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NOTE

From:	General Secretariat of the Council
To:	Working Party on Civil Law Matters (Insolvency)
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 - Compilation of Member States' written comments on Article 2(6)-(12), Article 8-18 - Comments from BE, CZ, EL, IT, LV, AT

1. At the meeting of the Working Party on Civil Law Matters (Insolvency) on 13 - 14 July 2017, the Presidency invited delegations to communicate in writing their positions on the following issues:

Title II - Preventive restructuring frameworks

Chapter 3 - Restructuring plans

- Article 8 (Content of restructuring plans)
- Article 9 (Adoption of restructuring plans) & relating definition in Article 2(6) - ("Class formation") & Article 2(7) - ("Cram-down of dissenting creditors")
- Article 10 (Confirmation of restructuring plans) & relating definition in Article 2(9) ("Best interest of creditors test")
- Article 11 (Cross-class cram-down) & relating definitions in Article 2(8) ("Closs-class cram-down") & Article 2(10 ("Absolute priority rule")
- Article 12 (Equity holders)
- Article 13 (Valuation by the judicial or administrative authority)
- Article 14 (Effects of restructuring plans)
- Article 15 (Appeals)

Chapter 4 - Protection for new financing, interim financing and other restructuring related transactions

- Article 16 (Protection for new financing and interim financing) & related definitions in Article 2(11) ("New financing) & Article 2(12) ("Interim financing")
- Article 17 (Protection for other restructuring related transactions)

Chapter 5 - Duties of directors in connection with negotiations on a preventive restructuring plan

- Article 18 (Duties of directors)

2. The compilation attached sets out the responses of delegations received so far. Several delegations indicated that the positions expressed in response to the above request are of a preliminary nature.

GENERAL REMARKS

CZ

Our general reservation regarding translation of the proposal into the Czech language is still valid. However, at the current stage of the working group discussion, we do not consider it appropriate to put forward formal remarks on translation, as we expect changes to the text of the proposal depending on the outcome of the discussion.

In regard of the Czech Republic's request for impact assessment, we refer to our previous opinion on Articles 1 to 7 and on Article 2, points 1 to 5 and 13 to 15, of the proposal. We state that we consider the issue of the impact assessment to be extremely important in relation to the discharge of debts (second chance for entrepreneurs). In this context, we point out that even the Senate of the Parliament of the Czech Republic (the upper chamber of the Czech Parliament) requires proper assessment of the impact of the proposed legal regulation of discharge of debts for entrepreneurs.

We also note that, even after the bilateral meeting with the Council Presidency, which has provided us with some new information in relation to the proposal, we are primarily, in this paper, dealing with the proposal in its current wording. Therefore, in this paper, we do not exclude the comments already accepted. Here, we just recall the content of the contributions made by the Czech delegation to the working group meetings in order to explain them.

General comments on Articles 8 to 18

We also believe that, even in the case of Articles 8 to 18 of the proposal, there can be observed a general feature characteristic of the whole of Title II of the proposal. This general feature lies in the fact that Title II of the Directive proposal covers a wide variety of different cases. The frameworks for preventive restructuring within the meaning of the draft directive are characterized by the following general attributes:

- the frameworks are designed for debtors regardless of their size (turnover, number of employees, amount of debts, etc.),
- missing degree of preventiveness of the frameworks,
- the frameworks are accessible only to debtors and to creditors only with debtor´s consent,
- the concept of affected parties, i. e. participation in the proceedings, is not clarified,
- the level of involvement of a judicial or administrative authority and a practitioner in the field of restructuring is not clarified.

The abovementioned general conceptual issues are reflected in a number of sub-themes.
The Commission supports preventive frameworks as non-complicated and non-costly procedures. In this context, however, we would like to draw attention to the fact that frameworks can be expeditious and simple only to the extent allowed by objective conditions of specific cases.

Frameworks can be quite simple if the restructuring is consensual, there are no disputes between the debtor and the creditors, the creditors are not in a state of lack of information (information deficit), because the debtor communicates appropriately with his creditors, with the practitioner in the field of restructuring and with the judicial or administrative authority. It is also necessary for the practitioner in the field of restructuring, as well as judicial or administrative authority, to fulfill its role properly in the case. Achieving these conditions, however, depends on objective facts and on the approach of all persons and bodies involved.

Size of the Debtor

In the case of relatively large debtors, restructuring is more complex. A more complex case requires more complex proceedings. If the frameworks were designed for all debtors irrespective of their size, the question would arise as to how to implement such a legal instrument into national law.

Generally speaking, if the restructuring is not consensual, the chance of its success is decreasing. Consensus is easier to achieve in the case of smaller debtors because they have fewer creditors and their business is less complex. Thus, for example, the problem of the creditor's information deficit is limited.

On the contrary, in the case of large debtors, the solution of their financial difficulties is more complex, there are more disputes, the creditors' information deficit is higher and the amount of claims of some creditors tends to be high. Such a situation requires more complex proceedings, the legal regulation of which requires a variety of safeguards for the creditors, the supervision of the court and of the practitioner in the field of restructuring.

The Czech Republic therefore prefers that the Directive stipulates that it is up to the Member States to restrict access to frameworks for preventive restructuring only for debtors of a certain size. In such a case, it will be possible to conduct procedures in the Czech Republic that will not be disproportionately complex and will include the necessary safeguards to protect the legitimate interests of creditors.

Degree of preventiveness

We mean by the degree of preventiveness the concrete moment preceding the bankruptcy from which the frameworks are available. This issue is important because the more the debtor is in financial difficulties, the more likely disputes will occur, the procedure will be complicated and the possibility of agreement between the debtor and the creditors will be limited. On the other hand, if the frameworks are available only at the time of bankruptcy, the more the intervention into the rights of debtor, the equity holders and the management (directors) is justified.

Therefore, we welcome the Council Presidency's assurance that Member States may determine the degree of the framework's preventiveness in national law.

Person submitting a plan

It is also important, from our point of view, who is entitled to submit a restructuring plan. It is preferable for us to preserve the right to submit the plan for the debtor, but if he does not do so, the creditor should have the right to submit a plan without debtors consent. This concept respects the privileged position of the debtor to restructure its business, but also the right of creditors to attempt to submit a restructuring plan where the debtor unjustifiably hinders a constructive solution in order to exert pressure or manipulate creditors. This solution motivates the debtor to act proactively and to propose a viable restructuring plan.

In this respect, therefore, we welcome the assurances of the Council Presidency that the provisions of the proposal in question will be redrafted, so the Directive proposal will reflect the above considerations. We suggest, for example, the following wording of Article 4(4): "The debtor has the priority right to submit a restructuring plan. Furthermore, the right to submit a restructuring plan has the debtor´s creditor. Member States may provide that when the debtor has no right to submit a restructuring plan and may limit a range of debtor´s creditors who are entitled to submit a restructuring plan."

If Article 4(4) of the proposal remained in the current wording, the debtor would be able to unreasonably block restructuring, thereby exerting pressure on its creditors, attempting to divide them, etc.

Therefore, the priority right shall have the debtor. This scheme is based on the intention declared by the European Commission to give debtors the opportunity to solve their situation. The Directive should allow Member States to determine when the debtor does not have the right to submit a plan. There will be cases when the debtor does not want to submit a plan, cases where it is clear that the debtor will not submit a plan at all or the debtor will not submit a viable plan. Similarly, there will be the cases where creditors affected by the debtor's financial difficulties will render a decision which will not be allowing the debtor to submit a plan.

The right to submit a plan could be limited only to creditors affected by the economic situation of the debtor. Typically, creditors with claims whose collectability or maturity is at risk. Therefore, these creditors have a legitimate interest in solving the situation, because the financial difficulties of the debtor also pose difficulties for them. At the same time, however, the motivation for the debtor to solve his problems properly is preserved, because the initiative may be taken by someone else (i. e. the creditor).

The Directive should also distinguish between submitting a plan and any procedural steps preceding the submission of the plan. These possible procedural steps preceding the submission of the plan should not be regulated by the Directive.

Affected parties

The concept of affected parties is not clear to us. From our point of view, it is a question of who is the party to the proceedings. Here, we refer to comments on Article 14 below.

Involvement of a judicial or administrative authority and a practitioner in the field of restructuring

Regarding the involvement of a judicial or administrative authority and a practitioner in the field of restructuring, we welcome the Commission's assurance that the proposal does not limit the right of access to the court. The purpose of the provisions of the proposal in question is to provide the least complex proceedings possible. In our opinion, however, the rights of creditors shall also be guaranteed. In this respect, one of the safeguards is the involvement of a judicial or administrative authority and of a practitioner in the field of restructuring.

Summary

The solution of general issues mentioned above represents - in certain sense - the parametric setting of the frameworks for preventive restructuring. Solution of these issues determines whether the Czech Republic will be able to design the appropriate type of procedure (or even more types of procedure) that will be universally applicable. If these issues are not addressed – by directive or by transposition regulation, the Czech Republic will have to introduce one type of procedure for a wide range of cases (large and small debtors, more preventive or less preventive frameworks) for which different types of proceedings are suitable.

Questions not covered by the Directive

The proposal is in a minimum harmonization regime. The Czech Republic welcomes this fact. Therefore, many issues are not covered by the Directive. For a Member State, however, it is difficult to ascertain in some cases which issues are regulated by the proposal and which are not.

It is therefore desirable for the proposal to address this fact. In this regard, the Commission mentioned the possibility of a general provision stating that issues not explicitly addressed by the proposal are dealt with at a national level. However, we would point out that even in such a case, it will be difficult for Member States to determine exactly how to implement the transposition.

In this context, we have a wide range of aspects (application of claims, resolution of disputes in incident proceedings or other remedies, property regulation, etc.) which are not covered by the Directive and need to be dealt with on a national level. Likewise, we have a number of issues covered by the revised directive, which will need to be further regulated (e. g. who can appeal against a decision to approve a plan by a judicial or administrative authority, etc.).

EL

We welcome the opportunity to express our preliminary views on the proposal of the European Commission for a directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and on the amendment of Directive 2012/30/EU.

We fully support the objectives of the proposal, since we firmly believe that helping viable businesses avoid an unnecessary bankruptcy and granting a realistic second chance to honest entrepreneurs in an EU level shall play a very important role in coping with the different aspects of business crisis.

As a preliminary comment, which applies horizontally to the Directive, we would propose a clarification of the term *'likelihood of insolvency'*. Alternatively, we would propose that Member States define the term according to their national laws, since it is a crucial introductory concept, which constitutes the point of entrance to the Directive.

ARTICLE 8 (Content of restructuring plans)

BE

Paragraph 1(a)

'Debtor' - not clear from a terminological point of view. The term 'debtor' may be used on its own because it refers to both the natural person and a legal person-entrepreneur.

Paragraph 1(e)

This provision is not clear. Why mention non-affected creditors?

Paragraph 1(g)

What is meant by these terms?

CZ

The content of the plan should reflect the economic nature of the plan and allow creditors and judicial or administrative authority to assess the plan. These persons and bodies are usually in a state of lack of information (information deficit). The plan shall therefore contain fact based and reviewable information to assess whether there will not be caused any damage to the creditors.

In this context, we point out the importance of valuation under (b). Without valuation, it is not possible to determine the value of the performance for creditors according to the plan, and the creditors and the judicial or administrative authority have no information to make informed and qualified decisions.

The minimum range of content requirements referred to in paragraph 1 is satisfactory for us. However, we consider it important to preserve the demonstrative nature of the list referred to in paragraph 1(f).

Paragraphs 2 and 3 regulate the model plan issue. The Czech Republic opposes the obligation for Member States to draw up a model restructuring plan. The creation of a universal restructuring plan model would be extremely difficult due to the diversity of the different ways of conducting business. Simple advice is not always the most reliable.

Rather than setting up a restructuring plan model, we would like to rely on a practitioner in the field of restructuring appointed for each individual procedure who would be responsible for his participation in creating a restructuring plan with the person who would submit the plan.

This, of course, does not preclude our own initiative of publishing the relevant methodology or launching a web portal with practical information; we only would like to prevent the creation of a formalized, non-viable model that would not be used in practice.

