EUROPEAN
COMMISSION

Brussels, 12.3.2014
C(2014) 1500 final

COMMISSION RECOMMENDATION

of 12.3.2014

on a new approach to business failure and insolvency

(Text with EEA relevance)

{SWD(2014) 61}
{SWD(2014) 62}

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

(1) The objective of this Recommendation is to ensure that viable enterprises in financial difficulties, wherever they are located in the Union, have access to national insolvency frameworks which enable them to restructure at an early stage with a view to preventing their insolvency, and therefore maximise the total value to creditors, employees, owners and the economy as a whole. The Recommendation also aims at giving honest bankrupt entrepreneurs a second chance across the Union.

(2) National insolvency rules vary greatly in respect of the range of the procedures available to debtors facing financial difficulties in order to restructure their business. Some Member States have a limited range of procedures meaning that businesses are only able to restructure at a relatively late stage, in the context of formal insolvency proceedings. In other Member States, restructuring is possible at an earlier stage but the procedures available are not as effective as they could be or involve varying degrees of formality, in particular in relation to the use of out-of-court processes.

(3) Similarly, national rules giving entrepreneurs a second chance, in particular by granting them discharge from the debts they have incurred in the course of their business vary as regards the length of the discharge period and the conditions under which discharge can be granted.

(4) The discrepancies between the national restructuring frameworks, and between the national rules giving honest entrepreneurs a second chance lead to increased costs and uncertainty in assessing the risks of investing in another Member State, fragment conditions for access to credit and result in different recovery rates for creditors. They make the design and adoption of consistent restructuring plans for cross-border groups of companies more difficult. More generally, the discrepancies may serve as disincentives for businesses wishing to establish themselves in different Member States.

(5) Council Regulation (EC) No 1346/2000[1] only deals with issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings. The Commission proposal for the amendment of that Regulation[2] should extend the scope of the Regulation to preventive procedures which

[1] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30.6.2000, p.1).
[2] COM(2012) 744 final.

promote the rescue of an economically viable debtor and give a second chance to entrepreneurs. However, the proposed amendment does not tackle the discrepancies between those procedures in national law.

(6) On 15 November 2011, the European Parliament adopted a Resolution[3] on insolvency proceedings. It included recommendations for harmonising specific aspects of national insolvency law, including the conditions for the establishment, effects and content of restructuring plans.

(7) In the Commission Communication on The Single Market Act II[4] of 3 October 2012, the Commission undertook as a key action to modernise the Union insolvency rules in order to facilitate the survival of businesses and present a second chance to entrepreneurs. To this end, the Commission announced that it would analyse how the efficiency of national insolvency laws could be further improved with a view to creating a level playing field for companies, entrepreneurs and private persons within the internal market.

(8) The Commission Communication on A New Approach to Business Failure and Insolvency of 12 December 2012[5] highlights certain areas where differences between domestic insolvency laws may hamper the establishment of an efficient internal market. It noted that the creation of a level playing field in these areas would lead to greater confidence in the systems of other Member States for companies, entrepreneurs and private individuals, and improve access to credit and encourage investment.

(9) On 9 January 2013 the Commission adopted the Entrepreneurship 2020 Action Plan[6] where the Member States are invited, among other things, to reduce when possible, the discharge time and debt settlement for honest entrepreneurs after bankruptcy to a maximum of three years by 2013 and to offer support services to businesses for early restructuring, advice to prevent bankruptcies and support for small and medium enterprises to restructure and re-launch.

(10) Several Member States are currently undertaking reviews of their national insolvency laws with a view to improving the corporate rescue framework and the second chance for entrepreneurs. Therefore it is opportune to encourage coherence in these and any future such national initiatives in order to strengthen the functioning of the internal market.

(11) It is necessary to encourage greater coherence between the national insolvency frameworks in order to reduce divergences and inefficiencies which hamper the early restructuring of viable companies in financial difficulties and the possibility of a second chance for honest entrepreneurs, and thereby to lower the cost of restructuring for both debtors and creditors. Greater coherence and increased efficiency in those national insolvency rules would maximise the returns to all types of creditors and investors and encourage cross-border investment. Greater coherence would also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union.

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[3] European Parliament Resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law, P7_TA (2011) 0484.

[4] COM(2012) 573 final.

[5] COM(2012) 742 final.

[6] COM(2012) 795 final.

