



EUROPEAN COMMISSION

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C(2017) 3783 final*

*Ms Malu DREYER
President of the Bundesrat
Leipziger Straße 3 - 4
D – 10117 BERLIN*

Dear President,

The Commission would like to thank the Bundesrat for its Opinion 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 {COM(2016) 723 final}.

The Commission's proposal falls under two Commission priority policies, the first of which is the Capital Markets Union Action Plan¹ which stated that the Commission would table a legislative initiative on business insolvency addressing the most important barriers to the free flow of capital and building on national regimes that work well. The second priority policy is the Single Market Strategy², which mentions that the Commission would support honest entrepreneurs and propose legislation to ensure that Member States provide a regulatory environment that is able to accommodate failure without dissuading entrepreneurs from trying new ideas.

This policy has also been supported by the Council of Ministers. The Competitiveness Council Conclusions of 30 May 2011 called on Member States to reduce the discharge period and debt settlement for honest entrepreneurs after bankruptcy to a maximum of three years by 2013³.

The Economic and Financial Affairs Council Conclusions of June 2016 on a roadmap to complete the Banking Union underlined the importance of the work carried out by the Commission on a legislative proposal for minimum harmonisation in the field of insolvency law in the context of the Capital Markets Union, noting that this may also support efforts to reduce future levels of non-performing loans⁴.

¹ COM(2015) 468 final.

² COM(2015) 550 final.

³ Council Conclusions on the review of the 'Small Business Act', for Europe, adopted on 30 May 2011, 10975/2011, available at

<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010975%202011%20INIT>.

⁴ Council Conclusions of 17 June 2016

http://www.consilium.europa.eu/pressreleasespdf/2016/6/47244642837_en.pdf.

The Commission welcomes the fact that the Bundesrat shares its objectives to stimulate economic growth and jobs by enabling a timely restructuring of viable companies in financial difficulties.

The Commission considers that divergent insolvency regimes in the Member States raise obstacles to the functioning of the internal market and that more coherence would improve legal certainty for foreign investors and would therefore make the European Union a more attractive place to do business. Harmonised rules would also make it easier to restructure cross-border groups of companies in financial difficulties. Finally, common rules would mitigate the domino effect that the insolvency of one enterprise has in the supply chain, a concern which you also express in your Opinion.

In consultation with the Member States, the Commission was made aware of the need to allow Member States sufficient flexibility to adapt the principles and rules of the proposal to national economic, legal and cultural specificities. As a result, the proposal lays down only minimum principles and rules which are essential for an efficient insolvency regime, but allows Member States to adjust the balance between creditors' and debtor's interests according to such local specificities.

As regards honest entrepreneurs, limiting discharge periods and improving the second chance regime in all Member States would reduce the incentives for relocating to other jurisdictions, remove the stigma of failure and give entrepreneurs a chance to re-enter the productive economy. The Commission considers that the proposal is effective in enabling honest entrepreneurs to have a fresh start but at the same time leaves Member States sufficient flexibility, for example to make the discharge conditional on a partial repayment of debt under certain conditions or to exclude specific categories of debt from the discharge.

When drafting the proposal, the Commission was very much aware of the need to build on best practices from those Member States where the restructuring frameworks produce good results. Although Germany has a well-functioning insolvency regime, it could still be improved in the sense of encouraging more companies in financial difficulties to restructure at an early stage rather than channel those companies towards liquidation.

As to the Bundesrat's more technical comments, the Commission is pleased to provide more detailed information in the attached Annex.

The Commission hopes that these comments address the concerns raised by the Bundesrat and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Věra Jourová
Member of the Commission*

ANNEX

The Commission has carefully considered the comments made by the Bundesrat in its Opinion and is pleased to offer the following clarifications.

a. Legal basis and cross-border impact

The Commission has found⁵ that the divergence of insolvency laws has a significant cross-border impact:

- there are about 200.000 insolvencies in the European Union each year, 25% of which are cross-border insolvencies;*
- insolvencies lead to about 1.7 million jobs lost yearly in the European Union;*
- it is impossible to have a restructuring plan for a group of companies with establishments in more than two Member States;*
- one in five insolvencies is triggered by the insolvency of another enterprise in the supply chain;*
- recovery rates vary greatly among the Member States;*
- recovery rates are lower in liquidation than in restructuring by about 25 %;*
- in 10 Member States insolvency procedures last over 2 years, sometimes up to 4 years; and*
- in 21 Member States the most likely outcome for enterprise in financial difficulties is liquidation, while in 7 Member States restructuring is the main outcome.*

b. Risk that the proposal promotes race to the bottom and bankruptcy tourism

The proposal would ensure more coherence and convergence between the Member States' insolvency laws. As a result, the directive would ensure that the need for companies to 'shop' for more restructuring-friendly regimes, or for entrepreneurs to relocate to Member States with lower discharge periods would be significantly reduced in future compared to the current situation.

⁵ Commission Staff Working Document, Impact Assessment accompanying the document Proposal for a directive of the European Parliament and 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, SWD(2016) 357 final.

c. Entry threshold

The proposal aims at striking a fair balance between the interests of debtors, their employees, creditors and society as a whole. At the same time, the proposal allows Member States sufficient flexibility to adjust that balance to national economic, cultural and social specificities.

Regarding the conditions to be fulfilled in order to use a preventive restructuring procedure, the proposal envisages that:

- only debtors in financial difficulty facing a likelihood of insolvency should be admitted in such procedures;*
- the stay – which is an essential element of the procedure - should be granted by a court only if and to the extent such a stay is necessary to support the negotiations on a restructuring plan.*

The proposal is not incompatible with certain entry conditions. However, the situation in most Member States today, including in Germany, is that most debtors are channelled towards liquidation procedures rather than early restructuring. A too heavy entry test which would imply also expert, third party opinions would add costs and delays and thus discourage enterprises, in particular small and medium-sized enterprises, from accessing such procedures at an early stage.

d. Length of the stay of enforcement

The stay of enforcement has potentially serious consequences on creditors' rights and should therefore be carefully regulated. It should be of a limited duration, short and, if at all, extendable only under strict conditions. However, available data shows that successful restructuring procedures can be found both in Member States providing for a short stay period as well as in those allowing for a longer stay period, provided that creditors are adequately protected. Therefore, the proposal allows Member States a degree of flexibility in that:

- the initial duration of the stay should be short, and in any case no longer than four months;*
- Member States could – but would certainly not be obliged to - provide for the initial period of the stay to be extended, under certain conditions;*
- there should be in any event no further extension after a maximum period of 12 months, which may be needed in some Member States to support complex restructuring negotiations of rather large companies.*

e. Data collection

High quality, comparable data is indispensable to a proper evaluation of how efficient the Directive would be once it is implemented and applied. Such data could also be used by the Member States themselves to put in place own initiatives in areas not covered by the Directive or in areas going beyond the minimum standards laid down by the Directive. For example, data on consumer insolvencies could lead Member States to decide to extend the discharge regime applicable to entrepreneurs also to consumers.

Putting in place a data collection system need not be too costly if procedures are digitalised. Such digitalisation has already started with the establishment of national insolvency registers in all Member States.