For Article 2(6), we require examples of agreements between creditors, to clarify this concept. Which agreements are meant by the proposal - agreements on the seniority of claims? Or agreements on a class formation, which would depend only on the agreement between the creditors and not on any other circumstances? In addition, we ask for information whether a judicial or administrative authority may not allow the class formation based on an agreement between creditors (Article 9(3) of the proposal) if this agreement fails to respect the similarity of claims of creditors.

EL

In paragraph (1)(b), the persons who shall make the valuation and their qualities, such as their expertise and independence must be clarified.

In paragraph (1)(e), the term “non – affected parties” is not clear. It should be clarified, given that the plan has certain effect on their interests.

In paragraph (1)(f), we propose that the article should also reflect that a restructuring procedure could include a transfer in ownership of the debtor's going concern or part thereof.

In paragraph (1)(g) we recall our position that an opinion on viability must not be necessary, when the plan is approved by the prescribed majority of creditors, since, making such a viability report obligatory, imposes an unnecessary burden.

IT

Paragraph 1 defines the required content of the plan 'submitted for confirmation by a judicial or administrative authority', but the **same information should also be provided to the creditors**, so that they may adhere to the restructuring plan, and since asymmetric information should be avoided.

- In point (a) the distinction between '***the identity of the debtor***' and '***the debtor’s business***' is not clear, given that only entrepreneurs, whether natural or legal persons, have access to restructuring, and in the latter case the business itself is the debtor. The text could be simplified to read '***the identity of the debtor***', in line with Article 4(1) which refers simply to 'debtors' in financial difficulty.
- Similarly, in point (b), it would be better to use '***value of the business***' rather than '*present value of the debtor or the debtor's business*', since it is the business which is valued, not the natural person.

- Also in point (b), instead of '***valuation of the present value of the business***' it would be better to use '***valuation report***', to make it clear that this information must be accompanied by documents (e.g. balance sheet) which allow the necessary checks to be made, without this putting a '*disproportionate burden on debtors*' (see the explanatory memorandum re. Article 8 (page 21 of the EN version)).
- On point (g), given the importance of the information required, it should be made clear that it is possible to ask either for an **expert** opinion, or for the 'reasoned statement' from the person who **assumes responsibility for drafting the plan** (as clarified by the Commission, this may be the debtor, or their advisor, if not a creditor), but that in either case this must be accompanied by the abovementioned **documents** which can easily be checked by the creditors.
- We consider this an essential point which is connected to the debate on whether a **test of viability** is necessary in order to access restructuring. We understand that in the Commission's view the provision of this evidence is too burdensome (in terms of time and money), especially for SMEs. Nevertheless, if we wish to make use of debtors' autonomous valuations, more information is required about the reality of the business, with accompanying data and documents which allow the creditors to check the reliability of the information and statements provided by the debtor. This is particularly true since Article 7(2) prevents creditors, during a stay of actions, from proving to the judicial or administrative authority that the business is not viable and is facing insolvency.
- Even though, according to Recital (17), 'a test of viability should not be made a pre-condition for entering negotiations', nevertheless the debtor should be at least prevented from entering a restructuring procedure when he is 'illiquid and therefore unable to pay his debts as they fall due'. This aim could be achieved:
    - either by amending Article 8(1)(g), so that the content of the restructuring plan should also include a reasoned statement on the absence of insolvency status;
    - or (even better) by amending Article 7(3), so that creditors have to be enabled to request the opening of an insolvency procedure by demonstrating the absolute incapability of debtor to pay his debts, as they fall due.

As already discussed, in Article 8(2), rather than a '**model for restructuring plans**' (which would be difficult and expensive to draw up), it would be better to provide for general and practical **information** on the correct preparation and submission of a restructuring plan; paragraph 3 would then become superfluous.

Drafting suggestion

Article 8

Content of restructuring plans

1. Member States shall require restructuring plans submitted ***for examination to creditors and*** for confirmation by a judicial or administrative authority to contain at least the following information:

   a) the identity of the debtor ~~or the debtor's business~~ for which the restructuring plan is proposed;

   b) a ~~valuation~~ ***documented report*** ~~of~~ ***on*** the present value of the ~~debtor or the debtor's~~ business as well as a reasoned statement on the causes and the extent of the financial difficulties of the debtor;

   …

   g) an opinion ***of an independent expert*** or ***a*** reasoned statement by the person responsible for ~~proposing~~ ***preparing/drafting*** the restructuring plan which explains why the business is viable, how implementing the proposed plan is likely to result in the debtor avoiding insolvency and restore its long-term viability, and states any anticipated necessary pre-conditions for its success.

2. Member States shall make ~~a model for restructuring plans~~ available online~~.~~ ~~That model shall contain~~ at least ~~the~~ ***general and practical*** information required under national law ***on the presentation of restructuring plans,*** ~~and shall provide general but practical information on how the model is to be used~~. ~~model~~ ~~shall be made available~~ in the official language or languages of the Member State. Member States shall endeavour to make the ~~model~~ ***information*** available in other languages, in particular in languages used in international business. ~~It shall be designed in such a way that it can be adapted to the needs and circumstances of every case.~~

3. ~~The parties may choose whether or not to use the model restructuring plan.~~

LV

Overall, Latvia agrees that the definition of the content of the restructuring plan will facilitate not only the development of the restructuring plan but also its evaluation.

Subparagraph (a) of Paragraph 1 says: "the identity of the debtor or the debtor's business for which the restructuring plan is proposed". The use of both terms "debtor" and "debtor's business" is unclear and, in Latvia's opinion, unnecessary since debtor is still the main identifier of a subject. Use of both terms causes uncertainty as to who is the subject of restructuring within preventive restructuring framework of Proposal. Therefore, Latvia asks to delete words "or the debtor's business" from Subparagraph (a) of Paragraph 1 or include a clear explanation for the necessity of both terms in Proposal.

Latvia believes that it is up to national legislators to determine the categories and their criteria in order to ensure compliance with the principle of equality of creditors in all situations. However, Subparagraph (d) of Paragraph 1, as well as Paragraph 2 of Article 9, gives the impression that the debtor himself will be able to choose criteria for creating classes. At the same time Recital 25 shows that the aim of this provision was to leave the formation of categories to the legislator. Consequently, Latvia proposes to amend Subparagraph (d) of Paragraph 1 in such wording: "(d) classes of creditors covered by affected creditors and information about the respective values of creditors and members in each class;".

It can be argued that with "non-affected parties" in subparagraph (e) are meant persons who do not meet the requirements set in Article 2, Paragraph 3. At the same time, this term is not defined and is too uncertain. Thus, it could be interpreted differently by Member States. Thereby Latvia would like to suggest "non-affected parties" to be replaced with "creditors or classes of creditors who are not affected by restructuring plan".

Under Subparagraph (g) of Paragraph 1 it is stated that an opinion or reasoned statement could be provided by a person responsible for proposing the restructuring plan. Latvia supports the idea for an opinion or reasoned statement and its aim, however, opposes such an approach since it could be severely abused and wouldn't have any added value. Namely, it is doubtful that a person who has himself/herself written a restructuring plan could give an honest and objective opinion of the restructuring plan.

In Latvia's opinion, an opinion or reasoned statement should be given by a person who will further ensure the monitoring of the plan's implementation – a practitioner in the field of restructuring – or at least an independent third party.

The availability of a model for restructuring plan will unequivocally facilitate the elaboration of a plan in cases where the debtor is unable or unwilling to write it himself.

However, Latvia objects to such an extensive reference to the creation of a sample in other languages since there is no additional indication that other languages are the official languages of the European Union, as is the case, for example, in the revised Regulation on insolvency proceedings with regard to the establishment of forms.

Moreover, the wording "trying to make" is too restrictive and limited by those Member States in which the general rules of proceedings provide for the conduct of proceedings in the official national language. Consequently, such a provision could affect regulation that is not covered by this proposal.

Latvia objects to the point in Paragraph 3 that the use of a sample is a matter of several persons and not the person who has developed the restructuring plan. At the same time, we draw attention to the fact that the scope of the term "party" at this point is unclear, namely, it is unclear exactly who will be able to decide whether a model plan is to be used. The decision should remain with the person who is actually developing the restructuring plan.

AT

As other member states have already mentioned, we consider the differentiation between the debtor and the debtor's business in **Article 8 para 1 sub-para a** and **b** problematic. What is more, we would appreciate a clarification concerning the German version of **Article 8 para 1 sub-para e** as there is no definition of the term "nicht betroffene Parteien". Furthermore, the term "Partei" suggests that the restructuring plan actually affects this person. Therefore, a non-affected party is – at least concerning the German version – a contradiction. We suggest using the term "Person" instead.

ARTICLE 9 (Adoption of restructuring plans) & relating definition in:

Article 2(6) - ("Class formation")

Article 2(7) - ("Cram-down of dissenting creditors")

CZ

For paragraph 2, this paragraph is similar to its definition. However, the definition of "class formation" is already laid down in Article 2(6). We propose that the definition be laid down only in Article 2(6), and the definition requiring that in each class there should always be creditors with essentially identical legal status and essentially identical economic interests. Article 9 should also stipulate that the plan submitter must justify the division of creditors into groups.

Paragraph 3. We consider that a judicial or administrative authority should be able to assess class formation even at different times than only when applying for a restructuring plan.

Paragraph 4. It is unclear whether the majority is calculated only from the votes of the voting creditors or the total number of votes, including non-voting creditors. In the Czech Republic, the majority is calculated from the votes of the voting creditors, not the votes of all creditors, including those who do not exercise their rights in the proceedings. We are therefore proposing an adaptation of the text in this sense.

We welcome the explanation of the European Commission for paragraph 5 that it can also be voted on a distance. This could be mentioned in recitals.

EL

Scrutiny reservation on class formation (paragraphs 2 and 3):,it creates a number of questions: (a) whether a classification as secured and not secured creditors is sufficient, (b) classification must be stipulated in the law or it may accrue as a result of the content of the plan, (c) classification as secured claim has different implications in every single jurisdiction (d) classification of workers as a separate class must not be left to the discretion of Member States.

Paragraph 4: the basis of calculation must be clarified in relation to Article 2(3).

IT

Article 9(1) should make explicit what is provided for in recital 24, which **excludes the voting rights of unaffected parties**, i.e. creditors or equity holders not affected by the restructuring plan, and also excludes requiring their support for approval of the plan.

The right to vote should also be withheld in cases of **conflict of interest**, as is the case in an arrangement with creditors or debt-restructuring agreement, for: *i)* the debtor's **spouse** and relatives up to the fourth degree; *ii)* parties to which claims are **transferred or awarded** less than one year before the plan is proposed; iii) **subsidiaries**, parent companies or companies under joint control (only for arrangements with creditors), to ensure the genuine nature of the agreement.

Paragraph 3 should allow Member States to **examine the criteria for class formation in advance**, not only at the proposer's request, but whenever it would make the procedure **faster and more efficient**, allowing necessary changes to be made in good time, in accordance with the criteria under national law, as provided for in recital 25.

Regarding paragraph 4, we do not understand how the '***majority in the amount of interests***' could actually be calculated, since for interests there is no numerical data analogous to that relating to claims; the Commission's view seems to be that, when it comes to **shareholders** who may be permitted to vote in a separate class, for example, reference should be made to the value of their shares. We consider that this **criterion should be made explicit, at least in one of the recitals**.

Similarly, it may be useful to regulate in a recital - or at least provide that Member States may regulate - the methods for exercising the voting right and calculating the majority for **dissenting creditors**, or for those which the plan indicates must be **satisfied** in full (e.g. because they have preferential claims), but in a **deferred** way, or **with benefits other than money**. It seems that the Commission considers that the overall value of claim should be calculated, but it would be useful to have a specific provision (we are including such a provision in Article 6(1)(g) of the draft delegated law on insolvency reform currently being approved in the Senate).

We suggest that paragraph 4 should set out a system by which **majorities can also be calculated 'per capita'**, to avoid the abuse of dominant position, **at least in cases in which a single creditor holds claims equal to or greater than the majority** (we are providing for this in Article 6(1)(f) of the draft delegated law on insolvency reform currently being approved in the Senate).

