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## PROPOSAL

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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	23 November 2016
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2016) 723 final
Subject:	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

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Delegations will find attached document COM(2016) 723 final.

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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 }

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## 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 investment<sup>1</sup>, 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 years<sup>2</sup>. 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.

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<sup>1</sup> 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

<sup>2</sup> 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).

they involve creditors and debtors in more than one EU Member State<sup>3</sup>. A significant percentage of firms and related jobs could be saved if preventive procedures existed in all 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 %<sup>4</sup> 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 procedures<sup>5</sup>. 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

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<sup>3</sup> 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.

<sup>4</sup> World Bank Doing Business Index 2016.

<sup>5</sup> World Bank Doing Business Index 2016.

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.

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 States<sup>6</sup>.

### *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 proceedings<sup>7</sup> 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 Regulation<sup>8</sup> 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 bills<sup>9</sup>. 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

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<sup>6</sup> Robert van Galen, Stephan Madaus, *Corporate Rescue*, 2013, p. 52.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> [http://ec.europa.eu/consumers/financial\\_services/reference\\_studies\\_documents/docs/part\\_1\\_synthesis\\_of\\_findings\\_en.pdf](http://ec.europa.eu/consumers/financial_services/reference_studies_documents/docs/part_1_synthesis_of_findings_en.pdf).

consequences such as reduced consumption, labour activity and foregone growth opportunities.

### *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 years<sup>10</sup>. 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 growth<sup>11</sup>. 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 sheets<sup>12</sup>. 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

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<sup>10</sup> EU Justice Scoreboard 2016.

<sup>11</sup> 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. 15/204, July 2015, p. 61.

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

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, 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 consultation<sup>13</sup>, 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 2012<sup>14</sup> are of rather low relevance given the improvements brought by the Insolvency Regulation<sup>15</sup>.

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.<sup>16</sup>

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<sup>13</sup> [http://ec.europa.eu/justice/newsroom/civil/opinion/160321\\_en.htm](http://ec.europa.eu/justice/newsroom/civil/opinion/160321_en.htm)

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

<sup>15</sup> OJ L 141/19.

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

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.

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 proceedings<sup>17</sup> 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 2013<sup>18</sup>.

Against this background and recognising the significant differences between national insolvency frameworks, the European Commission issued in December 2012 a Communication<sup>19</sup> 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 market<sup>20</sup>. The first action under this approach was to amend Regulation (EC) No 1346/2000<sup>21</sup>. This was done by the adoption of Regulation (EU) 2015/848 on insolvency proceedings<sup>22</sup>. That Regulation focuses on resolving conflicts of jurisdiction and laws in

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

<sup>18</sup> 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>.

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

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

<sup>21</sup> OJ L 160, 30.6.2000, p. 1.

<sup>22</sup> OJ L 141, 5.6.2015, p. 19.

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 chance<sup>23</sup>. 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-value<sup>24</sup>. 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 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 2016<sup>25</sup>. 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 beyond<sup>26</sup>.

In this context, the 2015 Capital Markets Union Action Plan<sup>27</sup> 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

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<sup>23</sup> C(2014) 1500 final, 12 March 2014.

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

<sup>25</sup> 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](http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm))

<sup>26</sup> '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.

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

provide a regulatory environment that is able to accommodate failure without dissuading entrepreneurs from trying new ideas again<sup>28</sup>.

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.<sup>29</sup>

More recently, in its Communication on 'Capital Markets Union - Accelerating Reform' the Commission reiterated that inefficiencies and differences in national insolvency frameworks 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.<sup>30</sup>

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

*Regulation on cross-border insolvency proceedings*

From 26 June 2017, Regulation (EU) 2015/848<sup>31</sup> 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

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

<sup>29</sup> Council Conclusions of 17 June 2016 [http://www.consilium.europa.eu/press-releases-pdf/2016/6/47244642837\\_en.pdf](http://www.consilium.europa.eu/press-releases-pdf/2016/6/47244642837_en.pdf)

<sup>30</sup> COM(2016) 601 final [http://ec.europa.eu/finance/capital-markets-union/docs/20160913-cmu-accelerating-reform\\_en.pdf](http://ec.europa.eu/finance/capital-markets-union/docs/20160913-cmu-accelerating-reform_en.pdf)

<sup>31</sup> 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.

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/EC<sup>32</sup>, credit institutions as defined in point 1 of Article 4(1) of Regulation (EC) No 575/2013<sup>33</sup>, 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<sup>34</sup>, central securities depositories as defined in point 1 of Article 2 of Regulation (EU) 909/2014<sup>35</sup> and other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU<sup>36</sup>. 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 systems<sup>37</sup>, Directive 2002/47/EC on financial collateral arrangements<sup>38</sup> and Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories<sup>39</sup>. 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

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<sup>32</sup> 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).

<sup>33</sup> 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).

<sup>34</sup> 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).

<sup>35</sup> 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).

<sup>36</sup> 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).

<sup>37</sup> 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.

<sup>38</sup> 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.

