reducing the length of restructuring procedures, most notably the limitations on the stay period. The specialisation of judges and practitioners and the use of digital technologies in the context of restructuring, insolvency and second chance is also expected to lead to a considerable shortening of these procedures.

How will the Commission assess that EU countries apply these principles?

The Directive, once adopted by the co-legislators, will have to be transposed into national law in all Member States. Moreover, it lists a number of statistics the EU countries will have to collect, e.g. the number of preventive restructuring procedures, the length of insolvency procedures. EU countries will then communicate these statistics to the Commission every year.

For further details:

[IP/16/3802](#)

MEMO/16/3803

Press contacts:

[Christian WIGAND](#) (+32 2 296 22 53)

[Melanie VOIN](#) (+ 32 2 295 86 59)

General public inquiries: [Europe Direct](#) by phone [00 800 67 89 10 11](#) or by [email](#)

1. REGULATION ON THE STAY OF THE PROCEEDINGS

Article 5 bis. *Notification of negotiations and effects thereof.*

1. The debtor may notify the Court that is competent to issue a declaration of opening its insolvency proceedings of initiation of negotiations to reach a refinancing composition of those foreseen in Article 71 bis.1 and in Additional Provision four, or to obtain adhesions to an advance proposal of composition under the terms foreseen in this Act.

In the event of requesting an out of court payment composition, once the insolvency practitioner proposed accepts office, the Business Registrar of the Notary Public who has been requested to appoint the insolvency practitioner shall notify the Court that is competent to declare the insolvency proceedings, of his own motion, of opening of the negotiations.

2. That notification may be made at any time prior to expiry of the term established in Article 5. Once the notification has been issued prior to that moment, the duty to request voluntary declaration of opening of the insolvency proceedings shall not be required.

3. The Court clerk shall order publication on the Public Insolvency Register of the statement of the resolution that records the notification lodged by the debtor or, in cases of an out of court payment composition being negotiated, by the Notary Public of Business Registrar, under the terms determined by the implementing regulations.

Should the debtor specifically request notification of the negotiations to be confidential, the order to publish the statement of the resolution shall not be issued.

The debtor may request that the confidential nature of the notification be raised at any time.

4. From presentation of the communication, no judicial or extrajudicial foreclosures may be performed on assets or rights that may be necessary to continue the professional or corporate activity of the debtor until any of the following circumstances concurs:

- a) formalisation of the refinancing agreement foreseen in Article 71 bis. 1;
- b) an order is handed down admitting the application for judicial homologation of the refinancing agreement to consideration;
- c) an extrajudicial agreement on payments is adopted;

- d) the necessary number of adhesions has been obtained to admit an early composition proposal to process;
- e) or if the insolvency proceedings are declared open.

In this notification, the debtor shall state what foreclosures are being brought against his assets and which befall assets he considers necessary for continuity of his professional or corporate activity, which shall be recorded in the decree by which the Court Clerk declares notice of the proceedings to have been made. In the event of dispute over whether the asset is necessary, the decree may be appealed before the Court that is competent to hear the insolvency proceedings.

Foreclosure of such assets or rights that are in process shall be suspended by the Court hearing such, on submission of the resolution by the Court Clerk, recording that notification. The limitations foreseen in Paragraph One of this Section shall be raised if the Court that is competent to hear the insolvency proceedings resolves that the assets or rights affected by the foreclosure are not necessary for continuity of the professional or corporate activity and, in all cases, once the terms foreseen in the following Section have elapsed.

Nor may unique foreclosures be initiated or, where appropriate, individual judicial or extrajudicial foreclosures shall be suspended, if promoted by creditors of the financial liabilities referred to in Additional Provision Four on any other of the debtor's assets or rights, as long as documentary evidence is provided that a proportion not lower than 51 per cent of the financial liabilities has specifically supported commencement of the negotiations aimed at signing a refinancing agreement, undertaking not to commence or continue individual foreclosures against the debtor whilst such negotiations are taking place.

The terms set forth in the preceding four Paragraphs shall not prevent creditors with in rem securities from foreclosing their security interests against the properties, assets and rights their security befalls, without prejudice to the fact that, once the proceedings are initiated, they shall be halted whilst any of the actions foreseen in the first Paragraph of this Section have not been performed or the term foreseen in the following Section has not elapsed.

In all cases, the provisions contained in this Section exclude foreclosure proceedings intended to settle Public law credits.

5. Once three months have elapsed from notification to the Court, whether or not the debtor has reached a refinancing composition, or an extrajudicial payment composition, or the necessary adhesions for admission to consideration of an early composition proposal, the debtor must apply for the declaration of opening of insolvency proceedings within the following working month, unless this has already been applied for by the insolvency practitioner, or the debtor is not a state of insolvency.

6. After filing the notification foreseen in this Article, no other may be filed by the same debtor within the term of one year.

2. THE PRE-INSOLVENCY REFINANCING AGREEMENT AND CRAMDOWN

Addition Provision four. *Homologation of refinancing agreement.*

1. A refinancing agreement may be judicially homologated if it has been signed by creditors who represent at least 51 per cent of the financial liabilities, fulfilling the conditions foreseen in Letter a) and numbers 2 and 3 od Letter b) of Section 1 of Article 71 bis, at the moment of the adoption. Resolutions adopted by the majority described may not be subject to termination pursuant to the terms set forth in Paragraph 13 of this Provision. The majorities required in the following Paragraphs of this Provision shall be required in order to extend its effects. The majorities required in the following Paragraphs of this Provisions shall be required in order to extend its effects.

For the purposes of calculation of the majorities indicated in this Provision, financial liabilities held by creditors who have the status of an especially related person pursuant to Section 2 of Article 93 shall not be taken into account but, notwithstanding this, such creditors may be affected by the homologation foreseen in this Additional Provision.

For the purposes of this Provision, holders of any financial debts shall be considered financial liability creditors, regardless of whether or not they are subject to financial supervision. Such item excludes creditors for labour credits, creditors for commercial operations and creditors for Public Law liabilities.

For the purposes of calculation of the necessary majorities for judicial homologation of a refinancing agreement, and extension of its effects to not participating or dissenting creditors, it shall be construed, in the case of agreements subject to a syndication regime or clause, that

the creditors subscribe the refinancing agreement when a vote in favour thereof is issued by those representing at least 75 per cent of the liabilities represented by the agreement, except if the rules that regulate the syndication establish a lower majority, in which case the latter shall prevail.

A homologated refinancing agreement may be voluntarily adhered to by the other creditors who are not holders of financial liabilities or Public Law liabilities. Such adhesions shall not be taken into account for the purposes of calculation of the majorities foreseen in this Provision.

2. For the purposes of this Provision, the in rem security value shall be deemed as that enjoyed by each creditor arising from the deducing from the nine tenths of the fair value of the asset on which that security is constituted, the debts pending that enjoy the pre-emptive guarantee to the same asset, without the value of the security being lower than zero in any case, nor greater than the value of the credit held by the relevant creditor nor greater than the value of the maximum mortgage or pledge liability agreed.

Only for these purposes, fair value shall be construed as:

- a) In the case of securities listed on an official secondary market or another regulated market, or in monetary marked instruments, the average weighted price which has been negotiated in one or several regulated markets in the last quarter prior to the date of commencement of the negotiations to reach the refinancing agreement, pursuant to the certification issued by the company governing the official secondary market or the regulated market concerned.
- b) In the case of real estate, that resulting from the report issued by a recognised appraisal company registered with the Special Register at the Bank of Spain.
- c) In the case of assets other than those stated in the preceding Letters, that resulting from the report issued by an independent expert pursuant to the valuation principles and provisions generally recognised for such assets.

The reports foreseen in Letters b) and c) shall not be necessary when that value has been determined by an independent expert, within the six months prior to the date of

commencement of the negotiations to reach the refinancing agreement or when cash, current accounts, electronic money or fixed-term deposits are involved.

If new circumstances arise that may significantly modify the fair value of assets, a new report by an independent expert must be submitted.

The appointment of the independent expert in the cases foreseen in this Section shall be performed pursuant to Article 71 bis. 4.

In the case of the security in favour of a same creditor befalling several assets, the rule in Paragraph one shall be added to the final result applied to each one of the assets, without the joint rule value of the collateral exceeding the value of the relevant claim.

In the case of a collateral constituted indivisibly in favour of one or more creditors, the relevant value of the collateral for each creditor shall be that, arising from applying to the total value of the collateral the proportion assigned to each of them, according to the rules and covenants that govern the indivisibility, without prejudice of the rules that are applicable to syndicated agreements in each case.

3. Creditors holding financial liabilities who are not signed the refinancing agreement, or who have expressed disapproval thereof, and whose claims do not enjoy an in rem security, of the part of the claims that exceed the value of the in rem security, shall have the following effects agreed in the refinancing agreement extended to them by the judicial homologation:

- a) If the agreement has been signed by creditors representing at least 60 per cent of the financial liabilities, the moratoriums, whether of principal, of interest, or any other sum owed, with a term not exceeding five years, or conversion of the debt to participation loans during the same term.
- b) If the agreement has been signed by creditors representing at least 75 per cent of the financial liabilities, the following measures:
 - 1. A moratorium, with a term of five years or more, but in no case greater than ten;
 - 2. Write-downs;
 - 3. Conversion of the debt to shares or stakes in the debtor company. In that case:

i) Creditors who have not signed the refinancing agreement, or who have expressed their disapproval thereof, may opt between conversion of the debt to capital, or a write-down equivalent to the amount of the face value of the shares or stakes that it shall be relevant for them to under write or take on and, where appropriate, the relevant issue or undertaking premium. If there is a lack of specific indication, it shall be understood that said creditors opt for that write-down.

ii) The agreement to increase the capital of the debtor required to capitalize the credits must be adopted by the majority foreseen, respectively, for limited liability companies and public limited companies under Articles 198 and 201.1 of the Consolidated Text of the Capital Companies Act, approved by Royal Legislative Decree 1/2010, dated 2nd July. For the purposes of Article 301.1 of said Consolidated Text of the Capital Companies Act, the financial liabilities shall be understood to be liquid, mature and callable.

4. The conversion of debt into participation loans for the term of five years or more, but in no case exceeding ten, or into convertible bonds or into subordinate loans or into capital interest loans, or into any other financial instrument with a different rank, maturity or characteristics to the original debt.

5. Assignment of assets or rights in the creditors in payment of all or part of the debt.

4. The judicial homologation shall cover creditors holding financial liabilities who have not signed the refinancing agreement, or who have expressed their disapproval thereof, for the part of the claim that does not exceed the in rem value, with the effects stated in the previous Section, as long as one or more of those effects have been decided, with the scope so resolved, by the following majorities, calculated according to the proportion of the value of the collateral accepting on the total value of the collateral established:

a) Of 65%, in case of the measures foreseen in Letter a) of the preceding Section;

b) Of 80%, in case of the measures foreseen in Letter b) of the preceding Section.

5. The competence to decide that homologation shall lie with the mercantile court that, where appropriated, is competent to declare the insolvency proceedings open.

The petition may be formulated by the debtor or by any creditor who has signed the refinancing agreement and shall be accompanied by the refinancing agreement adopted, by a certification by the auditor on the sufficiency of the majorities required to pass the resolutions for the purposes foreseen in each case, by the reports that have been issued, as appropriate, by independent experts appointed according to Article 71 bis.4 and by the certification of the agreement to increase capital in the event of it already having been adopted. If a certification, appraisal or report of those foreseen in Paragraph 2 of this Provision has been issued, it shall also be attached to the petition. The Court, having examined the homologation petition, shall hand down an order admitting it to consideration and it shall declare a moratorium of unique enforcements until the homologation is resolved.

The Court Clerk shall order publication of the order on the Public Insolvency Register by means of an announcement that shall contain the data that identifies the debtor, the competent court, the number of the judicial homologation proceedings, the date of the refinancing agreement and the effects of the measures these contain, stating that the agreement is available to creditors at the competent Mercantile Court where it has been deposited for publicity, even by telematics means, of this content.

6. The Court shall grant the homologation as long as the agreement complies with the requisites foreseen in Paragraph one of the Provision and it shall declare the extent of the relevant effects when the auditor certifies the concurrence of the majorities required in Sections three or four.

The ruling approving the homologation of the refinancing agreement shall be adopted by urgent procedure within the term of fifteen days and shall be published by announcement in the Public Insolvency Register and in the Official State Gazette, by means of a statement that shall contain the data foreseen in the last Paragraph of the preceding Section.

7. Within fifteen days following the publication, creditors holding financial liabilities affected by the judicial homologation who have not signed the homologation agreement, or who have expressed their disapproval thereof, may challenge it. The reasons to challenge shall be limited exclusively to the concurrence of the percentages required in this provision, and the assessment of the disproportionate nature of the sacrifice required.

All the challenges shall be processed jointly as in insolvency procedural plea and the debtor and rest of the creditors who are parties to the refinancing agreement shall be notified of this so that they may oppose the challenge. The ruling that resolves the challenge to the homologation, which shall be handed down within a term of 30 days, shall not be liable to a remedy of appeal and the same publicity foreseen for the homologation resolution shall be given thereto.

8. The homologation of the refinancing agreement takes effect, in all cases and without the possibility of suspension, from the day following publication of the judgment in the Official State Gazette.

9. The creditors holding financial liabilities who have not signed the homologation agreement, or who have expressed their disapproval thereof but who are affected by the homologation, shall preserve their rights against those bound jointly and severally with the debtor and before its backers and guarantors, who may not invoke neither the approval of the refinancing resolution nor the effects of the homologation to their detriment. With regard to the financial creditors who have signed the refinancing agreement, maintenance of their rights before the other parties bound, backers or guarantors shall depend on what has been decided as to the respective legal relation.

10. In enforcement of the homologated refinancing agreement, the Court may order cancellation of the seizures carried out in proceedings to enforce debts affected by the refinancing agreement.

11. In the event of the debtor not complying with the terms of the refinancing agreement, any creditor, whether or not he has adhered to it, may apply to the same Court that issued the homologation, for the declaration of breach thereof, through the equivalent procedure to the insolvency plea, that shall be notified to the debtor and to all the creditors who have appeared in order for them to be able to oppose it.

Once the breach has been declared, the creditors may instigate the declaration opening the insolvency proceedings or commence individual foreclosures. The judgment resolving the incident shall not be subject to appeal.

If the in rem securities are foreclosed, and except if it is agreed in the agreement that in the event of breach, its termination shall take place, the following rules shall apply:

a) If the amount obtained from the foreclosure were to exceed the original debt, or the balance pending thereof, had the agreement not existed, the difference between the first and second amount shall be considered as an excess for the purposes of Articles 674 and 692 of the Civil Procedure Act, Article 133 of the Mortgage Act and related provisions.

b) If the sum obtained from the enforcement is lower than the original debt, or the balance pending thereof had the agreement not been reached, but higher than that resulting from applying Paragraph 4 above, it shall be considered that there is no excess or remainder, the creditor taking charge of the whole sum resulting from the foreclosure,

c) If the sum resulting from the enforcement is lower than that resulting from applying Paragraph 4 above, the difference between both shall be considered a remainder of the credit.

12. Once a homologation is applied for, another may not be requested by the same debtor for the term of one year.

13. Judicially homologated refinancing agreements may not be subject to termination actions. Exercise of the other challenge actions shall be subject to the terms set forth in Article 72.2.

3. SAFE HARBOUR

Article 71 bis. *Special regime of certain refinancing agreements.*

1. Refinancing compositions reached by the debtor may not be revoked, nor the businesses, acts and payments, whatever their nature and the way in which they have been performed, and the guaranteed constituted to execute them, when:

(a) By virtue thereof, at least, a significant extension of the credit available of the amendment of extinction of its obligations, either by extension of their term of expiry, or the establishment of others contracted to substitute these are secured, as long as these respond to a feasibility plan that permits continuity of the professional or business activity in the short and medium term; and

(b) prior to the declaration opening the insolvency proceedings:

1. An agreement has been signed by creditors whose claims represent at least three fifths of the liabilities of the debtor on the date of adopting the refinancing agreement. For the purposes of calculating of that majority of liabilities, it shall be deemed that, in agreements subject to a syndication regime all the creditors subject to that agreement have been signed the refinancing agreement when a vote in favour thereof is issued by those representing at least 75 per cent of the liabilities affected by the syndication agreement, except if the rules regulating the syndication agreement establish a lower majority, in which case the latter shall be applicable.

In the case of group agreements, the percentage stated shall be calculated both on an individual basis, in relation to each and every one of the companies affected, an in relation to the credits of each group or subgroup affected, and in relation to the credits of each group or subgroup affected, and in both cases excluding from the calculation the liabilities deriving from loans and credits granted by companies in the group.

2. A certification by the accounts auditor to the debtor has been issued regarding the sufficiency of the liabilities established to adopt the composition. If one does not exist, the auditor shall be the one appointed for that purposes by the Business Registrar of the domicile of the debtor and, if a group or subgroup of companies, that of the parent company.
3. The composition has been formalised in a public instrument that shall be attached with all the documents that justify its content and compliance with the preceding requisites.

2. Acts that, having been performed prior to the declaration opening insolvency proceedings, not included in the previous Paragraph, but that fulfill all the following conditions, either individually or jointly with others that have been performed in executed of the same refinancing composition agreement may not be revoked:

- (a) That increase the prior proportion of assets over liabilities;
- (b) that the resulting current assets are greater than or equal to the current liabilities;

- (c) that the value of the collateral resulting in favour of the creditors acting does not exceed nine tenths of the value of the debt pending in favour thereof, nor the proportion of collateral on debt pending that existed prior to the resolution. The value of the collateral is understood to be that defined in Paragraph 2 of Additional Provision four.
- (d) that the interest rate applicable to the subsisting debt, or resulting from the refinancing composition in favour of the creditor or creditors intervening does not exceed the figure applicable to the prior debt by more than one third.
- (e) that the composition has been formalised in a public instrument signed by all the parties intervening therein, and with an specific record of the reasons that justify, from the financial point of view, the diverse acts and transactions performed between the debtor and the creditors intervening, with special mention of the conditions foreseen in the preceding Letters.

In order to verify the fulfilment of conditions a) and b) above, due consideration shall be given to all the consequences of an asset or financial based nature, including fiscal ones, the advanced maturity clauses, or other similar ones, arising from the acts carried out, even when these concur with regard to creditors who are not intervening.

The aforesaid conditions must concur at the moment of executing the public deed that records the compositions.

3. The resolutions regulated in this Article shall only be liable to the challenged pursuant to the terms set forth in Paragraph to of the following Article.

4. Both the debtor as well as the creditors may request appointment of an independent expert to report on the fair and achievable nature of the feasibility plan, on the proportionality of the collateral according to normal market conditions at the moment of signing the composition, as well as the other mentions that, when appropriate, are foreseen by the applicable rules. When the report contains reserves or limitations of any kind, their importance shall be specifically evaluated by the parties signing the composition.

Appointment of an independent expert shall be the remit of the Business Registrar of the domicile of the debtor. If the refinancing composition affects several companies in the same

group, the report may be a sole one and prepared by a sole expert appointed by the registrar of the domicile of the dominant company, if it is affected by the resolution or, failing that, to the domicile of any of the companies in the group.

The appointment shall take place between professionals who are appointed for the function. Those experts shall be subject to the conditions of Article 28 and the causes of incompatibility established for the auditors in the accounts auditing legislation.

Amendment to the Bankruptcy Act in connection with the introduction of the possibility to confirm a private restructuring plan in order to prevent bankruptcy (Act on the confirmation of a private restructuring plan in order to prevent bankruptcy)

BILL

We, Willem-Alexander, by the grace of God, King of the Netherlands, Prince of Orange-Nassau, etc.

