

Opinion*

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On the occasion of addressing the Committee on Legal Affairs of the European Parliament at the hearing
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 and
amending Directive 2012/30/EU (COM (2016) 723 final)

on 20 June 2017

VID supports the draft proposal's aim to promote and facilitate the financial reorganization of enterprises and a residual debt discharge for entrepreneurs which have run into difficulties. It has therefore submitted a comprehensive statement¹ and evaluated the respective statements of the German Industry and Banking sector. Nearly every detail of the draft proposal has generated objections and drawn criticism from German business associations. This summary collects the strongest of these objections.

1. No restriction to financial creditors

The draft proposal's aim to promote restructuring of viable enterprises and reduce non-performing loans can be achieved by creating unbureaucratic and efficient procedures which are limited to the restructuring of financial obligations and liabilities. In order to prevent negative effects on a macroeconomic as well as a microeconomic scale their personal scope should be restricted to financial creditors.² The definition given in Art. 2 sec. 2 of the draft proposal hints in this direction by stating that "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. Only by further concentrating the proposals focus on financial creditors will it be possible to establish a European restructuring framework without major contradictions stemming from various national differences in related areas of law. Most complications listed below stemming either from the threat to creditors' rights or the implicated need to amend national tax, labour or company laws could be avoided by this restricted approach.

2. Increase in credit costs for SME's in particular

The draft proposal is contradictory to recent European legislation concerning capital requirements in the banking sector. A loan is considered non-performing or defaulting in accordance with Art. 178 sec. 1 b) CRR if the obligor is past due more than 90 days on any material credit obligation.³ According to Art. 194 sec. 4 CRR Institutions (a credit institution or an investment firm) may recognize funded credit protection in the calculation of the effect of credit risk mitigation only where the lending institution has the right to liquidate or retain, in a timely manner, the assets from which the protection derives in the event of the default, insolvency or bankruptcy — or other credit event set out in the transaction documentation — of the obligor and, where applicable, of the custodian holding the collateral.

Entering the proposed restructuring procedure will often mean, that the affected company has not met its credit obligations in the recent past or will not be able to in the near future. Default therefore occurs within a short period of time after initiating a restructuring procedure.⁴ If the company tries to prevent losing its credit, a stay

* This opinion has been translated from a German version. Endnotes remain untranslated.

of enforcement actions according to Art. 6 and 7 of the draft proposal seems inevitable which in turn will quickly lead to a default status of subjected loans. By extending the stay of enforcement actions to 120 days (Art. 6 sec. 4) the draft proposal therefore promotes the accrual of non-performing loans.⁵

As a consequence, capital requirements will tighten considerably. Credit protection will lose its value.⁶ These risks will force consideration as early as the contracting stage, subsequently rising credit costs especially for SME's⁷ and entrepreneurs.⁸

Higher risks of default as well as rising credit costs will steer business towards larger banks since smaller institutions will not be able to shoulder the structural and regulatory costs of supporting their client base. Taking into account higher risks of credit defaults institutions will have to rely more heavily on data mining and other forms of credit risk mitigation. Wherever these means are not affordable, early termination of contracts or selling of loans will be inevitable, further weakening the market position of smaller institutions within their regional client base. Starting or restarting a small or medium size business — which the draft proposal tries to facilitate — will become more cumbersome.

3. Knock-on restructurings and insolvencies

The most likely application of the proposed stay of enforcement actions to all creditors threatens the viability of suppliers. Most supply chains in Europe work on credit-terms which allow for an average respite of at least 30 to 60 days. An average respite of 90 or even 180 days has become the norm especially within longer industry supply chains. Considering a stay of enforcement actions according to Art. 6 and 7 of the draft proposal this will lead to suppliers confronting the need to start a restructuring procedure of their own in order to prevent insolvency.⁹

This chain reaction seems inevitable wherever restructuring debtors initiate the stay of enforcement actions and force their suppliers to carry on in accordance to existing terms of payment. Clever strategies will include the maximization of payment targets and time the initiation of proceedings accordingly. The risk of default will add to the difficulties of suppliers¹⁰ and ensure knock-on insolvencies wherever capital and earnings cannot cover the losses. Suspended claims could not be used as adequate collateral in the suppliers own corporate financing. Banks and factoring companies would not accept them as such. With liquidity being generally in short supply business sectors as automotive suppliers or food producers as well as nearly all SME's would suffer disproportionately.¹¹ Better informed and positioned financial creditors would try to take advantage of weaker suppliers and minimize their contributions to restructuring. Suppliers as well as employees are often restricted in choosing their contractual partners leaving them vulnerable to any attempted extortion of concessions.

