

Preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures

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The European Parliament adopted by 327 votes to 34 with 142 abstentions, a legislative resolution on the proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU.

The proposed directive aims to provide a second chance for insolvent, honest entrepreneurs, and to facilitate the access of viable enterprises in financial difficulty to effective national preventive restructuring frameworks that enable them to continue operating.

Parliament's position in first reading following the ordinary legislative procedure amended the Commission's proposal as follows:

Early warning and access to information

Debtors should have access to one or more clear and transparent early warning tools which can detect circumstances that could give rise to a likelihood of insolvency and can signal to them the need to act without delay.

Early warning tools may include the following:

- alert mechanisms when the debtor has not made certain types of payments;
- advisory services provided by public or private organisations;
- incentives under national law for third parties with relevant information about the debtor, such as accountants, tax and social security authorities, to flag to the debtor a negative development.

Preventive restructuring frameworks

Where there is a likelihood of insolvency, debtors will have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, thereby protecting jobs and maintaining business activity.

Member States may also provide that preventive restructuring frameworks are available at the request of creditors and employees' representatives, subject to the agreement of the debtor. They may limit that requirement to obtain the debtor's agreement to cases where debtors are SMEs.

Facilitating negotiations on preventive restructuring plans

The amended text provides that the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall be decided on a case-by-case basis, except in certain circumstances where Member States may require the mandatory appointment of such a practitioner in every case.

Member States shall provide for the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in negotiating and drafting the plan, at least in the following cases: (i) where a general stay of individual enforcement actions is granted by a judicial or administrative authority; (ii) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down; or (iii) where it is requested by the debtor or by a majority of the creditors.

Practitioners in the field of restructuring, insolvency, and discharge of debt that are appointed by judicial or administrative authorities must be suitably trained and have the necessary expertise for their responsibilities. They should be subject to oversight and regulatory mechanisms which should include effective measures regarding the accountability of practitioners who have failed in their duties,

Stay of individual enforcement actions

Debtors may benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework. Judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary. Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions in well-defined circumstances.

The initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months. Member States may enable judicial or administrative authorities to extend the duration of a stay of individual enforcement actions, at the request of the debtor, a creditor or, where applicable, a practitioner in the field of restructuring. Member States may provide for a minimum duration of not more than four months during which a stay of individual action cannot be lifted. The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed twelve months. The expiry of a stay of individual enforcement actions without the adoption of a restructuring plan must not, of itself, give rise to the opening of an insolvency procedure which could end in the liquidation of the debtor.

Restructuring plans

Plans submitted for adoption or for confirmation by a judicial or administrative authority must contain at least the following information:

- the debtor's assets and liabilities at the time of submission of the restructuring plan, including a value for the assets;
- a description of the economic situation of the debtor and the position of workers;
- a description of the causes and the extent of the difficulties of the debtor;
- the affected parties, whether named individually or described by categories of debt in accordance with national law, as well as their claims or interests covered by the restructuring plan;
- the classes into which the affected parties have been grouped, for the purpose of adopting the restructuring plan, and the respective values of claims and interests in each class;

- the terms of the restructuring plan, including, in particular, any proposed restructuring measures and, if applicable, the proposed duration of any proposed restructuring measure and the general consequences for employment.

The plan must include a statement of reasons that explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary pre-conditions for the success of the plan. The following restructuring plans must be binding on the parties only if they are confirmed by a judicial or administrative authority:

- a) restructuring plans which affect the claims or interests of dissenting affected parties;
- b) restructuring plans which provide for new financing;
- c) restructuring plans which involve the loss of more than 25% of the workforce, if such loss is permitted under national law.

Duties of directors

Where there is a likelihood of insolvency, directors must have due regard, as a minimum, to the following: (i) the interests of creditors, equity holders and other stakeholders; (ii) the need to take steps to avoid insolvency; and (iii) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business.

Workers

A new article on workers' rights has been introduced stipulating that Member States should ensure that existing rights of workers under national and Union law are not affected by the process of preventive restructuring (e.g. the right to collective bargaining and the right to information and consultation).