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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 - General approach

I. INTRODUCTION

By letter of 23 November 2016, the Commission transmitted a 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 (the 'proposed Insolvency Directive') to the Council and the European Parliament.

The proposal is based on Article 53 and 114 of the Treaty on the Functioning of the European Union and is thus subject to the ordinary legislative procedure.

This proposal is a key deliverable under the 'Capital Markets Union Plan' and the 'Single Market Strategy'. Its objective is to reduce the most significant barriers to the free flow of capital stemming from differences in Member States’ restructuring and insolvency frameworks, and to ensure that viable companies and entrepreneurs in financial difficulty have access to effective preventive restructuring and second chance procedures, while protecting the legitimate interests of creditors.

In the context of the Commission’s work on the Banking Union, the proposal also seeks to contribute to preventing the accumulation of non-performing loans.

The (Justice and Home Affairs) Council has already agreed on a partial general approach covering Titles III (Discharge of debt and disqualifications), IV (Measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt) and V (Monitoring of procedures concerning restructuring, insolvency and discharge of debt) as well as the related definitions and recitals during its meeting on 4 and 5 June 2018.

During intensive discussions at technical level, and building on the results of the policy debates in the Council in June 2017 (9316/17) and December 2017 (15201/17), the Austrian Presidency focused on finding a good compromise on Titles I (General Provisions), II (Preventive restructuring frameworks) and VI (Final provisions).

After the meetings of the Working Party on Civil Law Matters (Insolvency) in June, July and September 2018, the Presidency is of the opinion that a general approach can be achieved on the overall revised text of the proposed Directive, including the recitals.

The JURI Committee of the European Parliament has voted on its report for this file in July 2018. The report was endorsed by the plenary meeting of the European Parliament in September 2018, meaning that interinstitutional negotiations can start as soon as the Council has adopted its position.

II. SPECIFIC ELEMENTS OF THE COMPROMISE

a. Access to preventive restructuring frameworks

Member States generally agreed from the outset of the negotiations with the principle that a debtor in a likelihood of insolvency should have access to a preventive restructuring framework in order to enable them to prevent insolvency and ensure their viability. However, a number of Member States raised concerns that allowing debtors with no prospect of viability to the framework would cause unnecessary delays of the opening of an insolvency procedure and would risk decreasing the value of the estate. The compromise text therefore allows those Member States to introduce a viability test, under certain conditions. This test is however optional, to provide other Member States, who want to ensure easier access to the procedure, the possibility to do so.

Some Member States also wanted to make this framework available upon request of creditors. The compromise text therefore provides them with a possibility to do so, but on an optional basis.

b. Mandatory appointment of an insolvency practitioner

Member States agree that the preventive restructuring procedure should be a debtor-in-possession procedure, meaning that the debtor should keep at least partial control over assets and the daily operations. In line with this principle, the Commission proposal had provided that the appointment of a practitioner in the field of restructuring should not be mandatory in all cases. Some Member States had raised concerns about the limited flexibility for national law in the Commission proposal. They considered that the presence of such a practitioner can increase the efficiency of the procedure and can ensure that the interests of all parties are taken into account. The Commission considered, however, that the mandatory appointment of a practitioner in all cases makes the procedure more costly and burdensome and therefore reduces easy access to the procedure for a debtor.

The compromise thus lays down the general principle that the appointment of such a practitioner shall be decided on a case-by-case basis, except in certain cases where national law may require such a mandatory appointment. The recitals provide a list of examples of such cases where national law can require a mandatory appointment.

c. Stay of individual enforcement actions

Member States were divided in their positions regarding the duration of the stay of individual enforcement actions. Whereas some Member States preferred to introduce a short stay in order to take into account the interests of the creditors, other Member States preferred to have a longer or indefinite stay in order to allow the debtor sufficient breathing space to come up with a restructuring plan, particularly in more complex cases. The compromise provides for a maximum period of stay of up to 4 months, which could be extended by a judicial or administrative authority up to 12 months. In cases where the national law requires the debtor to submit the plan for confirmation by the judicial or administrative authority within 8 months, the stay could be extended as long as it is necessary for the court to take a decision on the restructuring plan. Given that these are maximum deadlines, Member States are of course allowed to introduce a shorter stay.

A similar difference in the assessment of the interests of either the debtor or the creditor was also present regarding the possibility for a court to lift the stay. Whereas some Member States feared that such possibility would decrease the breathing space for the debtor given that there is always a threat that the stay could be lifted, other Member States considered such a possibility necessary to safeguard the interests of the creditors. The compromise therefore includes a possibility to lift a stay where it no longer fulfils the objectives or, where provided by national law, where it creates unfair prejudice to creditors, but allows Member States to introduce a minimum period during which the stay cannot be lifted. Member States are also allowed to limit the possibility to request the lifting of a stay to where creditors did not get an opportunity to be heard (e.g. where the stay is automatic).

d. Class formation

The Commission proposal introduced a requirement to put creditors in different classes for voting purposes, according to their commonality of interest. Some Member States, however, were not familiar with this system and considered that this could be burdensome, costly and, in many cases, unnecessary. This is especially the case where the debtor is a micro, small or medium-sized enterprise on account of its simple capital structure and limited number of creditors. The compromise therefore provides for a possibility for Member States to allow micro, small or medium-sized enterprises to opt to not treat affected parties in separate classes.

e. Cross-class cram-down

The cross-class cram-down mechanism was new to a number of Member States and raised some concerns. Two aspects, in particular, were problematic for a considerable number of Member States:

- the proposal required Member States to make a valuation of the debtor in order to determine which classes of creditors would be 'out of the money', and therefore not able to carry the plan by their support in a cross-class cram-down vote;
- the proposal introduced an absolute priority rule according to which a dissenting class of creditors must be satisfied in full if a more junior class could receive any distribution or keep any interest under the plan.

Some Member States considered that these requirements would make the procedure more burdensome and costly and would render the preventive restructuring more restrictive if not impossible. The European Commission highlighted that a valuation would be needed only if a creditor challenged the application of the cross-class cram-down mechanism in court.

The compromise text seeks to address the first problem by introducing an alternative option by which Member States can avoid the requirement that only classes of creditors 'in the money' can carry the plan, namely where a majority of classes of creditors votes in favour of the plan of which at least one class is a secured class of creditors or a class senior to the ordinary unsecured creditors.

The second problem has been addressed in the compromise text by providing an alternative option for Member States to introduce a different benchmark - a 'relative priority rule' - to protect dissenting creditor classes when using a cross-class cram-down mechanism. This option requires that dissenting voting classes are treated at least as favourably as any other class of the same rank, if the normal ranking of liquidation priorities under national law were applied, and more favourably than any junior class. This provides Member States with more flexibility in implementing this rule.

Although not all Member States considered these options flexible enough, a large majority of them agreed to the suggested approach.

III. CONCLUSION

The elements of this compromise text are to be seen as a package that aims at establishing a well-balanced regime taking into account the interests of the debtor, creditors and other interested parties alike. Although the compromise text harmonises some very important principles, it leaves sufficient flexibility for Member States to choose their approach of implementing these principles.

Bearing in mind the importance of keeping this balance, Coreper is invited to suggest that the Council (Justice and Home Affairs), at its meeting of 11 and 12 October 2018:

(a) confirms a general approach on the compromise text as set out in the Annex of this document;

(b) agrees that this text will constitute the basis for the negotiations with the European Parliament.

<u>ANNEX</u>

2016/0359 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on preventive restructuring frameworks, <u>on discharge of debt and disqualifications</u> and measures to increase the efficiency of <u>procedures concerning</u> restructuring, insolvency and discharge <u>of debt</u> and amending <u>Directive (EU) 2017/1132</u>

(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[1],

Having regard to the opinion of the Committee of the Regions[2],

Acting in accordance with the ordinary legislative procedure,

Whereas:

1 OJ C , , p. .

2 OJ C , , p. .

(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 **discharge of debt and disqualifications**. 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 **insolvent or** 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 **debtors** in financial difficulties to continue business in whole or in part, by changing the composition, conditions or structure of assets and liabilities or of their capital structure, including by sales of assets or parts of the business **as well as through operational changes. Unless otherwise provided for by national law, operational changes, such as the termination or amendment of contracts or the sale or other disposition of assets should comply with the general requirements that are provided for under national law for such measures, in particular civil law and labour law rules. Any debt to equity swaps should also comply with safeguards provided for in national law.** Preventive restructuring frameworks should above all enable the **debtors** 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 **in a balanced way**. At the same time, non-viable businesses with no prospect of survival should be liquidated as quickly as possible. **Where a debtor in financial difficulties is not economically viable or cannot be readily restored to economic viability, restructuring efforts could result in the acceleration and accumulation of losses to the detriment of creditors, employees and other stakeholders as well as the economy as a whole.**

(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 **discharge of debt and disqualifications** 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 **discharge of debt and disqualifications** 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 **discharge of debt** 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 **discharge of debt** 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 a **debtor**'s insolvency may trigger further insolvencies in the supply chain.

(10) Regulation (EU) 2015/848 of the European Parliament and of the Council[3] 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 **for preventive restructuring procedures as well as for procedures leading to a discharge of debt for entrepreneurs**.

(10a) **This Directive should have no impact on the scope of application of Regulation (EU) 2015/848. It aims at being fully compatible with and complementary to Regulation (EU) 2015/848, by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness. It does not change the approach taken in Regulation (EU) 2015/848 of allowing Member States the possibility to maintain or introduce procedures which do not fulfil the condition of publicity for recognition and notification under Annex A of Regulation (EU) 2015/848. Although the Directive does not require that procedures within its scope fulfil all the conditions for notification under Annex A of Regulation (EU) 2015/848, it aims at facilitating the cross-border recognition and enforcement of procedures falling within its scope of application.**

[3] 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).