Greetings to all who shall see or hear these presents! Be it known:

As We have formed the view that it is desirable to insert into the Bankruptcy Act a scheme whereby a Court may proceed to confirm a private plan for the restructuring of debts where this is necessary to ward off an impending bankruptcy;
We, therefore, with the Advisory Chapter of the Council of State, and in consultation with the States General, so having approved and decreed, likewise hereby approve and decree:

Article I

The **Bankruptcy Act** is amended as follows:

A

After Article 3c there is inserted Article 3d that reads:

Article 3d [Stay of a bankruptcy request]

1. Where the debtor has proposed a restructuring plan within the meaning of Article 370 aa bankruptcy petition filed against the debtor is suspended for a term not exceeding two months, which period may be extended once by a term not exceeding two months, unless:
 - a. the debtor cannot reasonably expect the Court to confirm the restructuring plan pursuant to Article 381, or
 - b. there are other grounds that oppose a suspension being granted.
2. The Court lifts the suspension where there are grounds that oppose the continuation thereof.
3. The Court takes no decisions of the nature referred to in the first and second paragraphs other than after it has given the debtor and the creditor who filed the petition for bankruptcy the opportunity to express their views in a manner to be determined by the Court.
4. The application for a bankruptcy declaration expires by operation of law when the decision to confirm the restructuring plan with the meaning of Article 381 has become effective.

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B

In Article 5, first paragraph, "and 363, first paragraph" is replaced by: "363, first paragraph, 375, 376, first paragraph, 377, 380, first paragraph, and 381, third and fourth paragraphs".

C

After Article 42 there is inserted an Article 42a that reads:

Article 42a

Where the debtor, prior to the bankruptcy order, has created a right of pledge or mortgage as security for obligations under a new loan that was extended to the debtor for the purpose of enabling payments to be made that were reasonably necessary for the continuation of the enterprise during an effort to implement a restructuring plan as referred to in Article 370, in the absence of proof to the contrary, it is presumed that there was no prejudice to creditors nor knowledge thereof within the meaning of Article 42.

D

In Article 47, after "was applied for" there is inserted "unless examination of this application has, pursuant to Article 3d, been suspended".

E

A paragraph is added to Article 252 reading:

2. The provisions of this Article do not apply where, in the three years preceding the filing of the application, the debtor already proposed a restructuring plan that, in a vote as referred to in Article 378, was rejected by all classes or in respect of which the Court denied confirmation pursuant to Article 381.

F

A paragraph is added that follows the seventh paragraph of Article 287a and that reads:

8. The provisions of this Article do not apply where, in the three years preceding the filing of the application, the debtor already proposed a restructuring plan that, in a vote as referred to in Article 378, was rejected by all classes or in respect of which a Court refused confirmation pursuant to Article 381.

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G

A new chapter is inserted after Article 368 that reads as follows:

SECOND CHAPTER CONFIRMATION OF A PRIVATE RESTRUCTURING PLAN

§ 1 General provisions

Article 369 [Scope of application]

1. The provisions of this chapter do not apply to a debtor who is a natural person exercising neither an independent profession nor a business, nor to bank within the meaning of Article 212g, part a, nor to an insurer within the meaning of Article 213.
2. The provisions in this chapter in respect of enfranchised creditors or shareholders apply to the creditors and shareholders who are entitled to vote pursuant to Article 378, second paragraph.
3. The provisions in this chapter in respect of the Court apply to the Court that, pursuant to Article 2, would be competent to declare the debtor bankrupt.
4. Where the debtor proposes a restructuring plan as referred to in Article 370, first paragraph, that concerns claims of which the beneficial interest, entirely or mostly, lies with a person other than the creditor, then, instead of the creditor, that other person is entitled, pursuant to Article 378, second paragraph, to vote on the restructuring plan as he sees fit. In that case the provisions of this chapter in respect of the creditor apply to that other person.
5. Where the debtor proposes a restructuring plan as referred to in Article 370, first paragraph, that also concerns shares for which depositary receipts have been issued, then, instead of the shareholder, the holders of the depositary receipts are entitled, pursuant to Article 378, second paragraph, to vote on the restructuring plan as they see fit. In that case the provisions of this chapter in respect of the shareholder apply to the depositary receipt holders. The same holds for usufructuaries.
6. Where the debtor is an association (vereniging) or a cooperative (coöperatie) the provisions of this chapter in respect of shareholders apply, mutatis mutandis, to the members.
7. The provisions in this chapter in respect of creditors apply mutatis mutandis to sureties, third parties with property against which creditors of the debtor can exercise rights, and fellow debtors with rights towards the debtor on the basis of Articles 10 or 13 of Book 6 of the Civil Code or on the basis of a contractual arrangement.
8. Where the Court appoints an expert as referred to in Article 371, first paragraph, the provisions of this chapter in respect of the debtor apply, mutatis mutandis, to that expert.
9. The provisions in this chapter do not apply to rights of employees in the service of the debtor that arise from contracts of employment within the meaning of Article 610 of Book 7 of the Civil Code.
10. The provisions of this chapter do not apply where, in the preceding three years, the debtor already proposed a restructuring plan that, in a vote as referred to in Article 378, was rejected by all classes or in respect of which a Court denied confirmation pursuant to Articles 153, 272 or 381.

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§ 2 Proposing and voting on a restructuring plan**Article 370** [The proposing of a restructuring plan by the debtor]

1. A debtor who foresees his inability to continue paying his debts as they fall due may propose a restructuring plan to his creditors and his shareholders, or a number of them, that allows for a modification of their rights.
2. If it is reasonably likely that, following the confirmation of the restructuring plan referred to in the first paragraph, sureties, third parties with property against which creditors of the debtor can exercise rights, or fellow debtors of the debtor, will be unable to continue paying their debts as they fall due, the restructuring plan may also allow for a modification of the rights of creditors towards such sureties, third parties or fellow debtors. In that case the provisions of this chapter in respect of the debtor also apply to these sureties, third parties and fellow debtors, subject to the proviso that the debtor remains exclusively entitled to file an application as referred to in Articles 376, first paragraph, 377, and 380, first paragraph.
3. Where the debtor is a legal person, Articles 38 and 107a and Title 5.3 of Book 2 of the Civil Code, neither any provisions under law nor any arrangements agreed upon between the entity and its shareholders in respect of decision-making by the general meeting apply to the proposing of a restructuring plan as referred to in the first paragraph and to the execution of a restructuring plan that has been confirmed by the Court pursuant to Article 381.

Article 371 [The proposing of a restructuring plan by the creditor]

1. If it can reasonably be assumed that a debtor will be unable to continue paying his debts as they fall due, a creditor may request the debtor in writing to propose a restructuring plan within the meaning of Article 370. If, within one week, the debtor does not undertake to do so, or if, after having given this undertaking, one month has elapsed and no restructuring plan has yet been proposed which has a reasonable prospect of being confirmed by the Court pursuant to Article 381, the Court may, at the creditor's request, appoint an expert who will then have the right, to the exclusion of the debtor, to propose a restructuring plan.
2. The Court may also, on the application of a creditor, appoint an expert as referred to in the first paragraph where the debtor has proposed a restructuring plan which, upon a vote as referred to in Article 378, has not been accepted by a single class or in respect of which the Court has denied confirmation on the basis of Article 381.
3. Upon request or of his own motion, the debtor must provide, in accordance with any directions thereby given, the expert referred to in the first and second paragraphs with all information and cooperation which the expert states he needs for the exercise of his duties or in respect of which the debtor knows, or ought to know, that these are relevant.
4. Save in the context of the provisions of this chapter, the expert does not share with others the information obtained pursuant to the third paragraph.
5. The applications referred to in the first and second paragraphs are examined in chambers. The Court takes no decision other than after it has given the debtor and the

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creditor who lodged the request the opportunity to express their views in a manner to be determined by the Court.

6. No appeal may be filed against the decision of the Court as referred to in the first paragraph.

Article 372 [Executory contracts]

1. A debtor within the meaning of Article 370, first paragraph, may make a proposal to a counterparty with whom he has concluded an executory contract seeking to modify that contract. If the counterparty does not agree to the proposal, the debtor may terminate the contract, provided that the termination takes at a time at which, under local custom, such agreements usually terminate and the agreed or customary notice period is observed, subject to the proviso that a three month termination period will in any case suffice.
2. Upon a modification or termination referred to in the first paragraph, the counterparty obtains a claim for damages against the debtor. Chapter 10 of Title 1 of Book 6 of the Civil Code applies. The restructuring plan referred to in Article 370, first paragraph, may allow for a modification of this claim for damages.
3. The proposing of a restructuring plan as referred to in the first paragraph, as well as events that are directly linked thereto, do not constitute a ground for modification of obligations or duties of, or towards, the debtor, for the suspension of the performance of an obligation towards the debtor and for the rescission of a contract concluded with the debtor.

Article 373 [Class formation]

Where a restructuring plan concerns creditors or shareholders who have interests or rights or who would receive rights under the restructuring plan that are so different that they cannot be said to be in a comparable position, those creditors and shareholders must be placed into different classes. In any case creditors or shareholders that have a different rank in bankruptcy must be placed into different classes.

Article 374 [The restructuring plan]

1. The restructuring plan must contain all the information that the enfranchised creditors and shareholders need to form an educated view on the restructuring plan before the votes takes place referred to in Article 378, and must in any event include:
 - a. the class formation and the criteria on the basis of which the creditors and shareholders have been placed into one or more classes;
 - b. the financial consequences of the restructuring plan for each class of creditors and shareholders;
 - c. the expected value of the assets and liabilities of the debtor in the event that the restructuring plan were to become effective, together with the underlying valuation principles, and the expected proceeds in the event of a liquidation of the assets of the debtor in bankruptcy;
 - d. if the restructuring plan provides for the granting of rights to the creditors or shareholders: the point in time at which those rights are to be granted;

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- e. the manner in which the creditors and shareholders may obtain further information about the restructuring plan, and
 - f. the procedure governing the vote on the restructuring plan as well as the point in time at which the vote will take place or the vote must have been cast.
2. The restructuring plan must in any event be accompanied by the following schedules:
- a. a properly specified overview of assets and liabilities as set out in Article 96, and
 - b. a list in which:
 - 1° the enfranchised creditors and shareholders are identified by name or, where this is not possible, are identified by reference to one or more categories of debts,
 - 2° the amount of their claim or the nominal amount of their shares is stated, and
 - 3° the classes into which they have been placed are specified.
3. By administrative decree further rules may be issued on further information that is to be contained in the restructuring plan or in the documents attached thereto and the manner in which this information is to be provided.

Article 375 [Stay of enforcement]

- 1. Where a debtor has proposed a restructuring plan as referred to in Article 370, he may request the Court to order a stay. During this period, the duration of which may not exceed two months, any right of a third party to recover against property of the debtor or to repossess property that is under the debtor's control may not be exercised, save with the Court's authorisation. The Court may prolong this period once by a period of no more than two months.
- 2. The request for a stay referred to in the first paragraph is denied where there is no reasonable prospect that the Court will confirm the restructuring plan pursuant to Article 381.
- 3. Articles 241a, second and third paragraphs, 241c, 241d apply mutatis mutandis, subject to the proviso that in the context of the application of Article 241a, third paragraph, this concerns a term imposed on the debtor.
- 4. The Court lifts the stay where there are reasons that oppose its continuation. The Court takes no decision on this matter other than after it has given the debtor an opportunity to express his views in a manner to be determined by the Court.
- 5. No appeal may be filed against a decision of the Court pursuant to in this Article.

Article 376 [Early determinations by the Court]

- 1. Until such time as debtor has submitted the definitive restructuring plan to the creditors or shareholders pursuant to Article 378, first paragraph, the debtor may request the Court to render a decision on a dispute concerning:
 - a. the competence of the debtor to propose a restructuring plan on the basis of this chapter;
 - b. the content of the information set out in the restructuring plan or in the documents attached thereto;
 - c. the right of a creditor or shareholder to vote;
 - d. the class formation;

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- e. the proposed voting procedure, or
 - f. the question whether, if all classes were to consent to the restructuring plan, a ground for denying the confirmation as set out in Article 381, second and third paragraphs, would apply.
2. Where there is a dispute concerning the right of a creditor or shareholder to vote or the amount for which such creditor or shareholder is allowed to vote, the Court determines whether, and up to which amount, that creditor or shareholder will be permitted to vote on the restructuring plan. Article 147 applies correspondingly.
 3. In the context of a judgment to be rendered by the Court, the Court may appoint one or more experts so as to perform an investigation and issue a reasoned report of their findings, within a term to be determined by the Court.
 4. If any information as referred to in Article 374 is lacking in the restructuring plan or in the documents attached thereto, the Court may grant the debtor a reasonable term within which to supply the missing information before taking a decision as referred to in the first and third paragraphs.
 5. The applications referred to in the first paragraph are examined in chambers. The Court takes no decisions as referred to in the first and second paragraphs other than after it has given the debtor and the creditors or shareholders involved in the dispute the opportunity to express their views in a manner to be determined by the Court.
 6. No appeal may be lodged against decisions of the Court rendered pursuant to this article.

Article 377 [Bespoke measures]

Where a debtor has proposed a restructuring plan as referred to in Article 370, the Court, may, whether at the debtor's request or of its own motion, issue such rulings and impose such directions as it deems necessary to safeguard the interests of the creditors or the shareholders. The Court may also do this on the occasion of:

- a. a stay of a bankruptcy request as referred to in Article 3d, first paragraph, at the request of the creditor referred to in that paragraph;
- b. a stay of enforcement as referred to in Article 375, first paragraph, at the request of the third parties referred to in that paragraph, or
- c. when taking a decision as referred to in Article 376, first and second paragraphs, at the request of the creditors or shareholders involved in the dispute.

Article 378 [Voting]

1. Within a reasonable term that in any case may be no shorter than eight days prior to the taking place of the vote, the debtor must provide the definitive restructuring plan to the enfranchised creditors and shareholders or notifies them of the manner in which they may take cognisance thereof, in order for them to be able to form an educated view on the matter.
2. The creditors and shareholders who are enfranchised are those whose rights are modified on the basis of the restructuring plan.
3. The voting on the restructuring plan is carried out by each class of creditors or shareholders, according to the procedure set forth in the information provided

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pursuant to Article 374, first paragraph, part F, in a meeting that is either physical or that is to be held by electronic means or in writing.

4. A class of creditors has consented to the restructuring plan where the decision granting consent has been taken by a group of creditors that in aggregate represents no less than two thirds of the total amount of claims belonging to the creditors that cast their vote within that class.
5. A class of shareholders has consented to the restructuring plan where the decision granting consent has been taken by a majority of no less than two thirds of the number of votes cast.

Article 379 [Report]

1. As soon as possible, and in no case no later than seven days after the vote, the debtor must prepare a report stating:
 - d. the names of the creditors and shareholders that cast their votes;
 - e. the result of the vote;
 - f. the creditors and shareholders that voted for or against the restructuring plan, as well as amount of the claims or shares for which they cast their vote, and
 - g. such other matters as took place at the meeting at which the vote took place.
2. The debtor must immediately enable the enfranchised creditors and shareholders to take cognisance of the report. If a request for confirmation as referred to in Article 380, first paragraph, is made by the debtor, the debtor must deposit the report with the Clerk of the Court. The report must be made available there for a period of eight days for inspection by the enfranchised creditors and shareholders without charge.

§ 3 Confirmation of the restructuring plan

Article 380 [Confirmation hearing]

1. If at least one class has consented to the restructuring plan, the debtor may file a request with the Court for confirmation of the restructuring plan. In that case the Court issues as soon as possible a decision scheduling the confirmation hearing. The debtor notifies the enfranchised creditors and shareholders in writing of this decision.
2. The hearing will be held no less than eight and no more than fourteen days after the report referred to in Article 379 has been deposited for inspection with the Clerk.
3. Until the day of the hearing referred to in the foregoing paragraph, the creditors and shareholders who voted against the restructuring plan may file with the Court an application as referred to in Article 381, third and fourth paragraphs in which they set out the grounds on which they believe confirmation ought to be denied. The creditor may not invoke a ground for denying confirmation where he has failed to raise his complaint with the debtor promptly after he discovered, or ought reasonably to have discovered, the possible existence of the relevant ground for denying confirmation.

Article 381 [Confirmation requirements]

1. The Court renders as soon as possible a reasoned decision in which it grants the request for confirmation, unless one of the grounds for refusal set forth in the second

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- to fourth paragraphs is applicable.
2. The Court investigates of its own motion whether the debtor has complied with the provisions of Articles 378, first paragraph, and 380, first paragraph, in respect of all enfranchised creditors and shareholders. If this is not the case, the Court refuses confirmation, unless the creditors and shareholders concerned accept the restructuring plan.
 3. The Court refuses confirmation at the request of one or more creditors or shareholders who voted against the restructuring plan, where:
 - a. the debtor had no competence to propose a restructuring plan on the basis of this chapter;
 - b. the information set out in the restructuring plan or in the documents attached thereto was insufficient, if the class formation did not comply with the requirements of Article 372 or if the voting procedure did not comply with the applicable requirements, unless any such flaw could not reasonably have resulted in a different outcome of the vote;
 - c. a creditor or the shareholder should have been admitted to the vote on the restructuring plan for another amount, unless this decision could not reasonably have resulted in a different outcome of the vote;
 - d. on the basis of summary investigation it is clear that the rights that these creditors or shareholders would receive under the restructuring plan have a value that is significantly lower than the amount that could expect to receive upon a liquidation of debtor's assets in bankruptcy;
 - e. the performance of the restructuring plan has not been sufficiently safeguarded;
 - f. the restructuring plan has come about by deception, by inducements extended to one or more enfranchised creditors or shareholders or with the help of other forms of dishonesty, irrespective of whether the debtor or another person lent his assistance thereto;
 - g. the fees and the disbursements of experts appointed by the Court have not been paid or properly secured, or
 - h. other cogent reasons that oppose confirmation exist.
 4. The Court refuses confirmation of a restructuring plan to which not all classes have consented where an application to that effect has been filed by one or more creditors or shareholders who themselves voted against the restructuring plan and who were placed in a class that did not consent to the restructuring plan and such class consists of:
 - a. creditors or shareholders who would receive rights under the restructuring plan that have a value that is lower than the amount of the claims or the nominal amount of the shares for which they should have been allowed in that class, while there are one or more lower ranking classes of creditors or shareholders who receive or retain rights under the restructuring plan, unless those rights constitute arm's length consideration for the provision of a new loan or new capital;
 - b. creditors or shareholders who would receive rights under the restructuring plan that have a value that is lower than the amount of the claims or the nominal amount of the shares for which they should have been allowed in that class, while there are one or more higher ranking classes of creditors or shareholders who would receive rights under the restructuring plan that have a value that

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- is higher than the amount of the claims or the nominal value of the shares for which they should have been allowed in that class;
- c. creditors or shareholders who would receive rights under the restructuring plan that, without reasonable ground, have a value that is comparatively lower than the value of the rights which another class of equally ranked creditors or shareholders would receive under the restructuring plan;
 - d. creditors or shareholders whose rights are modified on the basis of the restructuring plan, while there are other creditors or shareholders with an equal or lower rank who, without reasonable ground, remain outside the restructuring plan, or;
 - e. creditors who under the terms of the restructuring plan do not have the right to opt for a payment in the form of cash in an amount equal to the amount that they could reasonably expect to receive upon a liquidation of the debtor's assets in bankruptcy.
5. The confirmation decision can provide that, upon becoming effective, it serves as any resolution of the general meeting of shareholders that may be required to execute the restructuring plan.
 6. Save for the possibility of an appeal to the Supreme Court in the interest of law, no remedy is available for challenging a decision of the Court rendered pursuant to the first paragraph.