Comment: The amendment proposed in paragraph 5 gives Member States the option to provide for a tacit consent mechanism. Indeed, it is widely recognised that the smaller the claim, the less the incentive for creditors to cast their vote in the context of a restructuring (so-called, 'creditor passivity' or 'rational apathy'): creditors weigh up the additional value they estimate they could receive by actively participating to the process against the amount of time and money this effort requires and, when the costs outweigh the return, they do not participate to the process (see UNCITRAL, 'Insolvency of micro, small and medium-sized enterprises', 10-19 May 2017). In the absence of a tacit consent mechanism, rational apathy may, indeed, translate into the practical impossibility to successfully push through an efficient restructuring when the business' debts are fractioned among plenty of small claimants. According to the proposed amendment, Member States would be entitled to enact a tacit consent mechanism applicable only to SMEs (where this phenomenon is more common due to the usual small median value of claims) or extended to all debtors (in consideration of the fact that rational apathy may also affect creditors of large businesses).

Drafting suggestion

Article 9

Adoption of restructuring plans

1. Member States shall ensure that any affected creditors have a right to vote on the adoption of a restructuring plan, ***unless they are in conflict of interest, as well as unaffected parties have no voting rights, nor should their support be required for the approval of the plan***. Member States may also grant such voting rights to affected equity holders, in accordance with Article 12(2).

…

3. Class formation shall be examined by the judicial or administrative authority when a request is filed for confirmation of the restructuring plan. ***Member States may stipulate that such authorities examine class formation at an earlier stage.***

4. A restructuring plan shall be deemed to be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each and every class. ***Member States may stipulate that, where a single creditor owns the majority of the total amount of the claims, the plan has to be adopted also by the majority of the creditors.*** Member States shall lay down the required majorities for the adoption of a restructuring plan, which shall be in any case not higher than 75% in the amount of claims or interests in each class.

5. Member States may stipulate that a vote on the adoption of a restructuring plan takes the form of a consultation and agreement of a requisite majority of affected parties in each class. ***Member States may maintain or put in place "silent-assent" voting mechanisms, in all or some kind of procedures.***

…

LV

Conceptually, Latvia supports the idea in Paragraph 1 that only those creditors affected by the plan should be given the right to vote on the adoption of a restructuring plan.

However, uncertainty arises from Paragraph 3 and its impact on Paragraph 2. Namely, like Article 8, Paragraph 1, Subparagraph (d), Paragraph 3 also gives the impression that the creation of categories will be in the hands of the debtor himself. In Latvia's view, legal certainty would not be ensured from both the debtor and the creditor point of view, and the efficiency and quality of the plan's development and approval would be significantly reduced, and additional burdens would be imposed on the courts who will have to examine the grounds for establishing such categories.

Consequently, we propose to amend Paragraph 3 to the effect that a court or an administrative authority has the right to check the division of creditors into separate categories according to national law, but doesn't have an obligation to carry out an assessment of the establishment of categories.

Comments on Paragraph 6 are expressed in the context of Article 11, while it should be noted that from a systemic point of view Paragraph 6 would fit better into Article 11.

AT

In our view, the formation of classes, as **Article 9 para 2** provides for**,** should not be mandatory, because not every member state establishes such a duty. Since Austrian law does not provide for material infringements of secured creditors' rights, a restructuring plan usually does not affect these creditors. Therefore, the minimum formation of a class comprising secured claims and another one encompassing unsecured claims should not be mandatory as well.

As concerns the required majority stipulated in **Article 9 para 4**, we accept the required majority of 75% of the claims. However, we ask for additional flexibility, permitting member states to implement the requirement of the consent of the majority of creditors to ensure that the rights of small creditors may also be secured.

ARTICLE 10 (Confirmation of restructuring plans) & relating definition in:

Article 2(9) ("Best interest of creditors test")

BE

Paragraph 1

What is the Commission's intention? This does not encourage the conclusion of amicable out-of-court settlements even though they are the solutions, which leave the debtor in possession, which are to be preferred.

CZ

We believe that the best interest of creditors test should be taken into account because its application makes it possible to compare the restructuring with the liquidation process. Therefore, we do not agree with the view expressed at the Working Group meeting of 5 May 2017 that a test of best interest of creditors should not be carried out when a plan is approved by a judicial or administrative authority.

However, we suggest that the definition of the best interest test laid down in Article 2 (9) of the proposal should be redrafted. The new wording should take into account the value of the performance intended for the creditors according to the plan compared to the value of the consideration in the case of the liquidation scenario. In addition, the definition should take account of the time value of money. We therefore propose, for example, the following wording:

Drafting suggestion

"Best interest of creditors test" means that each dissenting creditor obtains a performance under the restructuring plan, the current value of which on the date of the performance under the restructuring plan is at least equal to the value of the performance that the dissenting creditor would probably receive in the event of liquidation, whether piecemeal or sale as a going concern".

If the consideration value comparison is made, it will allow creditors to decide whether to agree with the plan. For the judicial or administrative authority it makes it possible to take a decision as to whether damage will not be caused to the creditors by the plan. And the need to pass the test of the best interests of creditors motivates the debtor or other plan submitter (Article 4 (4) of the proposal) to submit the plan in a timely manner and with such content as not to damage the creditors.

If a test of the best interests is not carried out, there will be a risk that the creditors will be harmed by the plan without the court or administrative authority finding it.

The Czech Republic welcomes the European Commission's statement that paragraph 3 is to establish discretion of the Member States when implementing the Directive. According to paragraph 3, Member States may therefore require a court or administrative authority to reject a plan if the plan does not prevent insolvency. However, given the doubts raised by the Member States, the Czech Republic requests that paragraph 3 shall be drafted in such a way as to make it clear that Member States are not obliged to introduce the obligation of courts or administrative authorities not to approve the plan into their national legislation, in the case the plan does not prevent the debtor's insolvency.

In regard of paragraph 3, we also propose that the recitals shall be amended by which procedure and by which attributes the court or administrative authority could assess the chance of preventing debtor's bankruptcy.

The 30-day period set in paragraph 4 may not always be sufficient. Therefore, it would be preferable to use a more general formulation. We also propose adding to the recitals that the period begins to run from the filing of a petition which has no defects (a petition which can be tried by court).

LV

Paragraph 4: Period of 30 days is very short, given the complexities that may arise in each particular case.

IT

It would seem expedient to include in paragraph 1 a provision allowing the Member States to maintain, or provide for, simplified forms of **confirmation** of the plan approved **unanimously** by the creditors affected, aimed at verifying only the **regularity of the procedure**.

As regards the definition of the **best interest of creditors test** set out in Article 2(9), we consider that the reference to how much the dissenting creditor would receive in the event of liquidation of the business - and not in the event of its continuity - should imply that the plan includes a declaration that, without its adoption, insolvency would develop from being a mere probability to becoming inevitable.

Alternatively, the definition in Article 2(9) should include the possibility of making a comparison with '**the feasible alternatives in the specific case**', instead of liquidation, especially as Article 7(7) expressly excludes any automatic link between failure to agree on a restructuring plan and the opening of the insolvency procedure.

In paragraph 2(a) it is more appropriate to stipulate that the restructuring plan should be **notified to all known creditors** - including those not likely to be affected by it - as it would be in the interests of all at least to have notification of the debtor's restructuring initiative.

In paragraph 3, as the Italian version seems to express a 'power' of the authorities, the English text '*may*' should be replaced by '*shall*', since it seems fair that, where the restructuring plan has no reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, the authorities should (not 'may') refuse to confirm it.

In paragraph 4, it would be advisable to have greater flexibility with regard to the **maximum period of 30 days** for the confirmation decision, since more time could be required, either to establish a cross-examination of all the affected parties (e.g. communications and notices transmitted abroad) or for any evaluations that a judicial or administrative authority must undertake and that may be very complex, including a company or comparative assessment, such as:

- Article 10(3) on the 'reasonable prospect of [the plan] preventing the insolvency of the debtor and ensuring the viability of the business';
- Article 10(2)(a), (b) and (c) on the best interest of creditors test, the need for financing to implement the plan and the absence of prejudice to the interests of the creditors;
- Article 11(1)(a), (b) and (c) on the cross-class cram-down and the absolute priority rule;
- Article 13 on the valuation of the 'liquidation value', the 'value of the enterprise as a going concern' or the 'value of the collateral'.

In all these cases, the judicial or administrative authority could need to appoint qualified experts, who in turn require time to carry out the necessary technical valuations, which are very important as they are intended to make the plan binding on the dissenting creditors as well. Hence the proposal to add at least the reservation '***except for cases of justified, particular complexity***', to prevent MS from committing infringements that may entail liability even in cases in which a period longer than 30 days would, on the contrary, be fully justified.

With regard to the Italian legal system:

- the plan must be approved by the majority of creditors and by the majority of any classes, as the Directive provides for the unanimity of the classes (by an internal majority)
- only the creditors belonging to a dissenting class (or, in the absence of classes, the creditors representing 20 % of the total amount in claims) may activate the 'cram down', a rule similar to the best interest of creditors test, while the dissenting parties belonging to the (majority) consenting class are not protected.

Drafting suggestion

Article 10

Confirmation of restructuring plans

1. ***Without prejudice to the provision of semplified confirmation of plans adopted unanimously***, Member States shall ensure that the following restructuring plans can become binding on the parties only if they are confirmed by a judicial or administrative authority:

   (a) restructuring plans which affect the interests of dissenting affected parties;

   (b) restructuring plans which provide for new financing.

2. Member States shall ensure that the conditions under which a restructuring plan can be confirmed by a judicial or administrative authority are clearly specified and include at least the following:

   (a) the restructuring plan has been adopted in accordance with Article 9 and has been notified to all known creditors***, whether*** likely ***or unlikely*** to be affected by it;

…

3. Member States shall ensure that judicial or administrative authorities ~~***may***~~ ***shall*** refuse to confirm a restructuring plan where that plan does not have a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business.

4. Member States shall ensure that where a judicial or administrative authority is required to confirm a restructuring plan in order for it to become binding, a decision is taken without undue delay after the request for confirmation has been filed and in any case no later than 30 days after the request is filed, ***except cases of particular reasoned complexity.***

Article 2

Paragraph 7

'best interest of creditors test' means that no dissenting creditor would be worse off under the restructuring plan than they would be in the event of liquidation, whether piecemeal or sale as a going concern***, or in the event of another feasible alternative***;

LV

During discussions on Paragraph 1 the Commission explained that this paragraph is exhaustive. In the opinion of Latvia, the wording of the paragraph indicates that the list is non–exhaustive, but gives a list of cases when it is imperative that the court or administrative authority approves it. Therefore, if an approach where the list is exhaustive was intended, the wording should be amended or a clear explanation should be given in Recitals.

Regardless of the above Latvia cannot agree with such approach and considers it necessary for the list to be non–exhaustive on the basis of the following considerations.

One of the main values of a formal procedure is the protection that is granted through it and more specifically – by the public aspect of it. A formal procedure grants the debtor protection not only from those creditors who are included in the restructuring plan, but also from other parties that could have a serious impact due to them exercising their rights.

Restrictions on submitting an application for opening of an insolvency proceeding are granted only through stay of individual enforcement actions (see Article 7, Paragraph 1). During the Working party discussion on Article 7, the Commission explained, that according to the Proposal stay of individual enforcement actions could be granted automatically. Consequently, those Member States that have an automatic stay of individual enforcement actions will not be able to ensure debtors' protection.

Latvia already has a type of legal protection proceeding (called "extrajudicial legal protection proceeding") that allows for the debtor not to initiate a formal proceeding until restructuring plan has been adopted. Respectively, the decisive factor is whether the debtor needs legal protection so that he can draw up a restructuring plan and coordinate it with a majority of creditors or not, or it is only necessary for the implementation of a restructuring plan.

The provisions contained in Proposal limiting the involvement of the court, in conjunction with the restrictive rules on the involvement of a practitioner, give the impression that Proposal regulates out-of-court debt restructuring. However, out-of-court debt restructuring should not be affected by rules regulating formal procedures, since such restructurings are solely based on an agreement between the debtor and his creditor or creditors and therefore are handled privately. In Latvia out-of-court restructurings are not regulated at any capacity.