(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 **debtors** in financial difficulties and the possibility of a **discharge of debt** 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 **debtors** 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 **discharge of debt** 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 **of the debtor**. Moreover, efficient insolvency frameworks would enable a better assessment of the risks involved in lending and borrowing decisions and smooth the adjustment for **insolvent or** over-indebted **debtors**, minimising the economic and social costs involved in their deleveraging process. **This Directive provides flexibility for Member States to apply these common principles while respecting national legal systems. Member States may maintain or introduce in their national legal systems other preventive restructuring frameworks.**

(13) In particular **micro,** small and medium sized enterprises should benefit from a more coherent approach at Union level, since they do not have the necessary resources to cope with high restructuring costs and to take advantage of the more efficient restructuring procedures in some Member States. **When defining micro, small and medium size enterprises Member States could give due consideration to Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC or Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises**. **Micro,** small and medium **size** 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. **Member States could either develop such tools themselves or leave it to the private sector, provided the objective is met.** In order to help such **debtors** restructure at low cost, **comprehensive check-lists for** restructuring plans**, adapted to the needs of micro, small and medium size enterprises,** should also be developed nationally and made available online. (…)

(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[4], 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[5], 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[6], central securities depositories as defined in point 1 of Article 2 of Regulation (EU) 909/2014 of the European Parliament and of the Council[7] 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[8]. These are subject to special arrangements and the national supervisory **and resolution** authorities have wide-ranging powers of intervention. **It is also appropriate to exclude** o**ther financial entities providing financial services which are subject to special arrangements under which the national supervisory or resolution authorities have wide-ranging powers of intervention comparable to those mentioned above. For similar considerations, it is also appropriate to exclude from the scope of this Directive public bodies under national law. Member States could also limit the access to preventive restructuring frameworks to legal persons. In Member States with different legal systems where the same type of entity has a different legal status in those legal systems, they could apply one uniform regime to all these types of entities.**

4 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).

5 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).

6 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).

7 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).

8 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).

(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 **are also** able to apply the discharge provisions to consumers.

(16) The earlier the debtor can detect its financial difficulties and can take appropriate action, the higher the probability of avoiding an impending insolvency or, in case of a business whose viability is permanently impaired, the more orderly and efficient the winding-up process. Clear**, up-to-date, concise and user-friendly** information on the available preventive restructuring procedures as well as **one or more** 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 **could** include **alert mechanisms when the debtor has not made certain types of payments or advisory services by public or private organisations (…)**. In addition, third parties with relevant information such as accountants, tax and social security authorities could be incentivised **(…)** under national law to flag **to the debtor** a negative development. **Member States could adapt the early warning tools depending on the size of the company and could lay down specific early warning provisions for large-sized companies and groups, taking into account their peculiarities. This Directive does not impose liability on the Member States for potential damages incurred through restructuring mechanisms which are triggered by such early warning tools.**

(17) A restructuring framework should be available to debtors, **including legal entities and, where so provided under national law, natural persons and groups of companies** 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 **under national law** for entering collective insolvency procedures which entail normally a total divestment of the debtor and the appointment of a liquidator. **(…)** 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. **Member States could determine whether claims that fall due or that come into existence after the procedure has been applied for or has been opened are included in the preventive restructuring measures or the stay of individual enforcement actions. Member States are free to decide whether the stay of individual enforcement actions has an effect on the interests on claims.**

(17a) Member States could introduce a viability test as a condition for access to the restructuring procedure provided for by this Directive. Such a test is to be carried out without detriment to the debtor's assets, which could mean, among others, that an interim stay is granted or that the assessment is carried out without undue delay. The absence of detriment does not exclude however the possibility to require debtors to prove their viability at their own costs.

(17b) Member States could extend the scope of preventive restructuring frameworks provided for by this Directive to situations in which the debtor faces non-financial difficulties, provided that such difficulties give rise to a real and serious threat to the debtor's actual or future ability to pay its debts as they fall due. The time frame relevant for the determination of such threat may extend to a period of several months or even longer in order to account for cases in which the debtor is faced with non-financial difficulties threatening the status of its business as a going concern and, in the medium term, its liquidity. This may be the case, for example, where the debtor has lost a contract which is of key importance to it.

(18) To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures**. Where the provisions of this Directive are implemented in different procedures within a restructuring framework, the debtor should have access to all rights and safeguards provided for by this Directive for purposes of preventing restructuring. Except for the cases of mandatory involvement of judicial or administrative authorities required under this Directive, Member States could limit their** involvement **(…)** to where it is necessary and proportionate, **taking into consideration, among others, the aim** of **safeguarding the rights and** interests of **debtors and of affected** parties **and the aim of reducing delays and costs of the procedures. When creditors are allowed to initiate a restructuring procedure under national law, Member States could require the agreement of the debtor as a precondition for the initiation of the procedure.**

(18a) To avoid unnecessary costs, reflect the early nature of the procedure and **to incentivise debtors to apply for the preventive restructuring at an early stage of financial difficulties, they** 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 **to support** the negotiations of a restructuring plan or **(..) to supervise** 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. **(…)** Nevertheless, **(…) Member States could decide that the appointment of a practitioner in the field of restructuring** is **always** necessary **in certain circumstances, (…) such as where the debtor benefits from (…)** a general stay of individual enforcement actions, where **(…) the** restructuring plan **needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down or where the restructuring plan includes measures affecting the rights of workers,** when **the debtor or its management have acted in a fraudulent, criminal or detrimental way in business relations, or when the appointment is made with the sole purpose of assisting in drafting or negotiating the restructuring plan**.

(19) A debtor should be able to **benefit from** a temporary stay of individual enforcement actions**, whether granted by a judicial or administrative authority or by operation of law (…) with the aim of supporting the negotiations on a restructuring plan, by enabling the debtor during the negotiations to continue operating or to preserve the value of the debtor's estate. Where so provided by national law, the stay could also apply against third party security providers, including guarantors and collateral givers. However, Member States could provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not fulfil the objective of supporting the negotiations. Factors that can amount to a ground for refusal might include a lack of support by the required majorities of creditors or, where so provided under national law, the debtor's actual inability to pay debts as they fall due. In order to facilitate and accelerate the course of proceedings, Member States should be able to establish, on a rebuttable basis, presumptions for the presence of grounds for refusal, where, for example, the debtor shows a conduct that is typical of a debtor who is unable to pay debts as they fall due, such as a substantial default vis-à-vis workers or tax or social security agencies, or where financial crime has been committed by the entrepreneur or the current management of a company that gives reason to believe that a majority of creditors will not support the start of the negotiations.**

(19a) The stay of enforcement could be general, that is to say affecting all creditors, or targeted towards individual creditors or categories of creditors. **Member States could exclude certain claims or categories of claims from the scope of the stay in well-defined circumstances, such as claims which are secured by assets the removal of which would not jeopardise the restructuring of the business or claims of creditors in respect of whom a stay would create unfair prejudice, such as by way of an uncompensated loss or depreciation of collateral.**

(19b) In order to provide for a fair balance between the rights of the debtor and of creditors, the stay should **apply** for a **maximum** period of **up to** four months. Complex restructurings may, however, require more time. Member States **could** decide that **(…)** extensions of **the intial period of the stay could** be granted by the judicial or administrative authority **in well-defined circumstances which could include the progress made in the negotiations of the restructuring plan, the complexity of the case, the size of the debtor or the presence of evidence that a plan is likely to be adopted. (…)** 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. **By way of derogation from the twelve months period, where Member States require that restructuring plans are submitted for confirmation by a judicial or administrative authority within eight months, Member States could provide that the stay is extended until the plan is confirmed. Member States could provide for an indefinite stay once the debtor becomes insolvent under national law. Member States could decide whether a short interim stay pending a judicial or administrative authority's decision on the access to the preventive restructuring framework is subject to the time limits under this Directive.**

(20) To ensure that the creditors do not suffer **unnecessary** detriment, **Member States should ensure that judicial or administrative authorities can lift the stay if it no longer fulfils the objective of supporting negotiations, for example if it becomes apparent that the required majority of creditors does not support the continuation of the negotiations. (…)** The stay should **also** be lifted **if** creditors are unfairly prejudiced by the stay of enforcement. **Member States could limit the possibility to lift the stay of individual enforcement actions to situations where creditors have not had the opportunity to be heard before it came into force or before it was extended. They could also provide for a minimum period during which the stay cannot be lifted.** In establishing whether there is unfair prejudice to creditors, judicial or administrative authorities **could** 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. **This Directive does not cover provisions on compensation or guarantees for creditors whose collateral is likely to decrease in value during the stay.** 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 **did** not **apply**, or if the creditor is put more at a disadvantage than other creditors in a similar position. **Member States could provide that, whenever unfair prejudice is established in respect of one or more creditors or one or more classes of creditors, the stay can be lifted in respect of those creditors or classes of creditors or in respect of all creditors. Member States remain free to decide who is able to request the lifting of the stay.**

(21) **(…) A stay of individual enforcement actions should also suspend the debtor's obligation to file for, or the opening upon a creditor's request of an insolvency procedure which can end in liquidation of the debtor. Such insolvency procedures should be those the outcome of which is not limited by law to a liquidation of the debtor, but could also be a restructuring of the debtor. The suspension of the opening of an insolvency procedure at the request of creditors applies not only where Member States provide for a general stay of individual enforcement actions covering all creditors, but also where national law provides for a possibility for a limited stay of individual enforcement actions for only a limited number of creditors. Nevertheless, Member States could provide that insolvency proceedings can be opened at the request of public authorities which are not acting in a creditor capacity, such as a prosecutor, in the general interest. Member States could derogate from these rules when the debtor becomes unable to pay debts as they fall due, provided that a judicial or administrative authority could keep in place the benefit of the stay if, taking into account the circumstances of the case, the opening of an insolvency procedure which could end in the liquidation of the debtor would not be in the general interest of the creditors.**

(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)**, even if debtors have duly met their obligations**. 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, **in such cases**, it is necessary that creditors **(…)** 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.

(22a) **Member States could provide that creditors to which the stay applies, whose claims came into existence prior to the stay and have not been paid by the debtor are not allowed to withhold performance, terminate, accelerate or in any other way modify executory contracts during the stay period, provided the debtor complies with their obligations under such contracts which fall due during the stay. 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.**

(23) **(…) This Directive lays down minimum standards for the content of a restructuring plan. Member States could however require additional explanations in the restructuring plan, for example concerning the criteria according to which creditors have been grouped, which may be relevant in the case where a debt is only partially secured.**

(24) **(…)** 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. **Member States could provide for limited exceptions from this rule.** 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 an **(…)** agreement **with the requisite majority**, affected parties **who were not involved in this agreement could** 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. **Class formation means the grouping of affected parties for the purposes of adopting a plan in such a way as to reflect the rights and seniority of the affected claims and interests.** As a minimum, secured and unsecured creditors should always be treated in separate classes**, but Member States could require that more than two classes of creditors are formed, including different classes of unsecured or secured creditors and classes of creditors with subordinated claims. Member States could also treat other types of creditors lacking a sufficient commonality of interest in separate classes, such as tax or social security authorities.** National law **could** provide that secured claims may be divided into secured and unsecured **parts** based on collateral valuation. National law **could** 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.

