

EUROPEAN COMMISSION Regulatory Scrutiny Board

Brussels, D(2016)

Opinion

Title

DG JUST – Insolvency II - Proposal for a Directive on Restructuring and Second Chance

(draft version of 1 September 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: NEGATIVE

The Board gives a negative opinion because the report contains shortcomings that need to be addressed, particularly with respect to the following issues:

(1) The policy context should better justify the need to act now, only two years after the related Recommendation.

(2) The report should better justify the initiative's internal market aspects and minimum harmonisation approach. It should elaborate on the cross border dimension of restructuring. It should develop the justification for the specific

^{*}Note that this opinion concerns a draft impact assessment report which may differ from the one adopted

Commission européenne, B-1049 Bruxelles - Belgium. Office: BERL 6/29. E-mail: Regulatory-Scrutiny-Board@ec.europa.eu

features put forward for harmonisation. It should also clarify the internal market aspects of 'second chance.'

(3) Stakeholder views should feature throughout the assessment of the various policy options. Clearly present differences in views across the stakeholder groups.

(4) Clarify the overall impacts of the package, notably with regard to fundamental rights and social aspects. Identify potential downside risks, such as moral hazard and limited capacity of the courts to implement new provisions.

The lead DG shall ensure that the report is revised accordingly and resubmitted to the Board, which will issue a new opinion on the revised draft.

(C) Main recommendations for improvements

(1) **Policy context.** The policy context should better justify the need to act now. Member States have had relatively little time to implement the 2014 Recommendation. What is the evidence that suitable implementation will not take place over time without further EU action?

(2) Internal market/cross-border aspects. The report should provide more detail on the cross-border dimensions of restructuring cases. Notably, it should justify the internal market aspects of the various provisions of the initiative. For instance, it should explain why the proposal covers all potential cases (including purely domestic) rather than only those with a direct debtor/creditor cross-border dimension. The report should also explain how harmonizing specific features would achieve stated objectives. What will be the gains from harmonizing early restructuring, stay, debtors' business continuation, safeguarding of minority interests, possibility of new financing, costs and length of restructuring procedures and discharge? In line with the proportionality principle, the report needs better address the issue raised by stakeholders on 'principle' versus 'detailed' regulation. Clarify what the proposed approach implies for Member States and their degree of flexibility in implementation.

Explain the internal market dimension of the second chance provision.

The 'discharge for consumers' option is presented as a recommendation to Member States - how would this be more effective than the 2014 recommendation in that respect?

(3) Stakeholder views and assessment of options. Stakeholder views should feature more prominently throughout the report. This would strengthen the evidence base and enhance policymaker assessment of options. When doing so, it is important to present differences across stakeholder (sub-) groups.

The report should justify the inclusion of a soft law instrument in the preferred option against the background of the stated ineffectiveness of the 2014 Recommendation.

(4) Overall impacts of the package. The report should strengthen the section on the impacts of the different sub-option beyond the currently descriptive presentation. It should discuss risks involved in the implementation of the proposal. The package of preferred options represents an add-on to national insolvency proceedings. It entails elements that will have to work in close sync with existing national systems. Given this dependence and the diversity of legal systems across the union, harmonization would seem to entail risks as well as benefits. The report ignores administrative costs such as the provisions of the preferred option requiring specialised judges.

The report should also consider risks related to moral hazard problems occurring in the restructuring process. It needs to explain better how this relates to the problem of non-performing loans, and it should estimate the extent to which the proposal will have an

impact on these. Given that restructuring may involve situations with lay-offs, outsourcing, etc., the impact assessment also needs to cover social impacts of the preferred options better. It should spelling out any links to the social dialogue and workers' rights (including on information and consultation). The link with - and impact on - fundamental rights should also be clarified.

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

(D) Procedure and presentation

The report should clarify concepts and definitions of 'discharge' and 'recovery rates.' The mandatory annex (2) on stakeholder identification should be added.

The executive summary should be revised to take account of the views of the Board.

(E) RSB scrutiny process	
Reference number	2016/JUST/016
External expertise used	No
Date of RSB meeting	28 September 2016