

Position Paper

UEAPME¹ position² on a Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. (COM (2016) 723 final)

Executive Summary

UEAPME is defending all enterprises: on the one hand debtors facing financial difficulties and running the risk of insolvency and on the other hand creditors that are exposed to economic risks when losing their claims due to the insolvency of their debtors.

With this proposal, the European Commission is pursuing a harmonisation of both procedural and substantive insolvency rules. The proposed insolvency directive thus goes beyond the 2014 Recommendation (“Recommendation on a new approach to business failure and insolvency”, C (2014)1500 final, 12 March 2014), which has not been largely adopted in EU member states. The new proposal therefore has a new legal quality as until now, European regulatory initiatives regarding insolvency law have been limited to procedural aspects in the cross-border context.

However, the proposal does, rightly, not aim to harmonise certain core aspects of insolvency such as rules on conditions for opening insolvency proceedings, a common definition of insolvency, ranking of claims and avoidance actions.

Overall, the proposal is a good starting point that needs however to be further fine-tuned to balance the interests of debtors and creditors. In particular, it has to be highlighted that SMEs as creditors are exposed to serious economic risks in case of default of their claims which can have serious consequences for their own financial situation (i.e. chain reactions).

On the other hand, debtors need to have the possibility for a fresh start under proportionate conditions.

¹ UEAPME subscribes to the European Commission’s Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

² With the exception of WKÖ.

General Remarks

The Commission's objective is to develop early debt restructuring to boost growth and protect jobs. In the EU, 200 000 companies go bankrupt annually. This results in the loss of 1.7 million jobs. The European Commission therefore intends to provide for an efficient insolvency framework throughout Europe, which fosters growth and contributes to the creation and preservation of jobs.

One of the most important objectives of the directive is a stronger rescue culture for viable businesses. Indeed, insolvency proceedings should always pursue the aim of rehabilitating a business and not to wind it up. Only if the company has no chance of survival, the last option should be the efficient and swift liquidation.

Another significant objective is the second chance for an honest entrepreneur. Should the entrepreneur fail in his business, he is entitled to a debt discharge in a reasonable time. At the same time it is guaranteed that the entrepreneur has a chance to continue his business or start a new business despite of the failure. Indeed, insolvency should not lead to social and economic stigmatisation.

UEAPME fully supports the objectives of the directive. The possibility for the debtor to return to solvency and operational viability is important. Furthermore, positive effects on employment, entrepreneurship and growth are welcome. Should the entrepreneur fail, it is both economically necessary and socially equitable to provide the person with a fresh start as soon as possible.

To achieve an adequate insolvency framework, UEAPME emphasises, that **preventive measures** that help viable companies to enter restructuring should be prioritised when developing a new insolvency framework. Indeed on the condition that a business is viable, it is of the utmost importance that **a business in difficulty should be detected early enough, and be offered adjusted assistance**. This assistance could be offered in the form of restructuring, but **the aim of preventive measures should focus on businesses in difficulties that can be helped without having to resort to restructuring measures**. (too expensive, too long,...) If the survival of the business can be achieved without restructuring measures, the impact on creditors and employees is kept to a minimum. In case of restructuring measures, a fair balance between the survival of the business on the one hand, and the rights of the creditors on the other should be guaranteed. However, the proposed restructuring may lead to a mayor interference with the creditors' rights, in particular their property rights and contractual freedom.

UEAPME considers the principles of early restructuring and de-stigmatisation of insolvencies as a good initiative. However, the proposal needs to be further **fine-tuned in order to reach the right balance** between the rights of creditors and the interests of the debtor.

Specific Remarks

Title II Preventive restructuring frameworks. Articles 4-18

- When introducing preventive restructuring frameworks, the Members States should ensure that creditors' rights are sufficiently protected, in particular as a stay of individual enforcement actions may be ordered.
- Article 6 deals with the so called "**stand still**" obligation. It has to be noted that it does not apply to the workers outstanding claims, salaries etc. For SMEs, which are in general quite labour-intensive, this is of course a charge that continues.

- Article 7: It is inappropriate that creditors should be forced by law to maintain existing contracts during the whole stay period without any possibility to modify the conditions of the contract. Proper safeguards for creditors should be put in place as they are otherwise running a disproportionate risk of losing their claims and going insolvent themselves.
- In addition, **more stringent access conditions** should be introduced for the restructuring procedure, as this procedure has an impact on the creditors' rights. In particular, important elements of the restructuring plan, e.g. the list of creditors and the measures the debtor wants to take should be provided to a judge before the stay is granted. It might be useful to provide the conditions for access to this procedure in the Proposal as well. The elements provided for in article 8, 1. a, b, c, and (part of) g, should be presented to a judge before the stay is granted.

Title III Second chance for entrepreneurs. Articles 19- 23

- As this Title deals with the second chance for entrepreneurs, companies and associations are rightly excluded from the provisions. According to the proposal the entrepreneur has to have the benefit of a discharge of debts after maximum three years from the start of the insolvency procedure or a repayment plan. UEAPME fully supports the idea of a second chance for entrepreneurs. We need a definite deadline on EU level. Otherwise there is a risk that an agreement cannot be reached on national deadlines either. As a result, the second chance would remain only an objective. A binding deadline is however only legitimate when it is limited to honest insolvencies and linked to specific requirements, in particular that the entrepreneur did not engage in any particularly risky business behaviour. Otherwise, it does not provide for any incentives for a sound and responsible business management. Article 20 should therefore be amended in the sense that the discharge is limited to honest entrepreneurs.
- There should be the **presumption of honesty**. However, if there is an indication of a particular risky business behaviour, the presumption of honesty should be reversed.

Title IIV Measures to increase the efficiency of restructuring, insolvency and second chance.

- The proposal for a directive aims to make restructuring and insolvency proceedings more efficient, faster, and simpler. UEAPME fully supports these objectives. Shorter procedures and lower costs benefit financially both creditors and debtors.
- **Use of electronic means of communication** –Article 28. UEAPME welcomes the obligation for Member States to foresee the possibility of handling certain actions electronically.
- The needs of various sizes of companies should be taken into account in the development of insolvency measures. Restructuring is possible for all sizes of companies, but in practice it is too burdensome and expensive to regain solvency of a small-scale business. The duration of the procedure is too long as well. It can take almost a year from application to the confirmation of the plan. Considering that new jobs have been created specifically in SMEs in recent years, restructuring should be a viable option for them as well. Moreover, the “Think Small First” principle should be taken into account.
- **UEAPME would like to recall the proposals already agreed on in the “Think Small First” A” Small Business Act” for Europe (COM (2008)394 final of 25th June 2008.):**

“The Member States should ensure that honest entrepreneurs who have faced bankruptcy quickly get a second chance.

[...]

To translate this principle into practice:

the Commission:

- *will continue to promote a second chance policy by facilitating exchanges of best practice between Member States*

the Member States are invited to:

- *promote a positive attitude in society towards giving entrepreneurs a fresh start, for example through public information campaigns*
- *aim to complete all legal procedures to wind up the business in the case of non-fraudulent bankruptcy **within a year**³*
- *ensure that re-starters are treated on an equal footing with new start-ups, including in support schemes.”*

These agreed actions have to be ensured by the Member States and as such formulated under Title IV of the Directive.

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3 ZDH does not agree