(25a) Member States could provide that in the case of debtors which are micro, small or medium size enterprises on account of their relatively simple capital structure, an exception can be made from the obligation to treat creditors in separate classes. In cases where micro, small or medium size enterprises have opted to use only one voting class and this class votes against the plan, in line with the general principles of this Directive it is possible for debtors to submit another plan.

(25b) 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. **National law could regulate how contested claims are handled for the purposes of allocating voting rights.** The judicial or administrative authority should examine class formation, **including the selection of creditors affected by the plan,** 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. **Member States could in addition require a majority in the number of affected parties in each class. Member States could lay down rules in relation to affected parties with a right to vote who do not exercise their right to vote in a correct manner or are not represented, such as taking them into account for a participation threshold or for the calculation of a majority. Member States are also free to provide for a participation threshold for the vote.**

(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 **either** in the case of liquidation, whether **(…)** piecemeal liquidation or sale of the business as a going concern**, or in the event of the next best alternative scenario if the restructuring plan was not confirmed**. **Member States should be able to choose one of these two thresholds when implementing this test in national law.** 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. **As a consequence of the best-interest-of-creditors test, where public institutional creditors have a privileged status under national law, Member States could provide that the plan cannot impose a full or partial cancellation of the claims of those 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 **could** still be confirmed by a judicial or administrative authority **upon the proposal of a debtor or with the debtor's agreement. In case of a legal person, Member States should be able to decide if for this purpose the debtor is to be understood as the legal person's management board or a certain majority of shareholders or equity holders. For the plan to be confirmed in the case of a cross-class cram-down, it has to be** supported **either** by at least one affected **or impaired** class of creditors **or by a majority of voting classes of affected parties, provided that at least one of those classes is a secured creditor class or is senior to the ordinary unsecured creditors class** (the cross-class cram-down mechanism). **In the first case, Member States could increase the number of classes which are required to approve the plan, without necessarily requiring that all those classes should, upon a valuation of the debtor as a going concern, receive payment or keep any interest, or, where so provided under national law, can be reasonably presumed to receive payment or keep any interest if the normal ranking of liquidation priorities were applied under national law. However, Member States should not require the consent of all classes. This means that where there are only two classes of creditors, the consent of at least one class should be deemed to be sufficient, if other conditions for the application of the cross-class cram-down are also met. For creditors to be impaired means that there is a reduction in the value of their claims.**

(28a) **When using the cross-class cram-down mechanism, Member States should ensure that** dissenting classes **of affected creditors** are not unfairly prejudiced under the proposed plan **and should provide sufficient protection for such dissenting classes. Member States could do this by ensuring that (…)** a dissenting class of **affected** creditors is paid in full **if** a more junior class **is to** receive any distribution or keep any interest under the restructuring plan. **Member States should have discretion in implementing the concept of payment in full, including in relation to the timing of the payment, as long as the principal of the claim and, in the case of secured creditors, the value of the collateral are protected. Member States could also decide on what are the equivalent means by which the original claim could be satisfied in full. It is appropriate to enable Member States to derogate from this rule, for example where it is fair that equity holders keep certain interests under the plan despite the fact that a more senior class is obliged to accept a reduction of its claims, or that essential suppliers covered by the provision on the stay of individual enforcement actions are paid before more senior classes of creditors. Alternatively, Member States could protect a dissenting class of creditors by ensuring that they are treated at least as favourably as any other class of the same rank and more favourably than any junior class. Member States could choose which of the abovementioned protection mechanisms they put in place.**

(29) While shareholders' or other equity holders' legitimate interests should be protected, Member States should ensure that **they** cannot unreasonably **prevent** the adoption of restructuring plans which would bring the debtor back to viability. **Member States can adapt what is unreasonable to take into account, inter alia, whether the debtor is a SME or a large enterprise, the proposed restructuring measures touching upon the rights of equity holders, the type of equity holder, whether the debtor is a legal or a natural person, or whether partners in a company have limited or unlimited liability.** 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 **and not making** the adoption of a restructuring plan **(…)** 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. 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. **Member States who exclude equity holders from voting do not need to apply the absolute priority rule in the interrelation between creditors and equity holders. Another possible means of implementing this requirement could be ensuring that restructuring measures, which directly affect equity holders' rights and belong to the competence of a certain body under company law, are not subject to unreasonably high majority requirements and that equity holders have no competence in terms of restructuring measures which do not directly affect their rights.** More classes of equity holders may be needed where different classes of shareholdings with different rights exist. Equity holders of small and medium size enterprises who are not mere investors, but are the owners of the enterprise and contribute to the enterprise 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 debtors which are small and medium size enterprises.

(30b) While the compliance with the best interests of creditors test should be examined by the judicial or administrative authority only if challenged in order to avoid that a valuation is made in every case, Member States could provide that other conditions for confirmation may be examined ex officio. Member States are free to add other conditions which need to be complied with in order to confirm a restructuring plan, such as whether equity holders are adequately protected. Judicial or administrative authorities should be able to refuse to confirm restructuring plans which have no reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business. However, Member States are not required to ensure that such assessment is made ex officio.

(30c) Among the conditions for confirmation of a restructuring plan is that of the notification to all affected parties. Member States are free to define the form and point in time of the notification as well as to make provisions for the treatment of unknown claims for the purposes of notification. They can provide that the non-affected parties should be informed about the restructuring plan.

(30d) Judicial or administrative authorities should decide on a valuation of the business either in liquidation, or in the next best alternative scenario if the restructuring plan was not confirmed or according to the conditions for a cross-class cram-down, only if a dissenting affected party challenges the restructuring plan. This does not preclude Member States from carrying out valuations in another context under national law. However, such a decision could also consist of an approval of a valuation by an expert or a valuation that was presented by the debtor or another party at an earlier stage of the process. Where the decision is made to carry out a valuation, Member States could provide for special rules, separate from civil procedural law, for a valuation in restructuring cases, with a view to ensuring that it is carried out in an expedited manner. Nothing in this Directive affects the rules on burden of proof under national law in the case of a valuation.

(30e) The binding effects of a restructuring plan are limited to the affected parties which were involved in the adoption of the plan. Member States could determine what it means for a creditor to be involved, including in the case of unknown creditors or creditors of future claims. For example, Member States could decide how to deal with creditors who have been notified correctly but who did not participate in the procedures.

(31) The success of a restructuring plan may often depend on whether **(…)** financial **assistance is extended to the debtor** to support first the operation of the business during restructuring negotiations and second the implementation of the restructuring plan after its confirmation. **Financial assistance should be understood in a broad sense, including providing money or third-party guarantees and supplying stock, inventory, raw materials and utilities, for example through granting the debtor a longer repayment period. Interim** financing **and new** 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 **of interim and new financing** or stipulating that new lenders may incur civil, administrative or criminal sanctions for extending credit to debtors in financial difficulties **could jeopardise** the availability of financing necessary for the successful negotiation and implementation of a restructuring plan. **The Directive does not affect other grounds for declaring new and interim financing void, voidable or unenforceable, or for triggering civil, criminal or administrative liability for providers of such financing, as provided for by national law. Such other grounds could include, among others, fraud, bad faith, a certain type of relation between the parties which could be associated with a conflict of interest such as in the case of transactions between related parties or between shareholders and the company, transactions where a party received value or collateral without being entitled to it at the time of the transaction or in the manner performed.**

(31a) **(…)** When interim financing is extended the parties do not know whether the plan will be eventually confirmed or not**, therefore, Member States should not be obliged to limit** the protection of interim finance to cases where the plan is adopted by creditors or confirmed by a judicial or administrative authority **(…)**. 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. **Furthermore, this Directive does not prevent Member States from introducing an ex ante control mechanism for interim financing**. **Member States could limit such protection to cases where the plan is confirmed by a judicial or administrative authority or where interim financing was subject to ex ante control. An ex ante control mechanism for interim financing or other transactions could be exercised by a practitioner in the field of restructuring by a creditor's committee or by a judicial or administrative authority.** 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 **by an administrative authority**. **Member States could also introduce a possiblity to appeal a decision on the confirmation of a restructuring plan by a judicial authority.** However, in order to ensure the effectiveness of the plan, to reduce uncertainty and to avoid unjustifiable delays, appeals should **as a rule** not have suspensive effects on the implementation of a restructuring plan. **Member States could determine or limit the grounds for appeal. Where the confirmation of the plan is appealed, Member States could allow the judicial authority to issue a preliminary or summary decision that immunises the execution and implementation of the plan against a success of the appeal pending.** Where **an appeal is upheld (…)**, **judicial or administrative authorities** should consider, as an alternative to setting aside the plan, the **amendment and confirmation of the plan. The amendments to the plan could be proposed by the parties or voted upon by the parties, on their own initiative or at the request of the judicial authority. Member States could also make** provision **for (…)** compensation **for monetary losses for the party whose appeal was upheld. (…) It is left to national law to deal with a potential new stay or extension of the stay in case the judicial authority decides that the appeal has a suspensive effect.**

(33) In order to promote a culture of early resort to preventive restructurings, it is desirable that transactions **which are reasonable and immediately necessary (…) for the negotiation** or implementation of a restructuring plan are also given protection from avoidance actions in subsequent insolvency procedures. **(…) Judicial or administrative authorities could, when determining the reasonableness and immediate necessity of costs and fees, for instance, consider projections and estimates submitted to affected parties, a creditor's committee, a practitioner in the field of restructuring or the judicial or administrative authority. To this end, Member States could also require debtors to provide and update relevant estimates.** 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. **Member States could provide for a point in time prior to the opening of a preventive restructuring procedure and the granting of the stay of individual enforcement actions from which fees and costs of negotiating, adopting, confirming or seeking professional advice for the restructuring plan start to benefit from the protection against avoidance actions. In the case of other payments and disbursements, such a starting point could also be the granting of the stay or the opening of the preventive restructuring procedure.**

(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[9], Council Directive 2001/23/EC[10], Directive 2002/14EC of the European Parliament and of the Council[11], Directive 2008/94/EC of the European Parliament and of the Council[12] and Directive 2009/38/EC of the European Parliament and of the Council[13]. 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 **necessary** 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. **Alternatively, Member States could exclude workers' claims from the scope of the preventive restructuring framework and provide for their protection under national law.**

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9 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.