§ 4 The consequences of confirmation of the restructuring plan

Article 382 [Binding force of the restructuring plan]

1. A confirmed restructuring plan binds all enfranchised creditors and shareholders.
2. Where the debtor is a public limited company or private limited company, Articles 81 and 192 of Book 2 of the Civil Code disapply.

Article 383 [Enforceable title]

A confirmation decision that has become effective provides for the benefit of the creditors having claims not disputed by the debtor a title eligible for enforcement against the debtor and against persons having acceded to the restructuring plan as sureties, in so far as this is consistent with the nature of the rights which the creditors receive under the restructuring plan.

Article 384 [Non-performance of the restructuring plan]

The debtor is in default where there is any failure to perform the restructuring plan and is obliged to reimburse the loss which the creditors or shareholders sustain as a result thereof, unless no blame can be attributed to the debtor for such non-performance. Article 75 and chapter 10 of Title 1 of Book 6 of the Civil Code apply *mutatis mutandis*. The ability to rescind or annul the restructuring plan may be excluded in the restructuring plan.

Article II Concatenation [PM]

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Article III Coming into force

This Act comes into force at a time to be determined by Royal Decree (Koninklijk Besluit), which time may be set so as to vary for different Articles or parts thereof.

Article IV Title for citation purposes

This Act is to be cited as: Act on the confirmation of a private restructuring plan in order to prevent bankruptcy.

Enjoins and orders that this be placed in the Bulletin of Acts and Decrees (Staatsblad) and that all ministries, public authorities, public bodies and officials concerned by it ensure its meticulous execution.

Issued,

The Minister of Security and Justice

RESOR



EUROPEAN
COMMISSION

Strasbourg, 22.11.2016
COM(2016) 723 final

2016/0359 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on preventive restructuring frameworks, second chance and measures to increase the
efficiency of restructuring, insolvency and discharge procedures and amending Directive
2012/30/EU**

(Text with EEA relevance)

{SWD(2016) 357 final}
{SWD(2016) 358 final}

EN

EN

EXPLANATORY MEMORANDUM**1. CONTEXT OF THE PROPOSAL**• **Reasons for and objectives of the proposal**

Insolvency rules cover a wide range of measures from early intervention before a company gets into serious difficulties, timely restructuring to ensure that viable business parts are preserved, liquidation of assets where companies cannot be otherwise saved and finally giving a second chance to honest entrepreneurs via discharge of debt.

A well-functioning insolvency framework covering all these measures is an essential part of a good business environment as it supports trade and investment¹, helps create and preserve jobs, and helps economies absorb more easily economic shocks that cause high levels of non-performing loans and unemployment. These are all key priorities of the European Commission.

Insolvency matters have a strong Union dimension. An increasingly interconnected single market with an ever stronger digital dimension means that very few companies are purely national when aspects such as their client base, supply chain, scope of activities, investor and capital base (to mention a few) are considered. Importantly, insolvency matters are also a deterrent for cross-border expansion and investments. Many investors mention uncertainty over insolvency rules or the risk of lengthy or complex insolvency procedures in another country as a main reason for not investing or not entering into a business relationship outside their own country. A higher degree of harmonisation in insolvency law is thus essential for a well-functioning single market and for a true Capital Markets Union. This is why the issue has long attracted considerable interest at EU level.

Increased convergence of insolvency and restructuring procedures would facilitate greater legal certainty for cross-border investors and encourage the timely restructuring of viable companies in financial distress. Inefficient and divergent insolvency laws make it harder for investors to assess credit risk, particularly where they consider making cross-border investments. More cross-border risk-sharing, stronger and more liquid capital markets and diversified sources of funding for EU businesses will deepen financial integration, lower costs of obtaining credit and increase the EU's competitiveness.

Restructuring and insolvency

Today in Europe half of all businesses survive less than 5 years². The number of corporate insolvencies has risen since the peak of the economic crisis in 2009 and remains high, although the trend seems now to be reversing. In several Member States there is a tendency to steer viable enterprises in financial trouble towards liquidation rather than early restructuring. It is estimated that in the EU, 200 000 firms go bankrupt each year (or 600 a day), resulting in 1.7 million direct job losses every year. One in four of these are cross-border insolvencies, i.e. they involve creditors and debtors in more than one EU Member State³. A significant percentage of firms and related jobs could be saved if preventive procedures existed in all

¹ The Commission's Annual Growth Survey 2016 (COM(2015) 690 final, 26.11.2015) explicitly recognised the importance of "well-functioning insolvency frameworks" as crucial for investment decisions

² According to Flash Eurobarometer 354 (2012), which also showed that 43% of Europeans would not start a business because of the fear of failure (p. 72).

³ Commission Staff Working Document, Impact Assessment accompanying Commission Recommendation on a New Approach to Business Failure and Insolvency, SWD(2014) 61 final, 12.3.2014, p. 2.

Member States where they have establishments, assets or creditors. In addition, the availability of timely preventive restructuring procedures would ensure that action is taken before companies default on their loans. This would contribute to reducing the risk that loans become non-performing loans in cyclical downturns, thus reducing the related negative impact on the financial sector. But the cross-border dimension and costs of divergent insolvency frameworks are much broader. Firstly, although creditors might have suppliers in their supply chain that are purely domestic businesses, a supplier that experiences financial difficulties and cannot be saved may nonetheless have negative impacts which may trigger the insolvency of the cross-border company. The impact of these cross-border insolvencies may be extremely high as they are more likely to concern larger businesses. Secondly, some companies' cross-border creditors (especially SMEs) may prefer to drop cross-border claims simply because it is too costly to pursue them, for example if local legal advice is needed. Finally, future developments in the single market are expected to lead to more companies having cross-border dealings, and therefore more insolvencies with cross-border impact. Innovative companies in particular need a larger market to be able to thrive and avoid insolvency in the first 5 years.

The quality of Member States' restructuring and insolvency frameworks directly affects creditors' recovery rates. World Bank indicators suggest that in the EU recovery rates vary between 30 % in Croatia and Romania, and 90 %⁴ in Belgium and Finland. Recovery rates are higher in economies where restructuring is the most common insolvency proceeding. On average, in such economies creditors can expect to recover 83% of their claims, against an average of 57 % in liquidation procedures⁵. While these outcomes also reflect economic factors such as the overall health of the economy, they underline the importance of a comprehensive insolvency framework, anchored in a strong institutional and cultural setting, in delivering better outcomes for society.

The elements of preventive restructuring procedures affecting their effectiveness and consequently the number of businesses rescued and their long-term viability diverge significantly between Member States. For example, an effective framework should require that a business in difficulty has access as early as possible to preventive restructuring. However, in several Member States debtors cannot restructure debts with their creditors before they are actually insolvent or if they do, they face very strict or expensive access conditions.

The conditions for a stay of individual enforcement to support restructuring negotiations are also very different: in some countries such a stay is not possible, while the others have a wide variety of durations and exemptions. When plans are adopted by creditors, rules in Member States tend to vary greatly on class formation, the possibility of restructuring only with certain creditors while leaving the rights of non-involved creditors un-affected, the majorities required, and the conditions for a judicial or administrative authority's confirmation of the restructuring plan. The protection of new financing and interim financing (essential in ensuring restructuring plans' success) also varies among Member States, ranging from minimum protection from avoidance actions to a form of priority over existing debt in subsequent insolvency procedures. Finally, the involvement of judicial or administrative authorities and practitioners appointed by the judicial or administrative authorities ranges from minimal to full involvement.

⁴ World Bank Doing Business Index 2016.

⁵ World Bank Doing Business Index 2016.

Such divergences make it virtually impossible to have a restructuring plan for a cross-border group of companies with subsidiaries in more than two Member States⁶.

Second chance

In many Member States it takes more than 3 years for bankrupt, but honest entrepreneurs to discharge their debts and make a fresh start. Inefficient second chance frameworks result in entrepreneurs being locked into debt-traps or driven to the black economy, or having to relocate to other jurisdictions to access friendlier regimes. Relocation is expensive for creditors, who need to factor in the additional risk that an entrepreneur could obtain a shorter discharge in a different jurisdiction. Relocation also has high economic and human costs for entrepreneurs since under Regulation (EU) No 2015/848 on insolvency proceedings⁷ they may need to be established in a Member State for a certain period of time before being allowed to file for discharge in that jurisdiction. Furthermore, evidence shows that shorter discharge periods have a positive impact on both consumers and investors, as they are quicker to re-enter the cycles of consumption and investment. This in turn boosts entrepreneurship.

A discharge of debt alone may in some Member States not be enough to allow an entrepreneur to start a new business activity, e.g. where bankruptcy is accompanied by a disqualification order which lasts for a longer period of time and which may be issued without consideration to whether the entrepreneur was acting in good faith. To give honest entrepreneurs an effective second chance, disqualifications linked to over-indebtedness should also be time-limited so that they expire at the latest when the discharge period ends. Personal data used in connection with the debtor's over-indebtedness should be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed and kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed. The General Data Protection Regulation⁸ which will replace Directive 95/46/EC and will apply as of 25 May 2018 further clarifies the legal framework and the requirements when processing personal data.

Over-indebtedness of natural persons is a major economic and social problem. 11.4% of European citizens are permanently in arrears with payments, often for utility bills⁹. This is mostly due to unfavourable macroeconomic conditions in the context of the financial and economic crisis (e.g. unemployment) combined with personal circumstances (e.g. divorce, illness).

Entrepreneurs are not the only ones affected. Although consumers have largely the same treatment under national insolvency laws, this is not the case in all Member States. This results in increased costs for Member States' social security schemes and economic consequences such as reduced consumption, labour activity and foregone growth opportunities.

⁶ Robert van Galen, Stephan Madaus, *Corporate Rescue*, 2013, p. 52.

⁷ Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141/19, 5.6.2015.

⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119/1, 4.5.2016.

⁹ http://ec.europa.eu/consumers/financial_services/reference_studies_documents/docs/part_1_synthesis_of_findings_en.pdf.

General effectiveness of restructuring, insolvency and second chance

The excessive length of restructuring, insolvency and discharge procedures in several Member States is an important factor triggering low recovery rates and deterring investors from doing business in jurisdictions where procedures risk taking too long. In half of the Member States insolvency is resolved in 2 to 4 years¹⁰. Apart from three Member States, the length of procedures has not improved in the past 4 years, and in two Member States the length of procedures rose in the same time span. Specific aspects that play an important role in the length of procedures are the level of specialisation of judges and therefore their ability to take quick decisions, the professionalism of practitioners in the field of restructuring, insolvency and second chance, and the take-up of digital means of communication in such procedures. Specialised insolvency practitioners and judges, and the availability of digital tools can greatly help reduce the length of procedures, lower costs and improve the quality of assistance or supervision.

Despite an improvement in cyclical conditions, the level of non-performing loans, which increased rapidly in most Member States following the economic crisis, remains high. High levels of non-performing loans have a direct consequence on banks' capacity to support growth¹¹. In some Member States, targeted reforms have had a positive impact. However, the resilience of non-performing loans in the European Union shows that further action needs to be taken to ensure that the negative feedback loop between poor asset quality, lagging credit developments and low growth does not become prevalent. Measures to increase the effectiveness of restructuring, insolvency and second chance frameworks would contribute to efficient management of defaulting loans and reduce accumulation of non-performing loans on bank balance sheets¹². They would also contribute to improving the residual value which can be expected by creditors by allowing an earlier and swifter restructuring or resolution for debtors facing financial difficulties. Finally, they can also serve to avoid future build-up of non-performing loans since loans on which performance ceases could be enforced more efficiently. Improving legal settings of enforcement regimes will not fully resolve the issue of existing non-performing loans where enforcement proceedings have already started. However, reinforcement of the judiciary setting could help to speed up the proceedings' remaining steps. In this way, reforms of insolvency laws can complement other ongoing reforms at EU level in the banking sector and as regards capital markets.

Objective of the proposal

The proposal's key objective is to reduce the most significant barriers to the free flow of capital stemming from differences in Member States' restructuring and insolvency frameworks. The aim is for all Member States to have in place key principles on effective preventive restructuring and second chance frameworks, and measures to make all types of insolvency procedures more efficient by reducing their length and associated costs and improving their quality. More specifically, such frameworks aim to help increase investment and job opportunities in the single market, reduce unnecessary liquidations of viable companies, avoid unnecessary job losses, prevent the build-up of non-performing loans,

¹⁰ EU Justice Scoreboard 2016.

¹¹ According to the IMF Article IV review of the Euro area, "high levels of NPLs and debt have held back bank lending and investment, limiting the pass through of easier financial conditions; IMF: Euro Area Policies – Selected Issues, IMF Country Report No. 15/205, July 2015, Euro Area Policies, IMF Country Report No. 15/2014, July 2015, p. 61.

¹² 'Towards the completion of the Banking Union', European Commission, COM (2015) 587 final, 24 November 2015.

facilitate cross-border restructurings, and reduce costs and increase opportunities for honest entrepreneurs to be given a fresh start.

Along with key principles, more targeted rules are necessary to make restructuring frameworks more efficient. Rules on company managers' duty of care when nearing insolvency also play an important role in developing a culture of business rescue instead of liquidation, as they encourage early restructuring, prevent misconduct and avoidable losses for creditors. Equally important are rules on early warning tools.

The proposal does not harmonise core aspects of insolvency such as rules on conditions for opening insolvency proceedings, a common definition of insolvency, ranking of claims and avoidance actions broadly speaking. Although such rules would be useful for achieving full cross-border legal certainty, as confirmed by many stakeholders in the public consultation¹³, the current diversity in Member States' legal systems over insolvency proceedings seems too large to bridge given the numerous links between insolvency law and connected areas of national law, such as tax, employment and social security law. Prescriptive harmonisation could require far-reaching changes to commercial law, civil law and company law, whereas flexible provisions risk not bringing about desired changes. Furthermore, the rules on filing and verification of claims mentioned in the Commission Communication of December 2012¹⁴ are of rather low relevance given the improvements brought by the Insolvency Regulation¹⁵.

Instead, the focus of this proposal is on addressing the most important problems that could be feasibly addressed by harmonisation. Insolvency procedures need to be adapted to enable debtors in financial difficulties to restructure early. Rules which would contribute to this need include lifting the obligation to file for insolvency while the debtor is still in a formal restructuring process as otherwise such filing might prevent the restructuring from attaining its goals; and an avoidance actions regime in insolvency procedures to protect transactions concluded in good faith with a view to a debtor's preventive restructuring. The proposal also covers insolvency-related measures with direct impact on the length of procedures, such as judges' specialisation and the professionalism of practitioners, and those with a close link to the preventive restructuring framework, such as protecting new financing from avoidance actions.

To encourage entrepreneurial activity, entrepreneurs and company managers should not be stigmatised when their honest business endeavours fail. Individuals should not be deterred from entrepreneurial activity or denied the opportunity of a second chance. It is estimated that offering a true second chance to honest entrepreneurs to restart business activities would create 3 million jobs across Europe.¹⁶

In designing the proposal, the Commission sought to strike an appropriate balance between the interests of debtors and creditors, providing for safeguards wherever the proposed measures would have a potentially negative impact on the parties' rights.

Above all, the proposal aims to enhance the rescue culture in the EU. The rules on business restructuring and rights of shareholders will predominantly contribute to "prevention", the rules on avoidance, insolvency practitioners and judicial or administrative authorities to 'value recovery' and the rules on second chance to 'debt discharge'. Besides economic gains, there will also be positive social impacts.

¹³ http://ec.europa.eu/justice/newsroom/civil/opinion/160321_en.htm

¹⁴ European Commission: Communication "A new European approach to business failure and insolvency" COM(2012) 742.

¹⁵ OJ L 141/19.

¹⁶ Annual Report of European SMEs 2015/2016, p. 54.

The proposal sets common objectives, in the form of principles or, where necessary, targeted detailed rules. While aiming to achieve the needed coherence of frameworks across the EU, the proposal gives Member States the flexibility to achieve the objectives by applying the principles and targeted rules in a way that is suitable in their national contexts. This is particularly important since some Member States already have elements of well-functioning frameworks in place. The objective is not to interfere with what works well, but to establish a common EU-wide framework to ensure effective restructuring, second chance and efficient procedures both at national and cross-border level.

Boosting jobs and growth in Europe requires a stronger rescue culture which helps viable businesses to restructure and continue operating while channelling enterprises with no chance of survival towards swift liquidation, and gives honest entrepreneurs in distress a second chance. This proposal is an important step towards such a change of culture.

Institutional background

In 2011, the European Parliament adopted a Resolution on insolvency proceedings¹⁷ which contained recommendations for harmonising specific aspects of substantive insolvency law, including restructurings, and company law. That same year, the Council called on Member States to reduce the discharge period and debt settlement for honest entrepreneurs after bankruptcy to maximum 3 years by 2013¹⁸.

Against this background and recognising the significant differences between national insolvency frameworks, the European Commission issued in December 2012 a Communication¹⁹ which highlighted a need for a step-by-step approach in certain areas where differences between domestic insolvency laws could hamper the functioning of an efficient single market²⁰. The first action under this approach was to amend Regulation (EC) No 1346/2000²¹. This was done by the adoption of Regulation (EU) 2015/848 on insolvency proceedings²². That Regulation focuses on resolving conflicts of jurisdiction and laws in cross-border insolvency proceedings, and ensures recognition of insolvency-related judgments across the EU. It does not harmonise Member States' substantive insolvency laws.

As a next step, the Commission adopted in 2014 the Recommendation on restructuring and second chance²³. The Recommendation focused on restructuring and second chance, since it was considered that in these two fields action at EU level would bring most added-value²⁴. The Recommendation invited Member States to put in place (i) effective pre-insolvency procedures to help viable debtors to restructure and thus avoid insolvency, and (ii) second

¹⁷ Report with recommendations to the Commission on insolvency proceedings in the context of EU company law, 2011/2006(INI), 17 October 2011.

¹⁸ Council Conclusions on the review of the 'Small Business Act', for Europe, adopted on 30 May 2011, 10975/2011, available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010975%202011%20INIT>.

¹⁹ European Commission: "A new European approach to business failure and insolvency" COM(2012) 742, 12 December 2012.

²⁰ Second chance for entrepreneurs, discharge periods, opening of insolvency and restructuring proceedings, filing of claims and their verification, promotion of restructuring plans.

²¹ OJ L 160, 30.6.2000, p. 1.

²² OJ L 141, 5.6.2015, p. 19.

²³ C(2014) 1500 final, 12 March 2014.

²⁴ Impact Assessment accompanying the Commission Recommendation on a New Approach to Business Failure and Insolvency, SWD(2014) 61 final, 12 March 2014.

chance provisions for entrepreneurs enabling them to have a discharge in no more than 3 years after insolvency.

Following adoption, two evaluations of its implementation were conducted in 2015 and 2016²⁵. These reviews revealed that while the Recommendation provided useful focus for Member States undertaking reforms in the area of insolvency, it has not led to the desired impact in terms of consistent changes across all Member States that would facilitate the rescue of businesses in financial difficulty and give a second chance to entrepreneurs. This was due to its only partial implementation in a significant number of Member States, including those which had launched reforms.

There are still several Member States where a business cannot be restructured before it is insolvent. While some other Member States introduced new preventive restructuring procedures, those rules differ in several aspects from the Recommendation. On second chance, since the Recommendation's adoption, several Member States have introduced for the first time a debt discharge regime for natural persons. However, important discrepancies remain over the discharge period's duration. Such differences in Member States' legal frameworks mean continuing legal uncertainty, additional costs for investors in assessing their risks, less developed capital markets and persisting barriers to the efficient restructuring of viable companies in the EU, including cross-border enterprise groups.

