Amendments proposed by VID for 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 and amending Directive 2012/30/EU (COM (2016) 723 final)

Preface:

The Association of German Insolvency Administrators (VID) has already presented a comprehensive opinion[1] on the aforementioned proposal. Complementing this opinion, VID hereinafter presents proposals for amendments to the directive. These proposals do not merely aim to repeat critical statements[2] about central points, which have been published by a widespread array of business associations and trade unions. The proposals also try to substantially improve the directive by putting forward reasonable and practical modifications.

One central point of criticism has been the directives proposed scope of application which has not been restricted to financial creditors. This restriction would have brought a facilitation and simplification concerning the national implementation of the proposed procedures and would therefore be highly desirable.

The amendments presented hereinafter nevertheless assume that such a restriction will not be made going forward.

To facilitate reading they have been marked red.

[1] See Stellungnahme v. 1.3.2017: http://www.vid.de/stellungnahmen/stellungnahme-des-vid-zum-vorschlag-fuer-eine- richtlinie-des-europaeischen-parlaments-und-des-rates-ueber-praeventive-restrukturierungsrahmen-die-zweite-chance-und-massnahmen-zur-steigerung-der-effiz/.

[2] See also *Bork*, ZIP 2017, 1441 ff.; *Kayser*, ZIP 2017, 1393 ff; *Hölzle*, ZIP 2017, 1307 ff; *Thole*, ZIP 2017, 101 ff.; Präventive Restrukturierung – Autobahn zur Sanierung oder Sackgasse? – Bericht zu einem Planspiel mit Akteuren aus Justiz, Unternehmen, Beratungs- und Verwaltungspraxis – durchgeführt durch das Institut für Insolvenz- und Sanierungsrecht (ISR) der Juristischen Fakultät der Heinrich-Heine-Universität Düsseldorf, ZInsO 2017, 1202 ff.; *Blankenburg*, ZInsO 2017, 241 ff.; *Jacobi*, ZInsO 2017, 1 ff.; *Berger*, ZInsO 2016, 2413 ff. sowie die Beiträge von *Cranshaw, Flöther, Fritz, Geiwitz/Heidenfelder et al.* in NZI Beilage 1/2017 zu Heft 5/2017.

Article 2 – Definitions

For the purposes of this Directive, the following definitions shall apply:

(1) 'insolvency procedure' means a collective insolvency procedure which entails a partial or total divestment of the debtor and the appointment of a liquidator;

(2) 'restructuring' means changing the composition, conditions, or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, including share capital, or a combination of those elements, including sales of assets or parts of the business, with the objective of enabling the enterprise to continue in whole or in part;

(2a) "financial difficulties leading to a likelihood of insolvency" means a debt load which the debtor can no longer fully service despite of his business being operationally sound.

(3) 'affected parties' means creditors or classes of creditors ~~and, where applicable under national law, equity holders~~ whose claims or interests are affected under a restructuring plan;

Explanation (see also VID Statement of 1 march 2017 – pages 12 et sqq.):

The proposed amendment of Art.12 through a newly added Nr. 2a aims at defining and restricting the legal concept given in Art. 4 subsec. 1 in its scope of application. This indefinite and very broadly formulated scope of application has given rise to some heated discussions in Germany. The restriction proposed hereinabove establishes a necessary distance of time in regard to any later occurrence of insolvency. According to German law an enterprise has reached the state of overindebtedness when its continuation has become mostly unlikely regarding the sum and maturity of its liabilities (§ 19 subsec. 2 sentence 1 InsO). Increasing this Likelihood is the single most important objective of the proposed restructuring procedure. Any enterprise working on a unsound operational basis will be endangered by insolvency regardless of any restructuring as laid out in Art. 2 unless this procedure doesn't address its operational weakness trough measures as listed exemplary in §§ 103 et sqq. InsO. It should therefore be prevented from using this procedure.

Removing shareholders from Art. 2nds scope of application shall prevent a situation which sees some member states allowing restrictions of equity rights (i.e. through a debt equity swap) whereas other member states (e.g. Germany) are restrained by constitutional reasons to allow any restriction of such rights against the will of their holders (e.g. by way of a cross class cram down) as long as there is no judicial confirmation of these rights being devaluated through an insolvency.