10 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.

11 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.

12 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.

13 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.

(35) Where a restructuring plan entails a transfer of part of undertaking or business, workers' rights arising from a contract of employment or from an employment relationship, notably including the right to wages, should be safeguarded in accordance with Articles 3 and 4 of Directive 2001/23/EC, without prejudice to the specific rules applying in the event of insolvency proceedings under Article 5 of that Directive and in particular the possibilities allowed by Article 5(2) of that Directive. Furthermore, in addition and without prejudice to the rights to information and consultation, including on decisions likely to lead to substantial changes in work organisation or in contractual relations with a view to reaching an agreement on such decisions, which are guaranteed by Directive 2002/14/EC, under this Directive workers **whose claims** 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 **could** 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 **(…)** steps **to minimise losses and to avoid insolvency, such** 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. **(…)**

(37) **Entrepreneurs who are natural persons exercising a trade, business, craft or independent, self-employed profession may run the risk of becoming insolvent.** The different second chance possibilities in the Member States may incentivise **insolvent or** 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 **insolvency**, 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 **insolvent** have more chance to be successful the second time. Steps should therefore be taken to reduce the negative effects of over-indebtedness **or insolvency** on entrepreneurs, in particular by allowing for a full discharge of debt after a certain period of time and by limiting the length of disqualification orders issued in connection with the debtor's over-indebtedness **or insolvency**. **The concept of insolvency should be defined by national law and it may take the form of over-indebtedness. The concept of entrepreneur in the sense of this Directive shall not affect the position of managers or directors of a company, which should be treated according to national law. Member States should be able to decide how the access to discharge operates, including the possibility to require that the debtor requests the discharge.**

(37a) A repayment plan might take the form of a periodic transfer to creditors of a percentage of the disposable income according to national law and may also include other conditions and legal obligations as provided for under national law. Member States could provide for the possibility to adjust the repayment obligations of insolvent entrepreneurs when there is a significant change in their financial situation, either in the sense of an improvement or a deterioration of that situation. There should not be a requirement for a repayment plan to be supported by the majority of the creditors. Member States could provide that entrepreneurs are not prevented from starting a new activity in the same or different field during the implementation of the repayment plan.

(37b) A discharge of debt should be available in procedures which include a repayment plan, a realisation of assets or a combination of these. In implementing these provisions, Member States can choose freely among these alternatives and, if more than one procedure leading to discharge are available under national law, Member States should ensure that at least one such procedure offers insolvent entrepreneurs the possibility of a full discharge of debt within a period no longer than three years. In the case of procedures which combine a realisation of assets and a repayment plan, the discharge period should run at the latest from the moment the repayment plan is confirmed by a court or starts being implemented, for example from the first instalment under the plan, but it could also start at an earlier point, such as when a decision is taken to open the procedure.

(37c) In procedures which do not include a repayment plan, the discharge period should start at the latest from the decision by a judicial or administrative authority to open the procedure, or the moment of the establishment of the insolvency estate. For the purposes of calculating the discharge period under this Directive, Member States could provide that the concept of 'opening of procedure' does not include preliminary measures, such as preservation measures or the appointment of a preliminary insolvency practitioner, unless such measures allow for the realisation of assets, including the disposal and the distribution of assets to creditors. The establishment of the insolvency estate should not necessarily entail a formal decision or confirmation by a judicial or administrative authority, where such decision is not already required under national law, and may consist in the submission of the inventory of assets and liabilities.

(37d) Where the procedural track leading to the discharge entails the realisation of the entrepreneur's assets, Member States shall not be precluded from providing that the request for discharge is treated separately from the realisation of assets, provided that such request constitutes an integral part of the procedural track leading to the discharge under this Directive. Member States should be free to decide on the national rules on the burden of proof in order for the discharge to operate, which means that a debtor may be required by law to prove compliance with his obligations.

(38) A full discharge **of debt** or the end of disqualification**s** after a (…) period **no longer than three years is** not appropriate in all circumstances**, and derogations from this rule which are duly justified by reasons laid down in national legislations may be put in place.** For instance, **such derogations may be put in place** in cases where the debtor is dishonest or has acted in bad faith **or where he has not complied with certain legal obligations, including obligations to maximise returns to creditors which may take the form of a general obligation to generate income or assets. A specific derogation may be put in place where it is necessary to guarantee the balance between the rights of the debtor and the rights of one or more creditors, such as where the creditor is a natural person who needs more protection than the debtor. A derogation could also be justified when the costs of the procedure leading to discharge of debts, including fees of judicial and administrative authorities and of insolvency practitioners, are not covered. After the granting of the discharge, Member States should be able to provide for the possibility under national law to revoke the benefits of a full discharge where, for example, the financial situation of the debtor improves significantly due to unexpected circumstances, such as winning a lottery, or coming in the possession of an inheritance or a donation. Member States should not be precluded from providing additional derogations in well-defined circumstances and when duly justified. Where there is a duly justified reason as laid down in national law, it may be appropriate to limit the possibility of discharge for certain categories of debt. Secured debts may be excluded from the possibility of discharge only up to the value of the collateral as determined by national law, while the rest of the debt should be treated as unsecured debt. Member States should be able to exclude further categories of debt when duly justified**.

(38a) If an entrepreneur's permit or license to carry on a certain craft, business, trade or profession has been denied or revoked as a result of a disqualification order, this Directive should not prevent Member States from requiring the entrepreneur to submit a new application for obtaining such a permit or licence after the disqualification has expired. Where a Member States authority adopts a decision concerning a specifically supervised activity, it could also take into account, even when the disqualification period has expired, that the insolvent entrepreneur has obtained a discharge of debt in accordance with this Directive.

(38b) Where Member States provide that the entrepreneur is subject to different insolvency procedures in respect of his professional and non-professinal debts, a coordination between those different procedures would be needed, for example where an asset is used in the course of the professional activity of the entrepreneur as well as outside that activity. Member States in which entrepreneurs are allowed to continue their business on their own account during an insolvency proceeding should not be precluded from providing that such entrepreneurs can be made subject to a new insolvency proceeding, where such continued business becomes insolvent.

(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 **suitably** trained and have **the necessary expertise for their responsibilities**. **Suitable training and expertise may be acquired also during the exercise of the profession of member of a judicial or administrative authority or, prior to appointment to such a profession, during the exercise of another relevant profession.** Such (…) **training and expertise** should allow **taking** decisions with potentially significant economic and social impacts **in an efficient manner** and **need** not mean that members of the judiciary have to deal exclusively with restructuring, insolvency and second chance matters. **Member States should ensure that procedures concerning restructuring, insolvency and discharge of debt can be dealt with in an efficient manner, including expeditiously.** For example, the creation of specialised courts or chambers, **or the appointment of specialised judges** in accordance with national law governing the organisation of the judicial system, **as well as concentrating jurisdiction in a limited number of judicial or administrative authorities** could be efficient ways of achieving the **above-mentioned objectives**. **Member States should not be obliged to provide that such procedures is to be prioritised over other procedures.**

(40) Member States should also ensure that practitioners in the field of restructuring, insolvency and **discharge of debt** which are appointed by judicial or administrative authorities are **suitably** 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. **Suitable training and expertise for practitioners could also be acquired during the exercise of the profession and Member States should not be obliged to provide the necessary training themselves, but this can be done by, for example, professional associations or other bodies. Insolvency practitioners as defined in Regulation (EU) 2015/848 should be included in the scope of these provisions. This includes cases where practitioners are chosen by the debtor, by creditors or by a creditors' committee from a list or a pool which is pre-approved by a judicial or administrative authority. In choosing the practitioner, the debtor, the creditors or the creditors' committee could be granted a margin of appreciation as to the practitioner's expertise and experience in general and the demands of the particular case, and debtors who are natural persons could be exempted from such a duty altogether. In cases with cross-border elements, the appointment should take into account, among others, the practitioners' ability to comply with the obligations under the Regulation (EU) 2015/848 to communicate and cooperate with foreign insolvency practitioners and judicial and administrative authorities as well as their human and administrative resources to deal with potentially high volume cases. (…) Member States shall not be precluded from selecting a practitioner by other selection methods, such as random selection by a software, provided that the person or mechanism selecting the practitioner in a particular case gives due consideration to the practitioner's experience and expertise. Member States should be able to decide on the means for objecting to the selection or appointment of a practitioner or requesting his or her replacement, for example through a creditors' committee.**

(40a) Practitioners should be subject to oversight and regulatory mechanisms **which should include effective measures for the accountability of practitioners** who have failed in their duties**, such as for example a reduction in the practitioner's fee, the exclusion from the list or pool of practitioners who can be appointed in insolvency cases, as well as, where appropriate, disciplinary, administrative or criminal sanctions. Such oversight and regulatory mechanisms should be without prejudice to provisions under national law on civil liability for damages for breach of contractual and non-contractual obligations.** Such standards may be attained without the need in principle to create new professions or qualifications **in national law. These provisions may, under national law, extend to other practitioners**. **Member States should not be obliged to provide that disputes over remuneration of practitioners is to be prioritised over other procedures.**