The 'Five Presidents' report' of 22 June 2015 on 'Completing Europe's Economic and Monetary Union' listed insolvency law among the most important bottlenecks preventing the integration of capital markets in the euro area and beyond²⁶.

In this context, the 2015 Capital Markets Union Action Plan²⁷ announced a legislative initiative on business insolvency, including early restructuring and second chance. This initiative is intended to address the main barriers to the free flow of capital and build on national regimes that work well. The Single Market Strategy also stated that the Commission would support honest entrepreneurs and propose legislation to ensure that Member States provide a regulatory environment that is able to accommodate failure without dissuading entrepreneurs from trying new ideas again²⁸.

The Council Conclusions of July 2016 on a roadmap to complete the Banking Union underlined the importance of Commission's work on a legislative proposal for minimum harmonisation over insolvency law in the context of the Capital Markets Union (CMU), noting that this may also support efforts to reduce future levels of non-performing loans.²⁹

More recently, in its Communication on 'Capital Markets Union - Accelerating Reform' the Commission reiterated that inefficiencies and differences in national insolvency frameworks

²⁵ Evaluation of the implementation of the Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency, 30.9.2015, (available at: http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm)

²⁶ 'Completing Europe's Economic and Monetary Union', Report by Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz (so-called Five Presidents'), 22 June 2015, p. 10.

²⁷ Action Plan on Building a Capital Markets Union, COM(2015) 468 final, p. 25.

²⁸ Upgrading the Single Market: more opportunities for people and business, European Commission, COM (2015) 550 final, p. 6.

²⁹ Council Conclusions of 17 June 2016 http://www.consilium.europa.eu/press-releases-pdf/2016/6/47244642837_en.pdf

generate legal uncertainty, obstacles to recovery of value by creditors, and barriers to the efficient restructuring of viable companies in the EU, including for cross-border groups.³⁰

- **Consistency with existing policy provisions in the policy area**

Regulation on cross-border insolvency proceedings

From 26 June 2017, Regulation (EU) 2015/848³¹ will replace Council Regulation (EC) 1346/2000. Regulation 2015/848 deals with issues of jurisdiction, applicable law, recognition and enforcement of insolvency decisions, as well as coordination of cross-border insolvency proceedings. It designates the applicable law, i.e. restructuring and insolvency procedures that exist already in the Member States, and ensures that they are recognised throughout the EU. It also covers many types of insolvency procedures, including preventive/pre-insolvency procedures and certain personal insolvency procedures provided that they fulfil certain conditions (e.g. pre-insolvency procedures must be available at the earliest where there is a likelihood of insolvency, procedures must include all or a significant part of a debtor's creditors and must be public).

However, Regulation 2015/848 does not oblige Member States to introduce specific types of procedures or to ensure that their procedures are effective in promoting preventive restructurings and second chance.

The proposal would therefore complement Regulation 2015/848 by requiring Member States to ensure that their national preventive restructuring procedures comply with certain minimum principles of effectiveness.

Recommendation on a new approach to business failure and insolvency

The Recommendation, addressed to the Member States, aimed at establishing minimum standards for: (i) preventive restructuring procedures enabling debtors in financial difficulty to restructure at an early stage so as to avoid insolvency, and (ii) debt discharge, within prescribed periods, for honest bankrupt entrepreneurs as one of the steps necessary to give them a second chance. The proposal reinforces the 2014 Recommendation and goes beyond its scope by also establishing targeted rules on increasing the efficiency of all types of procedures, including liquidation procedures.

Legal framework on financial services

Special arrangements apply to insurance and re-insurance undertakings as defined in points 1 and 4 of Article 13 of Directive 2009/138/EC³², credit institutions as defined in point 1 of Article 4(1) of Regulation (EC) No 575/2013³³, investment firms and collective investment undertakings as defined in points 2 and 7 of Article 4(1) of Regulation (EC) No 575/2013, central counterparties as defined in point 1 of Article 2 of Regulation (EU) No 648/2012³⁴,

³⁰ COM(2016) 601 final http://ec.europa.eu/finance/capital-markets-union/docs/20160913-cmu-accelerating-reform_en.pdf

³¹ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19–72.

³² Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

³³ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176 27.6.2013, p. 1).

³⁴ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201 27.7.2012, p. 1).

central securities depositories as defined in point 1 of Article 2 of Regulation (EU) 909/2014³⁵ and other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU³⁶. For these, the national supervisory authorities have wide-ranging powers of intervention so it is appropriate to exclude such debtors from the preventive restructuring procedures envisaged in this proposal.

The proposal is also without prejudice to Directives 98/26/EC on settlement finality in payment and securities settlement systems³⁷, Directive 2002/47/EC on financial collateral arrangements³⁸ and Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories³⁹. This is important in order to avoid overlaps between these instruments and the current proposal which would impact on secured creditors' ability to enforce their financial collateral security provided by a corporate entity, including margins provided to central counterparties (CCPs) or to central banks/the ECB or of financial collateral arrangements concluded by a non-financial corporate with a financial institution. Without a carve-out of such transactions from the stay provisions, financial market's stability may be harmed.

Directives on workers' protection

Adequate and timely information and consultation of workers enhances the effectiveness of restructuring processes. A number of Directives guarantee the right to information and consultation before restructuring and/or collective redundancies. This proposal leaves the rights guaranteed by Directives 98/59/EC⁴⁰, 2001/23/EC⁴¹, 2002/14/EC⁴², 2008/94/EC⁴³ and 2009/38/EC⁴⁴, intact and, in addition, grants affected workers the right to vote on restructuring plans.

³⁵ Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257 28.8.2014, p. 1).

³⁶ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

³⁷ Directives 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166, 11.6.1998, p. 45.

³⁸ Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2012 on financial collateral arrangements, OJ L 168, 27.6.2002, p. 43.

³⁹ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.7.2012, p. 1.

⁴⁰ Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16.

⁴¹ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.03.2001, p. 16.

⁴² Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002, p. 29.

⁴³ Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, OJ L 283, 28.10.2008, p. 36.

⁴⁴ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works council or a procedure in Community-scale undertakings and community-scale groups of undertakings for the purpose of informing and consulting employees, OJ L 122, 16.5.2009, p.28.

Directive 2008/94 requires Member States to put in place guarantee institutions to guarantee the payment of workers' outstanding claims resulting from contracts of employment or employment relationships in the event of the employer's formal insolvency proceedings. Member States can extend the coverage of such guarantee institutions also to other types of procedures and the current proposal may incentivize, but does not oblige, Member States to extend coverage to restructuring procedures where this is not yet foreseen. The proposal aims at putting in place in each Member State preventive procedures to help debtors avoid insolvency. However, if restructuring efforts fail and the debtor becomes insolvent under national law, Directive 2008/94 will apply accordingly.

Under the proposal, workers' outstanding claims as defined in Directive 2008/94/EC should be in principle exempted from a stay of enforcement actions, which would lead to a temporary suspension of workers' ability to enforce such claims, irrespective of whether they have arisen before or after the stay is granted. A stay in relation to such claims should be permissible only for the amounts and for the period that Member States guarantee the payment of such claims by other means.

Directive 2001/23/EC aims at safeguarding workers' rights in the case of transfers of undertakings. Under the proposal restructuring may entail the transfer of part of an undertaking or business. In such cases, Directive 2001/23/EC and the level of protection for workers it guarantees will fully apply and will not be affected by this proposal. Where a restructuring entails a transfer of part of an undertaking or business, workers' rights should be safeguarded in accordance with Directive 2001/23/EC, without prejudice to the possibilities allowed by Article 5(2) of that Directive. Article 5(2) of Directive 2001/23/EC provides that, where proceedings are under the supervision of a competent public authority, the transferee can be relieved of previous liabilities if workers receive a compensation at least equivalent to the one they would receive from the existing guarantee fund for workers. In addition, working conditions can be altered in agreement with workers.

Directive 2002/14/EC establishes a right to constant information and consultation of workers' representatives in the company, including on 'decisions likely to lead to substantial changes in work organisation or in contractual relations'. Such consultation shall take place with a view to reaching an agreement on such decisions. The proposal will not affect the rights guaranteed by Directive 2002/14/EC. Moreover, in addition and without prejudice to the workers' rights to consultation and information under Directive 2002/14, the proposal will give affected workers the right to vote on a restructuring plan. For the purposes of voting on a restructuring plan, Member States may decide to place workers in a class separate from other classes of creditors.

Directive 2012/30/EU on company law

Articles 19 (1), 29, 34, 35, 40(1)(b), 41(1) and 42 of Directive 2012/30/EU⁴⁵ provide for the necessity of convening a shareholders' general meeting. If capital is increased by consideration in cash, Article 33 of the Directive establishes a pre-emptive right of shareholders to the new shares. Both the requirements for a shareholders' general meeting and the pre-emption rights could jeopardise the effectiveness of the restructuring plan's adoption and implementation. The proposal requires Member States to derogate from those company

⁴⁵ Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, OJ L 315/74, 14.11.2012.

law provisions to the extent and for the period necessary to ensure that shareholders do not frustrate restructuring efforts by abusing their rights under Directive 2012/30/EU. However, Member States do not have to derogate from company law rules if they can ensure that the above-mentioned company law requirements cannot jeopardise the effectiveness of the restructuring process or if Member States have other, equally effective tools ensuring that shareholders do not unreasonably prevent the adoption or implementation of a restructuring plan which would restore the viability of the business.

State aid rules

The proposal will not affect state aid rules. State creditors do not give away their claims and therefore cannot be considered as giving incompatible state aid to debtors by merely participating in a restructuring plan provided that the restructuring measures affect state creditors in the same way as private creditors, and that they behave like private operators in a market economy placed in the most comparable situation. This proposal is also without prejudice to the rules on full recovery of unlawful state aid, as affirmed in Case C-454/09 *New Interline* (paragraph 36) and Case C-610/10 *Magefesa* (paragraph 104).

• **Consistency with other Union policies**

One of the measures announced in the Capital Markets Union Action Plan⁴⁶ of 30 September 2015 was that the Commission will produce a legislative initiative on business insolvency, including early restructuring and second chance, drawing on the experience of the 2014 Recommendation. The initiative would build on national systems that work well.

Also the Single Market Strategy⁴⁷ announced that the Commission would support *bona fide* entrepreneurs and propose legislation to ensure that Member States provide a regulatory environment that can accommodate failure without dissuading entrepreneurs from trying new ideas.

The economic significance of well-functioning insolvency frameworks is particularly relevant in the financial sector when dealing with high levels of private debt and non-performing loans, which is the case in some Member States. The European Central Bank's 2015 comprehensive assessment identified EUR 980 billion in non-performing exposures in the banking system⁴⁸. Such loans weigh heavily on banks' capacity to finance the real economy in several Member States. Banks are the principal source of credit to businesses and households and therefore particularly sensitive to inefficiencies in insolvency frameworks. Good insolvency frameworks could help to address the problems, but cannot in themselves address all the challenges banks face in managing impaired balance sheets. Dealing with the problems of debt overhang and non-performing loans requires additional policies and general conditions. Good insolvency frameworks on paper do not deliver satisfactory outcomes without also having adequate judicial infrastructure or appropriate tax policies to ensure financial stability. Moreover, specific policies may be needed to reduce debt-overhang. For creditors, such measures relate in particular to the valuation of assets, the resolution targets set by the supervisor and the tax treatment of write-offs. For debtors, the availability of social safety nets would reduce the impact of more decisive resolution and recovery strategies considered necessary by creditors.

⁴⁶ Action Plan on Building a Capital Markets Union, COM(2015) 468 final, 30.9.2015.

⁴⁷ COM (2015) 550 final, 28.10.2015

⁴⁸ European Central Bank, Statistics, 23 June 2016, <https://www.bankingsupervision.europa.eu/banking/statistics/html/index.en.html>

The proposal will help prevent accumulation of non-performing loans. Crucial complementary elements in this context are firstly to allow companies to restructure more easily and thus get back to financial viability faster and honour their debts and, secondly, to make sure that banks can recover assets where debtors have no prospect of return to viability.

A successful restructuring plan will turn non-performing loans into loans a company can actually pay back. In liquidation, secured creditors have to consider the possibility of substantial reduction in the value of their claims. In restructuring, on the other hand, insolvency is avoided, contract debts are in general paid, and negotiations concern in most cases only the financial debt. Data shows that the highest recovery rates for creditors are in economies where restructuring is the most common insolvency proceeding⁴⁹ and that 45 % of OECD economies use restructuring as the most common way to save viable firms. They also have an average recovery rate of 83 cents on the dollar, versus 57 cents on the dollar in countries where liquidation is the prevalent outcome⁵⁰. Another important factor to improve the overall recovery rates, and thus the residual value of potential non-performing loans, is the swift handling of restructuring and insolvency cases⁵¹.

The discharge of entrepreneurial, and possibly private, debt will also help to remove the loans that cannot be paid anyhow from credit institutions' balance sheets. The number of cases referred can also be reduced by developing successful arrangements for restructuring debt between debtors and creditors with limited or no intercession of judicial or administrative authorities or judicial procedures.

However, this proposal is not designed to and will not fully solve banks' loan enforcement problems, especially the effectiveness of enforcement, which constrains banks' financing of the real economy. As stated in the Commission Communication 'Towards the Completion of the Banking Union' of 24 November 2015⁵², the efficiency of both restructuring and insolvency proceedings needs to improve. The Commission also examined national insolvency frameworks as part of the European Semester – the EU's economic governance framework. Lengthy, inefficient and costly insolvency proceedings in some Member States were found to be a contributing factor to insufficient post-crisis debt deleveraging in the private sector and exacerbating debt overhang. Efficient and transparent public administration and effective justice systems are necessary to support economic growth and deliver high quality services for firms and citizens, including as regards insolvency frameworks. In this view the Commission will continue to work with Member States in the context of the European Semester towards enhancing their judicial systems.

Due to the absence of commonly agreed data collection practices and low cross-country comparability of data itself it is not possible to have a complete picture of the situation in Member States especially as regards the impact on financial institutions. Therefore, as announced in its Communication on 'Capital Markets Union – Accelerating Reform', the Commission is conducting a benchmarking review of loan enforcement (including insolvency) regimes to establish a detailed and reliable picture of the banks' outcomes when faced with defaulting loans in terms of delays, costs and value-recovery. The review will assist Member States seeking to make their regimes more efficient and transparent. The Commission will therefore continue to look into issues not directly dealt with in this proposal.

⁴⁹ Resolving Insolvency, World Bank, <http://www.doingbusiness.org/reports/globalreports/~media/GIABW/Doing%20Business/Documents/Annual-Reports/English/DB14-Chapters/DB14-Resolving-insolvency.pdf>

⁵⁰ Doing Business Project Encourages Economies to Reform Insolvency Frameworks, World Bank, January 2013.

⁵¹ Resolving Insolvency, World Bank.

⁵² COM(2015) 587 final, 24.11.2015.

Strengthening and convergence in the functioning of national frameworks for debt-restructuring, loan enforcement, insolvency and debt discharge will also contribute to the functioning of the single market, and in particular Capital Markets Union. Convergence in principles and confidence in the effective implementation of those principles in Member States will be crucial in creating the conditions for creditors to make loans to debtors in other Member States. Creditors will refrain from cross-border lending if they lack confidence in their ability to protect themselves in the event of non-payment and to recover value or collateral as necessary. By establishing common principles to support alignment of national restructuring and insolvency frameworks, this proposal makes a further contribution to debt restructuring.

Individual entrepreneurs' personal and business debts are often intertwined: entrepreneurs take personal loans to start and run their business, for example because they guarantee their business loan with their personal assets such as a car, while natural persons use consumer credits to buy assets for their professional activity. Under the proposal, both types of debt can be consolidated, where applicable, where incurred by individuals in their entrepreneurial activity.

At the same time, the proposal invites Member States to extend the application of the discharge principles also to natural persons who are not entrepreneurs, i.e. consumers. Many Member States in recent years have adopted or reformed national laws on consumer insolvency recognising the importance of enabling consumers to discharge of their debts and obtain a second chance. However, not all Member States have such laws and the discharge periods for over-indebted consumers remain very long. Helping consumers back into the economic spending cycle is an important part of good functioning markets and retail financial services. The Commission will continue to look into how Member States have reformed their national frameworks and monitor how they implement this specific second chance provision in the proposal, so as to review the situation of consumer over-indebtedness.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The proposal is based on Articles 53 and 114 of the Treaty on the Functioning of the European Union (TFEU).

The proposal sets out a comprehensive set of principles and, where necessary, targeted rules for an effective preventive restructuring framework and second chance. It also provides measures to make procedures more efficient, including formal insolvency (liquidation procedures), with the aim of reducing their length. An effective second chance would also imply limiting the length of disqualification orders issued for honest over-indebted entrepreneurs to enable them to take up and pursue an entrepreneurial activity after a reasonable period of time.

This proposal's objective is to remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures on preventive restructuring, insolvency and second chance. In particular, the proposal will remove additional *ex ante* costs for investors when assessing the risks of debtors entering financial difficulties in one or more Member States and the *ex post* costs of restructuring companies that have establishments, creditors or assets in other Member States, typically when restructuring international groups of companies. The proposal will also remove the additional risk-assessment and cross-border enforcement costs

for creditors of over-indebted entrepreneurs who relocate to another Member State in order to obtain a second chance in a much shorter period of time. It would also remove additional costs for entrepreneurs themselves who relocate to another Member State to obtain second chance.

The single market problems are not limited to purely cross-border situations. Even purely national insolvencies may have a domino effect on the functioning of the single market. Companies operating cross-border have in their supply chain some suppliers that may be purely domestic businesses. Where a supplier experiences financial difficulties and cannot be saved, this may have negative impacts, triggering the insolvency of the cross-border company.

An instrument limited to cross-border insolvencies only would not solve the single market problems, nor would it be feasible for investors to determine in advance the cross-border or domestic nature of debtor's future potential financial difficulties. The proposal goes beyond matters of judicial cooperation and establishes substantive minimum standards. For these reasons, it would not be appropriate to use Article 81 as a legal basis.

Several Members States took or have taken action independently and have recently enacted or started preparatory work to adopt new rules to improve the preventive restructuring and second chance framework. However, these national rules differ widely in content and, as a result, provide an uneven level of transparency and protection for investors. Investors may be obstructed from investing cross-border because the costs of doing so are much higher than they need to be. If the EU does not act, it is to be expected that other Member States reforming existing restructuring and second chance frameworks or introducing such frameworks for the first time will follow this divergent trend. This proposal is also designed to prevent such divergent legislative developments and consequent obstacles in the future.

• **Subsidiarity**

Given the substantial divergences between national restructuring and second chance frameworks in the EU and the absence of convergent trends in the more recent legislative changes at national level, it is highly unlikely that Member States individually would be able to ensure the overall coherence of their legislation with other Member States' insolvency legislations.

On second chance, to assess the question of subsidiarity a distinction needs to be made between natural persons who are entrepreneurs and those who are consumers. Unlike entrepreneurs, who constantly search for any sources of investment (often cross-border), consumers tend to receive, at this stage, local financing (loans from local banks)⁵³. Hence, the problem of consumers' over-indebtedness should be tackled first at national level. However, most recently in the replies to the Green Paper on retail financial services⁵⁴, industry respondents often indicated diverging national consumer insolvency laws as a barrier to selling retail financial products cross-border. Member States may therefore consider applying the same principles on discharge to all natural persons including consumers.