(12) Furthermore, removing the barriers to effective restructuring of viable companies in financial difficulties contributes to saving jobs and also benefits the wider economy. Making it easier for entrepreneurs to have a second chance would also lead to higher self-employment rates in the Member States. Moreover, efficient insolvency frameworks would provide a better assessment of the risks involved in lending and borrowing decisions and smooth the adjustment for over-indebted firms, minimizing the economic and social costs involved in their deleveraging process.

(13) Small and medium sized enterprises would benefit from a more coherent approach at Union level, since they do not have the necessary resources to cope with high restructuring costs and take advantage of the more efficient restructuring procedures in some Member States.

(14) Tax authorities also have an interest in an efficient restructuring framework for viable enterprises. In implementing this Recommendation, Member States should be able to take appropriate measures to ensure the collection and recovery of tax revenues respecting the general principles of tax fairness and to take efficient measures in cases of fraud, evasion or abuse.

(15) It is appropriate to exclude from the scope of this Recommendation insurance undertakings, credit institutions, investment firms and collective investment undertakings, central counter parties, central securities depositories and other financial institutions which are subject to special recovery and resolution frameworks where national supervisory authorities have wide-ranging powers of intervention. Although consumer over-indebtedness and consumer bankruptcy are also not covered by the scope of this Recommendation, Member States are invited to explore the possibility of applying these recommendations also to consumers, since some of the principles followed in this Recommendation may also be relevant for them.

(16) A restructuring framework should enable debtors to address their financial difficulties at an early stage, when their insolvency could be prevented and the continuation of their business assured. However, in order to avoid any potential risks of the procedure being misused, the financial difficulties of the debtor must be likely to lead to its insolvency and the restructuring plan must be capable of preventing the insolvency of the debtor and ensuring the viability of the business.

(17) To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures limiting court formalities to where they are necessary and proportionate in order to safeguard the interests of creditors and other interested parties likely to be affected. For example, to avoid unnecessary costs and reflect the early nature of the procedure, debtors should in principle be left in control of their assets and the appointment of a mediator or a supervisor should not be compulsory, but made on a case-by-case basis.

(18) A debtor should be able to request the court for a stay of individual enforcement actions and suspension of insolvency proceedings whose opening has been requested by creditors where such actions may adversely affect negotiations and hamper the prospects of a restructuring of the debtor's business. However, in order to provide for a fair balance between the rights of the debtor and of creditors, and taking into account the experience of recent reforms in the Member States, the stay should be initially granted for a period of no more than four months.

(19) Court confirmation of a restructuring plan is necessary to ensure that the reduction of the rights of creditors is proportionate to the benefits of the restructuring and that

creditors have access to an effective remedy, in full compliance with the freedom to conduct a business and the right to property as enshrined in the Charter of Fundamental Rights of the European Union. The court should therefore reject a plan where it is likely that the attempted restructuring reduces the rights of dissenting creditors below what they could reasonably expect to receive in the absence of a restructuring of the debtor's business.

(20) The effects of bankruptcy, in particular the social stigma, legal consequences and the on-going inability to pay off debts constitute important disincentives for entrepreneurs seeking to set up a business or have a second chance, even if evidence shows that entrepreneurs who have gone bankrupt have more chance to be successful the second time. Steps should therefore be taken to reduce the negative effects of bankruptcy on entrepreneurs, by making provisions for a full discharge of debts after a maximum period of time,

HAS ADOPTED THIS RECOMMENDATION:

I. Objective and subject matter

1. The objective of this Recommendation is to encourage Member States to put in place a framework that enables the efficient restructuring of viable enterprises in financial difficulty and give honest entrepreneurs a second chance, thereby promoting entrepreneurship, investment and employment and contributing to reducing the obstacles to the smooth functioning of the internal market.

2. By reducing those obstacles, the Recommendation aims in particular to:

   (a) lower the costs of assessing the risks of investing in another Member State,

   (b) increase recovery rates for creditors, and

   (c) remove the difficulties in restructuring cross-border groups of companies.

3. This Recommendation provides for minimum standards on:

   (a) preventive restructuring frameworks; and

   (b) discharge of debts of bankrupt entrepreneurs.

4. When implementing this Recommendation, Member States should be able to take appropriate and efficient measures to ensure the enforcement of taxes, in particular in cases of fraud, evasion or abuse.

II. Definitions

5. For the purposes of this Recommendation:

   (a) 'debtor' means any natural or legal person in financial difficulties when there is a likelihood of insolvency;

   (b) 'restructuring' means changing the composition, conditions, or structure of assets and liabilities of debtors, or a combination of those elements, with the objective of enabling the continuation, in whole or in part, of the debtors' activity;

(c) 'stay of individual enforcement actions' means a court ordered suspension of the right to enforce a claim by a creditor against a debtor;

(d) 'courts' includes any other body with competence in matters relating to preventive procedures to which the Member States have entrusted the role of the courts, and whose decisions may be subject to an appeal or review by a judicial authority.

