



Brussels,
Ares(2016)

Opinion

Title

**DG JUST – Impact Assessment on the Proposal for a
Directive on Restructuring and Second Chance**

(resubmitted version of 13 October 2016)

(A) Context

A 2012 Communication highlighted the costs of business failure and insolvency for growth in the EU. A subsequent Insolvency Regulation resolved conflicts of jurisdiction and laws in cross-border insolvency proceedings. In 2014, the Commission adopted a Recommendation on restructuring and second chance. This Recommendation invited Member States to put in place: (i) effective pre-insolvency procedures with the aim of helping viable debtors to restructure and thus avoid insolvency and (ii) second chance provisions for entrepreneurs.

A 2015 evaluation found that the recommendation had not had the desired impact. It attributed this to partial and heterogeneous implementation in several Member States. In its 2015 Capital Markets Union Action Plan, the Commission signalled its intention to propose a legislative initiative that would include early restructuring and second chance. This initiative would draw on the experience of the 2014 Recommendation and would build on national regimes that work well. A 2015 Banking Union Communication also expressed a need for greater convergence in insolvency law. It signalled the intention to encourage timely restructuring of borrowers in financial distress. It connected this to a problem of non-performing loans in some Member States. Under the Single Market Strategy, the Commission would also support honest entrepreneurs, and would propose legislation to ensure a regulatory environment that can accommodate failure while not dissuading entrepreneurs from trying new ideas again.

(B) Overall opinion: POSITIVE WITH RESERVATIONS

The Board acknowledges improvements to the report on the context, the internal market motivation and the presentation of differentiated stakeholder views for the analysis of the options.

The Board gives a positive opinion, on the understanding that the report shall be adjusted in order to integrate the Board's recommendations with respect to the following key aspects:

1) The analysis of impacts should integrate a discussion of downside risks. The report should explain the extent to which the options can or cannot solve the identified problems. It should further clarify likely employment impacts. It should further address workers' rights in a (early) restructuring/insolvency context.

2) Stakeholder views have been differentiated and presented in the discussion of options. The IA should extend this practice to the remaining sections of the IA. Since the responses to the public consultation are not a representative sample of the stakeholder population, the IA should specifically avoid lumping all responses together and reporting percentages of the total that responded in some way. There appears to be a wide spectrum of opinions within stakeholder subgroups on the feasibility and effectiveness of the options. The IA should specify and analyse this further and draw relevant implications.

3) The reasons for taking EU-level action now remain unclear. The report should more explicitly integrate the outcome of the capital market union consultation in the single-market argumentation. It should also clarify what divergences in Member States' laws and legal practice are likely to remain after the envisaged harmonisation and to what extent these may cause problems for the internal single market.

4) The report should clarify why it addresses the second chance and discharge of consumers, as the report rightly mentions the different rationale when compared with entrepreneurs (point 2.2 vs 5.7.2). It should confirm that the recommended option is to not take action on this point.

The lead DG shall ensure that the report is adjusted accordingly prior to launching the interservice consultation.

(C) Further recommendations for improvements

1) **Implementation risks:** While the report considers specific risks relating to particular aspects of the restructuring process, it should identify and assess more general implementation risks, for instance vis-a-vis possible deficient court or legal systems. Given the dependency between the proposed EU scheme and national insolvency proceedings, it should be considered whether there is a need to prepare an implementation plan in accordance with the Better Regulation tool #32.

2) **Impact analysis:** While the Board takes note that most impacts are difficult to quantify, an additional effort should be made to further elaborate on the likely (additional) costs of insolvency practitioners (e.g. monitoring, minimum standards, training, fees, etc.).

Moreover, the IA should revise the analysis of employment impacts to provide a consistent line across different parts of the report (e.g. the executive summary and the main impact analysis section). For instance, the report provides different job estimates in different sections – e.g. potential annual saving of 1.7 million jobs (p.95), impact of 3 million jobs (p.95), estimate of 600.000 to 1.2 million jobs saved of preferred option (p.92), employment impact (at Member State level) (chart on p.95). These various figures should be brought together and be better qualified in the report (e.g. whether estimates concern jobs or self-employment, net or gross figures, time horizon, etc.).

In elaborating on employment and social impacts, the main report should also address workers' rights in a restructuring context as well as in the cross border context in which information and consultation of workers is required (European Work Council directive). The report should elaborate on whether the initiative takes those rights into account without prejudice to EU labour law Directives. The list of rights in annex 3 should be completed.

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report.

(D) Procedure and presentation

All conclusions and estimated figures that appear in the executive summary should also feature in the body of the main report. Recheck the layout and numbering of sections, etc. in the main report.

(E) RSB scrutiny process

Reference number	2016/JUST/025
External expertise used	No
Date of RSB meeting	28 September 2016