A well-functioning EU single market requires a coherent restructuring and second chance framework capable of addressing the cross-border dimension of firms, as interaction between companies located in different Member States has become increasingly common. EU action will therefore add value by facilitating cross-border investing in the EU, ensuring that viable

⁵³ Cross-border lending to households, which is now approximatively 5% of total household lending.
⁵⁴ http://ec.europa.eu/finance/consultations/2015/retail-financial-services/docs/green-paper_en.pdf

businesses in financial difficulty, wherever they are located in the single market, will be able to benefit from a wider range of accessible tools to prevent their insolvency. At the same time, entrepreneurs will benefit from being able to use reasonable discharge periods in their Member States. This could not realistically be achieved by the Member States acting alone. In addition, ensuring that cross-border creditors and investors involved in such a restructuring process have at their disposal appropriate safeguards will have positive economic effects. The proposed rules will create legal certainty for creditors and investors who want to lend in other Member States; the necessary information will be available so that they can take informed decisions.

In conclusion, the proposal respects the principle of subsidiarity by proposing action only where and to the extent that the Member States cannot achieve the objectives by themselves.

- **Proportionality**

The proposal is designed to respect the principle of proportionality. The means it uses will be tailored to achieve the objective of ensuring the proper functioning of the single market. The future EU instrument should set common objectives and general rules, while leaving freedom to Member States to determine how to achieve those objectives.

- **Choice of the instrument and degree of harmonisation**

A binding instrument in the form of a Directive setting up a minimum harmonised framework appears necessary to achieve the policy objectives on restructuring, insolvency and second chance. The 2014 Commission Recommendation did not succeed in ensuring that Member States have a coherent and robust response to the problems it identified. Moreover, shortcomings in the functioning of the EU's single market due to lack of convergence of insolvency frameworks were further highlighted by the Commission in the Capital Markets Union Action Plan and the Single Market Strategy. A Directive would allow Member States to retain flexibility as to the most appropriate means to implement in their national context principles such as the availability of early warning tools or the duties of directors in the vicinity of insolvency. They could also set more detailed targeted rules needed to attain the proposal's objectives, such as maximum periods of stay of enforcement actions or majorities for adopting restructuring plans.

Restructuring, insolvency and second chance are highly regulated at national level and are linked to other areas of law such as company law, employment law, tax law and state aid law. Furthermore, restructuring, insolvency and second chance are treated differently in the Member States not only due to different historical and economic developments, but also due to different approaches to protecting social values, such as workers' rights or the right to property. Minimum standards are therefore the most appropriate means to ensure a coherent framework in all Member States while also enabling Member States to go beyond the Directive's provisions. For example, Member States may further encourage new and interim financing in restructuring procedures by giving it priority ranking above pre-restructuring claims in subsequent liquidation procedures. Member States may also enhance second chance frameworks by extending its personal scope to cover all natural persons, including consumers. Member States may also improve the treatment of workers when at the stage of adoption of restructuring plans, by requiring that workers are placed in a class of their own, separate from other creditors.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

The proposal builds on the 2014 Recommendation on a new approach to business failure and insolvency⁵⁵. A Commission evaluation concluded that the Recommendation has been only partially taken up by some Member States, including those that received insolvency-related recommendations under the European Semester. Even the Member States that implemented the Recommendation have done so in a selective manner, so significant differences remain.⁵⁶ Consequently, the Recommendation by itself was not sufficient to achieve the objectives of convergence and the reduction of inefficiencies for rules enabling early debt restructuring and a second chance.

- **Stakeholder consultations**

The Commission conducted extensive consultation of stakeholders. An online public consultation from 23 March 2016 to 14 June 2016 received more than 260 contributions from 27 Member States (particularly Germany, followed by the United Kingdom, Belgium and Lithuania). Dedicated meetings were held with Member States governmental experts. An informal group composed of selected stakeholders with particular interest in issues of debt restructuring, insolvency and second chance was created and met three times in 2016.⁵⁷ Finally, a Conference on the convergence of insolvency frameworks within the European Union was organised under the Slovak Presidency on 11 July 2016.

Most Member States supported the objectives of the Commission to improve early restructuring and second chance frameworks, but insisted that harmonisation should remain mainly on the level of principles due to complex links with other areas of law such as company law. As to the stakeholders, business organisations, professionals' associations, financial institutions, consumer organisations, Trade Unions and academics were in general supportive of minimum harmonised rules on early restructuring and a second chance approach and welcomed the idea of an efficient and (cost)-effective EU insolvency framework for saving viable businesses. They also stressed that a balanced approach should be envisaged, safeguarding the interests of all stakeholders and preventing moral hazard. The banking sector and some other stakeholders were of the view that EU rules on consumer discharge, if considered, should be covered in a separate instrument. The European Parliament supported harmonisation of certain aspects of restructuring and put emphasis on ensuring a second chance to all natural persons.

- **Collection and use of expertise**

The expert group on restructuring and insolvency law held six expert group meetings between January and July 2016. A comprehensive comparative legal study on substantive insolvency laws in all Member States was carried out to identify all areas where differences in national

⁵⁵ C(2014) 1500 final, 12.3.2014.

⁵⁶ For more details please see the evaluation of the implementation of the Commission Recommendation on a new approach to business failure and insolvency, 30 September 2015: http://ec.europa.eu/justice/civil/files/evaluation_recommendation_final.pdf.

⁵⁷ The main participants were BusinessEurope, AFME, EBF, ACCA, UEAPME, ESBA, Independent Retail Europe, EuroChambers, ETUC, EFIN, FEE, INSOL Europe, FDC, The Council of Bars and Law Societies of Europe, European Law Institute.

laws might raise obstacles to the single market⁵⁸. An economic study on the impact of minimum standards in restructuring, insolvency and second chance was also carried out⁵⁹.

• Impact assessment

The following high level options were considered:

Option 1: Maintaining the status quo (baseline scenario)

Option 2: Setting up a fully harmonised preventive restructuring procedure and a second chance framework

Option 3: Introducing an alternative, optional EU restructuring and second chance regime

Option 4: Setting up a harmonised minimum legal framework in the area of restructuring and second chance for entrepreneurs

The **selected option** under the impact assessment was to set up a harmonised minimum legal framework for restructuring and second chance for entrepreneurs, with a non-binding provision on second chance for consumers, and to make procedures more efficient. The preferred option offers the following benefits:

- (i) efficient possibilities for early restructuring;
- (ii) improving chances of negotiation by allowing the debtor ‘breathing space’ via a stay of enforcement actions (moratorium);
- (iii) facilitating continuation of a debtor’s business while restructuring;
- (iv) preventing dissenting minority creditors and shareholders from jeopardising the restructuring effort, while safeguarding their interests;
- (v) increasing restructuring plans’ chances of success;
- (vi) reducing costs and length of restructuring procedures;
- (vii) enabling discharge for over-indebted entrepreneurs in a reasonable time (3 years);
- (viii) increasing the effectiveness of restructuring, insolvency and second chance.

The preferred option will help reduce barriers to cross-border investment. It would result in more viable business being rescued than at present since minority creditors will not be able to destabilise the negotiation process in the hope of extracting some commercial advantage, e.g. by forcing an early recovery of their debt. Efficient preventive procedures can contribute to limiting the occurrence of non-performing loans in cyclical downturns while ensuring a high recovery rate on loans whose value is impaired. The preferred option should lead to increases in recovery rates which, in turn, lead to lower borrowing costs. The preferred option will reduce the costs of and increase the opportunities for natural persons (entrepreneurs) to have a fresh start. The cost of assessing investment risks ex ante will fall and recovery rates in insolvency proceedings will improve. The greater the alignment of restructuring regimes, the lower the cost of legal advice currently used to avoid application of multiple national restructuring and insolvency frameworks.

The preferred option will also increase self-employment, since reducing discharge periods increases the rate of self-employment. The preferred option will also favour consumption and growth.

⁵⁸ Tender No. JUST/2014/JCOO/PR/CIVI/0075, available at http://ec.europa.eu/justice/civil/files/insolvency/insolvency_study_2016_final_en.pdf.
⁵⁹ Tender No. JUST /2015/JCOO/FWCIVI0103, forthcoming.

The preferred option will mean that some Member States incur costs when amending their restructuring and second chance frameworks. Some Member States will need to put in place a preventive procedure or adapt a procedure already notified under Annex A of the Insolvency Regulation. Some changes to company law may be needed to implement the provisions on shareholders' position in restructuring.

- **Regulatory fitness and simplification**

The preferred option will reduce barriers for providing cross-border credit to SMEs: efficient restructuring would enable SMEs who are creditors to recover more than they would if the debtor entered insolvency. This is because creditors' recovery rates are generally higher where the insolvency and restructuring framework allows for early and efficient restructuring of viable firms and quick resolution of non-viable firms. As debtors, SMEs will have access to early warning tools which should lead to more restructurings being filed early. SMEs in particular will also benefit from model restructuring plans developed nationally as they would make it easier for debtors to draft restructuring plans with the appropriate disclosures. By promoting a more flexible restructuring framework and better conditions for fresh start upon failure, the death rate of companies can be reduced, as well as the negative knock-on effects of related insolvencies in the supply chain. Easier discharge conditions for entrepreneurs also contribute to higher birth rates for companies.

Raising the efficiency of restructuring, insolvency and discharge procedures and in particular the digitisation of all insolvency procedures will help reduce the length of procedures and increase their efficiency, which would translate to lower costs of restructuring and higher recovery rates for creditors.

- **Fundamental rights**

Freedom to conduct a business and the right to engage in gainful employment (Articles 16 and 15 of the Charter of Fundamental Rights): these rights are guaranteed. Debtors in financial difficulties can continue operating during restructuring negotiations and have full or at least partial control of their assets and affairs. Over-indebted entrepreneurs would be able to have a second start after a full discharge of debt.

Right to property and the right to an effective remedy and to a fair trial (Articles 17 and 47 of the Charter): although certain parts of the procedure may affect these rights, they are necessary and proportionate in order to facilitate speedy implementation of restructuring plans capable of restoring debtors to viability. Appropriate safeguards have been included in each case to ensure that the parties' legitimate interests are protected against abuse.

Workers' right to information and consultation (Article 27 of the Charter): these will be affected positively by the proposed measures since the proposal is without prejudice to existing Union legislation in this area and provides, in addition, a right for affected workers to vote on restructuring plans.

Right of collective bargaining and action (Article 28 of the Charter): the proposal is without prejudice to the rights of workers and employers, or their respective organisations, to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action in accordance with Union law and national laws and practices.

4. BUDGETARY IMPLICATIONS

The proposal will not have implications for the EU budget. The costs of implementing and transposing the Directive will be fully covered by the Justice Programme's voted budget allocation. The cost of preparing an implementation report 5 years after the date of application of the Directive and every 7 years thereafter will be covered by the budget allocation of the instruments in the Justice and Consumers policy area for the years in question.

5. OTHER ELEMENTS

• Implementation plans and monitoring, evaluation and reporting arrangements

The Commission will facilitate the Directive's implementation in the Member States by:

- providing transposition assistance;
- organising two transposition workshops and interim stock-taking exercises;
- organising bilateral meetings including on demand by Member States;
- providing Member States with templates for communicating national transposition measures.

Member States will also be invited to take certain implementation measures, such as indicating a dedicated contact point, notifying all national transposition measures and raising awareness.

To ensure monitoring and implementation of the rules, the proposal would require Member States to collect data based on a standard methodology, on indicators such as the number of filings for each type of procedure (restructuring, insolvency, second chance), length, outcome of procedures, administrative costs of procedures, recovery rates, and success of such procedures. Data will be broken down by size and type of debtors so that the effectiveness of Member States' procedures can be objectively assessed. Member States are required to transmit data to the Commission annually.

The Directive's operation will be first reviewed 5 years after its entry into application and every 7 years thereafter.

• Detailed explanation of the specific provisions of the proposal

The Directive has three distinct main parts: preventive restructuring frameworks (Title II) and second chance for entrepreneurs (Title III) and measures to raise the efficiency of restructuring, insolvency and second chance (Title IV). Titles I, IV, V and VI are horizontal in scope.

Title I General provisions: contains provisions on the scope of application, both *rationae materiae* and *rationae personae*, several definitions and a provision on the availability of early warning tools for debtors, be they legal persons or natural persons engaged in a trade, business or professional activity (entrepreneurs).

Although the provisions in Title III are restricted to entrepreneurs, it is explicitly stated that Member States may extend those provisions to all natural persons to ensure consistent treatment of personal debt. Indeed, several Member States do not distinguish between personal debts incurred following a business activity and those incurred outside such activity. Nothing in this Directive suggests that such a distinction should be made or is appropriate.

The Directive invites Member States to apply the same principles on second chance to all natural persons.

Title II Preventive restructuring frameworks: this puts in place common, core elements for preventive restructuring frameworks to give debtors in financial difficulty, be they legal or natural persons, effective access to procedures facilitating restructuring plans' early negotiation, adoption by creditors and possible confirmation by a judicial or administrative authority.

Article 4: preventive restructuring frameworks can consist of one or more procedures or measures provided that a debtor can combine all the elements listed in them in order to effectively negotiate and adopt a restructuring plan.

Article 5: the debtor should be left in possession of its assets and affairs. Mediators or supervisors (practitioners in the field of restructuring) may have a role, but such practitioners should not be appointed by a judicial or administrative authority in every case.

Article 6 and 7: allow negotiations to take place and to fend off hold-out creditors, the debtor should have access to a stay of individual enforcement actions. Concerns that creditors might be negatively affected by the stay are addressed by provisions on the duration of the stay, the conditions for its renewal and the conditions for lifting the stay. Workers' outstanding claims are exempted from the stay to the extent Member States do not provide for an appropriate protection by other means. The debtor should also not be under obligation or under threat of opening of other types of insolvency procedures, in particular liquidation procedures, for the period of the stay, so it can continue operating its business. It should also be able to count on the continued performance of contracts with suppliers and other creditors provided that it fulfils his obligations under such contracts.

Article 8: provides for minimum mandatory information to be included in restructuring plans. Member States may require additional mandatory information, provided this does not put a disproportionate burden on debtors. Member States should develop on-line restructuring plan models and practical information on how a plan proposer can use such models.

Article 9: provides for adoption of restructuring plans by affected creditors or classes of creditors. Where creditors with different interests are involved, they should also be treated in separate classes. As a minimum, secured creditors should always be treated separately from unsecured creditors. Member States may also provide that workers are treated in a class separate from other creditors.

Article 10: lists cases where a restructuring plan need confirmation from a judicial or administrative authority to make it binding and specifies the conditions for such confirmation.

Article 11: sets out the conditions to be fulfilled to ensure that a restructuring plan not supported by all classes of creditors is nevertheless confirmed by a judicial or administrative authority.

Article 12: lays down the principle that shareholders and other equity holders should not be allowed to obstruct the adoption of restructuring plans of a viable business, provided that their legitimate interests are protected.

Article 13: provides rules on valuation, on when and how it must be determined in order to ensure fair protection for dissenting parties.

Article 14: spells out the effects of restructuring plans on affected and non-affected parties.

Article 15: lays down minimum rules on appeals as safeguards for protecting the parties' legitimate interests, while also ensuring that such safeguards do not delay confirmation or implementation of restructuring plans.

Article 16 and 17: provide minimum protection for new financing necessary to implement a restructuring plan, for interim financing incurred to ensure a business's continuity during restructuring negotiations, and for other transactions concluded in close connection with a restructuring plan.

Article 18: contains an obligation for the Member States to impose specific duties on directors in the vicinity of insolvency which would incentivise them to pursue early restructuring when the business is viable.

Title III Second chance for entrepreneurs: puts in place minimum provisions on discharge of debt for over-indebted entrepreneurs as the basic conditions for ensuring entrepreneurs a second chance. Member States can go beyond this minimum protection, by allowing even more friendly treatment of entrepreneurs, e.g. through rules on access to finance for second starters.

Article 19: lays down the principle that over-indebted entrepreneurs should have effective access to full discharge without a minimum repayment amount or percentage of the debt.

Article 20: entrepreneurs should have the benefit of a full discharge of debts after maximum 3 years, without the need to reapply to a judicial or administrative authority. The starting point of the three-year period differs, depending on whether the entrepreneur makes payments to creditors under a repayment plan or the procedure consists only in a realisation of assets. Limitations to a short discharge period are included in Article 22.

Article 21: entrepreneurs disqualified on grounds linked to their over-indebtedness should also have the benefit of short disqualification orders to offer them an effective second chance. The limitations in Article 22 should apply.

Article 22: gives Member States a large margin of discretion when setting limitations to the provisions on access to discharge and on discharge periods, provided that such limitations are clearly specified and are necessary to protect a general interest.

Article 23: as personal debts of a professional and non-professional nature are often intertwined, Member States should try to consolidate, where applicable, the separate procedures to achieve effective access to second chance for entrepreneurs.

Title IV Measures to increase the efficiency of restructuring, insolvency and discharge procedures: applies not only to preventive restructuring and discharge procedures, but also to insolvency procedures.

Article 24: requires Member States to ensure that members of the judiciary and of other competent authorities are properly trained and specialised in restructuring, insolvency and second chance matters.

Article 25: requires Member States to encourage the initial and further training as well as the establishment of codes of conduct for practitioners dealing with restructuring, insolvency and second chance matters.

Article 26: contains minimum standards for appointing, supervising and remunerating practitioners in the field of restructuring, insolvency and second chance.

Article 27: provides for the use of electronic means of communication in the context of restructuring, insolvency and second chance.

Title V Monitoring of restructuring, insolvency and second chance: contains minimum rules on data collection by the Member States and on communication of such data to the Commission using a standardised data communication template;

Title VI Final provisions: rules on the Directive's relationship of the with other Union instruments, on reviewing the Directive's application, on adopting standard forms, on entry into force and entry into application.

2016/0359 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53 and 114 thereof,
Having regard to the proposal from the European Commission,
After transmission of the draft legislative act to the national parliaments,
Having regard to the opinion of the European Economic and Social Committee⁶⁰,
Having regard to the opinion of the Committee of the Regions⁶¹,
Acting in accordance with the ordinary legislative procedure,
Whereas:

- (1) The objective of this Directive is to remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures on preventive restructuring, insolvency and second chance. This Directive aims at removing such obstacles by ensuring that viable enterprises in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; that honest over indebted entrepreneurs have a second chance after a full discharge of debt after a reasonable period of time; and that the effectiveness of restructuring, insolvency and discharge procedures is improved, in particular with a view to shortening their length.
- (2) Restructuring should enable enterprises in financial difficulties to continue business in whole or in part, by changing the composition, conditions or structure of assets and liabilities or of their capital structure, including by sales of assets or parts of the business. Preventive restructuring frameworks should above all enable the enterprises to restructure at an early stage and to avoid their insolvency. Those frameworks should maximise the total value to creditors, owners and the economy as a whole and should prevent unnecessary job losses and losses of knowledge and skills. They should also prevent the build-up of non-performing loans. In the restructuring process the rights of all parties involved should be protected. At the same time, non-viable businesses with no prospect of survival should be liquidated as quickly as possible.

⁶⁰ OJ C , , p. .

⁶¹ OJ C , , p. .