(41) To further reduce the length of procedures, **to facilitate** a better participation of creditors **in procedures concerning** restructuring, insolvency and discharge **of debt** and to ensure similar conditions for creditors irrespective of where they are located in the Union, **Member States should put in place provisions enabling debtors, creditors, practitioners and judicial and administrative authorities to use distance means of electronic communication.** Therefore, it should be possible that procedural steps such as the filing of claims by creditors, the notification **of creditors** or **the** lodging **of contestations and** appeals take place electronically. **Member States could provide that notifications to a creditor may be performed electronically only if the creditor concerned has previously consented to electronic communication. Parties should not be obliged to use such electronic means if these are not mandatory under national law, without prejudice to the possibility for the Member States to establish a mandatory system of electronic filing and service of documents in procedures concerning restructuring, insolvency and discharge of debt**. **Member States may choose the actual means of electronic communications which could be, for example, a purpose-built system for the electronic transmission of such documents or the use of e-mail, without precluding the possibility for Member States to put in place features to ensure the security of electronic transmissions, such as electronic signature, or trust services, such as electronic registered delivery services, in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council.**

(42) It is important to gather reliable **and comparable** 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 **and should communicate that data to the Commission. The communication form for the transmission of such data to the Commission which will be established by the Commission as sited by a Committee within the meaning of Regulation (EU) No 182/2011 should provide a shortlist of main outcomes of procedures which are common to all Member States. For example, in the case of a restructuring procedure, main outcomes could be: procedures where a plan was confirmed by a court, plans which were not confirmed by a court, restructuring procedures which were converted to liquidation procedures or closed because of the opening of liquidation procedures before a plan was confirmed by a court. Member States should not be obliged to provide a break-down by types of outcome in respect of those procedures which end before any relevant measures are taken, but could provide instead a common number for all procedures which are declared inadmissible, are rejected or withdrawn before being opened. The form should also provide a list of options which could be taken into account by the Member States when determining the size of the debtor, by reference to one or more of the elements of the definition of micro, small, medium and large enterprises common to the laws of all Member States. One of these options should in any case be to determine the size of debtors by the number of employees only. The form developed with the assistance of the Committee should also define the elements of average cost and average recovery rates for which Member States may collect data voluntarily**. **The form should provide guidance on elements which could be taken into account when Member States make use of a sampling technique, for example on sample sizes to ensure representativeness in terms of geographical distribution, size of debtors and industry.The form should include a possibility for Member States to provide additional information if they have such information available, for example on the total amount of assets and liabilities of debtors.**

(43) The stability of financial markets relies heavily on financial collateral arrangements, in particular, when security collateral is provided in connection with participation in designated systems or in central bank operations and when margins are provided to central counterparties (CCPs). As the value of financial instruments given as security may be very volatile, it is crucial to realize their value quickly before its goes down. Therefore, **(…)** Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998[14], Directive 2002/47/EC of the European Parliament and of the Council[15] and Regulation (EU) No 648/2012[16] **should prevail over the provisions of this Directive**. **Member States should be allowed to exempt netting arrangements, including close out netting, from the effects of the stay of individual enforcement actions even in circumstances where they are not covered by the above-mentioned instruments, if such arrangements are enforceable under the laws of the respective Member State even if insolvency proceedings are opened. This could be the case for a significant number of master agreements widely used in the financial, energy and commodity markets both by non-financial and financial counterparties. These arrangements reduce systemic risks especially in derivatives markets. Such arrangements might therefore be exempt from restrictions that insolvency laws impose on executory contracts. Accordingly, Member States should also be allowed to exempt from the effects of the stay of individual enforcements actions statutory close out netting arrangements upon the opening of insolvency proceedings. The amount resulting from the operation of close out netting arrangements should, however, be subject to the stay.**

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14 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).

15 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).

16 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).

(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 **(EU) 2017/1132** of the European Parliament and of the Council[17] 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 **(EU) 2017/1132**. **For example, Member States may need to put in place derogations from the obligation to convene a general meeting of shareholders or from the normal periods, where urgent action is to be taken by the management to safeguard the assets of the company, for instance through requesting a stay of individual enforment actions, when there is a serious and sudden loss of subscribed capital and a likelihood of insolvency. Derogations from company law may also be required when the restructuring plan provides for the emission of new shares which may be offered with priority to creditors as debt-to-equity swaps, or for the reduction of the amount of subscribed capital in case of a transfer of parts of the undertaking. Such derogations should be limited in time to the extent that Member States consider such derogations necessary for the establishment of a preventive restructuring framework.** Member States should not be obliged to derogate from company law rules, completely **or partially, for an indefinite** 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 **unduly** impaired by the calls for or the results of the general meetings of shareholders.

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[17] 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).

Directive (EU) 2017/1132 should therefore be amended accordingly. Member States enjoy a margin of appreciation in assessing which derogations are needed in the context of national company law in order to effectively implement this Directive and may also provide for similar exemptions from the application of said provisions in Directive 2017/1132 in insolvency proceedings not covered by this Directive that allow for restructuring measures to be taken.

(45) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents[18], 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[19].

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18 OJ C 369, 17.12.2011, p. 14.

19 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).

(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 **frameworks** available for debtors in financial difficulty **and, where so provided under national law, non-financial difficulty,** when there is a likelihood of insolvency;

   (b) procedures leading to a discharge of debt incurred by **insolvent** entrepreneurs and **any linked disqualification periods**; **and**

   (c) measures to increase the efficiency of procedures **concerning restructuring, insolvency and discharge of debt**.

2. This Directive shall not apply to procedures referred to in paragraph 1 of this Article that concern debtors **which** 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) **respectively** of Article 4(1) of Regulation (EC) No 575/2013;

(d) central counter parties **("CCP")** 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) **No** 909/2014;

(f) **(…)** entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU**, other than those listed in points (a) to (e) of this paragraph**;

(fa) **other financial entities providing financial services which are subject to special arrangements under which the national supervisory or resolution authorities have wide-ranging powers of intervention comparable to those laid down for the entities listed in point (a) to (f);**

(g) **public bodies under national law; and**

(h) 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 **insolvent** natural persons who are not entrepreneurs.

Member States may restrict the application of point (a) of paragraph 1 to legal persons.

4. Member States may provide that the following claims are excluded from, or are not affected by, preventive restructuring frameworks referred to in point (a) of paragraph 1:

(a) **existing and future claims of existing or former employees;**

(b) **maintenance claims arising from a family relationship, parentage, marriage or affinity; or**

(c) **claims that arise out of tortious liability of the debtor.**

Article 2

Definitions

1. For the purposes of this Directive, the following definitions (…) apply:

(1) (…)

(2) 'restructuring' means **measures that include** changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, (…) **such as** sales of assets or parts of the business **and, where so provided under national law, the sale of the business as a going concern**, **as well as any necessary operational changes,** or a combination of those elements (…);

(3) 'affected **party'** means **a creditor whose claims** and, where applicable under national law, equity holders whose (…) interests are **directly** affected **in** a restructuring plan;

(3a) 'equity holder' means a person who has an ownership interest in the debtor or debtor's business, including shareholders, to the extent that that person is not a creditor;

(4) 'stay of individual enforcement actions' means a temporary suspension**, granted by a judicial or administrative authority or by operation of law,** of the right to enforce a claim by a creditor against a debtor **and, where so provided for by national law, against a third party security provider, in the context of a judicial, administrative or other procedure, or of the right to seize or realise out of court the assets or business of the debtor;**

(5) 'executory **contract**' means **a contract** between the debtor and one or more creditors under which both **parties** still have obligations to perform at the moment the stay of individual enforcement actions is **granted or applied**;

(6) (…)

(7) (…)

(8) (…)

(9) 'best-interest-of-creditors test' means that no dissenting creditor would be worse off under the restructuring plan than **such a creditor** would be**, either** in the event of liquidation, whether piecemeal or sale as a going concern, **if the normal ranking of liquidation priorities under national law were applied, or in the event of the next best alternative scenario if the restructuring plan was not confirmed**;

(10) (…)

(11) 'new financing' means any new **financial assistance** (…) provided by an existing or a new creditor **in order** to implement a restructuring plan **and** (…) **included** in that restructuring plan (…);

(12) 'interim financing' means **new financial assistance**, (…) provided by an existing or **a** new creditor, **which includes, as a minimum, financial assistance during the stay of individual enforcement actions** that is **reasonable** and immediately necessary for the debtor's business to continue operating (…), or to preserve or enhance the value of that business (…);

(13) '(…) entrepreneur' means a natural person exercising a trade, business, craft or profession (…)**;**

(14) 'full discharge of debt' means cancellation of the possibility to enforce against the entrepreneur the dischargeable debts or the cancellation of the outstanding dischargeable debts as such, as part of a procedure which could include a realisation of assets (…) or a repayment (…) plan or both;

(15) 'practitioner in the field of restructuring' means any person or body appointed by a judicial or administrative authority to carry out**, in particular,** one or more of the following tasks:

(a) **assisting** the debtor **and** the creditors in drafting or negotiating a restructuring plan;

(b) **supervising** the activity of the debtor during the negotiations on a restructuring plan and report to a judicial or administrative authority;

(c) **taking** partial control over the assets or affairs of the debtor during negotiations.

2. For the purposes of this Directive, the following concepts are to be understood as defined by national law:

(a) insolvency;

(b) likelihood of insolvency;

(c) small and medium sized enterprises ("SMEs").

Article 3

Early warning ***and access to information***

1. Member States shall ensure that debtors (…) have access to **at least one** early warning tool which can detect **circumstances that may give rise to a likelihood of insolvency** and **which can** signal to the debtor (…) the need to act **without delay**.

2. Member States shall ensure that debtors (…) have access to relevant (…) information about **available** early warning tools **as well as the procedures and measures concerning restructuring** (…) **and** discharge of (…) **debts**.

3. Member States may limit the access provided for in paragraphs 1 and 2 to **SMEs and** 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 **a** likelihood of insolvency, debtors (…) have access to a (…) preventive restructuring framework that enables them to restructure (…) **with a view to** (…) **preventing** insolvency **and ensuring their viability**.

1a. Member States may maintain or introduce a viability test under national law, provided that such a test has the purpose to exclude debtors which do not have a prospect for viability and can be carried out without detriment to the debtors' assets.

1b. Member States may limit the number of times a debtor can access a preventive restructuring framework provided for under this Directive within a certain period.

2. **A** preventive restructuring **framework as provided for by this Directive** may consist of one or more procedures**,** measures **or provisions which afford debtors and affected parties the rights and safeguards provided for in this Title in a coherent framework, without prejudice to any other restructuring frameworks under national law.**

3. Member States **may** put in place provisions limiting the involvement of a judicial or administrative authority to where **such involvement** is necessary and proportionate (…).