Article 4 – Availability of preventive restructuring frameworks

1. Member States shall ensure that, where there is likelihood of insolvency, debtors in financial difficulty have access to an effective preventive restructuring framework that enables them to restructure their debts or business, restore their viability and avoid insolvency.

2. Access to a preventive restructuring framework can be made dependent upon evidence that the debtor has no liabilities owed to public creditors, that he has observed accounting rules and that he will be able to service his debts for at least 6 months going forward.

~~2.~~ 3. Preventive restructuring frameworks may consist of one or more procedures or measures and provide for the involvement of a judicial or administrative authority as soon as a statutory duty to file for insolvency is triggered.

~~3.~~ 4. Member States ~~shall~~ can put in place provisions limiting the involvement of a ~~judicial or administrative authority~~ practitioner in the field of restructuring to where it is necessary and proportionate so that rights of any affected parties are safeguarded.

~~4.~~ 5. Preventive restructuring frameworks shall be available on the application by debtors, or by creditors with the agreement of debtors.

Explanation (see also VID Statement of 1 march 2017 – pages 12 et sqq.):

Amending Art. 4 with a new subsection 2 shall provide for member states having the opportunity of restricting access to restructuring procedures by implementing provisions for producing evidence concerning the observation of statutory duties connected with doing business. Enterprises which rely on taking out a "public loan" by deliberately failing to pay taxes or social duties deserve no protection by restructuring procedures. Considering the far-reaching opportunities of overruling public creditors in a restructuring plan there could be an incentive to restructure tax liabilities by letting the public bear the brunt.

Alterations in Art. 4 subsections 3[3] and 4[4] make it clear that invoking judicial participation in the process is mandatory as long as a statutory duty to file for insolvency has been triggered. The appointment of a restructuring practitioner can be accepted under the provision of necessary protection for creditors rights.

The call for compliance with statutory duties of proper accounting aims at restricting access to restructuring procedures to enterprises which honor their statutory obligations. Enterprises which cannot comply with these duties will almost certainly not be able to present a restructuring plan within the necessary timeframe.

[3] In the version proposed here.
[4] In the version proposed here.

The provision of evidence for liquidity reaching out at least six months when initiating restructuring procedures is necessary to separate these procedures form insolvency. Otherwise it would be impossible to prohibit structural insolvent enterprises from reaching out for the assistance of preventive restructuring. On the one hand, the EU might be lacking sufficient authorization to regulate Insolvency. On the other hand, six months seem to be necessary considering the duration of the stay proposed in Art. 6 and the need to formulate a restructuring plan.

Article 5 – Debtor in possession

1. Member States shall ensure that debtors accessing preventive restructuring procedures remain totally or at least partially in control of their assets and the day-to-day operation of the business.

2. The appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall ~~not~~ be mandatory ~~in every case~~ if the appropriate protection of affected creditors so requires.

3. Member States ~~may require~~ shall ensure the appointment of a practitioner in the field of restructuring in the following cases:

(a) where the debtor is granted a ~~general~~ stay of ~~individual~~ enforcement actions in accordance with Article 6;

(b) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance with Article 11.

(c) where it is requested by either the debtor or affected creditors.

Explanation (see also VID Statement of 1 march 2017 – pages 21 et sqq.):

The proposed amendment in Art. 5 subsec. 2 connects with our proposal for Art. 4 subsec. 4. Amending Art. 5 subsec. 3 shall secure the coherent action of member states concerning the rights of creditors whenever these rights appear to be in danger. Within a stay of enforcement actions there should be no differentiation between a individual or a general stay. Providing debtors and creditors with individual rights to apply, as proposed herein through Art. 5 subsec. 3c), adds to the securing of creditors rights and gives the debtor an opportunity to build up trust by involving a restructuring practitioner.

Article 6 – Stay of individual enforcement actions

1. Member States shall ensure that debtors who are negotiating a restructuring plan with their creditors may benefit from a stay of individual enforcement actions covering these creditors if and to the extent such a stay is necessary to support the negotiations of a restructuring plan and the debtors can prove their ability to restructure as well as the consent of a majority of affected creditors to go ahead doing so.