Any failed attempt of restructuring will massively enhance the default risk of creditors. Reducing default risks and enhancing the confidence of creditors can only be achieved by appointing an independent third party as early as the first individual stay of enforcement is ordered.¹²

4. Massive discrimination of creditors

Restructuring and Insolvency procedures of many EU member states provide a counterbalanced system taking into account the interests of workers, creditors, debtors, equity holders and suppliers. Credit risk has to be distributed in a balanced way to ensure functioning markets and prevent moral hazard. Without the risk of insolvency entrepreneurs will take higher risks, leveraged buyouts will become even more overloaded and payment behaviour will deteriorate. Suspending the obligation to file for insolvency provokes abuse and erodes trust in market participants. The draft proposal in contrast provides almost exclusively for the interests of debtors. Especially the following points put the balance of interest between stakeholders into question:

- (1) The draft proposal does not define sufficient entry requirements for debtors initiating a restructuring procedure.¹³ There is no clear differentiation of restructuring and insolvency procedures. This enables debtors to initiate restructuring proceedings shortly before or even after becoming insolvent and thereby endangering creditors' claims. Creditors, especially suppliers and employees, need to be protected from actually insolvent, but seemingly restructuring companies. Debtors should therefore be obliged to provide objective evidence of sufficient liquidity reaching out at least six months in order to prevent insolvent debtors from entering restructuring procedures.¹⁴

- (2) The proposed restructuring procedure does not verify claims made or purported to be made by individual creditors. This leaves a wide scope of manipulation for debtors. Loans made or purported to be made by "Friends and Family" are a common feature of small or medium size insolvencies. The legal existence of such claims is often very doubtful. Counted without verification they could have very detrimental consequences for real creditors when it comes to the adoption and confirmation of a restructuring plan with or without a cross-class cram-down (Art.9-11).¹⁵ Small sum creditors in particular have no means to protect themselves against such an attempt at deception.
- (3) According to the draft proposal insolvent debtors may be exempted from any obligation to file for insolvency during ongoing restructuring proceedings (Art. 7 sec.1). Creditors cannot request the opening of insolvency procedures (Art.7 sec. 2) while being prohibited from preventing, stopping or influencing the opening of the proposed restructuring procedure during which there is no provision to call for a creditor meeting or any other mechanism to control the debtor or retrieve information from him.¹⁶ Supervision of the debtor is insufficient due to the absence of an administrator independent from the debtor and individual creditors and trusted by the creditors as a whole.
- (4) The required majority to pass a restructuring plan shall be in any case not higher than 75% in the amount of claims or interests in each class (Art 9 sec. 4). Reaching this majority in only one of several classes may be sufficient to impose a cross-class cram-down on all dissenting creditors (Art. 11 sec. 1b). This leaves restructuring procedures open to domination by small groups of financial investors or strategies involving "Friends and Family" to take advantage of real creditors.
- (5) The draft proposal formulates lengthy provisions (Art. 17) to safeguard the beneficiaries of transactions carried out by the debtor during a stay of enforcement actions. It excludes the judicial repeal of these actions during any insolvency procedure which might occur going forward. Avoidance actions, personal liability and even criminal prosecution would be prohibited disregarding any detrimental effects for the creditors.

5. Prolonging inevitable decline

The root cause of most corporate crises lies in poor economic performance. Nine times out of ten bad management decisions will either lead to a strategy crisis or a crisis of business performance. Permanently loss-making enterprises must change ownership or be forced to exit the market in order to protect viable companies. Whenever this exit is impeded by restructuring procedures which facilitate the existence of non-viable enterprises without changing the root cause of the crisis any chances of rescuing at least some parts of the company are diminishing very quickly. Suppliers as well as customers and employees will lose trust in the viability of the company. Rescuing or selling during a follow up insolvency will be severely impeded.