III. Preventive restructuring framework

A. AVAILABILITY OF A PREVENTIVE RESTRUCTURING FRAMEWORK

6. Debtors should have access to a framework which allows them to restructure their business with the objective of preventing insolvency. The framework should contain the following elements:

(a) the debtor should be able to restructure at an early stage, as soon as it is apparent that there is a likelihood of insolvency;

(b) the debtor should keep control over the day-to-day operation of its business;

(c) the debtor should be able to request a temporary stay of individual enforcement actions;

(d) a restructuring plan adopted by the majority prescribed by national law should be binding on all creditors provided that the plan is confirmed by a court;

(e) new financing which is necessary for the implementation of a restructuring plan should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors.

7. The restructuring procedure should not be lengthy and costly and it should be flexible so that more steps can be taken out-of-court. The involvement of the court should be limited to where it is necessary and proportionate with a view to safeguarding the rights of creditors and other interested parties affected by the restructuring plan.

B. FACILITATING NEGOTIATIONS ON RESTRUCTURING PLANS

Appointment of a mediator or a supervisor

8. Debtors should be able to enter a process for restructuring their business without the need to formally open court proceedings.

9. The appointment of a mediator or a supervisor by the court should not be compulsory, but rather be made on a case by case basis where it considers such appointment necessary:

(a) in the case of a mediator, in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan;

(b) in the case of a supervisor, in order to oversee the activity of the debtor and creditors and take the necessary measures to safeguard the legitimate interests of one or more creditors or another interested party.

Stay of individual enforcement actions and suspension of insolvency proceedings

10. The debtors should have the right to request a court to grant a temporary stay of individual enforcement actions (hereafter "stay") lodged by creditors, including secured and preferential creditors, who may otherwise hamper the prospects of a restructuring plan. The stay should not interfere with the performance of on-going contracts.

11. In Member States which make the granting of the stay subject to certain conditions, debtors should be able to be granted a stay in all circumstances where:

(a) creditors representing a significant amount of the claims likely to be affected by the restructuring plan support the negotiations on the adoption of a restructuring plan; and

(b) a restructuring plan has a reasonable prospect of being implemented and preventing the insolvency of the debtor.

12. Where provided for in the laws of the Member States, the obligation of the debtor to file for insolvency, as well as applications by creditors requesting the opening of insolvency proceedings against the debtor lodged after the stay has been granted should also be suspended for the duration of the stay.

13. The duration of the stay should strike a fair balance between the interests of the debtor and of creditors, and in particular secured creditors. The duration of the stay should therefore be determined on the basis of the complexity of the anticipated restructuring, and should not exceed four months. Member States may provide that the period can be renewed upon evidence of progress in the negotiations on a restructuring plan. The total duration of the stay should not exceed 12 months.

14. When the stay is no longer necessary with a view to facilitating the adoption of a restructuring plan, the stay should be lifted.

C. RESTRUCTURING PLANS

Contents of restructuring plans

15. Member States should ensure that courts can confirm plans with expediency and in principle in written procedure. They should lay down clear and specific provisions on the content of restructuring plans. Restructuring plans should contain a detailed description of the following elements:

(a) clear and complete identification of the creditors who would be affected by the plan;

(b) the effects of the proposed restructuring on individual debts or categories of debts;

(c) the position taken by affected creditors on the restructuring plan;

(d) where applicable, the conditions for new financing; and

(e) the potential of the plan to prevent the insolvency of the debtor and ensure the viability of the business.

Adoption of restructuring plans by creditors

16. To increase the prospects of restructuring and therefore the number of viable businesses being rescued, it should be possible to adopt a restructuring plan by the affected creditors, including secured and unsecured creditors.

17. Creditors with different interests should be treated in separate classes which reflect those interests. As a minimum, there should be separate classes for secured and unsecured creditors.

18. A restructuring plan should be adopted by the majority in the amount of creditors' claims in each class, as prescribed by national law. Where there are more than two classes of creditors, Member States should be able to maintain or introduce provisions which empower courts to confirm restructuring plans which are supported by a majority of those classes of creditors, taking into account in particular the weight of the claims of the respective classes of creditors.

19. Creditors should enjoy a level playing field irrespective of where they are located. Therefore, where the laws of the Member States require a formal voting process, creditors should in principle be allowed to vote by distance means of communication such as registered letter or secure electronic technologies.