We believe that the insertion "likely" in Paragraph 2 Subparagraph (a) is redundant and raises serious concerns about its impact on practical application. Accordingly, as we pointed out at the Working Party meeting, we propose to reword Subparagraph (a) by specifying that the plan has been notified to all known creditors who will be affected.

Paragraph 3 generally is to be considered as positive. However, in order to ensure a qualitative and full application of this norm in practice, a practitioner in the field of restructuring and his involvement (this consideration was also mentioned in the comments of Articles 4 and 5 of the Proposal) plays an important role in Latvia's view, as the courts have limited opportunity to comprehensively assess the practical applicability of the plan, in particular within the time limit specified in Paragraph 4.

Additionally, Latvia agrees with the opinion of other Member States expressed in Working Party meeting that this provision should be imperative, thus replacing “may refuse” with “shall refuse”. If a restructuring plan does not have a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business it should not be confirmed.

There is no objection as to the date as such specified in Paragraph 4. However, also in Latvia’s view, the Proposal should allow the court to depart from such a deadline if there is a valid reason for it.

AT

We appreciate **Article 10** regarding the stipulated confirmation of the restructuring plan by a judicial or administrative authority. However, it is of utmost importance that, unlike it is currently stipulated in **Article 10 para 3**, the authority has no discretion in refusing the confirmation of a restructuring plan which does not have a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business. In fact, the refusal should be mandatory.

As concerns the period in which the authority is obliged to decide upon the confirmation, we consider the period of 30 days, as **Article 10 para 4** provides for, as too short. Such a short period may pose problems, e.g. it could lead to state liability issues. We propose to adopt a similar wording as in Article 45 of Regulation (EU) No 655/2014. This provision stipulates that in exceptional circumstances, where it is not possible for the court or the authority involved to respect the time frames provided for in certain provisions of the regulation the court or authority shall take the steps required by those provisions as soon as possible.

ARTICLE 11 (Cross-class cram-down) & relating definitions in:
Article 2(8) ("Closs-class cram-down")
Article 2(10 ("Absolute priority rule")

BE

Reservation - we do not have this system.

CZ

In regard of the definition of the absolute priority rule in Article 2 (10) of the proposal we state that this definition now – in its wording – requires that claims of dissenting creditors shall be fully satisfied prior to lower-rank claims. Such an interpretation, however, clearly does not correspond to the intentions of the European Commission.

The definition is to stipulate that the value of the claims of creditors in dissenting classes of creditors remain unaffected by the plan, that is to say these creditors are to receive such performance that corresponds to the rank of their claims.

We therefore propose that the definition of the absolute priority rule be modified to make it clear that the restructuring plan for the dissenting classes of creditors

- does not reduce the value of collateral held by secured creditors, i. e. the secured creditor is expected to receive the same or comparable collateral and performance that corresponds to the economic value of the collateral,
- gives the right to unsecured creditors to fully satisfy their claims, including accessories (so that the unpaid claims cease to exist under substantial law by virtue of their fulfillment), or entitles them to all (considering the rank of the claim) disposable sources (so claims with worse rank will not be satisfied at all),
- in the case of holders of equity, they retain the value of their claims if their shares in the company is settled if all creditors are satisfied.

We see the problem in the condition set out in Article 11 (1) (a) which refers to Article 10, which refers in part to Article 9, which again refers to Article 11. We consider this to be the case of a circle definition. We therefore propose to amend the wording of Article 11 (1) (a) not to refer to the adoption of the restructuring plan in accordance with Article 9, since such a plan was never adopted.

EL

General scrutiny reservation: it is a provision not familiar with the Greek legal system and not addressed in the Recommendation of 2014. It requires further clarification.

IT

The suggested amendment to the **definition of absolute priority rule in Article 2(10)** has the sole purpose of taking account of the fact that - as the Commission has stated in response to the concerns raised by some MS - the rule would not be **chronological** but only value-related, in the sense that it should not be necessary for the lower-ranking consenting classes to **await** the full satisfaction of the higher-ranking dissenting classes before being able to obtain any satisfaction, as it is sufficient for the plan to provide for **appropriate resources** to guarantee the full satisfaction of the dissenting parties.

In accordance with the indications given by the Italian Parliament, we propose the insertion in paragraph 1 of this Article - if not in Article 4, which would be even better - of a provision enabling **third parties**, including creditors, to submit a **restructuring plan as an alternative** to the debtor's plan, once the latter has taken the initiative (the Commission having explained that this is possible).

Comment

Under the Proposal, only the debtor is entitled to (i) apply for the restructuring tool (Article 4, par. 4), and (ii) apply for the confirmation of a plan that has not been approved by each and every affected class, i.e. apply for a cross-class cram-down (Article 11, par. 1). Creditors are entitled to apply for the restructuring tool and apply for a cross-class cram-down solely "with the debtor's agreement". The result of the above provisions is that only the debtor is entitled to initiate the process and, most commonly, determine the content of the proposal (indeed, creditors may not obtain the confirmation of a plan that has not received the approval of all classes, including shareholders, without the company's consent).

The provision of the debtor's exclusive right to initiate the restructuring process appears well justified, as proved by the following considerations:

- providing a creditors' right to initiate the process may pose a negative incentive for the debtors to transparently and truthfully communicate to third parties and, particularly, creditors their actual financial and economic situation, making creditors' monitoring more costly and less effective (this is particularly serious problem for SMEs that usually do not have any internal monitoring mechanism, such as the provision of a statutory auditors committee);
- the restructuring tool provided under the Proposal does not require any preventive judicial and/or administrative decision on the existence of a situation of financial and/or economic distress; thus, no one other the debtor itself could be entitled to activate a tool that implies such a situation, such as the restructuring tool at issue.

To the contrary, regarding the right to propose a competing plan, it is advisable to amend the Proposal (particularly, Article 11 concerning the application for cross-class cram-down) in order to ensure that, once the debtor has activated the restructuring procedure, the creditors may formulate a plan and obtain its confirmation through a cross-class cram down. Without a creditors' right to file a competing plan, the debtor could easily impose on creditors terms that are in its own best interest, despite not being value maximizing, provided that what offered to creditors is (even marginally) better than what creditors estimate to receive in case of insolvency. In other words, the debtor may exercise its exclusive right to formulate a restructuring plan to extract value from creditors, relying on the fact that creditors cannot file a more convenient restructuring plan and, thus, are bound to take it or leave it.

That solution would be clearly in contrast with the considerations underlying what stated by the Proposal under Article 12, par. 1 ("Member States shall ensure that, where there is a likelihood of insolvency, shareholders and other equity holders with interests in a debtor may not unreasonably prevent the adoption or implementation of a restructuring plan which would restore the viability of the business").

In that same vein, the Italian "concordato preventivo" (as well as other preventive tools provided by other Member States such as France and Spain) provides, on the one hand, for the exclusive right of the debtor to initiate the process and, on the other hand, for the right of creditors to file a competing plan once the restructuring process has been started upon the debtor's initiative.

It is strongly advisable to amend the Proposal with a view at entitling creditors to file a competing plan and apply for a cross-class cram-down, if needed to have the plan confirmed

With regard to paragraph 1(b), we consider that the assumption that the '*class which [...] would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied*' should not only be assessed on the basis of '*a valuation of the enterprise*', but should be backed up by an independent **expert's technical evaluation**, or in any case checked by an adviser appointed by the judicial or administrative authority.

- It should be borne in mind that the **best interest of creditors** *test* is applied to bind dissenting creditors of a (majority) consenting class, while the **absolute priority rule** is applied to bind one or more (majority) dissenting classes

- The absolute priority rule is thus a very important <u>further constraint</u>, since:

  ⇒ the debtor is in principle free to distribute the resources as it thinks fit, without respecting any ranking, on condition however of obtaining the consent of all the creditors, or of all the classes (if only of a majority of the creditors making up each class)

  ⇒ if, however, it does not obtain the consent of all the classes (by a majority), to obtain confirmation of the plan it must respect the order of ranking of the different creditors

  ⇒ this order of ranking is that laid down by each MS

The flexibility provided for in paragraph 2 is significant with regard to the minimum number of classes required to approve the plan.

It must be stressed, with regard to the discussion among the delegations, that the law provides for very thorough and helpful control by the judicial or administrative authority

- With regard to the Italian legal system:

  ⇒ there is no cross-class cram-down in the *concordato preventivo* (arrangement with creditors), because it is not necessary to have unanimity of the classes, as the majority of the classes is sufficient; therefore, the proposal for a Directive would be more rigorous in this respect

  ⇒ however, the Directive also allows confirmation in the case of approval by (at least) one (substantial) class, on the sole additional condition that the absolute priority rule is observed, to avoid encroaching excessively on the creditors' interests

  ⇒ the absolute priority rule is inspired by the same principle of *par condicio creditorum* (rule of equality of creditors) that must be observed in the arrangement with creditors

By contrast, this constraint does not appear in the debt restructuring agreements, but it is not even necessary, in fact, because the approval of all the creditors involved (representing at least 60 % of the total amount in claims) is required.

Drafting suggestion

Article 11

Cross-class cram-down

1. Member States shall ensure that a restructuring plan which is not approved by each and every class of affected parties may be confirmed by a judicial or administrative authority upon the proposal of a debtor or of a creditor with the debtor's agreement, ***or even of third parties, including creditors, who submitted a competing plan in respect of the debtor's one,*** and become binding upon one or more dissenting classes where the restructuring plan:

   (a) fulfils the conditions in Article 10(2);

(b) has been approved by at least one class of affected creditors other than an equity-holder class and any other class which, upon a valuation of the enterprise ***by an indipendet expert or a practictioner appointed by a judicial or administrative authority,*** would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied;

(c) complies with the absolute priority rule.

…

Article 2

Definitions

Paragraph 10

(10) 'absolute priority rule' means that ***the plan shall not provide any distribution or keep any interest to a junior class if it does not provide the full satisfaction of a dissenting senior class*** ~~a dissenting class of creditors must be satisfied in full before a more junior class may receive any distribution or keep any interest under the restructuring plan~~;

LV

The principle of cross-class cram-down is welcome, given that restructuring is a collective procedure and not in the interests of one creditor or one creditor category.

In Latvia's opinion Paragraph 1, Subparagraph (a) is in conflict with the nature of cross-class cram-down. In particular, it is foreseen that the restructuring plan will also apply to disagreeable categories of affected persons, while at the same time, the said paragraph stipulates that the plan must comply with the conditions referred to in Article 10, Paragraph 2. Such regulation is mutually exclusive, since according to Article 10, Paragraph 2, the restructuring plan must be adopted in accordance with Article 9, which means that there is a majority in each category (see Article 9, Paragraph 4, first sentence).

Consequently, Paragraph 1, Subparagraph (a) should be revised.

In Latvia's view, there is a substantial possibility for the creditor to use the refusal to approve the plan to trigger the principle of absolute priority, which in turn would significantly affect the principle of creditors' equality. The first paragraph of Article 11 provides the court with the right to choose whether the cross-class cram-down is permissible in a particular case.

Accordingly, the Member States should be able to determine that the court, when deciding on the cross-class cram-down, has the right to assess further considerations, such as the objections of the creditors on the merits to avoid situations, where the actual aim is only to receive priority status.

At the same time, Latvia joins the concerns expressed by other Member States in Working party meeting (within the discussion about Article 9) on impact to employees due to possibility to separate employees in a separate class. In Latvia, an employee is protected also in the event of restructuring, since the restructuring plan can only be applied to the employee with his/her consent. Accordingly, employees should be exempted from the possibility of imposing cross–class cram–down.

Thereby Latvia suggests adding paragraph 3 to this article:

"3. The obligation referred to in paragraph 1 shall not apply to category that combines all employees, if it has been created."

In Latvian:

"3. Šā panta 1. punktā minētais pienākums nav piemērojams uz kategoriju, kurā apvienoti visi darbinieki, ja tāda izveidota."