2. Member States shall ensure that a stay of individual enforcement actions may be ordered in respect of all types of affected creditors, including secured and preferential creditors. The stay may be general, covering all creditors, or limited, covering one or more individual creditors, in accordance with national law.

3. Paragraph 2 shall not apply to workers' outstanding claims except if and to the extent that Member States ensure by other means that the payment of such claims is guaranteed at a level of protection at least equivalent to that provided for under the relevant national law transposing Directive 2008/94/EC.

4. Member States shall limit the duration of the stay of individual enforcement actions to a maximum period of no more than ~~four~~ three months.

5. Member States may nevertheless enable judicial or administrative authorities to extend the initial duration of the stay of individual enforcement actions or to grant a new stay of individual enforcement actions, upon request of the debtor or of affected creditors. Such extension or new period of stay of individual enforcement actions shall be granted only if a statutory duty to file for insolvency has not been triggered and there is evidence that:

(a) the overriding majority of creditors with whom the debtors discusses his restructuring plan supports an extension

~~(a)~~ (b) relevant progress has been made in the negotiations on the restructuring plan; and

~~(b)~~ (c) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties.

6. Any further extensions shall be given only if the conditions referred to in points (a) ~~and (b)~~ to c) of paragraph 5 are met and the circumstances of the case show a strong likelihood that a restructuring plan will be adopted.

7. The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed ~~twelve~~ six months. It shall be restricted to three months if the

debtors center of main interest has been moved to another member state within a three-month period preceding an application under Art. 4 subsec. 4[5].

8. Member States shall ensure that judicial or administrative authorities may lift the stay of individual enforcement actions, in whole or in part:

(a) if it becomes apparent that a proportion of creditors who under national law could block the adoption of the restructuring plan does not support the continuation of the negotiations and individual creditors therefore apply for a lift; or

(b) at the request of the debtor or the practitioner in the field of restructuring.

9. Member States shall ensure that, where an individual creditor or a single class of creditors is or would be unfairly prejudiced by a stay of individual enforcement actions, the judicial or administrative authority may decide not grant the stay of individual enforcement actions or may lift a stay of individual enforcement actions already granted in respect of that creditor or class of creditors, at the request of the creditors concerned. An unfair prejudice is to be accepted regularly if individual creditors or a class of creditors would themselves face financial difficulties as a result of granting a stay of enforcement actions.

Explanation (see also VID Statement of 1 march 2017 – pages 23 et sqq.):

The directives proposal of a stay of enforcement actions and its consequences appear to be overshooting by unilaterally favoring debtors over their creditors. Creditors interests as well as the interests of suppliers and contractors are not considered sufficiently. Corrective amendments therefore seem to be required.

The clarification of Art. 6 subsec. 1 underlines the call for restricting any stay to creditors which are actually taking part in the creditors negotiations on a restructuring plan. Creditors which are not taking part in these negotiations should be excluded from the stay considering that it would not be necessary to further negotiations in their case. Without their exclusion, these creditors would otherwise be subject to a stay without the possibility of taking a part in the negotiations for themselves aiming solely at the participation of other creditors.

The amendment of Art. 6 subsec. 1 restricts the stay of enforcement actions by confining its application to businesses which are "viable and where the proposed plan is likely to result in the debtor avoiding insolvency and restore its long-term viability" (see Art. 8 subsec.1 g). Evidence proving the general ability to restructure and the consent of a majority of creditors should be presented in advance.

[5] Corresponds to Art. 4 subsec. 5 in the version proposed here.

Our proposal for Art. 6 subsec. 4 limits the duration of the stay to 3 months. This limitation corresponds with § 270b subsec. 1 sentence 2 InsO and has proven to be perfectly suitable to judge any existing chances of restructuring. A Prolongation should only be granted under very limited circumstances. Further restrictions regarding Art. 6 subsec. 5 sentence 2 are therefore proposed to exclude any prolongation if a statutory duty to file for insolvency has been triggered or a majority of creditors has been showing insufficient support. Furthermore, a duration of 4 months puts Art. 6 in conflict with Art. 178 subsec. 1 b) of the Capital Requirements Regulation CCR.

Art. 6 subsec. 7 should be amended along the lines of Art. 3 subsec. 1 sentence 4 VO (EU) 2015/848 to prevent forum shopping. A time limit of six months would be sufficient and corresponding with our proposed amendment of Art.4 subsec.2.