4. **A** preventive restructuring **framework under this Directive** shall be available on application by debtors. **Member States may provide that such framework is also available on application by creditors.**

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. **Where necessary**, the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall (…) **be decided on a case-by-case basis**, except in **certain circumstances where Member States may require the mandatory appointment in every case of such a practitioner.**

3. (…)

Article 6

Stay of individual enforcement actions

1. Member States shall ensure that debtors (…) may benefit from a stay of individual enforcement actions (…) to support the negotiations of a restructuring plan **in a preventive restructuring framework.**

Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not fulfil the objective set out in the first subparagraph.

2. **Without prejudice to paragraphs 2b and 3,** Member States shall ensure that a stay of individual enforcement actions may **cover** all types of **claims**, including secured **claims** and preferential **claims**.

2a. **Member States may provide that** the stay **of individual enforcement actions can** be general, covering all creditors, or **can be** limited, covering one or more individual creditors **or categories of creditors** (…).

2b. **Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions in well-defined circumstances where such an exclusion is duly justified and**

(a) **where enforcement is not likely to jeopardise the restructuring of the business; or**

(b) **where the stay would create unfair prejudice to the creditors of those claims.**

3. Paragraph 2 shall not apply to workers' (…)claims.

Member States may apply paragraph 2 to such claims if**,** and to the extent that**,** Member States ensure (…) that the payment of such claims is guaranteed **in preventive restructuring frameworks** 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 **initial** duration of the stay of individual enforcement actions to a maximum period of no more than four months.

5. **Notwithstanding paragraph 4,** Member States may (…) enable judicial or administrative authorities to extend the (…) duration of the stay of individual enforcement actions or to grant a new stay of individual enforcement actions, upon request of the debtor, **a creditor or, where applicable, a practitioner in the field of restructuring**. Such extension or new period of stay of individual enforcement actions shall be granted only **in well-defined circumstances where such extensions or new periods of stay are duly justified.** (…)

6. (…)

7. The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed twelve months.

7a. By way of derogation from paragraph 7, where, according to national law, the restructuring plan is to be submitted within eight months from the start of the initial stay of individual enforcement actions to a judicial or administrative authority for confirmation, Member States may provide that that stay is extended until the plan is confirmed.

8. Member States shall ensure that judicial or administrative authorities **can** lift the stay of individual enforcement actions (…) **in the following cases**:

(a) **the stay no longer fulfils the objective set out in paragraph 1; or**

(b) **where so provided by national law, one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions.**

Member States may limit the possibility to lift the stay of individual enforcement actions to situations where creditors have not had the opportunity to be heard before the stay came into force or before an extension of the period was granted by a judicial or administrative authority.

Within the time limit set out under paragraph 4, Member States may provide for a minimum period during which the stay of individual enforcement actions cannot be lifted.

9. **(…)**

Article 7

Consequences of the stay of individual enforcement actions

1. Where **a debtor's** obligation (…), **provided for under national law,** to file for **the opening of an** insolvency **procedure which can end in the liquidation of the debtor,** arises during (…) the stay of individual enforcement actions, that obligation shall be suspended for the duration of **that** stay.

2. A (…) stay **of individual enforcement actions** (…) **in accordance with Article 6** shall **suspend, for the duration of the stay,** the opening of **an** insolvency **procedure which can end in the liquidation of the debtor** at the request of one or more creditors.

3. Member States may derogate from **paragraphs** 1 **and 2** where the debtor (…) **is** unable to pay **its** debts as they fall due **(…)**. In that case, Member States shall ensure that (…) a judicial or administrative authority may decide to **(…)** keep in place the benefit of the stay of individual enforcement actions**, if, taking into account the circumstances of the case, the opening of an insolvency procedure which can end in the liquidation of the debtor would not be in the general interest of the creditors.**

4. (…)

5. Member States shall ensure that creditors **do** 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**:**

(c) **a request for an opening of a preventive restructuring procedure;**

(d) a **request** for a stay of individual enforcement actions**;**

(e) **the opening of a preventive restructuring procedure; or**

(f) **the granting** of **a** stay **of individual enforcement actions** as such**.** (…)

5a. Member States **may provide for rules preventing or restricting** (…) creditors to which the stay applies **from withholding** performance or **terminating**, **accelerating** or**,** in any other way**, modifying** executory contracts to the detriment of the debtor for debts that came into existence prior to the stay **and were not paid by the debtor.**

This paragraph applies in particular in the case of essential contracts which are necessary for the continuation of the day-to-day operation of the business.

5b. Member States may provide that the stay of individual enforcement actions shall not apply to netting arrangements, including close out netting arrangements, on financial markets, energy markets and commodity markets even in circumstances where Article 31 does not apply, if such arrangements are enforceable under national insolvency law. The stay shall, however, apply to the enforcement by a creditor of a claim against the debtor arising as a result of the operation of a netting arrangement.

6. **This Directive shall not prevent** 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 (…) **during** the stay of individual enforcement actions.

7. Member States shall **ensure that the expiry of the stay without the adoption of a restructuring plan does not, as such, give rise to the opening of an insolvency procedure which can end in the liquidation of the debtor,** unless the other conditions for **such opening** 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 **adoption in accordance with Article 9, or for** confirmation by a judicial or administrative authority **in accordance with Article 10,** to contain at least the following information:

   (a) the identity of the debtor **(…)**;

   (b) **the assets and liabilities at the moment of submission of the restructuring plan as well as a description of the economic situation of the debtor and the position of workers, and a description of** the causes and the extent of the (…) difficulties of the debtor;

   (c) the (…) affected parties, whether named individually or described by (…) categories of debt **in accordance with national law**, as well as their claims or interests covered by the restructuring plan;

   (d) **where applicable,** the classes into which the affected parties have been grouped for the purpose of adopting the **restructuring** plan (…) and (…) the respective values of **claims and interests** in each class;

   (e) **where applicable,** the (…) parties, whether named individually or described by (…) categories of debt **in accordance with national law**, **which are not affected by the restructuring plan**, together with a **description** of the reasons why it is (…) proposed to **not** affect them;

(f) the terms of the **restructuring** plan, including, **in particular**:

  (i) any (…) **proposed restructuring measures as referred to in point (2) of Article 2(1);**

  (ii) **the** proposed duration **of such measures, if applicable**; **and**

  (iii) any new financing anticipated as part of the restructuring plan **and the reasons why it is necessary to implement that plan**; **and**

(g) **a** (…) statement **of reasons** (…) which explains why the **restructuring plan has a reasonable prospect of preventing the** insolvency **of the debtor and ensuring the viability of the business, including the** necessary pre-conditions for its success.

2. Member States shall make **available online** a **comprehensive check-list** for restructuring plans**, adapted to the needs of SMEs. The check-list shall include practical guidelines** on how **the restructuring plan has to be drafted under national law.**(…)

3. (…)

Article 9

Adoption of restructuring plans

01. **Member States shall ensure that, irrespective of who applies for the preventive restructuring procedure in accordance with Article 4, debtors have the right to submit restructuring plans for adoption by the affected parties. Member States may also provide that creditors and practitioners in the field of restructuring have the right to submit restructuring plans.**

1. Member States shall ensure that (…) affected **parties** have a right to vote on the adoption of a restructuring plan. (…)

1a. Notwithstanding paragraph 1, Member States may exclude from the right to vote the following:

(a) **equity holders;**

(b) **creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or**

(c) **any related party of the debtor or the debtor's business with a conflict of interest under national law.**

2. Member States shall ensure that affected parties are treated in separate classes which reflect (…) **sufficient** commonality of interest**, in accordance with national law**. 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' **claims** are treated in a separate class of their own.

Member States may provide that debtors which are SMEs may opt to not treat affected parties in separate classes.

3. **The formation of classes** shall be examined by **a** judicial or administrative authority when a request (…) for confirmation of the restructuring plan **is submitted**. **Member States may provide for a judicial or administrative authority to examine and confirm the formation of classes at an earlier stage.**

4. A restructuring plan shall be (…) adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each (…) class. **Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.**

Member States shall lay down the majorities **required** for the adoption of a restructuring plan. **Those majorities** shall (….) not **be** higher than 75% in the amount of claims or interests in each class **or, where applicable, in the number of affected parties in each class**.

5. **Notwithstanding paragraphs 1 to 4,** Member States may **provide** that a **formal** vote on the adoption of a restructuring plan **can be replaced by** (…) **an** agreement **with the** requisite majority.

6. (…)

Article 10

Confirmation of restructuring plans

1. Member States shall ensure that **at least** the following restructuring plans **are** binding on the parties only if they are confirmed by a judicial or administrative authority:

   (a) restructuring plans which affect the **claims or** interests of dissenting affected parties; **and**

   (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 (…);

   (aa) creditors in the same voting class, or, where there is only one class in accordance with the second subparagraph of Article 9(2), creditors with sufficient commonality of interest are equally treated, proportionate to their claim;

(ab) **the restructuring plan** has been notified to all (…) **affected parties in accordance with national law**;

(b) **where there are dissenting creditors,** the restructuring plan complies with the best-interest-of-creditors test;

(c) **where applicable,** any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors.

Compliance with point (b) of the first subparagraph shall be examined by a judicial or administrative authority only if challenged.

3. Member States shall ensure that judicial or administrative authorities **are able to** refuse to confirm a restructuring plan where that plan **would** (…) not have a reasonable prospect of preventing the insolvency of the debtor **or** ensuring the viability of the business.

4. (…)

Article 11

Cross-class cram-down

1. Member States shall ensure that a restructuring plan which is not approved by **all voting classes** of affected parties **as provided for in Article 9(4),** may be confirmed by a judicial or administrative authority upon the proposal of a debtor or (…) with the debtor's agreement**,** and become binding upon (…) dissenting **voting** classes where the restructuring plan **fulfils at least the following conditions**:

(a) **it complies with** Article 10(2);

(b) **it** has been approved by **the required voting classes of affected parties in accordance with paragraph 2**;

(c) it complies with the fairness test in accordance with paragraph 2a;

(d) no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests;

By derogation from the first subparagraph, Member States may limit the requirement for the debtor's agreement to cases where debtors are SMEs.