AT

If the commission and the member states insisted on the formation of classes, it would be necessary to alter the minimum requirements for a cross-class cram-down. In this case, we suggest that the consent of a single class should not suffice for such a cram-down, but the debtor ought to establish consent of the majority of classes and the majority of creditors. Otherwise, the creditors' position would be notably weakened. What is more, if the majority of creditors does not support the restructuring plan, the cutback of claims would lack legitimisation, as the debtor should still be solvent. This could constitute an infringement of constitutional rights. Finally yet importantly, the proposed directive itself considers the appropriateness of the restructuring plan being guaranteed by the consent of the majority of creditors.

With regard to the involvement of the authority in the case of a cross-class cram-down, we propose a stronger involvement of the authority as **Article 11 para 1** in connection with **Article 11 para 2** provide for. In particular, it should be clear that the authority is able to assess whether the restructuring plan is appropriate in the sense of **Article 11 para 3** and deny its approval if it is not. Therefore, a reference to **Article 10 para 3** should be included in the text. A more intensive review of the restructuring plan carried out by the authority is necessary to replace the lacking majority of consent.

ARTICLE 12 (Equity holders)

BE

Equity holders can only block the adoption of a plan if they are creditors.

CZ

We agree with the idea that equity holders should not unduly hinder the restructuring.

EL

Scrutiny reservation for paragraph 2: it is a provision not familiar with the Greek legal system and not addressed in the Recommendation of 2014.

IT

In paragraph 1 the expression '*shareholders and other equity holders* ***with interests in a debtor***' is incorrect: it should be replaced by '***with interests in a debtor's business***'.

We appreciate the **flexibility** provided by paragraph 2 (under which forming a specific class of partners and allowing them to vote is made optional), since our system currently excludes such partners from voting.

In response to the Italian Parliament's document, we propose that Article 12, just like recital 29, should 'allow partners in small and medium enterprises to contribute to a restructuring plan in non-monetary ways', since:

- as stated in recital 29, strict application of the 'absolute priority rule' may discourage restructuring at an early stage given that, in small and medium enterprises: (a) equity holders are not mere investors but are the 'owners' of the firm; (b) the administrators are the direct representatives of the partners; (c) it is difficult to maintain value in a firm other than by the direct contribution of the partners, which is often non-monetary in nature;

- the claims of partners are generally subordinate to those of creditors and hence, if the absolute priority rule were applied, partners could never '***keep any interest*** *under the restructuring plan*' (i.e. they could never maintain their rights as shareholders since, not being creditors, they cannot '*receive any distribution*', according to the alternative definition of the absolute priority rule contained in Article 2(10)); in other words, it would be difficult for them to continue being shareholders on the basis of their non-monetary contribution, should the plan fail to be approved by all classes;

- one solution might be to allow the MS to introduce a sort of 'new-value exception' to the absolute priority rule, enabling partners in small and medium enterprises to keep their interest, in whole or in part, on the basis of any new-value contribution they have made to the firm, including in the form of intangible assets (e.g. managerial expertise, experience, business contacts, reputation), the value of which matches the amount received.

To that end, a clause could be added to Article 11 stipulating that the conditions for cross-class cram-down are met where there is a **contribution** (in tangible or intangible form) that is equal or superior to the value obtained or kept by the holders of subordinated claims, even if the holders of senior claims do not obtain full satisfaction.

Comment:

- Although Recital 29 to the Proposal correctly points out that the strict application of the absolute priority rule (which is a condition for "cross-class cram-down") may result in the lack of incentives to initiate the restructuring process when equity holders are the "owners of the firm and contribute to the firm in other ways such as managerial expertise", the articles of the Proposal do not contain any reference to that issue, nor allow any discretion to Member States with respect to the application of the cross-class cram-down mechanism.

- It is important to actually implement Recital 29 in the Proposal so as to ensure that the perspective of the strict application of the absolute priority rule does not result in a delay in the implementation of a restructuring attempt (which indeed may often turn out to be fatal for the success of the business restructuring).The implementation of Recital 29 (either or not in the form of an option granted to Member States) could be envisaged through the provision of a "new-value exception" to the absolute priority rule in the context of SMEs' restructurings.

- This would allow equity holders to retain, in whole or in part, their interest on account of the contribution of new value to the company, which should be considered as including valuable intangibles such as managerial expertise. By this way, equity holders that act, indeed, as the owners of the firm (rather than investors) may nurture the perspective of preserving an equity interest in the company after the implementation of the restructuring tool. Such perspective would allow a prompter initiative by debtors, as equity holders would have more chances to preserve their interest in case of early intervention.

We support the general principle that equity holders must not be able to unreasonably prevent a restructuring plan from being adopted or put into effect, to ensure that partners – who are formally vested with the power to determine the corporate will during a crisis – do not take advantage of that power to deprive creditors of part of the value of the remaining assets.

When an operation requiring the agreement of the partners (e.g. merger, division, capital increase) provides greater protection for the value of the assets of the crisis-hit company, creditors are often induced to agree to share this surplus with the shareholders (who face losing their investment entirely), e.g. by granting the latter a warrant or a deferral of payment rather than writing off the investment, which is detrimental to the creditors' recovery rate. This problem has also been highlighted in the international arena, in that the IMF has commented on Italy's lack of a legal framework to prevent partners (as residual claimants during the crisis) from abusing their position of effectively exercising control over the company. It is therefore right to stipulate that, in application of the absolute priority rule, value may not be assigned to partners unless this is agreed, through majority voting, by all classes of holders of senior claims, since the absolute priority rule requires that, in the event of dissent by one of those classes, the claims of the creditors must be satisfied in full (which is unrealistic) before the partners' claims can be satisfied.

Drafting suggestion

Article 12

Equity holders

1. Member States shall ensure that, where there is a likelihood of insolvency, shareholders and other equity holders with interests ***in a debtor's business*** may not unreasonably prevent the adoption or implementation of a restructuring plan which would restore the viability of the business.

...

3. Member States may stipulate that the cross-class cram-down mechanism should remain optional for equity holders of small and medium enterprises

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LV

Latvia agrees that it is necessary to restrict the ability of shareholders and other equity holders to influence the adoption or implementation of the restructuring plan, since the national legislation does not provide for these persons the right to vote.

ARTICLE 13 (Valuation by the judicial or administrative authority)

BE

Paragraph 2

Reservation - we do not have these systems.

CZ

Under paragraph 1, the liquidation value is established only if an objection is raised because of the alleged breach of the best interest of creditors test. However, the best interest of creditors test means that the liquidation value of claims is compared with the value of claims according to the plan. In other words, the creditor compares the sum of money he is about to obtain under the plan with the performance in the event of liquidation. Therefore, if the creditor is to be entitled to raise an objection based on alleged breach of the best interest of creditors test, he or she will need to know the liquidation value firstly. However, the creditor can know the liquidation value only if a valuation has been made.

Paragraph 1 shall therefore always require valuation so that creditors may raise objections based on alleged breach of the best interest of creditors test and therefore it will be possible for the judicial or administrative authority to decide on the objection.

Otherwise, the implementation legislation would have to provide for the right to object to the alleged breach of test of the best interest of creditors without giving any specific reasons (without substantiating) such an objection. The valuation would then have to be made since such a non-specific objection had been raised.

In this context, we point out the Austrian delegation's speech at the Working Party meeting on 13 and 14 July 2017. Representatives of Austria have asked for information whether the objection based on alleged breach of the best interest of creditors test shall be qualified, i. e. whether there are specific requirements regarding reasons of the objection. The European Commission responded to this question by stating that it is a matter of national law to address this issue.

However, we believe that the Directive should provide for the obligation to make the valuation so that the creditors may eventually raise objections. Otherwise, creditors will raise objections based on alleged breach of a test of the best interest of creditors simply because they are in a state of lack of information (information deficit) and they will, this way, try to compel the judicial or administrative authority to make the valuation. And only on the basis of the valuation they will actually decide.

With regard to paragraph 2, we consider that the going concern value should be established whenever it is possible to liquidate the entire business or part of the business as a going concern. The purpose of the valuation is to determine whether the plan does not lead to damage to creditors. It is therefore necessary to determine what value the creditors would have received if the debtor's assets had been liquidated. And if the debtor's assets can be liquidated in the form of a liquidation of the whole business or part of it as a going concern, such a valuation shall be made.

We support paragraph 3, we consider that the general requirement for the substantive correctness of a judicial or administrative authority decision can lead to the need to appoint experts (court experts or other experts). We also welcome the flexibility that paragraph 3 provides as it does not always require the appointment of experts, nor does it specify who are the experts (e.g. court experts).

In regard of paragraph 4, we welcome the explanation of the European Commission that the proposal does not provide for who is entitled to raise an objection because this issue is to be regulated by national law.

EL

The valuation task imposed on the judicial or administrative authority will be very difficult to bear and, in this regard, it will impair the applicability of the provision. We would suggest assigning it to an expert and combining it with a sustainable confirmation by him that the best interests of creditors test and the equal treatment of creditors are fully adhered to.

IT

These provisions include two different terms of comparison: paragraph 1 refers to 'liquidation value', in connection with the best interests of creditors test; paragraph 2 refers to the 'value of the enterprise as a going concern', in connection with the absolute priority rule. However, both these terms reveal a bias in favour of restructuring, since:

- (1) in the first case, protection of a dissenting creditor is limited to what they would receive following liquidation, albeit with the important clarification, contained in the definition laid down in Article 2(9), that such liquidation may be not only '*piecemeal*' but also '*sale as a going concern*';

- (2) in the second case, the *ex ante* reference to the value of the enterprise as a going concern (which is greater than the liquidation value) increases the margins used as a basis for satisfying the claims of the senior (dissenting) class, thereby freeing up resources for the junior (consenting) class.

Some delegations believe that the value of the enterprise as a going concern should also be used as the basis for the best interest of creditors test; however, dissenting creditors are unlikely to have confidence in the proposal that the firm should continue trading.

Other delegations believe that reference should be made to the possibility of satisfying the dissenting creditor in the event of 'another feasible alternative'; however, it has been argued that this would complicate proceedings and increase the likelihood of challenges being brought before the judicial or administrative authority, making the restructuring process longer and costlier.

- A compromise solution might be to take the liquidation value as the point of reference unless the dissenting creditor indicates that there is ***another feasible alternative*** which would enable them to obtain greater satisfaction.

Paragraph 2 provides for two different cases in which the judicial or administrative authority must refer to **the value of the enterprise as a going concern**:

- in **point (a)**, when it must be established that the plan has been approved by a class other than an equity-holder class (or any other class) which would not receive any payment or other consideration 'if the normal ranking of liquidation priorities were applied', so that the debtor can confirm their approval of the plan through the cross-class cram-down mechanism (see point (b) of Article 11(1));

- in **point (b)**, when it is necessary to identify the extent to which resources are sufficient to pay a dissenting class of creditors before satisfying 'a more junior [consenting] class', in compliance with the absolute priority rule (see point (c) of Article 11(1));

- This dual requirement could also come into play at two different points in time when the judicial authority may be asked to apply the cross-class cram-down rule, in compliance with the absolute priority rule, namely:

  ⇒ in **point (a)**, when the plan is being confirmed;

  ⇒ in **point (b)**, when an appeal is brought against the decision on the confirmation of the plan;

Paragraphs 3 and 4, which provide for the appointment of qualified experts to assist the judicial or administrative authority in carrying out the complex valuation required in the confirmation decision ('*including where a creditor challenges the value of the collateral*'), indirectly confirm that the prescribed time-limit of 30 days after the request for confirmation has been filed, as laid down in Article 10(4), may not be long enough.

This provides further justification for our proposal, in the section dealing with Article 10, that a formula be devised to maintain the objective of speeding up proceedings – we would point out that Article 15(2), which stipulates that '*[a]ppeals shall be resolved in an expedited manner*', is merely a statement of principle – while nevertheless ensuring that further examination can be carried out where necessary in more complex cases.

LV

Latvia doesn't object to a valuation itself, but does object to a provision imposing an obligation on the court to determine the value of a company. There is a discrepancy with the ideology mentioned in Recital 17.

At the Working party meeting, the Commission indicated that the purpose of the article was not to oblige a court or an administrative authority to determine the value of the liquidation itself.

Despite the intention, the wording of the article clearly indicates the opposite, given that the title of the article and the article itself refers to valuation **by** the judicial or administrative authority. Moreover, in Paragraph 3 the wording "experts are appointed **to assist** the judicial or administrative authority" suggests, that the performer of the valuation is court or administrative authority.