The proposed amendment of Art. 6 subsec. 8 ensures that individual creditors can apply for the termination of the stay if and when the acceptance of a restructuring plan has become unlikely. At the same time it subjects termination to a provision of application thereby safeguarding debtors and consenting creditors against a judicial lift of the stay without creditors applying for it.

Proposing an amendment of Art. 6 subsec. 9 is subject to Art. 7 subsec. 4 not being eliminated. Art. 7 subsec. 4 could threaten the existence of small and medium-sized suppliers and contractors involved as creditors in a restructuring procedure. They are in dire need of protection similar to employees since many services nowadays are provided by micro and small-scale entrepreneurs.

Article 7 – Consequences of the stay of individual enforcement actions

1. Where the obligation of the debtor to file for insolvency under national law arises during the period of the stay of individual enforcement actions, that obligation shall be suspended for the duration of the stay.

2. A general stay covering all creditors negotiating a restructuring plan shall prevent the opening of insolvency procedures at the request of one or more of these creditors.

3. Member States ~~may derogate~~ shall ensure that an exception from paragraph 1 is established where the debtor becomes illiquid and therefore unable to pay his debts as they fall due during the stay period. In that case, Member States shall ensure that restructuring procedures are not automatically terminated and that, upon examining the prospects for achieving an agreement on a successful restructuring plan within the period of the stay, a judicial or administrative authority may decide to defer the opening of insolvency procedure for a maximum of three weeks after the appointment of a restructuring practitioner and keep in place the benefit of the stay of individual enforcement actions.

~~4. Member States shall ensure that, during the stay period, creditors to which the stay applies may not withhold performance or terminate, accelerate or in any other way modify executory contracts to the detriment of the debtor for debts that came into existence prior to the stay. Member States may limit the application of this provision to essential contracts which are necessary for the continuation of the day-to-day operation of the business.~~

5. Member States shall ensure that creditors may not withhold performance or terminate, accelerate or in any other way modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of the debtor's entry into restructuring negotiations, a requested for a stay of individual enforcement actions, the ordering of the stay as such or any similar event connected to the stay.

~~6. Member States shall ensure that nothing prevents the debtor from paying in the ordinary course of business claims of or owed to unaffected creditors and the claims of affected creditors that arise after the stay is granted and which continue to arise throughout the period of the stay.~~

7. Member States shall not require debtors to file for insolvency procedures if the stay period expires without an agreement on a restructuring plan being reached, unless the other conditions for filing laid down by national law are fulfilled.

Explanation (see also VID Statement of 1 march 2017 – pages 29 et sqq.):

Amending Art. 7 subsec. 3 sentence 1 shall ensure that lack of liquidity can trigger a statutory duty to file for insolvency in all member states and exceptions are not subject to the discretion of national laws. Different regulations could otherwise lead to unwanted forum shopping and unequal protection of creditors rights. Moreover this regulation provides for legal security for all participants in cross border legal transactions, making sure that illiquidity triggers the duty to file for insolvency which in turn strengthens legal protection against losses incurred by defaulting claims. This provision also facilitates harmonization of insolvency regulations.

By introducing a narrow time frame of 3 weeks in Art. 7 subsec. 3 sentence 2, which corresponds to § 15 a subsec. 1 sentence 1 InsO, any further delays in the initiation of insolvency procedures which could be detrimental to creditors after reaching the stage of illiquidity will be prevented. The simultaneous appointment of a restructuring practitioner tasked with the protection of creditors rights and the reestablishment of trust should be mandatory.

Art. 7 subsec. 4 could be left unchanged if our proposals for Art. 4 subsec. 2 , Art. 5 subsec. 3a and Art. 7 subsec. 3 would get implemented. These cases provide for sufficient oversight and balance between the interests of debtors and the risks of creditors. Non-Implementation of these amendments should lead to a deletion of Art. 7 subsec. 4 which

could force creditors to supply insolvent enterprises placing the risk of failing restructuring plans and illiquidity leading to defaulting claims on suppliers.