20. To make the adoption of restructuring plans more effective, Member States should also ensure that it is possible for restructuring plans to be adopted by certain creditors or certain types or classes of creditors only, provided that other creditors are not affected.

Court confirmation of the restructuring plan

21. To ensure that the rights of creditors are not unduly affected by a restructuring plan and in the interest of legal certainty, restructuring plans which affect the interests of dissenting creditors or make provision for new financing should be confirmed by a court in order to become binding.

22. The conditions under which a restructuring plan can be confirmed by a court should be clearly specified in the laws of the Member States and should include at least the following:

(a) the restructuring plan has been adopted in conditions which ensure the protection of the legitimate interests of creditors;

(b) the restructuring plan has been notified to all creditors likely to be affected by it;

(c) the restructuring plan does not reduce the rights of dissenting creditors below what they would reasonably be expected to receive in the absence of the restructuring, if the debtor's business was liquidated or sold as a going concern, as the case may be;

(d) any new financing foreseen in the restructuring plan is necessary to implement the plan and does not unfairly prejudice the interests of dissenting creditors.

23. Member States should ensure that courts can reject restructuring plans which clearly do not have any prospect of preventing the insolvency of the debtor and ensuring the

viability of the business, for example because new financing needed to continue its activity is not foreseen.

Rights of creditors

24. All creditors likely to be affected by the restructuring plan should be notified of the content of the plan and given the right to formulate objections and to appeal against the restructuring plan. Nevertheless, in the interest of the creditors supporting the plan, the appeal should not in principle suspend the implementation of the restructuring plan.

Effects of a restructuring plan

25. The restructuring plans which are adopted by the unanimity of affected creditors should be binding on all those affected creditors.

26. The restructuring plans which are confirmed by a court should be binding upon each creditor affected by and identified in the plan.

D. PROTECTION FOR NEW FINANCING

27. New financing, including new loans, selling of certain assets by the debtor and debt-equity swaps, agreed upon in the restructuring plan and confirmed by a court should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors.

28. Providers of new financing as part of a restructuring plan which is confirmed by a court should be exempted from civil and criminal liability relating to the restructuring process.

29. Exceptions to the rules on protection of new financing should be made where fraud is subsequently established in relation to the new financing.

IV. Second chance for entrepreneurs

Discharge periods

30. The negative effects of bankruptcy on entrepreneurs should be limited in order to give them a second chance. Entrepreneurs should be fully discharged of their debts which were subject of a bankruptcy after no later than three years starting from:

    (a) in the case of a procedure ending with the liquidation of the debtor's assets, the date on which the court decided on the application to open bankruptcy proceedings;

    (b) in the case of a procedure which includes a repayment plan, the date on which implementation of the repayment plan started.

31. On expiry of the discharge period, entrepreneurs should be discharged of their debts without the need in principle to re-apply to a court.

32. A full discharge after a short period of time is not appropriate in all circumstances. Member States should therefore be able to maintain or introduce more stringent provisions which are necessary to:

(a) discourage entrepreneurs who have acted dishonestly or in bad faith, either before or after the bankruptcy proceedings were opened;

(b) discourage entrepreneurs who do not adhere to a repayment plan or to any other legal obligation aimed at safeguarding the interests of creditors; or

(c) safeguard the livelihood of the entrepreneur and his family by allowing the entrepreneur to keep certain assets.

33. Member States may exclude specific categories of debt, such as those rising out of tortious liability, from the rule of full discharge.

V. Supervision and reporting

34. The Member States are invited to implement the principles set out in this Recommendation by [ADD date 12 months from the publication of the Recommendation].

35. The Member States are invited to collect reliable annual statistics on the number of preventive restructuring procedures opened, the length of procedures and information about the size of the debtors involved and the outcome of the procedures opened, and to communicate that information to the Commission on an annual basis and for the first time by [ADD date: 12 months from the publication of the Recommendation].

36. The Commission will assess the implementation of this Recommendation in the Member States by [ADD date: 18 months from the publication of the Recommendation]. In this context, the Commission will evaluate its impact on rescuing companies in financial difficulties and giving honest entrepreneurs a second chance, its interplay with other insolvency procedures in other areas such as discharge periods for natural persons not exercising a trade, business, craft or professional activity, its impact on the functioning of the internal market and on small and medium enterprises and the competitiveness of the economy of the Union. The Commission will assess also whether additional measures to consolidate and strengthen the approach reflected in this Recommendation should be proposed.

Done at Brussels, 12.3.2014

For the Commission
Viviane Reding
Vice-President of the Commission