Although there is a limitation that this obligation is enforceable in certain cases, this is not a proportionate obligation to the jurisdiction of the court and its ability to carry out such an assessment, while taking into account that the court must ensure the speed of the procedure as set out in Article 24(2).

Such an obligation runs counter to the principle contained in Article 4(3) of Proposal that the involvement of a court must be reduced to the necessary minimum. It is not clear how the involvement of a court or administrative authority as the primary subject in this situation would be the most effective solution, including in view of the fact that the court's ability to make such assessments in practice would be limited, since the court should request all information that is not available in state information systems.

At the same time, we would like to draw the attention to the fact that Paragraph 2, Subparagraph (a) as an obligation before the approval of the restructuring where a cross-class cram-down has been requested is likely to prolong the opening of the procedure. Similarly, if a moratorium is applied, it may be that restrictions on creditors will be extended, which will only lead to an even greater domino effect and, accordingly, will be contrary to the interests of the creditor or general body of creditors.

We propose a revision of this article by enabling the party who does not support the plan to request, for example, a sworn auditor's assessment, if the plan has already been approved, or the opinion of the practitioner in the field of restructuring before the approval of the plan, without imposing any obligation on the court. It would thus be possible to avoid the misuse of the resources of the court or administrative authority, additionally raising concern, that an assessment given by a court or an administrative authority might be inaccurate.

At the same time, it would also be necessary to ensure that the assessment itself does not justify refusing or canceling the restructuring. Accordingly, if an assessment is made, it should be judged by the court or administrative authority in the context of the plan as a whole, and not merely formally.

Among other things, it is not clear what is meant in Paragraph 3 with the phrase "when necessary". It is also unclear which criteria a person should meet to be considered a "properly qualified expert". Moreover, the obligation to **appoint** such a person raises concerns about its role in the proceedings, as it creates an impression of compliance with the entities defined in Article 25.

In addition, we draw attention to the inaccurate (not only in formulation but also in substance) translation to Latvian of Paragraph 1. Namely, the words "A liquidation value" have been translated as "likvidējama uzņēmuma vērtību" (in English: "the value of a company to be liquidated"). Such translation might lead to different interpretations and should be reviewed in greater detail.

AT

As regards **Article 13**, we support the valuation on the going concern basis. However, we would appreciate a clarification of **Article 13 par 3**, as we currently are not sure which meaning the term "challenges" has. We assume that the aforementioned challenge does not have to be qualified.

ARTICLE 14 (Effects of restructuring plans)

CZ

The concept of affected parties is not clear to us. We believe that this is one of the key issues of the frameworks for preventive restructuring.

The concept can be understood as a definition of the contracting parties in the case where the nature of plan is comparable to an agreement between the debtor and the creditors. Then, however, the question arises as to how creditors who have not been involved in the adoption of the plan are protected if the plan de facto (not de iure) affects them. This concerns, for example, a situation where the plan provides for a change in assets that leads to limitations of collectibility of the claim of the unaffected creditor. How should be solved such a situation?

It may happen that the de facto affected (not de iure) creditor does not know about the plan. Similarly, it may happen that a judicial or administrative authority or a practitioner in the field of restructuring are not aware of such a creditor, therefore the plan can be approved to the detriment of such a creditor.

We are aware that Article 8(1)(e) of the proposal provides for an obligation of the person submitting the plan to inform about unaffected parties. However, it can happen that the person submitting the plan does not inform on identity of unaffected party in the plan, intentionally, by mistake or because of the fact that the person submitting the plan does not to know about such a party.

Next, the concept of the affected parties can be understood as a definition of the parties to the proceedings. However, in such a case, the creditors would have had to be able to become a party to the proceedings independently of the debtor, by submitting their claims in court to become an affected party.

We cannot exclude an interpretation that the non-affected parties would also be parties to the proceedings (despite the fact that they are not affected parties because they are not involved in negotiations regarding the plan). Although they would have a right to be heard (to make a statement etc.), argue the facts, suggest evidence, make appeals, etc., they wouldn't be able to vote on the plan and would not be legally affected by the plan.

Therefore, the concept of the affected parties is not clear to us.

We believe that this is one of the key issues of the frameworks for preventive restructuring. This issue must be clarified.

EL

We consider it necessary to clarify the phrase "not involved" in the Directive, in order to ensure that anyone who was given a notice and chose not to participate in any meeting is considered to be involved in the plan.

IT

Our national system expressly stipulates that the confirmed plan is binding and mandatory for all creditors '*with the exception of claims vis-à-vis persons jointly liable, joint and several debtors and persons liable by way of recourse*' (first paragraph of Article 184 of the Bankruptcy Law). No such provision is contained in Article 14, although it could be inferred from paragraph 2. We would like to insert a new paragraph (paragraph 3) expressly providing for this.

Our system also stipulates that '*unless otherwise agreed, the arrangement proposed by the company is effective vis-à-vis the partners with unlimited liability*' (second paragraph of Article 184 of the Bankruptcy Law). We would like to see this rule introduced by way of a new paragraph (paragraph 4); alternatively, we would at least like to see clarification in one of the recitals that the inclusion of such a rule in Member States' national legal systems is not incompatible with the Directive.

More generally, this affords us an opportunity to reiterate some of our underlying concerns about how the Directive is to be applied in our legal system; although these issues have already been discussed in various meetings, we would like all aspects to be clarified, given their major importance for all MS. For instance, Italy's legal system provides, broadly speaking, for two preventive restructuring models:

- (1) an **arrangement with creditors**, in which all creditors must necessarily be involved and the plan is binding on all who were creditors prior to the request for the arrangement (Article 184 of the Bankruptcy Law);

- (2) a **debt restructuring agreement**, in which the creditor can choose which creditors to involve in the plan, provided they represent at least 60 % of total loans; however, those who are not involved must be paid in full (Article 182a of the Bankruptcy Law), even if they fall into a junior class, since the absolute priority rule does not apply (this does not give rise to major incompatibilities with the Directive since, in any case, unanimity is required of all the creditors involved).

It would seem, then, that only the debt restructuring agreement – and not also the arrangement with creditors (which requires all creditors to participate) – complies with the article in question. Notwithstanding this, could the arrangement with creditors also be maintained?

And if, with regard to other articles in the Directive, the situation were reversed – that is, if the agreement with creditors complied with its provisions and the debt restructuring agreement did not – how should we regulate for this?

Drafting suggestion

Article 14

Effects of restructuring plans

1. Member States shall ensure that restructuring plans which are confirmed by a judicial or administrative authority are binding upon each party identified in the plan.

2. Creditors who are not involved in the adoption of a restructuring plan shall not be affected by the plan.

3. Rights of creditors against debtor's coobligants, guarantors and obligants with right of recourse remain in force.

4. Member States may provide that, unless otherwise agreed, shareholders of partnerships with unlimited liability may also take advantage of the restructuring plan.

LV

Latvia supports the idea contained in the article that the consequences apply to all affected persons.

However, to ensure clarity and in order to avoid inappropriate interpretation, Paragraph 2 should be rephrased:

"2. Creditors who are not identified in the plan shall not be affected by the plan."

In Latvian:

"2. Pārstrukturēšanas plāns neietekmē kreditorus, kuri nav identificēti plānā."

ARTICLE 15 (Appeals)

BE

Paragraph 4(b)

Reservation with regard to the granting of compensation.

CZ

The Czech Republic express its full understanding that the process of approving of the plan shall be undergone quickly, because the timeliness of the process is crucial to successful resolution of the debtor´s financial difficulties.

However, we believe that an accelerated treatment of restructuring should not be given en bloc for the entire process (the whole procedure) but only for certain parts of it. This includes appeals. We therefore support paragraph 2. On the contrary, we have a restrained approach towards Article 24 (2) of the proposal, which will be specified in our written opinion on Article 24.

We welcome the European Commission's explanation that it is a matter of national law, who will be entitled to appeal, as well as the specification of further conditions for the appeal.

For the Czech Republic, however, the key question remains whether the creditors, who are de iure unaffected, will be entitled to appeal even on the grounds that the plan has a de facto negative effect on their rights. Even Article 15 reflects the important concept of the affected parties described under Article 14, which we do not consider addressing all consequences.

This issue is closely linked to the suspensive effect of the appeal (paragraph 3). It is not clear from the Directive proposal how will be solved the situations in which the implementation of the plan will have a factual impact on the rights of the appellant or third parties and the plan will then not be confirmed by the appeal. We are wondering if the good faith of third parties would be protected and how. Following, we are interested in how the appellant will be protected.

In the case of third parties, it is a situation where a third party, for example, makes an investment (according the plan) in the business of the debtor – hence the third party will pay a certain amount of money to the debtor, but the plan will subsequently not be confirmed on the basis of the appeal. In the case of the de facto affected persons is particularly concerned the issue of the claims of these persons.

We therefore consider paragraph 3 as a risk and we are in an opposition to its current wording. In this context, we can say that more structured solutions can exist. The German delegation referred in this regard to § 253 of the German Insolvency Act (Insolvenzordnung, InsO) during the working party discussions. The German delegation stated that, in accordance with their national rules, it is possible – as an exception to the general rule – to cancel a suspensive effect of the appeal. We believe that paragraph 3 should include discretion for Member States to introduce legislation to cancel the suspensive effect of an appeal. Alternatively, other solutions supporting timeliness should be sought. These other solutions should also be more structured than the current wording of paragraph 3.

Paragraph 4 should be formulated as a list of examples. We consider an idea, which is behind Article 15 (4) (b), very interesting. It could be beneficial in the sense that creditors in bad faith who are causing damage to other creditors, usually in coordination with the debtor, would bear the consequences of their actions. It could also be beneficial in the situation when some creditors are preferred so other creditors are damaged. However, we believe that this idea should be explained in more detail in recitals. Without further explanation, we cannot reach a final position on this idea.

EL

The article seems unclear in two aspects: (a) it does not seem to cover the most important case of appeal against a rejection of the plan, and (b) provides, as a mandatory for Member States alternative, a monetary compensation to dissenting creditors, which has to address a number of substantial and procedural issues in every legal system. If this alternative remains, we strongly propose to be provided as an option to Member States.

IT

N.B.: We would point out that there is a translation error in paragraph 1, where '*a decision ON the confirmation of a restructuring plan*' has been translated into Italian as '*decisione DI omologazione del piano di ristrutturazione*' ['a decision TO confirm a restructuring plan']; this would make it seem as if only confirmation orders can be appealed against (which is in fact in line with the current Italian system, under which refusals cannot be appealed against on their own but only together with a bankruptcy declaration – see Articles 162 and 183 and paragraph 5 of Article 182a of the Bankruptcy Law)

- having also received clarification from the Commission, the correct translation in Italian is '***decisione SULLA omologazione del piano di ristrutturazione***', in that both confirmation and non-confirmation orders can be appealed against.

The proposal does not specify who is entitled to appeal or what the possible grounds for appeal are. It should perhaps be clarified – **at least in a recital** – that MS can establish their own rules for both aspects, providing for an entitlement to appeal for **all affected parties** and specifying that the grounds for appeal may relate to:

- formal aspects of the adoption procedure (see Article 10(2)(a))

- substantive aspects of the plan contents, such as: (i) merit (e.g. unfair prejudice arising from new financing, e.g. Article 10(2)(c); (ii) suitability (e.g. best interest of creditors test, absolute priority rule); (iii) function of the plan (no reasonable prospects of preventing the insolvency of the debtor and ensuring the viability of the business (e.g. Article 10(3)).

As regards ruling out the suspensive effect of appeals in paragraph 3, considering the different positions taken by delegations, it may be appropriate to provide that the **suspension of the execution of the plan** may be permitted by the appeal judge, in full or in part, on serious grounds only, such as at the request of an affected party providing evidence of **imminent and irreparable injury**.

The option of granting monetary compensation to dissenting creditors who contested the confirmation, pursuant to point (b) of paragraph 4, instead of setting aside the restructuring plan pursuant to point (a), also represents a new feature for our system. In regard to this, recital 32 indicates that the sole (and generic) criterion for choosing the monetary compensation option – which may be exercised solely by the judicial authority, which is also responsible for appeals against confirmation by the administrative authority – is the establishment of the fact that '*minority creditors have suffered unjustifiable detriment under the plan*'. This is a highly invasive, discretionary power, which nevertheless favours restructuring.