Article 8 – Content of restructuring plans

1. Member States shall require restructuring plans submitted for confirmation by a judicial or administrative authority to contain at least the following information:

(a) the identity of the debtor or the debtor's business for which the restructuring plan is proposed;

(b) a valuation of the ~~present~~ market value of the debtor or the debtor's business as well as a reasoned statement on the causes and the extent of the financial difficulties of the debtor;

(c) the identity of the affected parties, ~~whether~~ named individually ~~or described by reference to one or more categories of debt,~~ as well as their claims ~~or interests~~ covered by the restructuring plan with information on the legal justification and existence as well as the extent of the claim or interest;

(d) the classes into which the affected parties have been grouped for the purposes of adopting the plan, together with a rationale for doing so and information about the respective values of creditors and members in each class;

(e) the identity of non-affected parties, whether named individually or described by reference to one or more categories of debt, together with a statement of the reasons why it is not proposed to affect them;

(f) the terms of the plan, including, but not limited to:

(i) its proposed duration;

(ii) any proposal by which debts are rescheduled or waived or converted into other forms of obligation;

(iii) any new financing anticipated as part of the restructuring plan;

(g) an opinion or reasoned statement by the person responsible for proposing the restructuring plan which explains how and to what extent voting rights were attributed and creditors classes where formed, why the business is viable, its financial difficulties depend solely on financing problems, how implementing the proposed plan is likely to result in the debtor avoiding insolvency and restore its long-term viability, and states any anticipated necessary pre-conditions for its success. Member states can transfer the right to submit a restructuring

plan and present necessary information as well as delivering an opinion or an reasoned explanation to a restructuring practitioner.

Explanation (see also VID Statement of 1 march 2017 – pages 38 et sqq.):

Replacing the present value of the debtor or the debtor's business in Art. 8 subsec. 1b) with the market value secures reasonable valuation on the creditors side. Present value represents the acquisition value minus scheduled depreciations. It is therefore depending on tax regulations and does not necessarily represent a market value which could be realized by selling.

The amendment of Art. 8 subsec 1c) prepares a verification of claims which is necessary to protect creditors (esp. in cross class cram downs) from manipulations and abuse by non existent claims.

Art. 8 subsec. 1g) should be amended by adding necessary duties for the debtor to provide information in order to prevent abuse or manipulation regarding voting rights or formation of creditors classes. By using a clarifying reference to the causes of financial difficulties (see also Art 2 no. 2a proposed herein) restructuring will be restricted to operationally sound businesses.

Article 9 – Adoption of restructuring plans

1. Member States shall ensure that any affected creditors have a right to vote on the adoption of a restructuring plan. ~~Member States may also grant such voting rights to affected equity holders, in accordance with Article 12(2).~~

2. Member States shall ensure that affected parties are treated in separate classes which reflect the class formation criteria. Classes shall be formed in such a way that each class comprises claims ~~or interests with rights~~ that are sufficiently similar to justify considering the members of the class a homogenous group with commonality of interest. As a minimum, secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan. Member States may also provide that workers are treated in a separate class of their own.

3. Voting rights and class formation shall be examined by the judicial or administrative authority when a request is filed for confirmation of the restructuring plan. Restructuring practitioners can be entrusted with this task.

4. A restructuring plan shall be deemed to be adopted by affected parties, provided that a majority in the amount of their claims ~~or interests~~ is obtained in each and every class. Member States shall lay down the required majorities for the adoption of a restructuring plan,

which shall be in any case not higher than 75% in the amount voting rights ~~of claims or interests~~ in each class. A majority is achieved if the percentages set by the member states are reached regarding the amount of claims as well as the number of creditors in each class.

5. Member States may stipulate that a vote on the adoption of a restructuring plan takes the form of a consultation and agreement of a requisite majority of affected parties in each class.

6. Where the necessary majority is not reached in one or more dissenting voting classes, the plan may still be confirmed if it complies with the cross-class cram-down requirements set out in Article 11.

Explanation (see also VID Statement of 1 march 2017 – pages 42 et sqq.):

In Art. 9 subsec. 1 sentence 2 as well as in subsec. 2 sentence 2 and subsec. 4 sentence 1 we propose a deletion of references to shareholders corresponding to the proposed modification of Art. 2 no. 3.

