



Proposal on preventive restructuring, second chance and efficiency measures

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Main objectives

Reduce the barriers for cross-border investment, increase investment and job opportunities in the internal market (Capital Markets Union Action Plan)

Reduce the costs and increase the opportunities for honest entrepreneurs to be given a fresh start (Single Market Strategy)

Support efforts to reduce future levels of non-performing loans (ECOFIN Council Conclusions of July 2016)

Quick facts

200 000 insolvencies yearly in the EU, at least 25% have a cross-border dimension

1.7 million jobs lost in liquidations

1 in 6 insolvencies is caused by the insolvency of another company in the supply chain

Recovery rates are lower in liquidation than in insolvency by about 25 cents on the dollar (WB)

Impossible to restructure a groups of companies with establishments in more than 2 MS

Discharge periods vary from 1 year to indefinite periods

Different level of efficiency – in 10 MS procedures last over 2 years

Main challenges when drafting the proposal

Great divergence of legal frameworks, not much common ground

Strike the right balance between legal certainty for cross-border investors and flexibility for Member States

Need to ensure a proper balance between the rights of debtors and creditors

Need to provide the right incentives to restructure at an early stage

Making restructuring more affordable for SMEs

Fair treatment of workers

Scope of the proposal

*Commission Recommendation of 12 March 2014
on a new approach to business failure and
insolvency*

- + new elements to strengthen the restructuring framework*
- + new elements to strengthen the second chance framework*
- + new elements to improve the efficiency of procedures (horizontal concerns)*

A. Preventive restructuring procedures

Enterprises do not have the same opportunities to deal with their financial difficulties everywhere in the Union

- all Member States should have in place preventive restructuring procedures*
- these procedures must be **efficient, fast and low cost** -> **7 main elements to ensure that these requirements are met***

1. Early access to the procedure

Debtors have the possibility of restructuring before they become insolvent (as defined in national law)

- *the later a business initiates restructuring proceedings, the higher the costs of restructuring and the lower the management powers and success*

*There must be a **likelihood of insolvency** – alignment with the EIR 2015/848*

- *Early warning tools play a role*

2. The position of the debtor

Debtors should be left in control of the day-to-day operation of their business

- *incentive to restructure early*
- *least disruption to the operation of the business*
- *insolvency is not yet actual*

Practitioners appointed on a case-by-case basis

3. Stay of individual enforcement actions

Debtor should be able to request a court the suspension of individual enforcement actions

- *need to address the hold-out problem*
- *against any type of creditor*
- *Limitations when workers' claims are concerned*

Safeguards to protect creditors:

- **duration of the stay:** max 4 months; possibility to extend the duration
- **possibility to have the stay lifted**

3. Stay of individual enforcement actions (continued)

Suspension of duty to file for insolvency and suspension of creditors' request to open such proceedings

Executory contracts: creditors cannot terminate for debts which came into existence before the stay

- **No such restriction for debts which arise during the stay**

Inapplicability of ipso facto clauses when debtor starts negotiations or is granted a stay

4. Adoption of restructuring plans

Creditors must be treated in classes according to their interests

Plans must be adopted by creditors in each class representing the majority stipulated under national law ('best interest of creditors test, liquidation valuation)

Courts may also confirm plans against the dissent of certain classes via a cross-class cram-down mechanism, provided that the absolute priority rule is respected

5. Encouraging new financing and interim financing

Exempt new financing and interim financing from avoidance actions

Exempt providers of such new financing from civil and criminal liability, where it exists

! No protection should be granted where fraud was established.

Member States may give priority ranking over existing debt in subsequent insolvency procedures

6. Court involvement

Court involvement is required when the rights of dissenting creditors are affected (at the stage of the stay of individual enforcement actions, or at the stage of confirming a restructuring plan which affects such creditors)

Other steps do not need to take place in court, e.g. voting, creditors' meetings

7. Rights of shareholders

Shareholders should not be able to oppose a plan which returns the enterprise to viability

! Need to ensure protection of legitimate interests of shareholders (APR, enterprise valuation)

Amendments to Directive 2012/30 on the obligation to convene a general meeting of shareholders and on the preferential rights of shareholders

Other efficiency elements

Early warning tools

- **To help the debtor detect a deteriorating business development**
- **Signal to the debtor the urgency to act**
- **Available information about the existence of early warning tools**
- **Available information about the means available to restructure early**

B. Second chance for over-indebted entrepreneurs

*Full discharge after a maximum of **3 years** for **honest entrepreneurs***

Consolidation of procedures when entrepreneurs have both professional and non-professional debts

Limitation of the duration of disqualification orders for honest entrepreneurs

Limitations

Longer discharge periods or restricted access may be justifiable where:

- the over-indebted entrepreneur acted dishonestly or in bad faith towards the creditors;*
- the over-indebted entrepreneur does not adhere to a repayment plan or to any other legal obligation aimed at safeguarding the interests of creditors;*
- in case of abusive or repeated access.*

Certain categories of debt can be excluded from discharge

C. Enhancing the efficiency of procedures

Training and specialisation of judges

Training and professional standards for insolvency practitioners

Minimum rules on appointment, remuneration and supervision of insolvency practitioners

Digitalisation of procedures

Data collection

The proposal puts in place data collection obligations for the Member States, covering data on number of procedures, their outcome, length and costs .

Such data will allow a better assessment of how Member States are implementing the directive, how well it is performing and how it would need to be improved in the future.

Topics which create difficulties

Treatment of 'privileged' creditors (workers, secured creditors, public authorities)

Stay of individual enforcement actions (duration, scope)

Classes of creditors (if, when and how)

The cross-class cram-down (APR, valuation)

Treatment of equity holders

Relationship with other NPL-reduction initiatives

Next steps

Bulgarian Presidency – partial general approach on Title III (second chance)

Austrian Presidency – general approach???

Romanian Presidency – trilogues and first reading agreement???

European Parliament – vote in JURI on report expected in March/April 2018