

A closer look at...

The adoption of the Directive on Preventive Restructuring Frameworks



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ON 6 JUNE 2019 THE EUROPEAN COUNCIL FORMALLY ADOPTED THE DIRECTIVE ON PREVENTIVE RESTRUCTURING FRAMEWORKS



On 6 June 2019 the European Council formally adopted the directive on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (directive on preventive restructuring frameworks).

The formal vote of the European Council marks the end of the legislative procedure after the Directive Proposal was adopted by the European Commission on 22 November 2016. The Directive will now be formally signed and will enter into force on the twentieth day following its publication in the Official Journal of the European Union. The Member States will then be required to transpose the Directive's provisions into their respective legal systems within two years. Member States that encounter particular difficulties in implementing this Directive will be able to benefit from an extension of a maximum of one year.

To sum up, the Directive requires each Member State to implement harmonised legislation on:

- Access for the debtors 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.
- Preventive restructuring

frameworks available for debtors to enable them to address their financial difficulties at an early stage, when it appears likely that their insolvency can be prevented and the viability of the business can be ensured.

- Procedures aimed at discharging the debts of insolvent entrepreneurs in order to give them a second chance in business.
- Measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

Members States must ensure that the preventive restructuring frameworks include the following characteristics:

Debtor-in-possession regime

Debtors accessing preventive restructuring procedures must remain totally, or at least partially, in control of their assets and the day-to-day operation of their business. The appointment by a judicial or administrative authority of a practitioner in the field of restructuring must 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. However, Member States must provide measures for the appointment of a practitioner in the field of restructuring and ways to assist the debtor and creditors in negotiating and drafting the plan, at least:

- where a general stay of individual enforcement

- actions is granted by a judicial or administrative authority;
- where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down; or
- where it is requested by the debtor or by a majority of the creditors.

Stay of individual enforcement actions

Debtors must benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan whose initial duration must be limited to 4 months and whose total duration, including extensions and renewals, must not exceed twelve months.

Class formation

Debtors have the right to submit restructuring plans for adoption by the affected parties. Member States must ensure that affected parties are treated in separate classes, which will reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. As a minimum, creditors of secured and unsecured claims must be treated in separate classes for the purposes of adopting a restructuring plan.

Cross-class cram-down mechanisms

The restructuring plan which is not approved by the required majority in every voting class may be forced upon dissenting voting classes by means of a cross-class cram-down mechanism. Member States are free to opt for the absolute priority rule or the

relative priority rule.

According to the absolute priority rule, Member States may provide that a dissenting class can be bound to a restructuring plan whether the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan. Derogations are however allowed where

- i. they are necessary to achieve the aims of the restructuring plan; and
- ii. the restructuring plan does not unfairly prejudice the rights or interests of any affected parties.

According to the relative priority rule, a dissenting class can be bound to a plan as long as dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class.

New financing and interim financing

Financing must be adequately protected against avoidance actions and civil, administrative or criminal liability in case of any subsequent insolvency of the debtor.

Duties of directors

Where there is a likelihood of insolvency, directors must have due regard, as a minimum, to:

- 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.

Individual and collective workers' rights under EU and national labour law must not be affected by the preventive restructuring framework.

Transposition

The Directive on preventive restructuring frameworks provides a high degree of flexibility, the Member States being able to adapt the new legislation to their existing frameworks. It is hoped that Member States will not sacrifice the rescue culture, a key driver behind the Directive, by choosing to implement only the minimum standards proposed.

Please consult the text of the Directive here:

<https://data.consilium.europa.eu/doc/document/PE-93-2018-INIT/en/pdf>



IT IS HOPED THAT MEMBER STATES WILL NOT SACRIFICE THE RESCUE CULTURE, A KEY DRIVER BEHIND THE DIRECTIVE, BY CHOOSING TO IMPLEMENT ONLY THE MINIMUM STANDARDS PROPOSED



We want you!

Call for expression of interests for the INSOL Europe 2020 Sorrento Congress

by the Co-chairs of INSOL Europe's 2020 Sorrento Congress, Giorgio Corno (Italy) & Simeon Gilchrist (United Kingdom)

The Technical Committee for the INSOL Europe 2020 Congress, which will be held in Sorrento from 1 to 4 October 2020, invites all INSOL Europe members to express their interest to participate as speakers at our flagship event.

All expressions of interest should be sent to the Secretary to the INSOL Europe Conference Technical Committees, Emmanuelle Inacio, at emmanuelleinacio@insol-europe.org, and should indicate (a) the speaker's nationality, affiliation and qualifications, (b) the topic on which the speaker would be interested in speaking, and (c) a short statement as to what unique or compelling perspective the speaker would like to bring to the congress.

The Technical Committee seeks in particular proposals from speakers who have not been speakers at the last two Annual Congresses.

Expressions of interest should be sent as early as possible, no later than **15 September 2019**. All expressions of interest will be considered by the Technical Committee, although due to the large number the Committee expects to receive, the Committee likely will not be able to accommodate all, or even most, requests.



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