The amendment of Art. 9 subsec. 3 shall facilitate the verification of claims which will be necessary as a result of voting on a cram down as well as its delegation unto a restructuring practitioner. Modifying Art. 9 subsec. 4 furthermore ensures that a necessary majority cannot be produced by relying solely on 75 % of the nominal amount of claims. This would come up to absolute domination by financial creditors or privileged creditors.

Article 10 – Confirmation of restructuring plans

1. Member States shall ensure that the following restructuring plans can become binding on the parties only if they are confirmed by a judicial or administrative authority:

(a) restructuring plans which affect the interests of dissenting affected parties;

(b) restructuring plans which provide for new financing.

2. Member States shall ensure that the conditions under which a restructuring plan can be confirmed by a judicial or administrative authority are clearly specified and include at least the following:

(a) the restructuring plan has been adopted in accordance with Article 9 and has been notified to all known creditors likely to be affected by it;

(b) the restructuring plan complies with the best interest of creditors test;

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

3. Member States shall ensure that judicial or administrative authorities may refuse to confirm a restructuring plan where that plan does not have a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business.

4. Member States shall ensure that where a judicial or administrative authority is required to confirm a restructuring plan in order for it to become binding, a decision is taken without undue delay after the request for confirmation has been filed and in any case no later than ~~30~~ 60 days after the request is filed.

Explanation (see also VID Statement of 1 march 2017 – pages 44 et sqq.):

Prolonging the examination period in Art. 10 subsec. 4 ensures the necessary verification of claims (see Art. 9 subsec. 3).

Article 11 – Cross-class cram-down

1. Member States shall ensure that a restructuring plan which is not approved by each and every class of affected parties may be confirmed by a judicial or administrative authority upon the proposal of a debtor or of a creditor with the debtor's agreement and become binding upon one or more dissenting classes where the restructuring plan:

(a) fulfils the conditions in Article 10 (2);

(b) has been approved by ~~at least one class~~ a majority of classes of affected creditors ~~other than an equity-holder class~~ and any other class which, upon a valuation of the enterprise, would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied;

(c) complies with the absolute priority rule.

2. Member States may vary the minimum number of affected classes required to approve the plan laid down in point (b) of paragraph (1) as long as the majority of classes is preserved.

Explanation (see also VID Statement of 1 march 2017 – pages 47 et sqq.):

Amending Art. 11 subsec. 1 b) and 2 aims at providing assurance that a qualified majority decision of creditors established by Art. 9 subsec. 4 as part of a cram down will not be dominated by a minority of classes or even by one class alone.

Article 13 – Valuation by the judicial or administrative authority

1. A ~~liquidation~~ market value shall be determined by the judicial or administrative authority where a restructuring plan is challenged on the grounds of an alleged breach of the best interest of creditors test.

2. Notwithstanding the objection of a presumed violation of best interest of creditors an enterprise value shall be determined by the judicial or administrative authority on the basis of the value of the enterprise as a going concern in the following cases:

(a) where a cross-class cram-down application is necessary for the adoption of the restructuring plan;

(b) where a restructuring plan is challenged on the grounds of an alleged breach of the absolute priority rule.

3. Member States shall ensure that properly qualified experts are appointed to assist the judicial or administrative authority, when necessary and appropriate, for the purposes of the valuation, including where a creditor challenges the value of the collateral.

4. Member States shall ensure that the challenges referred to in paragraphs 1, 2 and 3 can be lodged with the judicial or administrative authority called upon to confirm the restructuring plan or in the context of an appeal against a decision on the confirmation of a restructuring plan.

Explanation (see also VID Statement of 1 march 2017 – pages 49 et sqq.):

The proposed amendment of Art. 13 subsec.1 establishes a valuation according to market value following Art. 8 subsec. 1.

Art. 13 subsec. 2 requires the mandatory valuation of companies as a going concern whenever the qualifying conditions of Art. 13 subsec. 2a) and b) are met.

This type of valuation surpasses market value (which represents only the substance value of material or immaterial assets (operating or nonoperating) minus liabilities) because it takes into account that enterprises will carry on with the least interference.

Article 15 - Appeals

1. Member States shall ensure that a decision on the confirmation of a restructuring plan taken by a judicial authority may be appealed before a higher judicial authority and that a decision on the confirmation of a restructuring plan taken by an administrative authority may be appealed before a judicial authority.