- (3) There are differences between the Member States as regards the range of the procedures available to debtors in financial difficulties in order to restructure their business. Some Member States have a limited range of procedures meaning that businesses are only able to restructure at a relatively late stage, in the context of insolvency procedures. In other Member States, restructuring is possible at an earlier stage but the procedures available are not as effective as they could be or are very formal, in particular limiting the use of out-of-court processes. Similarly, national rules giving entrepreneurs a second chance, in particular by granting them discharge from the debts they have incurred in the course of their business, vary between Member States in respect of the length of the discharge period and the conditions for granting such a discharge.
- (4) In many Member States it takes more than three years for bankrupt, but honest entrepreneurs to discharge their debts and make a fresh start. Inefficient second chance frameworks result in entrepreneurs having to relocate in other jurisdictions in order to benefit from a fresh start in a reasonable period of time, at considerable additional costs to both their creditors and the debtors themselves. Long disqualification orders which often accompany a procedure leading to discharge create obstacles to the freedom to take up and pursue a self-employed, entrepreneurial activity.
- (5) Excessive length of restructuring, insolvency and discharge procedures in several Member States is an important factor triggering low recovery rates and deterring investors from making business in jurisdictions where procedures risk taking too long.
- (6) All these differences translate into additional costs for investors when assessing the risks of debtors entering financial difficulties in one or more Member States and the costs of restructuring companies having establishments, creditors or assets in other Member States, such as is most clearly the case of restructuring international groups of companies. Many investors mention uncertainty about insolvency rules or the risk of lengthy or complex insolvency procedures in another country as a main reason for not investing or not entering into a business relationship with a counterpart outside their own country.
- (7) Those differences lead to uneven conditions for access to credit and to uneven recovery rates in the Member States. A higher degree of harmonisation in the field of restructuring, insolvency and second chance is thus indispensable for a well-functioning single market in general and for a working Capital Markets Union in particular.
- (8) The additional risk-assessment and cross-border enforcement costs for creditors of over-indebted entrepreneurs who relocate to another Member State in order to obtain a second chance in a much shorter period of time should also be removed. The additional costs for entrepreneurs stemming from the need to relocate to another Member State in order to benefit from a second chance should also be reduced. Furthermore, the obstacles stemming from long disqualification orders linked to an entrepreneur's over-indebtedness suppresses entrepreneurship.
- (9) The obstacles to the exercise of fundamental freedoms are not limited to purely cross-border situations. An increasingly interconnected single market - where goods, services, capital and workers circulate freely - with an ever stronger digital dimension means that very few companies are purely national if all relevant elements are considered, such as their client base, supply chain, scope of activities, investor and capital base. Even purely national insolvencies may have an impact on the functioning

of the single market through the so-called domino effect of insolvencies, whereby an enterprise's insolvency may trigger further insolvencies in the supply chain.

- (10) Regulation (EU) 2015/848 of the European Parliament and of the Council⁶² deals with issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings as well as with the interconnection of insolvency registers. Its scope covers preventive procedures which promote the rescue of an economically viable debtor as well as procedures which give a second chance to entrepreneurs. However, Regulation (EU) 2015/848 does not tackle the discrepancies between those procedures in national law. Furthermore, an instrument limited to cross-border insolvencies only would not remove all obstacles to free movement, nor would it be feasible for investors to determine in advance the cross-border or domestic nature of the future potential financial difficulties of the debtor. There is a need therefore to go beyond matters of judicial cooperation and to establish substantive minimum standards.
- (11) It is necessary to lower the costs of restructuring for both debtors and creditors. Therefore the differences which hamper the early restructuring of viable enterprises in financial difficulties and the possibility of a second chance for honest entrepreneurs should be reduced. That should bring greater transparency, legal certainty and predictability in the Union. Also, it should maximise the returns to all types of creditors and investors and encourage cross-border investment. Greater coherence should also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union.
- (12) Removing the barriers to effective restructuring of viable enterprises in financial difficulties contributes to minimising job losses, losses for creditors in the supply chain, preserves know-how and skills and hence benefits the wider economy. Facilitating a second chance for entrepreneurs avoids their exclusion from the labour market and enables them to restart entrepreneurial activities, drawing lessons from past experience. Finally, reducing the length of restructuring procedures would result in higher recovery rates for creditors as the passing of time would normally only result in a further loss of value for the enterprise. Moreover, efficient insolvency frameworks would enable a better assessment of the risks involved in lending and borrowing decisions and smooth the adjustment for over-indebted enterprises, minimizing the economic and social costs involved in their deleveraging process.
- (13) In particular small and medium sized enterprises should benefit from a more coherent approach at Union level, since they do not have the necessary resources to cope with high restructuring costs and to take advantage of the more efficient restructuring procedures in some Member States. Small and medium enterprises, especially when facing financial difficulties, often do not have the resources to hire professional advice, therefore early warning tools should be put in place to alert debtors to the urgency to act. In order to help such enterprises restructure at low cost, model restructuring plans should also be developed nationally and made available online. Debtors should be able to use and adapt them to their own needs and to the specificities of their business.
- (14) It is appropriate to exclude from the scope of this Directive debtors which are insurance and re-insurance undertakings as defined in points 1 and 4 of Article 13 of

⁶² Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141, 5.6.2015, p. 19).

Directive 2009/138/EC of the European Parliament and of the Council⁶³, credit institutions as defined in point 1 of Article 4(1) of Regulation (EC) No 575/2013 of the European Parliament and of the Council⁶⁴, investment firms and collective investment undertakings as defined in points 2 and 7 of Article 4(1) of Regulation (EC) No 575/2013, central counterparties as defined in point 1 of Article 2 of Regulation (EU) No 648/2012 of the European Parliament and of the Council⁶⁵, central securities depositories as defined in point 1 of Article 2 of Regulation (EU) 909/2014 of the European Parliament and of the Council⁶⁶ and other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU of the European Parliament and of the Council⁶⁷. These are subject to special arrangements and the national supervisory authorities have wide-ranging powers of intervention.

- (15) Consumer over-indebtedness is a matter of great economic and social concern and is closely related to the reduction of debt overhang. Furthermore, it is often not possible to draw a clear distinction between the consumer and business debts of an entrepreneur. A second chance regime for entrepreneurs would not be effective if the entrepreneur had to go through separate procedures, with different access conditions and discharge periods, to discharge his business personal debts and his non-business personal debts. For these reasons, although this Directive does not include binding rules on consumer over-indebtedness, Member States should be able to also apply the discharge provisions to consumers.
- (16) The earlier the debtor can detect its financial difficulties and can take appropriate action, the higher the probability of avoiding an impending insolvency or, in case of a business whose viability is permanently impaired, the more orderly and efficient the winding-up process. Clear information on the available preventive restructuring procedures as well as early warning tools should therefore be put in place to incentivise debtors who start to experience financial problems to take early action. Possible early warning mechanisms should include accounting and monitoring duties for the debtor or the debtor's management as well as reporting duties under loan agreements. In addition, third parties with relevant information such as accountants, tax and social security authorities could be incentivised or obliged under national law to flag a negative development.
- (17) A restructuring framework should be available to debtors to enable them to address their financial difficulties at an early stage, when it appears likely that their insolvency

⁶³ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

⁶⁴ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176 27.6.2013, p. 1).

⁶⁵ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201 27.7.2012, p. 1).

⁶⁶ Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257 28.8.2014, p. 1).

⁶⁷ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

may be prevented and the continuation of their business assured. A restructuring framework should be available before a debtor becomes insolvent according to national law, i.e. before the debtor fulfils the conditions for entering collective insolvency procedure which entail normally a total divestment of the debtor and the appointment of a liquidator. A test of viability should not therefore be made a precondition for entering negotiations and for granting a stay of enforcement actions. Rather, the viability of an enterprise should most often be an assessment to be made by affected creditors who in their majority agree to some adjustments of their claims. However, in order to avoid the procedures being misused, the financial difficulties of the debtor should reflect a likelihood of insolvency and the restructuring plan should be capable of preventing the insolvency of the debtor and ensuring the viability of the business.

- (18) To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures limiting the involvement of judicial or administrative authorities to where it is necessary and proportionate in order to safeguard the interests of creditors and other interested parties likely to be affected. To avoid unnecessary costs and reflect the early nature of the procedure, debtors should in principle be left in control of their assets and the day-to-day operation of their business. The appointment of a restructuring practitioner, whether a mediator supporting the negotiations of a restructuring plan or an insolvency practitioner supervising the actions of the debtor, should not be mandatory in every case, but made on a case-by-case basis depending on the circumstances of the case or on the debtor's specific needs. Furthermore, there should not necessarily be a court order for the opening of the restructuring process which may be informal as long as the rights of third parties are not affected. Nevertheless, a degree of supervision should be ensured when this is necessary to safeguard the legitimate interests of one or more creditors or another interested party. This may be the case, in particular, when a general stay of individual enforcement actions is granted by the judicial or administrative authority or where it appears necessary to impose a restructuring plan on dissenting classes of creditors.
- (19) A debtor should be able to request the judicial or administrative authority for a temporary stay of individual enforcement actions which should also suspend the obligation to file for opening of insolvency procedures where such actions may adversely affect negotiations and hamper the prospects of a restructuring of the debtor's business. The stay of enforcement could be general, that is to say affecting all creditors, or targeted towards individual creditors. In order to provide for a fair balance between the rights of the debtor and of creditors, the stay should be granted for a period of no more than four months. Complex restructurings may, however, require more time. Member States may decide that in such cases, extensions of this period may be granted by the judicial or administrative authority, providing there is evidence that negotiations on the restructuring plan are progressing and that creditors are not unfairly prejudiced. If further extensions are granted, the judicial or administrative authority should be satisfied that there is a strong likelihood that a restructuring plan will be adopted. Member States should ensure that any request to extend the initial duration of the stay is made within a reasonable deadline so as to allow the judiciary or administrative authorities to deliver a decision within due time. Where a judicial or administrative authority does not take a decision on the extension of a stay of enforcement before it lapses, the stay should cease to have effects on the day the stay period expires. In the interest of legal certainty, the total period of the stay should be limited to twelve months.

- (20) To ensure that the creditors do not suffer detriment, the stay should not be granted or, if granted, should not be prolonged or should be lifted when creditors are unfairly prejudiced by the stay of enforcement. In establishing whether there is unfair prejudice to creditors, judicial or administrative authorities may take into account whether the stay would preserve the overall value of the estate, whether the debtor acts in bad faith or with the intention of causing prejudice or generally acts against the legitimate expectations of the general body of creditors. A single creditor or a class of creditors would be unfairly prejudiced by the stay if for example their claims would be made substantially worse-off as a result of the stay than if the stay was not granted, or if the creditor is put more at a disadvantage than other creditors in a similar position.
- (21) Creditors to which the stay applies should also not be allowed to withhold performance, terminate, accelerate or in any other way modify executory contracts during the stay period, provided the debtor continues to comply with its existing obligations under such contracts. Early termination would endanger the ability of the business to continue operating during restructuring negotiations, especially when it concerns contracts for essential supplies such as gas, electricity, water, telecoms and card payment services. However, in order to protect the legitimate interests of creditors and to ensure the least disruption to the operation of creditors in the supply chain, the stay should only apply in respect of the claims which arose before the stay was granted. In order to achieve a successful restructuring, the debtor should pay in the ordinary course of business claims of and owed to creditors unaffected by the stay and the claims of creditors affected by the stay that arise after the stay is granted.
- (22) When a debtor enters an insolvency procedure, some suppliers may have contractual rights entitling them to terminate the supply contract solely on account of the insolvency (known as *ipso facto* clauses). The same may be true when a debtor applies for preventive restructuring measures. Where such clauses are invoked when the debtor is merely negotiating a restructuring plan or requesting a stay of enforcement or in connection with any event connected with the stay, early termination may have a negative impact on the debtor's business and the successful rescue of the business. Therefore, when the stay is granted by a judicial or administrative authority, it is necessary that creditors to which the stay applies are not allowed to invoke *ipso facto* clauses which make reference to negotiations on a restructuring plan or a stay or any similar event connected to the stay.
- (23) Creditors should have the right to challenge the stay once it has been granted by a judicial or administrative authority. When the stay is no longer necessary with a view to facilitating the adoption of a restructuring plan, for example because it is clear that there is a lack of support for the restructuring from a majority of creditors as required by national law, creditors should also be able to ask that stay be lifted.
- (24) Any creditors affected by the restructuring plan and, where allowed under national law, equity-holders should have a right to vote on the adoption of a restructuring plan. Parties unaffected by the restructuring plan should have no voting rights in relation to the plan, nor should their support be required for the approval of any plan. The vote can take the form of a formal voting process or of a consultation and agreement with the required majority of affected parties. However, where the vote takes the form of a consultation and agreement, affected parties whose agreement was not necessary should nevertheless be offered the possibility to join the restructuring plan.
- (25) To ensure that rights which are substantially similar are treated equitably and that restructuring plans can be adopted without unfairly prejudicing the rights of affected

parties, affected parties should be treated in separate classes which reflect the class formation criteria under national law. As a minimum, secured and unsecured creditors should always be treated in separate classes. National law may provide that secured claims may be divided into secured and unsecured claims based on collateral valuation. National law may also stipulate specific rules supporting class formation where non-diversified or otherwise especially vulnerable creditors, such as workers or small suppliers, would benefit from such class formation. National laws should in any case ensure that adequate treatment is given to matters of particular importance for class formation purposes, such as claims from connected parties, and should contain rules that deal with contingent claims and contested claims. The judicial or administrative authority should examine class formation when a restructuring plan is submitted for confirmation, but Member States could stipulate that such authorities may also examine class formation at an earlier stage should the proposer of the plan seek validation or guidance in advance.

- (26) Requisite majorities should be established by national law to ensure that a minority of affected parties in each class cannot obstruct the adoption of restructuring plan which does not unfairly reduce their rights and interests. Without a majority rule binding dissenting secured creditors, early restructuring would not be possible in many cases, for example where a financial restructuring is needed but the business is otherwise viable. To ensure that parties have a say on the adoption of restructuring plans proportionate to the stakes they have in the business, the required majority should be based on the amount of the creditors' claims or equity holders' interests in any given class.
- (27) The 'best interest of creditors' test makes it possible to ensure that no dissenting creditor is worse off under the restructuring plan than they would be in the case of liquidation, whether that means piecemeal liquidation or sale of the business as a going concern. That test should be applied in any case where a plan needs to be confirmed in order to be binding over dissenting creditors or, as the case may be, dissenting classes of creditors.
- (28) While a restructuring plan should always be deemed adopted if the required majority in each affected class supports the plan, a restructuring plan which is not supported by the required majority in each affected class may still be confirmed by a judicial or administrative authority provided that it is supported by at least one affected class of creditors and that dissenting classes are not unfairly prejudiced under the proposed plan (the cross-class cram-down mechanism). In particular, the plan should abide by the absolute priority rule which ensures that a dissenting class of creditors is paid in full before a more junior class can receive any distribution or keep any interest under the restructuring plan. The absolute priority rule serves as a basis for the value to be allocated among the creditors in restructuring. As a corollary to the absolute priority rule, no class of creditors can receive or keep under the restructuring plan economic values or benefits exceeding the full amount of the claims or interests of such class. The absolute priority rule makes it possible to determine, when compared to the capital structure of the enterprise under restructuring, the value allocation that parties are to receive under the restructuring plan on the basis of the value of the enterprise as a going concern.
- (29) While shareholders' or other equity holders' legitimate interests should be protected, Member States should ensure that shareholders cannot unreasonably block the adoption of restructuring plans which would bring the debtor back to viability. For example, the adoption of a restructuring plan should not be conditional on the

agreement of the out-of-the-money equity holders, namely equity holders who, upon a valuation of the enterprise, would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied. Member States can deploy different means to achieve this goal, for example by not giving equity holders the right to vote on a restructuring plan. However, where equity holders have the right to vote on a restructuring plan, a judicial or administrative authority should be able to confirm the plan notwithstanding the dissent of one or more classes of equity holders, through a cross-class cram down mechanism. More classes of equity holders may be needed where different classes of shareholdings with different rights exist. Equity holders of small and medium enterprises who are not mere investors but are the owners of the firm and contribute to the firm in other ways such as managerial expertise may not have an incentive to restructure under such conditions. For this reason, the cross-class cram-down mechanism should remain optional for the plan proposer.

- (30) Confirmation of a restructuring plan by a judicial or administrative authority is necessary to ensure that the reduction of the rights of creditors or interests of equity holders is proportionate to the benefits of the restructuring and that they have access to an effective remedy. The judicial or administrative authority should therefore reject a plan where it has been established that the attempted restructuring reduces the rights of dissenting creditors or equity holders below what they could reasonably expect to receive in the event of the liquidation of the debtor's business, either by piecemeal liquidation or by a sale as a going concern, depending on the particular circumstances of each debtor. However, where the plan is confirmed through a cross-class cram-down mechanism, the absolute priority rule should be applied by reference to the enterprise valuation which, as opposed to the going-concern liquidation valuation of the enterprise, looks at the value of the debtor's business in the longer term. The enterprise valuation is, as a rule, higher than the going-concern liquidation value because it captures the fact that the business continues its activity and contracts with the minimum disruption, has the confidence of financial creditors, shareholders and clients, continues to generate revenues and limits the impact on workers.
- (31) The success of a restructuring plan may often depend on whether there are financial resources in place to support first the operation of the business during restructuring negotiations and second the implementation of the restructuring plan after its confirmation. New financing or interim financing should therefore be exempt from avoidance actions which seek to declare such financing void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures. National insolvency laws providing for avoidance actions if and when the debtor becomes eventually insolvent or stipulating that new lenders may incur civil, administrative or criminal sanctions for extending credit to debtors in financial difficulties are jeopardising the availability of financing necessary for the successful negotiation and implementation of a restructuring plan. As opposed to new financing which should be confirmed by a judicial or administrative authority as part of a restructuring plan, when interim financing is extended the parties do not know whether the plan will be eventually confirmed or not. Limiting the protection of interim finance to cases where the plan is adopted by creditors or confirmed by a judicial or administrative authority would discourage the provision of interim finance. To avoid potential abuses, only financing that is reasonably and immediately necessary for the continued operation or survival of the debtor's business or the preservation or enhancement of the value of that business pending the confirmation of that plan should be protected. Protection from avoidance actions and protection from personal liability are minimum guarantees granted to interim financing and new

financing. However, encouraging new lenders to take the enhanced risk of investing in a viable debtor in financial difficulties may require further incentives such as for example giving such financing priority at least over unsecured claims in subsequent insolvency procedures.

- (32) Interested affected parties should have the possibility to appeal a decision on the confirmation of a restructuring plan. However, in order to ensure the effectiveness of the plan, to reduce uncertainty and to avoid unjustifiable delays, appeals should not have suspensive effects on the implementation of a restructuring plan. Where it is established that minority creditors have suffered unjustifiable detriment under the plan, Member States should consider, as an alternative to setting aside the plan, the provision of monetary compensation to the respective dissenting creditors payable by the debtor or the creditors who voted in favour of the plan.
- (33) In order to promote a culture of early resort to preventive restructurings, it is desirable that transactions undertaken in good faith and closely connected with the adoption or implementation of a restructuring plan are also given protection from avoidance actions in subsequent insolvency procedures. Transactions in contemplation and closely connected with negotiations for a restructuring plan could be, for example, the selling of a subsidiary to obtain cash that the enterprise in financial difficulties needs to continue operating the business during restructuring negotiations. Transactions in furtherance of or closely connected with the terms of the restructuring plan could take place when the debtor pledges the shares in a subsidiary to secure a new loan included in the plan or when he carries out a debt for equity swap envisaged in the plan. Such protection should enhance certainty with respect to transactions with businesses that are known to be in difficulties and remove the fear of creditors and investors that all such transactions could be declared void in case the restructuring fails.
- (34) Throughout the preventive restructuring procedures, workers should enjoy full labour law protection. In particular, this Directive is without prejudice to workers' rights guaranteed by Council Directive 98/59/EC⁶⁸, Council Directive 2001/23/EC⁶⁹, Directive 2002/14/EC of the European Parliament and of the Council⁷⁰, Directive 2008/94/EC of the European Parliament and of the Council⁷¹ and Directive 2009/38/EC of the European Parliament and of the Council⁷². The obligations concerning the information and consultation of workers under national law implementing the above-mentioned Directives remain fully intact. This includes

⁶⁸ Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.08.1998, p. 16.