- recital 32 should specify more clearly what is meant by 'unjustifiable detriment':

  ⇒ does it refer to errors made in the best interest of creditors test?

  ⇒ does it relate to parties that were not involved in negotiations and were unable to vote?

Once that important clarification has been made, this exceptional and innovative measure – which caused concern among many delegations – could be retained for cases where the appeal is upheld on the basis of mere procedural errors, or in any case trivial errors, which nevertheless have the extreme effect of the plan being set aside. The following could be done to soften the impact of the measure:

⇒ clearly identify the cases in which the approval of the plan should be upheld and the unfair detriment suffered by the successful appellant-creditor remedied, such as when the discovered error has an entirely marginal impact on the structure of the plan;

⇒ make the compensation option available only if it is paid for by creditors with an interest in maintaining the plan, or clarify what resources the debtor should use to pay it;

⇒ specify that in any case the absolute priority rule must be respected.

The Commission has clarified that compensation is not something which goes beyond the provisions of the plan but rather is merely a means of restoring the creditor's infringed rights in compliance with the plan; what is more, some delegations also indicated that modifying the plan could be permitted as an alternative to setting it aside. If anything, then, compensation could be **an alternative to modifying the plan** where the latter would involve difficult-to-implement changes, not least in view of the time elapsed.

Drafting suggestion

Article 15

Appeals

1. Member States shall ensure that a decision on the confirmation of a restructuring plan taken by a judicial authority may be appealed before a higher judicial authority and that a decision on the confirmation of a restructuring plan taken by an administrative authority may be appealed before a judicial authority ***by any interested party***.

2. Appeals shall be resolved in an expedited manner.

3. An appeal against a decision confirming a restructuring plan shall have no suspensive effects on the execution of that plan. ***The judicial authority may nevertheless suspend, even partially, the execution of the plan upon request from the party concerned, in case of imminent and irreparable damage***.

…

LV

In Latvia, the regulation provides for the filing of a complaint, however, only in cases where the court decides not to implement the procedure. Consequently, there is no conceptual objection to the appeal as such, given that the appeal does not stop the execution of the plan.

Latvia has concerns about Paragraph 4. The possibility of granting a monetary compensation to dissenting creditors provided for in Subparagraph (b) will not give the desired result, on the contrary, it will create a negative effect. Such regulation could lead to a person who does not receive full satisfaction of his claim within the plan, the tempting circumstances not to support the plan to get the chance to appeal against the decision solely in order to qualify for compensation. There would undeniably be cases where such an appeal would be well founded, but it's expected that more often they would be unjustified claims that would only burden the courts.

Therefore, the possibility to grant monetary compensation to dissenting creditors should be deleted from Paragraph 4.

At the same time, Latvia still has concerns whether such a regulation (declaring specific types of decisions) is compatible with the principle of judicial autonomy.

AT

We support **Article 15 para 1** to **3** of the proposed directive. Nevertheless, **Article 15 para 4** is highly problematic. We therefore suggest to delete **Article 15 para 4 sub-para b** or to implement it as an optional provision. Otherwise, there is a threat that creditors might not consent to the restructuring plan in fear of the duty to compensate other dissenting creditors.

ARTICLE 16 (Protection for new financing and interim financing) & related definitions in:
Article 2(11) ("New financing)
Article 2(12) ("Interim financing")

CZ

In regard of Article 16 of the proposal, we lack the possibility for Member States to introduce an ex-ante approval procedure of interim financing. Interim financing could be subjected to approval, for example, by judicial or administrative authority, or by creditors.

We are aware of the fact that the European Commission rejects this option, but we believe that the introduction of an ex-ante approval procedure could support the chance of the success of preventive restructuring.

The approval procedure could limit cases of fraudulent transactions or malicious transactions. If interim financing was approved in a particular case, it gives the creditor involved in financing (i. e. providing financing) higher level of legal certainty that the affected transaction will not be subsequently objected. This, of course, does not impede an additional avoidance to a transaction that is actually fraudulent or misleading.

As part of the ex-ante approval of interim financing, the obligation and the burden of the claim and the duty and the burden of proof should be imposed on the plan-submitter. The debtor or creditor should therefore state the specific facts that would require the need for specific interim financing so that a conclusion can be made as to whether the interim financing should be approved or provided.

In regard of new financing, the restructuring plan should be in line with the proposed Article 8(1) (f) point (iii) and state, among other information, to what extent and for what purpose the new financing will be provided, what its terms will be. Only new financing, which is clearly and in detail specified in the restructuring plan, should be protected under Article 16. A risk exists that attempts to include a number of obligations into new financing could be made in practice with an intention to gain protection under Article 16. In such cases there emerges a risk of numerous disputes over the nature of certain obligations and the burden of the courts in these disputes.

With regard to the definitions of the notion interim financing and new financing, the definitions of these notions should include not only the provision of monetary funds but also, for example, the supply of energy or raw materials, so that the definition would also include other types of performance than financial consideration.

We do not find justification for limiting financing only to monetary funds. Fulfillment of the plan can also be supported by other kind of resources than money.

EL

We propose greater flexibility to Member States as to when financing is considered interim, especially in pre-packaged procedures where financing during negotiation period is most important.

IT

This provision is essentially in line with our reform, which provides for '*the reorganisation and simplification of the various types of financing for distressed companies, preserving the super-priority status of financing authorised by the court in the event of a subsequent judicial liquidation or extraordinary administration, except in the case of acts in fraud of creditors*' (Senate Act 2681, Article 6(1)(p)). We nevertheless suggest:

- explaining in a recital that the **concept of 'financing'** should be understood **in a broad sense**, e.g. with reference to the waiver of a debt or to 'funds' indirectly accelerated by creditors based on the provisions of Article 7(4);

- expressly providing that MS can set specific rules for **financing from partners**, for example providing for reduced protection in cases where partners should have re-capitalised rather than financed the company;

- introducing a definition of '**plan-related financing**' in Article 2 alongside new financing (point 11 of Article 2) and interim financing (point 12 of Article 2), insofar as that category is in a way envisaged by Article 17(2)(e) – 'financial contributions'.

Some reflection is needed on the lack of **judicial approval**, which is in fact provided for by Article 17(3) for the transactions covered by point (e) of paragraph 2, i.e. for 'new credit, financial contributions' (provided that these are to be understood as financing received, not paid out, by the debtor)

It should be expressly specified whether or not **interim financing** pursuant to Article 2(12) comes under the rules established for **new financing** pursuant to Article 2(11), namely:

- that the debtor must indicate in the proposal '*any new financing anticipated as part of the restructuring plan*' (Article 8(1)(f)(iii))

- that the unanimously approved plan must be confirmed by the judicial or administrative authority if it provides for new financing (Article 10(1)(b))

- that new financing must be necessary to implement the plan and must not unfairly prejudice the interests of creditors (Article 10(2)(c))

In **paragraph 3**, we propose adding **serious misconduct** as grounds for potentially exempting grantors of financing from civil liability.

In accordance with the indications given by the Italian parliament, we would ask that:

- in paragraph 2, 'liquidation procedures' be replaced by '**insolvency procedures**'

- in paragraph 2, Member States be expressly given 'the power to establish that **loans from practitioners** are to benefit from **super-priority status**, providing that this benefit be preserved in the event of a subsequent insolvency procedure'.

Comment

It is widely recognized by empirical economic literature that there is a positive correlation between new and interim financing and the rate of success of restructuring attempts. The pivotal importance of new and interim financing has been pointed out also by the UNCITRAL in its recent publications (see UNCITRAL, "Insolvency of micro, small and medium-sized enterprises", 10-19 May 2017). Further, the present Proposal moves from two fundamental assumptions:1) the restructuring of viable businesses is a primary goal for Member States, since it allows to better preserve the value of the distressed business, save jobs, and reduce the risk that loans become non-performing loans in cyclical down turns and/or increase the market value of non-performing loans (see the Explanatory Memorandum attached to the Proposal);2) legal uncertainty poses a significant obstacle to investments, inducing investors to restrain from making them or to pretend a higher return. In light of the above, the priority provided for grantors of new or interim financing may not depend on the nature of the insolvency proceeding applied in case of failure of the restructuring attempt. To the contrary, the priority should apply regardless of the type and nature of the restructuring procedure so as to provide grantors with an adequate level of certainty about the ranking of their claim. That is pivotal to pose an effective and satisfactory incentive to provide new or interim financing and, ultimately, to make practically possible the restructuring of many viable firms facing a financial distress. To this purpose, **"liquidation" should be replaced by "insolvency"** to reassure grantors of new or interim financing that that favourable raking be enforceable regardless of the nature of the specific proceeding applied in case of failure of the restructuring attempt (particularly, even the priority should be granted even if a non-liquidation insolvency procedure is applied).

Drafting suggestion

Article 16

Protection for new financing and interim financing

…

2. Member States may afford grantors of new or interim financing the right to receive payment with priority in the context of subsequent ***insolvency*** procedures in relation to other creditors that would otherwise have superior or equal claims to money or assets. In such cases, Member States shall rank new financing and interim financing at least senior to the claims of ordinary unsecured creditors. ***Member States may lay down the same rights to creditors described in art. 17, paragraph 2, lett. a) and b)***

3. The grantors of new financing and interim financing in a restructuring process shall be exempted from civil, administrative and criminal liability in the context of the subsequent insolvency of the debtor, unless such financing has been granted fraudulently or in bad faith ***or with grave negligence***.

LV

Latvia supports the establishment of such a regulation. The Insolvency Law does not differentiate between temporary and new financing; however, it already provides for the procedure that the allocated financing in the event of the declaration of insolvency proceedings can be considered as procedural expenses, without prejudice to the interests of secured creditors.

AT

As regards **Article 16**, in our view the term "interim financing" is too broad. It is very important to determine a time frame in which interim financing is protected. This period should not include financing which the debtor raised before the opening of restructuring proceedings, as this could detriment creditors. Therefore, we suggest that the term "interim financing" only includes financing which the debtor raised after the opening of restructuring proceedings.

Even though we understand the need to encourage new financing during the restructuring proceedings, the protection for new financing as well as for related transactions as **Article 16 et seq.** provides for poses several threats which ought not to be ignored. Firstly, this could entail a loss of the insolvency estate as the debtor might grant new securities in exchange for the financing and at the same time use the received funds inefficiently. Secondly, there is a serious threat that this protection of financing could also hinder a successful restructuring within insolvency proceedings, as the necessary liquid funds might have already been gone.

ARTICLE 17 (Protection for other restructuring related transactions)

BE

Paragraph 2

The list should be open and not exhaustive.

Paragraph 3

This should remain an option.

CZ

We also propose that Article 17 shall be amended so that the proposal allows Member States to introduce an ex-ante approval procedure for all transactions within the meaning of Article 17. The possibility for a Member State to introduce the approval procedure is currently laid down only in relation to the transactions referred to in Article 17 (2) (e). At the same time, we recommend a special rule that this special procedure would not apply if a particular transaction is laid down directly in the restructuring plan that was approved because in that case the transaction would be approved as a result of the approval of the restructuring plan.

Costs of restructuring and other transactions relating to restructuring should be, for the purposes of protection under Article 17, explicitly divided into two categories, namely transactions and costs:

- made or incurred prior to the approval of the restructuring plan (i. e. transactions and cost relating to preparation for restructuring), and
- relating to implementation of the restructuring plan.

The Directive should allow Member States to introduce a rule under which all transactions and cost made or incurred prior to the approval of the restructuring plan should be included (laid down) in the restructuring plan and their payment should be possible only after the approval of the plan by court.

The same regime should be allowed by the Directive in regard of the transaction and costs relating to implementation of restructuring plan, they should also be included (laid down) in the approved restructuring plan. These transactions and cost should be supervised by a practitioner in the field of restructuring.

The protection under Article 17 should be allowed in these cases only. Otherwise, a number of costs could be "labelled" as costs protected by the Directive and a number of disputes could arose.