2. Appeals shall be resolved in an expedited manner.

3. An appeal against a decision confirming a restructuring plan shall have no suspensive effects on the execution of that plan if the plan provides compensation in the case of an individual creditor being able to prove his disadvantage.

4. Member States shall ensure that, where an appeal pursuant to paragraph 3 is upheld, the judicial authority may either:

(a) set aside the restructuring plan; or

(b) confirm the plan and grant monetary compensation to the dissenting creditors, payable by the debtor or by the creditors who voted in favour of the plan.

Explanation (see also VID Statement of 1 march 2017 – pages 49 et sqq.):

The amendment of Art. 15 subsec. 3 refers to the principle formulated in § 251 subsec. 3 InsO and prevents discrimination of individual creditors without endangering the process of restructuring.

Article 16 – Protection for new financing and interim financing

1. Member States shall ensure that new financing and interim financing are adequately encouraged and protected. In particular, new and interim financing shall not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures, unless such transactions have been carried out fraudulently or in bad faith, the plan provided no reasonable prospect of preventing insolvency and restoring the debtor's viability or an application for insolvency was filed within 90 days of.

2. Member States may afford grantors of new or interim financing the right to receive payment with priority in the context of subsequent liquidation procedures in relation to other creditors that would otherwise have superior or equal claims to money or assets. In such cases, Member States shall rank new financing and interim financing at least senior to the

claims of ordinary unsecured creditors but subordinate to the claims of creditors which came into existence after the granting of new or interim financing.

3. The grantors of new financing and interim financing in a restructuring process shall be exempted from civil, administrative and criminal liability in the context of the subsequent insolvency of the debtor, unless such financing has been granted fraudulently or in bad faith, the plan provided no reasonable prospect of preventing insolvency and restoring the debtor's viability or an application for insolvency was filed within 90 days of.

Explanation (see also VID Statement of 1 march 2017 – pages 50 et sqq.):

Amending Art. 16 subsec. 2 sentence 2 seems to be advisable because the lack of arguments – let alone constitutional reasons – to classify the claims of new creditors (e.g. suppliers) below the claims of grantors of new or interim financing.

The amendments of Art. 16 subsec. 1 sentence 2 and subsec. 3 ensure that the protection of new and interim financing will not be abused. Apart from the bad faith mentioned in subsec. 1 sentence 2 there could be cases where clear warning signals are ignored deliberately. To facilitate the taking of evidence and to secure at least a lump-sum consideration of interests involved the proposed 90 day deadline refers to a similar regulation in §§ 130 and 131 InsO.

Article 17 – Protection for other restructuring related transactions

1. Member States shall ensure that transactions carried out in the ordinary course of business to further the negotiation of a restructuring plan confirmed by a judicial or administrative authority or closely connected with such negotiations are not declared void, voidable or unenforceable as acts detrimental to the general body of creditors in the context of subsequent insolvency procedures, unless such transactions have been carried out fraudulently or in bad faith, the plan provided no reasonable prospect of preventing insolvency and restoring the debtor's viability or an application for insolvency was filed within 90 days of.

Explanation (see also VID Statement of 1 march 2017 – pages 53 et sqq.):

The amendment of Art. 17 subsec. 1 is based on the same idea as the proposed amendments of Art. 16 subsec. 1 sentence 2 and Art. 16 subsec. 3.

Article 20 – Discharge period

1. The period of time after which over-indebted and honest entrepreneurs who have proven their observation of statutory accounting duties may be fully discharged from their debts shall be no longer than three years starting from:

(a) the date on which the judicial or administrative authority decided on the application to open such a procedure, in the case of a procedure ending with the liquidation of an over-indebted entrepreneur' s assets; or

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

2. Member States shall ensure that on expiry of the discharge period, over-indebted entrepreneurs are discharged of their debts without the need to re-apply to a judicial or administrative authority.

Explanation (see also VID Statement of 1 march 2017 – pages 53 et sqq.):

By amending Art. 20 subsec.1 the group of entrepreneurs eligible for a debt discharge without any fixed minimum of repayments shall be restricted to persons which honored their legal obligations. A debt discharge cannot be granted for dishonest or unlawful behavior.