2. **In order for the restructuring plan to be confirmed, Member States shall require that it has been approved by either:**

(a) at least one **voting** class of affected **parties, or, where so provided under national law, impaired parties,** other than an equity-holders class **or** any other class which, upon a valuation of the **debtor as a going concern**, would not receive any payment or **keep any interest, or, where so provided under national law, can be reasonably presumed not to receive any payment or keep any interest,** if the normal ranking of liquidation priorities were applied **under national law**; **or**

(b) **a majority of voting classes of affected parties, provided that at least one of those classes is a secured creditor class or is senior to the ordinary unsecured creditors class.**

Member States may introduce both alternatives under national law.

Member States may **increase** the minimum number of (…) classes **of affected parties , or where so provided under national law, impaired parties** required to approve the plan **as** laid down in point **(a) of this paragraph**.

2a. Member States shall define the fairness test by requiring that either:

(a) **a dissenting voting class of affected creditors is satisfied in full by the same or equivalent means if a more junior class is to receive any payment or keep any interest under the restructuring plan; or**

(b) **dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class.**

Member States may maintain or introduce provisions derogating from point (a) of paragraph 2a where it is necessary to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties.

2b. Article 10(3) shall apply *mutatis mutandis*.

Article 12

Equity holders

1. **Where Member States exclude equity holders from the application of Articles 9 to 11,** they shall ensure **by other means** that (…) **those** (…) equity holders (…) **do** not unreasonably prevent the adoption, **confirmation** or implementation of a restructuring plan (…).

Member States may adapt what is unreasonable under paragraph 1 to take into account, inter alia, whether the debtor is a SME or a large enterprise, the proposed restructuring measures touching upon the rights of equity holders, the type of equity holder, whether the debtor is a legal or a natural person, or whether partners in a company have limited or unlimited liability.

2. (…)

Chapter 3

Restructuring plans

Article 13

Valuation by the judicial or administrative authority

1. (…) The judicial or administrative authority **shall take a decision on a valuation (…)** on the grounds of an alleged breach of **either:**

   (a) the best-interest-of-creditors test **under point (9) of Article 2(1); or**

   (b) **the conditions for a cross-class cram-down under point (a) of Article 11(2),**

   only where a restructuring plan is challenged **by a dissenting affected party.**

2. **(…)**

3. Member States shall ensure that**, for the purpose of taking a decision on a valuation in accordance with paragraph 1, judicial or administrative authorities may appoint or hear** properly qualified experts (…).

4. **For the purposes of paragraph 1**, Member States shall ensure that (…) **a dissenting affected party may lodge a challenge** with the judicial or administrative authority called upon to confirm the restructuring plan (…).

   Member States may provide that such a challenge can be lodged 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 **all affected parties**.

2. **Member States shall ensure that** creditors who are not involved in the adoption of a restructuring plan **according to national law are** not affected by the plan.

Article 15

Appeals

1. Member States shall ensure that **any appeal provided for under national law against** a decision **to confirm or reject** a restructuring plan taken by a judicial authority **is brought** before a higher judicial authority**.**

   Member States shall ensure that an appeal against a decision **to confirm or reject** a restructuring plan taken by an administrative authority **is brought** before a judicial authority.

2. (…)

3. An appeal against a decision confirming a restructuring plan shall have no suspensive effects on the execution of that plan.

   By way of derogation from the first subparagraph, Member States may provide that judicial authorities can suspend the execution of the restructuring plan or parts thereof where necessary and appropriate to safeguard the interests of a party.

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) **amend, where so provided under national law, and** confirm the **restructuring** plan (…)**.**

Member States may provide that, where a plan is confirmed under point (b) of the first subparagraph, compensation is granted to the party who incurred monetary losses and whose appeal is upheld.

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 **(…)** protected. **As a minimum, in the case of any subsequent insolvency of the debtor,**

(a) new **financing** and interim financing shall not be declared void, voidable or unenforceable**, and**

(b) **the grantors of such financing (…) shall not incur civil, administrative or criminal liability,**

on the sole ground that such financing is detrimental to the general body of creditors. (…)

1a. **Member States may limit the scope of paragraph 1 as regards new and interim financing to cases where the plan is confirmed by a judicial or administrative authority or the interim financing was subject to ex ante control.**

1b. **Member States may exclude from the application of paragraph 1 interim financing which is granted after the debtor has become unable to pay their debts as they fall due.**

2. Member States may **provide that, in the case of any subsequent insolvency of the debtor,** grantors of new or interim financing **are entitled** to receive payment with priority (…) in relation to other creditors that would otherwise have superior or equal claims (…).

3. (…)

Article 17

Protection for other restructuring related transactions

1. **Without prejudice to Article 16,** Member States shall ensure that**, in the case of any subsequent insolvency of the debtor,** transactions **that are reasonable and immediately necessary for** the negotiation of a restructuring plan (…) are not declared void, voidable or unenforceable **on the sole grounds that such transactions are** detrimental to the general body of creditors (…)**.**

1a. **Member States may limit the scope of paragraph 1 to cases where the plan is confirmed by a judicial or administrative authority or where such transactions were subject to ex ante control.**

1b. **Member States may exclude from the application of paragraph 1 transactions that are concluded after the debtor has become unable to pay their debts as they fall due.**

2. Transactions (…) referred to in paragraph 1 shall include**, as a minimum**:

(a) the payment of (…) fees and costs of negotiating, adopting **or** confirming **(…)** a restructuring plan;

(b) the payment of (…) fees and costs in seeking professional advice in **close** connection with (…) **the** restructuring (…); **and**

(c) (…)

(d) any (…) payments and disbursements made in the ordinary course of business **other than those listed in points (a) and (b)**.

(e) (…)

3. (…)

4. **Without prejudice to Article 16,** Member States shall ensure that, **in the case of any subsequent insolvency of the debtor,** any transaction (…) **which is reasonable and immediately necessary for** the implementation of a restructuring plan **and is carried out in accordance with** (…) **the** restructuring plan confirmed by a judicial or administrative authority (…) is not declared void, voidable or unenforceable **on the sole ground that such transaction is** detrimental to the general body of creditors (…)**.**

CHAPTER 5

Duties of directors <u>where there is a likelihood of insolvency</u>

Article 18

(…)

TITLE III

(…) <u>Discharge of debt and disqualifications</u>

Article 19

Access to discharge

1. Member States shall ensure that **insolvent** entrepreneurs **have access to at least one procedure that can lead to a full discharge** of debt in accordance with this Directive.

   Member States may require that the trade, business, craft or profession to which the debts are related has ceased.

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**, in particular,** is (…) proportionate to **the entrepreneur's seizable or** disposable income **and assets during** the discharge period **and takes into consideration the equitable interest of creditors.**

Article 20

Discharge period

1. **Member States shall ensure that** the period (…) after which **insolvent** entrepreneurs **are able to** be fully discharged **of** debt **is** no longer than three years starting **at the latest** from **the date of either**:

   (a) **in the case of a procedure which includes a repayment plan, the decision by a judicial or administrative authority to confirm the plan or the start of the** implementation of the **(…)** plan (…); **or**

(b) **in the case of any other procedure, the decision by** the judicial or administrative authority (…) to open (…) the procedure**, or the moment of the establishment of the insolvency estate.**

2. Member States shall ensure that (…) **insolvent** entrepreneurs **who have complied with their obligations, where such obligations exist under national law, shall be** discharged of their debt **on expiry of the discharge period** without the need to **apply** to a judicial or administrative authority **to open a procedure additional to those referred to in paragraph 1**.

Without prejudice to the first subparagraph, Member States may maintain or introduce provisions allowing the judicial or administrative authority to verify, ex officio or upon request of a person having a legitimate interest, whether the entrepreneurs have fulfilled the obligations for obtaining a discharge of debt.

2a. Member States may provide that the full discharge of debt shall not impair the continuation of an insolvency procedure entailing the realisation and distribution of the entrepreneur's assets that formed part of the insolvency estate as at the time referred to in the first subparagraph of paragraph 2.

Article 21

Disqualification period

1. Member States shall ensure that, where an **insolvent** entrepreneur obtains a discharge of debt in accordance with this Directive, any disqualifications from taking up or pursuing a trade, business, craft or profession **on the sole ground that** the entrepreneur **is insolvent,** shall cease to have effect**,** at the latest**,** at the end of the discharge period**.** (…)

1a. Member States shall ensure that, on expiry of the discharge period, disqualifications referred to in paragraph 1 of this Article cease to have effect without the need to apply to a judicial or administrative authority to open a procedure additional to those referred to in Article 20(1).

Article 22

Derogations

1. By way of derogation from Articles 19 **to** 21, Member States may maintain or introduce provisions **denying,** restricting **or revoking** access to discharge **of debt** or **providing for** longer periods for obtaining a full discharge **of debt** or longer disqualification periods in certain well-defined circumstances and where such **derogations** are **duly** justified (…), **such as**:

   (a) **where** the **insolvent** entrepreneur acted **towards the creditors or other stakeholders** dishonestly or in bad faith **according to national law** when becoming indebted, **during the insolvency procedure** or during the **payment** of the debt;

   (b) **where** the **insolvent** entrepreneur does not adhere to a repayment plan or to any other legal obligation aimed at safeguarding the interests of creditors, **including an obligation to maximize returns to creditors;**

   (ba) where the insolvent entrepreneur fails to comply with information or cooperation obligations under national law;

   (c) in **the** case of abusive **applications** for a discharge;

   (d) in **the** case of **a new application** for a discharge (…) within a certain period (…) **after the insolvent entrepreneur has been granted a full discharge of debt or has been denied a full discharge of debt due to a serious violation of information or cooperation obligations**;

(da) where the cost of the procedure leading to the discharge of debt is not covered; or

(db) where a derogation is necessary to guarantee the balance between the rights of the debtor and the rights of one or more creditors.

2. **By way of derogation from Article 20,** Member States may provide for longer discharge periods in cases where**:**

(a) protective measures are approved or ordered by a judicial or administrative authority in order to safeguard the main residence of **the insolvent** entrepreneur and, **where applicable,** of **their** family, **or the essential assets for the continuation of the entrepreneur's trade, business, craft or profession; or**

(b) the main residence of the insolvent entrepreneur is not realised.