<sup>39</sup> 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.

consultation before restructuring and/or collective redundancies. This proposal leaves the rights guaranteed by Directives 98/59/EC<sup>40</sup>, 2001/23/EC<sup>41</sup>, 2002/14/EC<sup>42</sup>, 2008/94/EC<sup>43</sup> and 2009/38/EC<sup>44</sup>, intact and, in addition, grants affected workers the right to vote on restructuring plans.

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.

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<sup>40</sup> 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.

<sup>41</sup> 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.

<sup>42</sup> 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.

<sup>43</sup> 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.

<sup>44</sup> 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 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/EU<sup>45</sup> 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 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 Plan<sup>46</sup> 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.

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<sup>45</sup> 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.

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

Also the Single Market Strategy<sup>47</sup> 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 system<sup>48</sup>. 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.

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 proceeding<sup>49</sup> 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 outcome<sup>50</sup>. 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 cases<sup>51</sup>.

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

<sup>47</sup> COM (2015) 550 final, 28.10.2015

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

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

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

<sup>51</sup> Resolving Insolvency, World Bank.

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 2015<sup>52</sup>, 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.

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

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<sup>52</sup> COM(2015) 587 final, 24.11.2015.

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)<sup>53</sup>. 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 services<sup>54</sup>, 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 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.

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<sup>53</sup> Cross-border lending to households, which is now approximatively 5% of total household lending.

<sup>54</sup> [http://ec.europa.eu/finance/consultations/2015/retail-financial-services/docs/green-paper\\_en.pdf](http://ec.europa.eu/finance/consultations/2015/retail-financial-services/docs/green-paper_en.pdf)

- **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 insolvency<sup>55</sup>. 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.<sup>56</sup> 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.

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<sup>55</sup> C(2014) 1500 final, 12.3.2014.

<sup>56</sup> 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](http://ec.europa.eu/justice/civil/files/evaluation_recommendation_final.pdf).

- **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.<sup>57</sup> 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 laws might raise obstacles to the single market<sup>58</sup>. An economic study on the impact of minimum standards in restructuring, insolvency and second chance was also carried out<sup>59</sup>.

- **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

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<sup>57</sup> 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.

<sup>58</sup> Tender No. JUST/2014/JCOO/PR/CIVI/0075, available at [http://ec.europa.eu/justice/civil/files/insolvency/insolvency\\_study\\_2016\\_final\\_en.pdf](http://ec.europa.eu/justice/civil/files/insolvency/insolvency_study_2016_final_en.pdf).

<sup>59</sup> Tender No. JUST /2015/JCOO/FWCIVI0103, forthcoming.

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.

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 with other Union instruments, on reviewing the Directive's application, on adopting standard forms, on entry into force and entry into application.

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 Committee<sup>60</sup>,

Having regard to the opinion of the Committee of the Regions<sup>61</sup>,

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

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<sup>60</sup> OJ C , , p. .

<sup>61</sup> OJ C , , p. .

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.

- (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' 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 Council<sup>62</sup> 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

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<sup>62</sup> 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).

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 Directive 2009/138/EC of the European Parliament and of the Council<sup>63</sup>, credit institutions as defined in point 1 of Article 4(1) of Regulation (EC) No 575/2013 of the European Parliament and of the Council<sup>64</sup>, 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 Council<sup>65</sup>, central securities depositories as defined in point 1 of Article 2 of Regulation (EU) 909/2014 of the European Parliament and of the Council<sup>66</sup> 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 Council<sup>67</sup>. 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

<sup>63</sup> 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).

<sup>64</sup> 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).

<sup>65</sup> 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).

<sup>66</sup> 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).

<sup>67</sup> 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).

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 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 pre-condition 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/EC<sup>68</sup>, Council Directive 2001/23/EC<sup>69</sup>, Directive 2002/14/EC of the European Parliament and of the Council<sup>70</sup>, Directive 2008/94/EC of the European Parliament and of the Council<sup>71</sup> and Directive 2009/38/EC of the European Parliament and of the Council<sup>72</sup>. The obligations concerning the information and consultation of workers under national law implementing the above-mentioned Directives remain fully intact. This includes 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

<sup>68</sup> 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.

<sup>69</sup> 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.

<sup>70</sup> 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.

<sup>71</sup> 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.

<sup>72</sup> 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.

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 Council<sup>73</sup>.

- (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 it 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 1998<sup>74</sup>, Directive 2002/47/EC of the European Parliament and of the Council<sup>75</sup> and Regulation (EU) No 648/2012<sup>76</sup>.
- (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 Council<sup>77</sup> which concern the obligations to convene a 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.

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<sup>73</sup> 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).

<sup>74</sup> 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).

<sup>75</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2012 on financial collateral arrangements (OJ L 168/43, 27.6.2002).

<sup>76</sup> 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).

<sup>77</sup> 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, 14.11.2012, p.74).

- (45) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents<sup>78</sup>, 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 Council<sup>79</sup>.
- (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,

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;

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<sup>78</sup> OJ C 369, 17.12.2011, p. 14.

<sup>79</sup> 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).

- (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 systems<sup>80</sup>;
  - (b) Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements<sup>81</sup>; and
  - (c) Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories<sup>82</sup>.
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 ...).".

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<sup>80</sup> 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.

<sup>81</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2012 on financial collateral arrangements, OJ L 168/43, 27.6.2002.

<sup>82</sup> 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*