The Directive should also allow Member States to define the costs in the restructuring plan in general way, so that in the case that it is difficult to foresee extra costs it would not be necessary to approve such costs additionally.

EL

We propose merging this article with Article 16, since they share a common ratio. As they stand, they create confusions, first because of their different structure in paragraphs and, second, because they overlap. As title for the new united article, we propose the wording "Protection of new financing and provision of goods and services". In any event, the protection shall not presuppose *ex post* validation of the plan, since that would render *ex ante* (during the negotiation period) the provision of financing etc. very risky, and, therefore, would deprive it of restructuring efforts.

IT

NB: we would point out the translation error in paragraph 1, where the translation of the term '***confirmed*** (i.e. '**omologato**') has been omitted in the Italian version and must therefore be added ('*... le operazioni effettuate per agevolare le trattative* ***sul piano di ristrutturazion omologato dall'autorità giudiziaria****...*')

NB: we would also point out the misalignment between the English and Italian versions of the adjectives '**reasonable**' and '**necessary** in points (a), (b), (d) and (e) of paragraph 2. In this respect:

- we appreciate the reference to **reasonableness and necessity**, which in the Italian text applies to the payments referred to in points (a), (b) and (d); however, while we understand the derogation for wages referred to in point (c), we do not understand why a similar requirement (at least as regards necessity) has not been inserted for the 'extraordinary' administrative transactions referred to in point (e), particularly in view of the fact that the possibility of prior approval by a practitioner or by a judicial authority is merely optional on the basis of paragraph 3 (and exists in our legal system with regard to the arrangement with creditors)

  ⇒ we therefore propose that in all the points - with the sole exception of (c), concerning the wages of workers - the adjectives '**reasonable**' and '**necessary**' should be used

In our system, subject to the exemption for avoidance actions, the **Court can authorise the payment of earlier claims** (including employees' wages and salaries) only in the arrangement for creditors while the business is a going concern and on condition that an **expert certifies** that '*such services are essential for the continuity of business and ensure that the creditors obtain maximum satisfaction*' (Art. 182d(5) of the Bankruptcy Law)

We would request that the possibility for the MS to introduce **approval by an expert or by a judicial authority**, provided for in paragraph 3, should refer not exclusively - but only by way of example - to the extraordinary transactions set out in point (e) of paragraph 2

Recital (33) justifies the exemption from avoidance actions for **transactions connected with restructuring** (given as an example there) with the promotion of '***a culture of early resort to preventive restructurings***'. For this purpose, Article 17 considers two different categories of transaction:

- those '***to further***' (or '***closely connected with***' the **negotiation** of the plan (paragraphs 1-3)
- those relating to the **implementation** of the plan (paragraph 4)

In both cases the **necessary conditions** to prevent the transactions from being declared voidable, void or unenforceable in subsequent insolvency procedures are: (1) that the **plan** has been **confirmed**; (2) that the transactions have not been carried out **fraudulently** or in **bad faith.**

We should like there to be a comparative reflection on the broader protection granted by Article 16 for financing:

- the first condition (confirmation of the plan) relates, however, to the '***new financing*** *necessary to* ***implement*** *a* [confirmed] *plan*' (ex-Art. 2(11)), but not also to the '*interim financing*' (corresponding to our temporary financing (ex-Art. 18d(1) and (3) of the Bankruptcy Law) '***reasonably and immediately necessary***' for the operation or survival of the business '*pending the confirmation*' (ex-Art. 2(12);
- this is because, as explained in recital (31), making the latter subject to confirmation '*would discourage* ' disbursement.

  ⇒ however, this fear is not indicated in the case of the transactions protected by the first three paragraphs of Article 17, although neither do these concern the plan implementation stage (such as the new financing), but the previous negotiation stage (such as the interim financing)

- point (e) of paragraph 2, in providing for '*new credit*' and '*financial contributions*' represents a **third category of financing** (unless they are interpreted as financing granted, not received), which precedes the start of negotiations, i.e. only '***in contemplation of negotiations***'

  ⇒ such financing is not required to be '***reasonably and immediately necessary***' for the operation or survival of the business, like the interim financing, as it is considered sufficient that it is '***closely connected***' with the negotiations;

  ⇒ however, for the purpose of protection of such financing it is in any case necessary for the plan to be confirmed (by analogy with the 'bridging finance' or 'dependent finance' in the current Italian system, pre-deductible under Article 182d(2) of the Bankruptcy Law only if the arrangement with creditors is permitted or the debt restructuring agreement is confirmed)

  ⇒ in any case, there is the flexibility provided for in paragraph 3, which allows the MS to require the approval of a practitioner or of a judicial or administrative authority

With regard to **ordinary and extraordinary administrative transactions**, Article 17 is in line with the provisions of our system, even if limited to the arrangement with creditors (Article 161(7) and points (e), (f) and (g) of Article 67 of the Bankruptcy Law) and to the settlement of the over-indebtedness crisis (Article 10(3a) of Law 3/2012) and not also for the debt restructuring agreement (ex-Art. 182a of the Bankruptcy Law).

- There is another situation in which the MS has a procedure which meets the other criteria of the Directive, but not those under consideration; in this case, the question arises again of what should be done? Should this **procedure, which satisfies only some of the parameters laid down in the Directive**, be abolished? Or will it be sufficient that there are other procedures which meet the requirements lacking here, even if they in turn do not comply with the Directive in other aspects?

In our system, the settlement of the over-indebtedness crisis provides for *an **exemption from avoidance actions** only in the case of 'the acts, the payments and the guarantees granted **in execution** of the confirmed agreement', although it allows for **pre-deduction** for financing effected in execution of or dependent on the agreement confirmed*' (Article 12(5) of Law No 3/2012)

⇒ We should like clarification in a recital as to whether - with regard to specific procedures geared to 'small businesses', that are not subject to bankruptcy in Italy - the absence of protection given by the first three paragraphs of Article 17 (also) to **direct transactions to further negotiation** is compatible with the Directive.

Drafting suggestion

Article 17

Protection for other restructuring related transactions

…

2. Transactions enjoying the protection referred to in paragraph 1 shall include:

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

(b) the payment of ***necessary and*** reasonable fees and costs in seeking professional advice in connection with any aspect of a restructuring plan;

…

(e) transactions ***necessary and reasonable*** such as new credit, financial contributions or partial asset transfers outside the ordinary course of business made in contemplation of and closely connected with negotiations for a restructuring plan.

3. Member States may require ***some*** transactions, ***such as those*** referred to in point (e) of paragraph 2**,** to be approved by a practitioner in the field of restructuring or by a judicial or administrative authority in order to benefit from the protection referred to in paragraph 1.

…

LV

Latvia conceptually supports Article 17 of the Proposal. However, there should be a lot of precaution against it, because recognizing a transaction as fraudulent or bad will not always be the most effective solution, and therefore the regulation needs to be well thought out.

There are concerns about how the proposed regulation will affect employees. Namely, the 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 ensures a minimum level of protection for workers in the event of the insolvency of their employer. Accordingly, for the purpose of protecting workers, substantial deviations from the principle of creditors' equality have already been made.

In turn, Article 17(2)(c) of the Proposal contains a safeguard for employee salary payments for work already done. However, protection is only intended if the restructuring plan has been approved by a court or an administrative authority. Thus, with the solution offered, a situation may arise that the employee receives the salary paid to him for the work already done.

Consequently, Latvia has not been convinced that the interests of employees are not disproportionately affected by the possibility of the invalidation or ineligibility of a salary payment of employees by protecting the interests of the creditors.

In the opinion of Latvia, the regulation regarding employees should be deleted as it conflicts with another legal act of the European Union. However, for the sake of clarity, the article could stipulate that the remuneration paid to employees would be protected in any event.

AT

The scope of application of **Article 17** as regards the included transactions is currently too broad. In particular, the protection of transactions as mentioned in **Article 17 para 2 sub-para e** poses the threat of thwarting the provisions concerning rescission under insolvency law as well as creditors' protection mechanisms. If the (hopeless) negotiations on the restructuring plan fail, the creditors will have to carry the risk and the damage hereof. This is also true for the transactions mentioned in **Article 17 para 4**, in particular for the protection of guarantees or securities. The term "carried out to further the implementation of a restructuring plan […] or closely connected with such implementation" is very vague and open to abuse.

Therefore, we suggest implementing **Article 17**, in particular Art 17 para 2 sub-para e, merely as an option or granting protection solely for a few very specific transactions and leaving the rest of them optional. What is more, **Article 17 para 3** should apply to all transactions covered by **Article 16** and **17**, since this would establish legal certainty as well as hinder abuse.

ARTICLE 18 (Duties of directors)

CZ

We generally support the intention to regulate the duties of directors. We consider it as a useful tool to support timely and preventive solutions of financial difficulties. However, we have a number of ambiguities about the specific wording of the proposed provision and we therefore cannot take a final position before clarifying them.

The first comment relates to the moment when there emerges a likelihood of insolvency. From the Czech Republic's point of view, imposing obligations on directors is more justifiable, the more the debtor approached its bankruptcy. If, on the other hand, the probability of insolvency occurs at a time that greatly precedes the bankruptcy of the debtor, the proposal might limit the debtor in his business too much. We note that the proposal allows Member States to regulate this topic on a national level.

The second comment relates to the definition of directors, which is currently laid down in Recital 36. We believe that the definition should be laid down in the normative part of the proposal in Article 2.

In regard of the content of the definition, we do not know which persons are included in the definition - whether it involves members of an elected body, such as a board of directors, or even senior employees. The definition should be clarified in this respect. We believe that it would be appropriate if the Directive would at least allow a Member State to apply rules under Article 18 also to senior employees [for example, the amendment to the Shareholders Directive No. 2017/828/EU has been drafted in such sense].

The third comment relates to ascertainment of range of debtors covered by Article 18. Whether it applies only to debtors who are corporations or whether it also applies to other debtors.

We further consider the definition of persons according to paragraph 2(a) and (b) to be unclear. Point (b) does not explicitly refer to "workers" or "shareholders", while in point (a) they are explicitly mentioned. We would like to ask for an explanation of this difference.

Another comment relates to letter (b). It is not clear from the text or from the relevant recital what the interests of creditors and other stakeholders are meant to be within the meaning of point (b).

Lastly, we are not sure whether measure listed in Recital 36 – specifically professional advice on restructuring and insolvency – will cause an excessive increase in debtor costs. In addition, we are afraid that unintended consequences can occur. Specifically, there can be weakening of the directors' responsibility if they have the opportunity to claim that they were acting on the advice they received from the advisers. Therefore, we propose not to mention this measure in Recital 36.

EL

Scrutiny reservation: we agree with the principles, but it is a provision of company law and as it is, it serves only as a self-evident declaration.

IT

We are in favour of the provision. In our system there are currently no specific incentives for preventive restructuring, but only to prevent insolvency: (1) provisions governing criminal offences; (2) limitation of bankruptcy discharge. Company regulations provide for the obligation for administrators to preserve the integrity of the company's assets and protection of capital (which may not take into consideration a financial crisis). The reform under way introduces specific obligations for the corporate bodies. In particular:

- Article 4 sets out the alert procedure, requiring the supervisory bodies to notify the administrator and, should he or she fail to respond or respond inadequately, an appropriate public body, of the existence of reasonable indications of a crisis
- Article 6 provides for the regulation of the company's liability actions and the duty of the corporate bodies to implement the confirmed proposal, with the possibility of appointing an ad hoc judicial administrator with substitute powers in the event of obstructive conduct
- Article 14 provides for:
  - ⇒ (A) the duty of the entrepreneur and the corporate management bodies to set up adequate organisational structures for resolving crises in a timely manner and to adopt in good time the tools for recovering the company's viability;
  - ⇒ (B) the administrators' liability towards the company's creditors for failure to comply with obligations related to preserving the integrity of the company's assets.

LV

Latvia supports the inclusion of such a norm in the Proposal.

However, we can agree with the views already expressed at the Working party's meeting that the timeframe is unclear. Meaning, it is not clear whether it relates to the stage when the restructuring plan is being negotiated or to the stage at which the directors should decide on further action – to move to insolvency proceedings or to try to restructure the company.