3. Member States may exclude specific categories of debt, such as**:**

(e) secured debts;
(f) debts arising out of **or in connection with** criminal penalties;
(g) **debts arising out of** tortious liability;
(h) **debts regarding maintenance obligations arising from a family relationship, parentage, marriage or affinity;**
(i) **debts incurred after the application for or opening of the procedure leading to a discharge of debt; and**
(j) **debts arising out of the obligation to pay the cost of the procedure leading to a discharge of debt,**

from discharge **of debt,** or **restrict access to discharge of debt or** lay down a longer discharge period where such exclusions**, restrictions** or longer periods are **duly** justified (…)**.**

4. By way of derogation from Article 21, Member States may provide for longer or indefinite disqualification periods where the **insolvent** entrepreneur is a member of a profession to which specific ethical rules **or specific rules on reputation or expertise** apply or **a profession dealing with the management of the property of others, or where an insolvent entrepreneur intends to gain access to such a profession.**

4a. This Directive is without prejudice to national rules regarding disqualifications ordered by a judicial or administrative authority other than those referred to in Article 21.

Article 23

Consolidation of ***procedures*** *regarding (...)* ***the*** *debts* ***of entrepreneurs***

1. Member States shall ensure that, where **insolvent entrepreneurs have** (…) debts incurred in the course of **their** trade, business, craft or profession as well as (…) debts incurred outside those activities, all **dischargeable** debts are treated in a single procedure for the purposes of obtaining a **full** discharge **of debt**.

2. **By way of derogation** from paragraph **1, Member States may provide** that (…) debts **incurred by insolvent entrepreneurs in the course of their trade, business, craft or profession and debts incurred outside those activities** are to be treated in separate procedures, provided that these procedures can be coordinated for the purposes of obtaining a **full** discharge **of debt** in accordance with this Directive.

TITLE IV

Measures to increase the efficiency of <u>procedures concerning </u>restructuring, insolvency <u>and discharge of debt</u>

Article 24

Judicial and administrative authorities

Without prejudice to judicial independence and to any differences in the organisation of the judiciary across the Union, Member States shall ensure that:

(a) the members of the **judicial** and administrative authorities dealing with **procedures concerning** restructuring, insolvency and **discharge of debt** receive **suitable** (…) training (…) **and have the necessary expertise for** their responsibilities; **and**

(b) (…) **procedures concerning restructuring, insolvency and discharge of debt** are dealt with in an efficient manner (…)**.**

Article 25

(…)

Article 26

(...) Practitioners in ***procedures concerning*** *restructuring, insolvency and* ***discharge of debt***

Member States shall ensure that:

(a) **practitioners appointed by a judicial or administrative authority in procedures concerning restructuring, insolvency and discharge of debt ('practitioners') receive suitable (…) training and have the necessary expertise for their responsibilities;**

(b) (…) **the conditions for eligibility, as well as** the process for the appointment, removal and resignation of practitioners**,** (…) **are** clear, **transparent** and fair (…);

(c) (…) in **appointing** a practitioner (…) for a particular case**, including cases with cross-border elements,** due consideration is given to the practitioner's experience and expertise, **taking into account the specific features of the case** (…);**and**

(d) **in order to avoid any conflict of interest**, debtors and creditors **have the possibility to either object to** the selection **or appointment or request the replacement** of the practitioner.

2. (…)

3. (…)

4. (…)

Article 27

Supervision and remuneration of practitioners (...)

1. Member States shall put in place appropriate oversight and regulatory **mechanisms** to ensure that the work of practitioners (…) is **effectively** supervised, **with a view to ensuring that their services are provided in an effective and competent way, and, in relation to the parties involved, are provided impartially and independently**. **Those mechanisms** shall also include (…) effective **measures for the accountability of** practitioners who have failed in their duties.

1a. Member States may encourage the development of, and adherence to codes of conduct by practitioners.

2. Member States shall ensure that the **remuneration of** practitioners (…) **is** governed by rules which **are consistent with the objective of an** (…) efficient resolution of procedures. **(…)**

   Member States shall ensure that appropriate procedures (…) are **in place to resolve** any disputes over remuneration **and that those disputes are resolved in an efficient** manner.

Article 28

Use of electronic means of communication

1. Member States shall ensure that**, in procedures concerning restructuring, insolvency and discharge of debt, the parties to the procedure, the practitioner or the judicial or administrative authority are able to perform** electronically, including in cross-border situations**, at least the following actions**:

(a) filing of claims;

(b) **submitting** restructuring or repayment plans **(…)**;

(c) **notifying** creditors;

(d) (…);

(e) lodging of **contestations and** appeals.

TITLE V

Monitoring of <u>procedures concerning </u>restructuring, insolvency and discharge <u>of debt</u>

Article 29

Data collection

1. (…) Member States shall collect and aggregate, **on an annual basis,** at **national** level**,** data on **procedures concerning restructuring, insolvency and discharge of debt, broken down by each type of procedure, at least on the following elements**:

   (a) the number of procedures which were **applied for or opened, where such opening is provided for under national law, are** pending **or were closed (…);**

   (b) the **average** length of **procedures** from **the submission of the application, or from the opening thereof, where such opening is provided for under national law,** to **closing;**

   (c) the **number** of **procedures other than those mentioned in point (ca), broken down by** (…) **types** of outcome**;**

   (ca) the number of applications for restructuring procedures which were declared inadmissable, were rejected or were withdrawn before being opened;

   (d) (…)

   (e) (…)

   (f) (…)

   (g) (…)

1a. Member States shall collect and aggregate, on an annual basis, at national level, data on the number of debtors **which were** subject to **restructuring** procedures **or insolvency procedures and which,** within **the** three years **prior to the submission of the application or the opening** of such procedures**, where such opening is provided for under national law, had a restructuring plan confirmed under a previous restructuring procedure implementing Title II.**

1b. Member States may collect and aggregate, on an annual basis, at national level, data on the average cost of each type of procedure as well as on the average recovery rates for secured and unsecured creditors, and where applicable other types of creditors, separately.

2. Member States shall break down the **data** referred to in **points (a) to (c) of** paragraph 1 **and, where applicable and available, the data referred to in paragraph 1b** by:

   (a) the size of the debtors **which are not natural persons** (…);

   (b) whether debtors **subject to procedures concerning restructuring or insolvency** are natural or legal persons; **and**

   (c) (…) whether the procedures **leading to a discharge of debt** concern only entrepreneurs or all natural persons.

2a. Member States may collect and aggregate the data referred to in paragraphs 1, 1a, 1b and 2 through a sample technique which ensures that the samples are representative in terms of sample size and diversity.

3. Member States shall **collect and** aggregate **the** data referred to in paragraphs 1, **1a**, 2 **and, where applicable, paragraph 1b** for full calendar years ending on 31 December of each year, starting with (…) the first full calendar year following [*the date of (…) the application of implementing* ***acts referred to in paragraph 4***]. **Those data** shall be communicated to the Commission**,** on the basis of a standard data communication form**,** annually, by 31 **December** of the calendar year following the year for which data **are** collected.

4. The Commission shall establish the communication form referred to in paragraph 3 **of this Article** by way of implementing acts. Those implementing acts shall be adopted in accordance with the **examination** procedure referred to in Article 30(2).

Article 30

*Committee **procedure***

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 **5** of Regulation (EU) No 182/2011 shall apply.

Where the committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

TITLE VI

Final provisions

Article 31

*Relationship with other acts **and international instruments***

1. **The following acts shall prevail over the provisions of** this Directive:

(a) Directive 98/26/EC (…)[20];

(b) Directive 2002/47/EC (…)[21]; and

(c) Regulation (EU) No 648/2012 (…)[22]**;**

[20] 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.

[21] 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.

[22] 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.

1a. This Directive shall be without prejudice to the safeguarding requirements of funds for payment institutions prescribed under Directive (EU) 2015/2366 on payment services in the internal market and for electronic money institutions under Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions.

2. This Directive shall be without prejudice to workers' rights guaranteed by Directives 98/59/EC, 2001/23/EC, 2002/14EC, 2008/94/EC and 2009/38/EC.

2a. Title II of this Directive is without prejudice to the application of the Convention on international interests in mobile equipment and its Protocol on matters specific to aircraft equipment to which some Member States are party at the time of the adoption of this Directive.

Article 32

Amendment of Directive **(EU) 2017/1132**

In Article **84** of Directive **(EU) 2017/1132**[23], the following paragraph 4 is added:

"4. Member States shall derogate from Article 58(1), Article 68, Article 72, Article 73, Article 74, Article 79(1)(b), Article 80(1) and Article 81 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"*.

[23] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law**, OJ L 169, 30.6.2017, p. 46**.

This provision shall be without prejudice to the principle of the equal treatment of shareholders.

*** Directive of the European Parliament and of the Council on preventive restructuring frameworks, on procedures leading to a discharge of debt and disqualifications and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132. (OJ…).**

Article 33

Review clause

No later than [***five** years from the date of **the** start of application of **the** implementing measures*] and every **seven** years thereafter, the Commission shall present to the European Parliament, **to** the Council and **to** the European Economic and Social Committee a report on the application of this Directive, including on whether additional measures **should be considered** to consolidate and strengthen the legal framework on **procedures concerning** restructuring, insolvency and **discharge of debt** (…).

Article 34

Implementation

1. Member States shall adopt and publish, by [*3 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**, with the exception of the provisions necessary to comply with Article 28(a), (b) and (c) which shall be adopted and published by [*5 years from the date of entry into force of this Directive*] at the latest and the provisions necessary to comply with Article 28(e) which shall be adopted and published by [*7 years from the date of entry into force of this Directive*] at the latest**. They shall **immediately** communicate **the text of those provisions** to the Commission.

They shall apply **the laws, regulations and administrative** provisions **necessary to comply with this Directive** from [***3*** *years from the date of entry into force of this Directive*], **with the exception of the provisions necessary to comply with Article 28(a), (b) and (c) which shall apply from [*5 years from the date of entry into force of this Directive*] and ~~of~~ the provisions necessary to comply with Article 28(e), which shall apply from [*7 years from the date of entry into force of this Directive*]**. (…)

When Member States adopt those **measures**, 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 *For the Council*

The President *The President*