⁶⁹ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.03.2001, p. 16.

⁷⁰ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002, p. 29.

⁷¹ Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, OJ L 283, 28.10.2008, p. 36.

⁷² Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works council or a procedure in Community-scale undertakings and community-scale groups of undertakings for the purpose of informing and consulting employees, OJ L 122, 16.5.2009, p.28.

obligations to inform and consult workers' representatives on the decision to have recourse to a preventive restructuring framework in accordance with Directive 2002/14/EC. Given the need to ensure an appropriate level of protection of workers, Member States should in principle exempt workers' outstanding claims, as defined in Directive 2008/94/EC, from any stay of enforcement irrespective of the question whether these claims arise before or after the stay is granted. Such a stay should be permissible only for the amounts and for the period that the payment of such claims is effectively guaranteed by other means under national law. Where Member States extend the cover of the guarantee of payment of workers' outstanding claims established by Directive 2008/94/EC to preventive restructuring procedures set up by this Directive, the exemption of workers' claims from the stay of enforcement is no longer justified to the extent covered by that guarantee. Where under national law there are limitations to the liability of guarantee institutions, either in terms of the length of the guarantee or the amount paid to workers, workers should be able to enforce their claims for any shortfall against the employer even during the stay of enforcement period.

- (35) Where a restructuring plan entails a transfer of part of undertaking or business, workers' rights arising from a contract of employment or from an employment relationship, notably including the right to wages, should be safeguarded in accordance with Articles 3 and 4 of Directive 2001/23/EC, without prejudice to the specific rules applying in the event of insolvency proceedings under Article 5 of that Directive and in particular the possibilities allowed by Article 5(2) of that Directive. Furthermore, in addition and without prejudice to the rights to information and consultation, including on decisions likely to lead to substantial changes in work organisation or in contractual relations with a view to reaching an agreement on such decisions, which are guaranteed by Directive 2002/14/EC, under this Directive workers who are affected by the restructuring plan should have the right to vote on the plan. For the purposes of voting on the restructuring plan, Member States may decide to place workers in a class separate from other classes of creditors.
- (36) To further promote preventive restructurings, it is important to ensure that directors are not dissuaded from exercising reasonable business judgment or taking reasonable commercial risks, particularly where to do so would improve the chances for the restructuring of potentially viable businesses. Where the enterprise experiences financial difficulties, directors should take such steps as seeking professional advice, including on restructuring and insolvency, for instance by making use of early warning tools where applicable; protecting the assets of the company so as to maximize value and avoid loss of key assets; considering the structure and functions of the business to examine viability and reduce expenditure; not committing the company to the types of transaction that might be subject to avoidance unless there is an appropriate business justification; continuing to trade in circumstances where it is appropriate to do so to maximize going concern value; holding negotiations with creditors and entering preventive restructuring procedures. Where the debtor is in the vicinity of insolvency, it is also important to protect the legitimate interests of creditors from management decisions that may have an impact on the constitution of the debtor's estate, in particular where those decisions may have the effect of further diminishing the value of the estate available for restructuring efforts or for distribution to creditors. It is therefore necessary that in such circumstances directors avoid any deliberate or grossly negligent actions that result in personal gain at the expense of stakeholders, agreeing to transactions at under value, or taking actions leading to unfair preference of one or

more stakeholders over others. Directors for the purposes of this Directive should be persons responsible for taking decisions concerning the management of the company.

- (37) The different second chance possibilities in the Member States may incentivise over-indebted entrepreneurs to relocate to Member States in order to benefit from shorter discharge periods or more attractive conditions for discharge, leading to additional legal uncertainty and costs for the creditors when recovering their claims. Furthermore, the effects of bankruptcy, in particular the social stigma, legal consequences such as disqualifying entrepreneurs from taking up and pursuing entrepreneurial activity and the on-going inability to pay off debts constitute important disincentives for entrepreneurs seeking to set up a business or have a second chance, even if evidence shows that entrepreneurs who have gone bankrupt have more chance to be successful the second time. Steps should therefore be taken to reduce the negative effects of over-indebtedness and bankruptcy on entrepreneurs, in particular by allowing for a full discharge of debts after a certain period of time and by limiting the length of disqualification orders issued in connection with the debtor's over-indebtedness.
- (38) A full discharge or the end of disqualification after a short period of time are not appropriate in all circumstances, for instance in cases where the debtor is dishonest or has acted in bad faith. Member States should provide clear guidance to judicial or administrative authorities on how to assess the honesty of the entrepreneur. For example, in establishing whether the debtor was dishonest, judicial or administrative authorities may take into account circumstances such as the nature and extent of the debts, the time when these were incurred, the efforts of the debtor to meet the debts and comply with legal obligations including public licensing requirements and proper bookkeeping, and actions on his or her part to frustrate recourse by creditors. Disqualification orders may last longer or indefinitely in situations where the entrepreneur exercises certain professions which are considered sensitive in the Member States or where he or she was convicted for criminal activities. In such cases it would be possible for entrepreneurs to benefit from a discharge of debt, but still be disqualified for a longer period of time or indefinitely from exercising a particular profession.
- (39) It is necessary to maintain and enhance the transparency and predictability of the procedures in delivering outcomes that are favourable for the preservation of businesses and for giving entrepreneurs a second chance or that permit the efficient liquidation of non-viable enterprises. It is also necessary to reduce the excessive length of insolvency procedures in many Member States, which results in legal uncertainty for creditors and investors and low recovery rates. Finally, given the enhanced cooperation mechanisms between courts and practitioners in cross-border cases set up by Regulation (EU) 2015/848, the professionalism of all actors involved needs to be brought to comparable high levels across the Union. To achieve these objectives, Member States should ensure that members of the judicial and administrative bodies are properly trained and have specialised knowledge and experience in insolvency matters. Such specialisation of members of the judiciary should allow making decisions with potentially significant economic and social impacts within a short period of time and should not mean that members of the judiciary have to deal exclusively with restructuring, insolvency and second chance matters. For example, the creation of specialised courts or chambers in accordance with national law governing the organisation of the judicial system could be an efficient way of achieving these objectives.

- (40) Member States should also ensure that the practitioners in the field of restructuring, insolvency and second chance which are appointed by judicial or administrative authorities are properly trained and supervised in the carrying out of their tasks, that they are appointed in a transparent manner with due regard to the need to ensure efficient procedures and that they perform their tasks with integrity. Practitioners should also adhere to voluntary codes of conduct aiming at ensuring an appropriate level of qualification and training, transparency of the duties of such practitioners and the rules for determining their remuneration, the taking up of professional indemnity insurance cover and the establishment of oversight and regulatory mechanisms which should include an appropriate and effective regime for sanctioning those who have failed in their duties. Such standards may be attained without the need in principle to create new professions or qualifications.
- (41) To further reduce the length of procedures and at the same time ensure a better participation of creditors in restructuring, insolvency and discharge procedures and to ensure similar conditions for creditors irrespective of where they are located in the Union, Member States should put in place distance means of communication in court procedures. Therefore, it should be possible that procedural steps such as the filing of claims by creditors, the notifications sent by the debtor or by practitioners in the field of restructuring, insolvency and second chance, voting on a restructuring plan or lodging appeals take place electronically. The cross-border recognition of such communications should comply with Regulation (EU) No 910/2014 of the European Parliament and of the Council⁷³.
- (42) It is important to gather reliable data on the performance of restructuring, insolvency and discharge procedures in order to monitor the implementation and application of this Directive. Therefore Member States should collect and aggregate data that is sufficiently granular to enable an accurate assessment of how the Directive works in practice.
- (43) The stability of financial markets relies heavily on financial collateral arrangements, in particular, when security collateral is provided in connection with participation in designated systems or in central bank operations and when margins are provided to central counterparties (CCPs). As the value of financial instruments given as security may be very volatile, it is crucial to realize their value quickly before its goes down. Therefore, this Directive should be without prejudice to Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998⁷⁴, Directive 2002/47/EC of the European Parliament and of the Council⁷⁵ and Regulation (EU) No 648/2012⁷⁶.
- (44) The effectiveness of the process of adoption and implementation of the restructuring plan should not be jeopardised by company law rules. Therefore, Member States should derogate from the requirements laid down in Directive 2012/30/EU of the European Parliament and of the Council⁷⁷ which concern the obligations to convene a

⁷³ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73).

⁷⁴ Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166/45, 11.6.1998).

⁷⁵ Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2012 on financial collateral arrangements (OJ L 168/43, 27.6.2012).

⁷⁶ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, (OJ L 201/1, 27.7.2012, p.1).

⁷⁷ Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required

general meeting and to offer on a pre-emptive basis the shares to existing shareholders, to the extent and for the period necessary to ensure that shareholders do not frustrate restructuring efforts by abusing their rights under Directive 2012/30/EU. Member States should not be obliged to derogate from company law rules, completely or for a limited period of time, provided that they ensure that company law requirements are not able to jeopardise the effectiveness of the restructuring process or Member States have other, equally effective tools ensuring that shareholders do not unreasonably prevent the adoption or implementation of a restructuring plan which would restore the viability of the business. In this context, Member States should attach particular importance to the effectiveness of provisions related to stay of enforcement actions and confirmation of the restructuring plan which should not be impaired by the calls for or the results of the general meetings of shareholders. Directive 2012/30/EU should therefore be amended accordingly.

- (45) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents⁷⁸, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (46) In respect of the establishment and subsequent changes to the data communication form, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council⁷⁹.
- (47) Since the objectives of this Directive cannot be sufficiently achieved by the Member States acting alone because differences between national restructuring and insolvency frameworks would continue to raise obstacles to the free movement of capital and the freedom of establishment, but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives,

by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 315, 14.11.2012, p. 74).

⁷⁸

OJ C 369, 17.12.2011, p. 14.

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Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

General provisions

Article 1

Subject matter and scope

1. This Directive lays down rules on:
 - (a) preventive restructuring procedures available for debtors in financial difficulty when there is a likelihood of insolvency;
 - (b) procedures leading to a discharge of debts incurred by over-indebted entrepreneurs and allowing them to take up a new activity;
 - (c) measures to increase the efficiency of the procedures referred to in point (a) and (b) as well as of insolvency procedures.
2. This Directive shall not apply to procedures referred to in paragraph 1 of this Article that concern debtors who are:
 - (a) insurance undertakings and reinsurance undertakings as defined in points 1 and 4 of Article 13 of Directive 2009/138/EC;
 - (b) credit institutions as defined in point 1 of Article 4 of Regulation (EC) No 575/2013;
 - (c) investment firms and collective investment undertakings as defined in points 2 and 7 of Article 4(1) of Regulation (EC) No 575/2013;
 - (d) central counter parties as defined in point 1 of Article 2 of Regulation (EU) No 648/2012;
 - (e) central securities depositories as defined in point 1 of Article 2 of Regulation (EU) 909/2014;
 - (f) other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU;
 - (g) natural persons who are not entrepreneurs.
3. Member States may extend the application of the procedures referred to in point (b) of paragraph 1 to over indebted natural persons who are not entrepreneurs.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

- (1) 'insolvency procedure' means a collective insolvency procedure which entails a partial or total divestment of the debtor and the appointment of a liquidator;

- (2) 'restructuring' means changing the composition, conditions, or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, including share capital, or a combination of those elements, including sales of assets or parts of the business, with the objective of enabling the enterprise to continue in whole or in part;
- (3) 'affected parties' means creditors or classes of creditors and, where applicable under national law, equity holders whose claims or interests are affected under a restructuring plan;
- (4) 'stay of individual enforcement actions' means a temporary suspension of the right to enforce a claim by a creditor against a debtor, ordered by a judicial or administrative authority;
- (5) 'executory contracts' means contracts between the debtor and one or more creditors under which both sides still have obligations to perform at the moment the stay of individual enforcement actions is ordered;
- (6) 'class formation' means the grouping of affected creditors and equity holders in a restructuring plan in such a way as to reflect the rights and seniority of the affected claims and interests, taking into account possible pre-existing entitlements, liens or inter-creditor agreements, and their treatment under the restructuring plan;
- (7) 'cram-down of dissenting creditors' means the confirmation by a judicial or administrative authority of a restructuring plan that has the support of a majority in value of creditors or a majority in value in each and every class of creditors over the dissent of a minority of creditors or the dissent of a minority of creditors within each class;
- (8) 'a cross-class cram-down' means the confirmation by a judicial or administrative authority of a restructuring plan over the dissent of one or several affected classes of creditors;
- (9) 'best interest of creditors test' means that no dissenting creditor would be worse off under the restructuring plan than they would be in the event of liquidation, whether piecemeal or sale as a going concern;
- (10) 'absolute priority rule' means that a dissenting class of creditors must be satisfied in full before a more junior class may receive any distribution or keep any interest under the restructuring plan;
- (11) 'new financing' means any new funds, whether provided by an existing or a new creditor, that are necessary to implement a restructuring plan that are agreed upon in that restructuring plan and confirmed subsequently by a judicial or administrative authority;
- (12) 'interim financing' means any funds, whether provided by an existing or new creditor, that is reasonably and immediately necessary for the debtor's business to continue operating or to survive, or to preserve or enhance the value of that business pending the confirmation of a restructuring plan;
- (13) 'over-indebted entrepreneur' means a natural person exercising a trade, business, craft or profession, who is otherwise than temporarily unable to pay debts as they fall due;

- (14) 'full discharge of debt' means cancellation of outstanding debt subsequent to a procedure comprising a realisation of assets and/or a repayment/settlement plan;
- (15) 'practitioner in the field of restructuring' means any person or body appointed by a judicial or administrative authority to carry out one or more of the following tasks:
 - (a) to assist the debtor or the creditors in drafting or negotiating a restructuring plan;
 - (b) to supervise the activity of the debtor during the negotiations on a restructuring plan and report to a judicial or administrative authority;
 - (c) to take partial control over the assets or affairs of the debtor during negotiations.

Article 3

Early warning

- 1. Member States shall ensure that debtors and entrepreneurs have access to early warning tools which can detect a deteriorating business development and signal to the debtor or the entrepreneur the need to act as a matter of urgency.
- 2. Member States shall ensure that debtors and entrepreneurs have access to relevant up-to-date, clear, concise and user-friendly information about the availability of early warning tools and any means available to them to restructure at an early stage or to obtain a discharge of personal debt.
- 3. Member States may limit the access provided for in paragraphs 1 and 2 to small and medium sized enterprises or to entrepreneurs

TITLE II

Preventive restructuring frameworks

Chapter 1

Availability of preventive restructuring frameworks

Article 4

Availability of preventive restructuring frameworks

- 1. Member States shall ensure that, where there is likelihood of insolvency, debtors in financial difficulty have access to an effective preventive restructuring framework that enables them to restructure their debts or business, restore their viability and avoid insolvency.

2. Preventive restructuring frameworks may consist of one or more procedures or measures.
3. Member States shall put in place provisions limiting the involvement of a judicial or administrative authority to where it is necessary and proportionate so that rights of any affected parties are safeguarded.
4. Preventive restructuring frameworks shall be available on the application by debtors, or by creditors with the agreement of debtors.

Chapter 2

Facilitating negotiations on preventive restructuring plans

Article 5

Debtor in possession

1. Member States shall ensure that debtors accessing preventive restructuring procedures remain totally or at least partially in control of their assets and the day-to-day operation of the business.
2. The appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall not be mandatory in every case.
3. Member States may require the appointment of a practitioner in the field of restructuring in the following cases:
 - (a) where the debtor is granted a general stay of individual enforcement actions in accordance with Article 6;
 - (b) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance with Article 11.

Article 6

Stay of individual enforcement actions

1. Member States shall ensure that debtors who are negotiating a restructuring plan with their creditors may benefit from a stay of individual enforcement actions if and to the extent such a stay is necessary to support the negotiations of a restructuring plan.
2. Member States shall ensure that a stay of individual enforcement actions may be ordered in respect of all types of creditors, including secured and preferential creditors. The stay may be general, covering all creditors, or limited, covering one or more individual creditors, in accordance with national law.

3. Paragraph 2 shall not apply to workers' outstanding claims except if and to the extent that Member States ensure by other means that the payment of such claims is guaranteed at a level of protection at least equivalent to that provided for under the relevant national law transposing Directive 2008/94/EC.
4. Member States shall limit the duration of the stay of individual enforcement actions to a maximum period of no more than four months.
5. Member States may nevertheless enable judicial or administrative authorities to extend the initial duration of the stay of individual enforcement actions or to grant a new stay of individual enforcement actions, upon request of the debtor or of creditors. Such extension or new period of stay of individual enforcement actions shall be granted only if there is evidence that:
 - (a) relevant progress has been made in the negotiations on the restructuring plan; and
 - (b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties.
6. Any further extensions shall be given only if the conditions referred to in points (a) and (b) of paragraph 5 are met and the circumstances of the case show a strong likelihood that a restructuring plan will be adopted.
7. The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed twelve months.
8. Member States shall ensure that judicial or administrative authorities may lift the stay of individual enforcement actions, in whole or in part:
 - (a) if it becomes apparent that a proportion of creditors who under national law could block the adoption of the restructuring plan does not support the continuation of the negotiations; or
 - (b) at the request of the debtor or the practitioner in the field of restructuring.
9. Member States shall ensure that, where an individual creditor or a single class of creditors is or would be unfairly prejudiced by a stay of individual enforcement actions, the judicial or administrative authority may decide not grant the stay of individual enforcement actions or may lift a stay of individual enforcement actions already granted in respect of that creditor or class of creditors, at the request of the creditors concerned.

Article 7

Consequences of the stay of individual enforcement actions

1. Where the obligation of the debtor to file for insolvency under national law arises during the period of the stay of individual enforcement actions, that obligation shall be suspended for the duration of the stay.
2. A general stay covering all creditors shall prevent the opening of insolvency procedures at the request of one or more creditors.
3. Member States may derogate from paragraph 1 where the debtor becomes illiquid and therefore unable to pay his debts as they fall due during the stay period. In that case, Member States shall ensure that restructuring procedures are not automatically

terminated and that, upon examining the prospects for achieving an agreement on a successful restructuring plan within the period of the stay, a judicial or administrative authority may decide to defer the opening of insolvency procedure and keep in place the benefit of the stay of individual enforcement actions.

4. Member States shall ensure that, during the stay period, creditors to which the stay applies may not withhold performance or terminate, accelerate or in any other way modify executory contracts to the detriment of the debtor for debts that came into existence prior to the stay. Member States may limit the application of this provision to essential contracts which are necessary for the continuation of the day-to-day operation of the business.
5. Member States shall ensure that creditors may not withhold performance or terminate, accelerate or in any other way modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of the debtor's entry into restructuring negotiations, a requested for a stay of individual enforcement actions, the ordering of the stay as such or any similar event connected to the stay.
6. Member States shall ensure that nothing prevents the debtor from paying in the ordinary course of business claims of or owed to unaffected creditors and the claims of affected creditors that arise after the stay is granted and which continue to arise throughout the period of the stay.
7. Member States shall not require debtors to file for insolvency procedures if the stay period expires without an agreement on a restructuring plan being reached, unless the other conditions for filing laid down by national law are fulfilled.

Chapter 3

Restructuring plans

Article 8

Content of restructuring plans

1. Member States shall require restructuring plans submitted for confirmation by a judicial or administrative authority to contain at least the following information:
 - (a) the identity of the debtor or the debtor's business for which the restructuring plan is proposed;
 - (b) a valuation of the present value of the debtor or the debtor's business as well as a reasoned statement on the causes and the extent of the financial difficulties of the debtor;
 - (c) the identity of the affected parties, whether named individually or described by reference to one or more categories of debt, as well as their claims or interests covered by the restructuring plan;

- (d) the classes into which the affected parties have been grouped for the purposes of adopting the plan, together with a rationale for doing so and information about the respective values of creditors and members in each class;
 - (e) the identity of non-affected parties, whether named individually or described by reference to one or more categories of debt, together with a statement of the reasons why it is not proposed to affect them;
 - (f) the terms of the plan, including, but not limited to:
 - (i) its proposed duration;
 - (ii) any proposal by which debts are rescheduled or waived or converted into other forms of obligation;
 - (iii) any new financing anticipated as part of the restructuring plan;
 - (g) an opinion or reasoned statement by the person responsible for proposing the restructuring plan which explains why the business is viable, how implementing the proposed plan is likely to result in the debtor avoiding insolvency and restore its long-term viability, and states any anticipated necessary pre-conditions for its success.
2. Member States shall make a model for restructuring plans available online. That model shall contain at least the information required under national law and shall provide general but practical information on how the model is to be used. The model shall be made available in the official language or languages of the Member State. Member States shall endeavour to make the model available in other languages, in particular in languages used in international business. It shall be designed in such a way that it can be adapted to the needs and circumstances of every case.
 3. The parties may choose whether or not to use the model restructuring plan.

Article 9

Adoption of restructuring plans

1. Member States shall ensure that any affected creditors have a right to vote on the adoption of a restructuring plan. Member States may also grant such voting rights to affected equity holders, in accordance with Article 12(2).
2. Member States shall ensure that affected parties are treated in separate classes which reflect the class formation criteria. Classes shall be formed in such a way that each class comprises claims or interests with rights that are sufficiently similar to justify considering the members of the class a homogenous group with commonality of interest. As a minimum, secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan. Member States may also provide that workers are treated in a separate class of their own.
3. Class formation shall be examined by the judicial or administrative authority when a request is filed for confirmation of the restructuring plan.
4. A restructuring plan shall be deemed to be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each and every

class. Member States shall lay down the required majorities for the adoption of a restructuring plan, which shall be in any case not higher than 75% in the amount of claims or interests in each class.

5. Member States may stipulate that a vote on the adoption of a restructuring plan takes the form of a consultation and agreement of a requisite majority of affected parties in each class.
6. Where the necessary majority is not reached in one or more dissenting voting classes, the plan may still be confirmed if it complies with the cross-class cram-down requirements set out in Article 11.

Article 10

Confirmation of restructuring plans

1. Member States shall ensure that the following restructuring plans can become binding on the parties only if they are confirmed by a judicial or administrative authority:
 - (a) restructuring plans which affect the interests of dissenting affected parties;
 - (b) restructuring plans which provide for new financing.
2. Member States shall ensure that the conditions under which a restructuring plan can be confirmed by a judicial or administrative authority are clearly specified and include at least the following:
 - (a) the restructuring plan has been adopted in accordance with Article 9 and has been notified to all known creditors likely to be affected by it;
 - (b) the restructuring plan complies with the best interest of creditors test;
 - (c) any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors.
3. Member States shall ensure that judicial or administrative authorities may refuse to confirm a restructuring plan where that plan does not have a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business.
4. Member States shall ensure that where a judicial or administrative authority is required to confirm a restructuring plan in order for it to become binding, a decision is taken without undue delay after the request for confirmation has been filed and in any case no later than 30 days after the request is filed.

Article 11

Cross-class cram-down

1. Member States shall ensure that a restructuring plan which is not approved by each and every class of affected parties may be confirmed by a judicial or administrative authority upon the proposal of a debtor or of a creditor with the debtor's agreement and become binding upon one or more dissenting classes where the restructuring plan:
 - (a) fulfils the conditions in Article 10(2);
 - (b) has been approved by at least one class of affected creditors other than an equity-holder class and any other class which, upon a valuation of the enterprise, would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied;
 - (c) complies with the absolute priority rule.
2. Member States may vary the minimum number of affected classes required to approve the plan laid down in point (b) of paragraph (1).

Article 12

Equity holders

1. Member States shall ensure that, where there is a likelihood of insolvency, shareholders and other equity holders with interests in a debtor may not unreasonably prevent the adoption or implementation of a restructuring plan which would restore the viability of the business.
2. To achieve the objective in paragraph 1, Member States may provide that equity holders are to form one or more distinct classes by themselves and be given a right to vote on the adoption of restructuring plans. In this case, the adoption and confirmation of restructuring plans shall be subject to the cross-class cram-down mechanism provided for in Article 11.

Article 13

Valuation by the judicial or administrative authority

1. A liquidation value shall be determined by the judicial or administrative authority where a restructuring plan is challenged on the grounds of an alleged breach of the best interest of creditors test.
2. An enterprise value shall be determined by the judicial or administrative authority on the basis of the value of the enterprise as a going concern in the following cases:
 - (a) where a cross-class cram-down application is necessary for the adoption of the restructuring plan;
 - (b) where a restructuring plan is challenged on the grounds of an alleged breach of the absolute priority rule.

3. Member States shall ensure that properly qualified experts are appointed to assist the judicial or administrative authority, when necessary and appropriate, for the purposes of the valuation, including where a creditor challenges the value of the collateral.
4. Member States shall ensure that the challenges referred to in paragraphs 1, 2 and 3 can be lodged with the judicial or administrative authority called upon to confirm the restructuring plan or in the context of an appeal against a decision on the confirmation of a restructuring plan.

Article 14

Effects of restructuring plans

1. Member States shall ensure that restructuring plans which are confirmed by a judicial or administrative authority are binding upon each party identified in the plan.
2. Creditors who are not involved in the adoption of a restructuring plan shall not be affected by the plan.

Article 15

Appeals

1. Member States shall ensure that a decision on the confirmation of a restructuring plan taken by a judicial authority may be appealed before a higher judicial authority and that a decision on the confirmation of a restructuring plan taken by an administrative authority may be appealed before a judicial authority.
2. Appeals shall be resolved in an expedited manner.
3. An appeal against a decision confirming a restructuring plan shall have no suspensive effects on the execution of that plan.
4. Member States shall ensure that, where an appeal pursuant to paragraph 3 is upheld, the judicial authority may either:
 - (a) set aside the restructuring plan; or
 - (b) confirm the plan and grant monetary compensation to the dissenting creditors, payable by the debtor or by the creditors who voted in favour of the plan.

CHAPTER 4

Protection for new financing, interim financing and other restructuring related transactions

Article 16

Protection for new financing and interim financing

1. Member States shall ensure that new financing and interim financing are adequately encouraged and protected. In particular, new and interim financing shall not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures, unless such transactions have been carried out fraudulently or in bad faith.
2. Member States may afford grantors of new or interim financing the right to receive payment with priority in the context of subsequent liquidation procedures in relation to other creditors that would otherwise have superior or equal claims to money or assets. In such cases, Member States shall rank new financing and interim financing at least senior to the claims of ordinary unsecured creditors.
3. The grantors of new financing and interim financing in a restructuring process shall be exempted from civil, administrative and criminal liability in the context of the subsequent insolvency of the debtor, unless such financing has been granted fraudulently or in bad faith.

Article 17

Protection for other restructuring related transactions

1. Member States shall ensure that transactions carried out to further the negotiation of a restructuring plan confirmed by a judicial or administrative authority or closely connected with such negotiations are not declared void, voidable or unenforceable as acts detrimental to the general body of creditors in the context of subsequent insolvency procedures, unless such transactions have been carried out fraudulently or in bad faith.
2. Transactions enjoying the protection referred to in paragraph 1 shall include:
 - (a) the payment of reasonable fees and costs of negotiating, adopting, confirming or implementing a restructuring plan;
 - (b) the payment of reasonable fees and costs in seeking professional advice in connection with any aspect of a restructuring plan;
 - (c) the payment of worker wages for work already carried out;
 - (d) any other necessary and reasonable payments and disbursements made in the ordinary course of business;

- (e) transactions such as new credit, financial contributions or partial asset transfers outside the ordinary course of business made in contemplation of and closely connected with negotiations for a restructuring plan.
- 3. Member States may require the transactions referred to in point (e) of paragraph 2 to be approved by a practitioner in the field of restructuring or by a judicial or administrative authority in order to benefit from the protection referred to in paragraph 1.
- 4. Member States shall ensure that any transaction, payment, debt-equity swap, guarantee or security carried out to further the implementation of a restructuring plan confirmed by a judicial or administrative authority or closely connected with such implementation is not declared void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures, unless such transactions have been carried out fraudulently or in bad faith, irrespective of whether such transactions were deemed to be in the ordinary course of business.

CHAPTER 5

Duties of directors in connection with negotiations on a preventive restructuring plan

Article 18

Duties of directors

Member States shall lay down rules to ensure that, where there is a likelihood of insolvency, directors have the following obligations:

- (a) to take immediate steps to minimise the loss for creditors, workers, shareholders and other stakeholders;
- (b) to have due regard to the interests of creditors and other stakeholders;
- (c) to take reasonable steps to avoid insolvency;
- (d) to avoid deliberate or grossly negligent conduct that threatens the viability of the business.

TITLE III

SECOND CHANCE FOR ENTREPRENEURS

Article 19

Access to discharge

1. Member States shall ensure that over-indebted entrepreneurs may be fully discharged of their debts in accordance with this Directive.
2. Member States in which a full discharge of debt is conditional on a partial repayment of debt by the entrepreneur shall ensure that the related repayment obligation is based on the individual situation of the entrepreneur and is notably proportionate to his or her disposable income over the discharge period.

Article 20

Discharge period

1. The period of time after which over-indebted entrepreneurs may be fully discharged from their debts shall be no longer than three years starting from:
 - (a) the date on which the judicial or administrative authority decided on the application to open such a procedure, in the case of a procedure ending with the liquidation of an over-indebted entrepreneur's assets; or
 - (b) the date on which implementation of the repayment plan started, in the case of a procedure which includes a repayment plan.
2. Member States shall ensure that on expiry of the discharge period, over-indebted entrepreneurs are discharged of their debts without the need to re-apply to a judicial or administrative authority.

Article 21

Disqualification period

Member States shall ensure that, where an over-indebted entrepreneur obtains a discharge of debts in accordance with this Directive, any disqualifications from taking up or pursuing a trade, business, craft or profession which is connected with the entrepreneur's over-indebtedness shall cease to have effect at the latest at the end of the discharge period, without the need to re-apply to a judicial or administrative authority.

Article 22

Limitations

1. By way of derogation from Articles 19, 20 and 21, Member States may maintain or introduce provisions restricting access to discharge or laying down longer periods for obtaining a full discharge or longer disqualification periods in certain well-defined circumstances and where such limitations are justified by a general interest, in particular where:
 - (a) the over-indebted entrepreneur acted dishonestly or in bad faith towards the creditors when becoming indebted or during the collection of the debts;
 - (b) the over-indebted entrepreneur does not adhere to a repayment plan or to any other legal obligation aimed at safeguarding the interests of creditors;

- (c) in case of abusive access to discharge procedures;
 - (d) in case of repeated access to discharge procedures within a certain period of time.
- 2. Member States may provide for longer discharge periods in cases where the main residence of an over-indebted entrepreneur is exempt from the possibility of realisation of assets, in order to safeguard the livelihood of the over-indebted entrepreneur and his or her family.
- 3. Member States may exclude specific categories of debt, such as secured debts or debts arising out of criminal penalties or tortious liability, from discharge or lay down a longer discharge period where such exclusions or longer periods are justified by a general interest.
- 4. By way of derogation from Article 21, Member States may provide for longer or indefinite disqualification periods where the over-indebted entrepreneur is a member of a profession to which specific ethical rules apply or where disqualifications were ordered by a court in criminal proceedings.

Article 23

Consolidation of proceedings regarding professional and personal debts

- 1. Member States shall ensure that, where an over-indebted entrepreneur has professional debts incurred in the course of his or her trade, business, craft or profession as well as personal debts incurred outside those activities, all debts are treated in a single procedure for the purposes of obtaining a discharge.
- 2. Member States may derogate from paragraph 1 and stipulate that professional and personal debts are to be treated in separate procedures, provided that these procedures can be coordinated for the purposes of obtaining a discharge in accordance with this Directive.

TITLE IV

Measures to increase the efficiency of restructuring, insolvency and second chance

Article 24

Judicial and administrative authorities

- 1. Member States shall ensure that the members of the judiciary and administrative authorities dealing with restructuring, insolvency and second chance matters receive initial and further training to a level appropriate to their responsibilities.
- 2. Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, where restructuring, insolvency and second chance

matters are dealt with by judicial authorities, Member States shall ensure that these matters are dealt with in an efficient manner which ensures expeditious treatment of the procedures and that the members of the judiciary in charge have the necessary expertise and specialisation.

Article 25

Practitioners in the field of restructuring, insolvency and second chance

1. Member States shall ensure that mediators, insolvency practitioners and other practitioners appointed in restructuring, insolvency and second chance matters receive the necessary initial and further training in order to ensure that their services are provided in an effective, impartial, independent and competent way in relation to the parties.
2. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by practitioners in the field of restructuring, insolvency and second chance, as well as other effective oversight mechanisms concerning the provisions of such services.

Article 26

Appointment of practitioners in the field of restructuring, insolvency and second chance

1. Member States shall ensure that the process for the appointment, removal and resignation of practitioners in the field of restructuring, insolvency and second chance is clear, predictable and fair and fulfils, in particular, the requirements set out in paragraphs 2, 3 and 4.
2. Member States shall ensure that the conditions for eligibility and the grounds upon which an insolvency practitioner may be ineligible for appointment are clear and transparent.
3. Where practitioners in the field of restructuring, insolvency and second chance are appointed by the judicial or administrative authority, Member States shall ensure that the criteria concerning the manner in which the judicial or administrative authority selects such a practitioner are clear and transparent. In selecting a practitioner in the field of restructuring, insolvency and second chance for a particular case, due consideration shall be given to the practitioner's experience and expertise. Where appropriate, the debtors and creditors shall be consulted in the selection of the practitioner.
4. In restructuring and insolvency procedures with cross-border elements, due consideration shall be given to the practitioner's ability to communicate and cooperate with foreign insolvency practitioners and judicial or administrative authorities and to its human and administrative resources.

Article 27

Supervision and remuneration of practitioners in the field of restructuring, insolvency and second chance

1. Member States shall put in place appropriate oversight and regulatory structures to ensure that the work of practitioners in the field of restructuring, insolvency and second chance is appropriately supervised. This oversight and regulation shall also include an appropriate and effective regime for sanctioning practitioners who have failed in their duties.
2. Member States shall ensure that the fees charged by practitioners in the field of restructuring, insolvency and second chance are governed by rules which incentivise a timely and efficient resolution of procedures with due regard to the complexity of the case. Member States shall ensure that appropriate procedures with built-in safeguards are available to ensure that any disputes over remuneration can be resolved in a timely manner.

Article 28

Use of electronic means of communication

1. Member States shall ensure that the following actions may be performed electronically, including in cross-border situations:
 - (a) filing of claims;
 - (b) filing of restructuring or repayment plans with competent judicial or administrative authorities;
 - (c) notifications to creditors;
 - (d) voting on restructuring plans;
 - (e) lodging of appeals.

TITLE V

Monitoring of restructuring, insolvency and discharge procedures

Article 29

Data collection

1. With a view to arriving at reliable annual statistics, Member States shall collect and aggregate at Member State level data on:

- (a) the number of procedures which were initiated, pending and resolved, broken down by:
 - (i) preventive restructuring procedures,
 - (ii) insolvency procedures such as liquidation procedures,
 - (iii) procedures leading to a full discharge of debt for natural persons;
- (b) the length of the procedure from initiation to payout, separate by types of procedures (preventive restructuring procedure, insolvency procedure, discharge procedure);
- (c) the share of each type of outcome within each restructuring or insolvency procedure, including the number of procedures applied for but not commenced for lack of available funds in the debtor's estate.
- (d) the average costs of each procedures awarded by the judicial or administrative authority, in euro;
- (e) the recovery rates for secured and unsecured creditors separately, as well as the number of procedures with zero or no more than two percent total recovery rate in respect of each type of procedure referred to in point (a);
- (f) the number of debtors subject to procedures referred to in point (a)(i) who within three years from the conclusion of such procedures are subject to either of the procedures referred to in points (a)(i) and (a)(ii);
- (g) the number of debtors who, after having undergone a procedure referred to in point (a)(iii) of this paragraph, are subject to another such procedure or another procedure referred to in point (a) of this paragraph.

For the purposes of point (e) of the first subparagraph, recovery rates shall be after costs and anonymised data fields shall show both recovery rate and recovery rate lined to time until recovery.

- 2. Member States shall break down the statistics referred to in paragraph 1 by:
 - (a) the size of the debtors involved, by number of workers;
 - (b) whether debtors are natural or legal persons;
 - (c) in respect of discharge and where such distinction is made under national law, whether the procedures concern only entrepreneurs or all natural persons.
- 3. Member States shall compile statistics from the aggregate data referred to in paragraphs 1 and 2 for full calendar years ending on 31 December of each year, starting with data collected for the first full calendar year following [*the date of start of application of implementing measures*]. These statistics shall be communicated to the Commission on the basis of a standard data communication form annually, by 31 March of the calendar year following the year for which data is collected.
- 4. The Commission shall establish the communication form referred to in paragraph 3 by way of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 30(2).

Article 30

Committee

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

TITLE VI

Final provisions

Article 31

Relationship with other acts

1. This Directive shall be without prejudice to the following acts:
 - (a) Directive 98/26/EC of the European Parliament and of the Council on settlement finality in payment and securities settlement systems⁸⁰;
 - (b) Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements⁸¹; and
 - (c) Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories⁸².
2. This Directive shall be without prejudice to workers' rights guaranteed by Directives 98/59/EC, 2001/23/EC, 2002/14/EC, 2008/94/EC and 2009/38/EC.

Article 32

Amendment of Directive 2012/30/EU

In Article 45 of Directive 2012/30/EU, the following paragraph 4 is added:

"4. Member States shall derogate from Article 19(1), Article 29, Article 33, Article 34, Article 35, Article 40(1)(b), Article 41(1) and Article 42 to the extent and for the period that such derogations are necessary for the establishment of the preventive restructuring framework provided for in Directive of the European Parliament and of the Council [on preventive restructuring frameworks and second chance]*.

* Directive (...) of the European Parliament and of the Council on preventive restructuring and second chance frameworks (OJ ...)."

⁸⁰ Directives 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166/45, 11.6.1998.

⁸¹ Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2012 on financial collateral arrangements, OJ L 168/43, 27.6.2012.

⁸² Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201/1, 27.7.2012.

Article 33

Review clause

No later than [5 years from the date of start of application of implementing measures] and every 7 years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive, including on whether additional measures to consolidate and strengthen the legal framework on restructuring, insolvency and second chance should be considered.

Article 34

Implementation

1. Member States shall adopt and publish, by [2 years from the date of entry into force of this Directive] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from [2 years from the date of entry into force of this Directive], with the exception of the provisions implementing Title IV which shall apply from [3 years from the date of entry into force of this Directive].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 35

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 36

This Directive is addressed to the Member States.

Done at Strasbourg,

For the European Parliament
The President

For the Council
The President