6. Overreaching assumptions

Almost all statements point to the fact that decision-making of cross-border investors in Europe is not determined by uncertainty over insolvency rules or the risk of lengthy or complex insolvency procedures.¹⁷ Investment decisions are based on market and competition, infrastructure and the respective legal framework for doing business (tax law, labour law and company law). The influence of legal rules concerning restructuring or insolvency on investment decisions is only marginal in comparison.¹⁸

¹ <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 Richtlinienvorschlag COM(2016) 723 final, S. 2 f., S. 21 f., Erwägungsgrund (2); vgl. Stellungnahme des Gravenbrucher Kreises v. 28.02.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 3 f.; ebenfalls für die Beschränkung auf Finanzgläubiger: Stellungnahme des Gesamtverbandes der Deutschen Versicherungswirtschaft v. 22.02.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 2; Stellungnahme der Bundesrechtsanwaltskammer v. April 2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 3; Stellungnahme des Bundesverbandes Deutscher Inkasso-Unternehmen e. V. (BDIU) zum Richtlinienvorschlag COM(2016) 723 final, S. 3 zu Art. 4 a. E.; Stellungnahme der Bundessteuerberaterkammer v.

- 10.05.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 4 zu Art. 1; Stellungnahme des Deutschen Bundesrates v. 10.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 9 Pkt. 13.
- ³ Kapitaladäquanzverordnung/Capital Requirement Regulation: Verordnung über Aufsichtsanforderungen an Kreditinstitute und Wertpapierfirmen und zur Änderung der Verordnung (EU) Nr. 646/2012 (EU) Nr. 575/2013 v. 26.06.2013.
- ⁴ Stellungnahme des Deutschen Anwaltvereins v. Februar 2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 12 f., für eine dementsprechende Anpassung des europäischen Bankenaufsichtsrechts.
- ⁵ Stellungnahme des VID zum Richtlinienvorschlag COM(2016) 723 final, S. 7, Pkt. 1. c).
- ⁶ Stellungnahme der Deutschen Kreditwirtschaft v. 29.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 3, S. 17 Pkt. II. 4.1.4.
- ⁷ Richtlinienvorschlag COM(2016) 723 final, Erwägungsgrund (13) sowie Fact sheet der DG Justice vom Mai 2017, S.2.
- ⁸ Stellungnahme der Clearingstelle Mittelstand des Landes NRW v. 30.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 17 zu Art. 19-20.
- ⁹ Stellungnahme des Bundesverband der Deutschen Industrie e. V. (BDI) v. 15.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 6 Pkt. 3. a), weist auf die Gefahr von Folgeinsolvenzen hin.
- ¹⁰ Richtlinienvorschlag COM(2016) 723 final, Art. 7 Abs. 4.
- ¹¹ Stellungnahme der Clearingstelle Mittelstand des Landes NRW v. 30.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 13 zu Art. 7 Abs. 4-5.
- ¹² Vgl. hierzu den Vermerk des Ratsvorsitzenden in Consil-ST 9316/17, S. 4.
- ¹³ Richtlinienvorschlag COM(2016) 723 final, Erwägungsgrund (17).
- ¹⁴ Stellungnahme des VID zum Richtlinienvorschlag COM(2016) 723 final, S. 16, zu Pkt. 4. a) bb); Stellungnahme des Deutschen Anwaltvereins v. Februar 2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 5 f.; Stellungnahme des Gravenbrucher Kreises v. 28.02.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 2 (für 12 Monate); Stellungnahme des Deutschen Bundesrates v. 10.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 8 Pkt. 12.
- ¹⁵ Stellungnahme des Bundesarbeitskreis Insolvenzgerichte e. V. (BAKInso) v. 10.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 3 Pkt. 7, verweist zudem auf die „sehr niedrigschwellig ausgestaltete Möglichkeit der Überstimmung dissertierender Gläubigergruppen“ gemäß Richtlinienvorschlag; zumal die *absolute priority rule* (Art. 2 Nr. 10 i. V. m. Art. 11 Abs. 1 c des Richtlinienvorschlags) den Schutz *gleichrangiger* Gläubiger nach einem Vorbild wie § 245 Abs. 2 Nr. 3 InsO nicht sicherstellt, obschon diese Gläubiger verfassungsrechtlich mehr Schutz bedürfen als in der Insolvenz, da deren Forderungen wegen der frühen Phase der wirtschaftlichen Schwierigkeiten werthaltiger sind.
- ¹⁶ Gegen die Aussetzung von Insolvenzantragspflichten und -rechten: Stellungnahme des VID zum Richtlinienvorschlag COM(2016) 723 final, S. 29 f. zu Pkt. 8. a); Stellungnahme der Clearingstelle Mittelstand des Landes NRW v. 30.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 12 f. zu Art. 7 Abs. 1-2; Stellungnahme des Deutschen Bundesrates v. 10.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 14 Pkt. 22; Stellungnahme der Deutschen Kreditwirtschaft v. 29.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 14 Pkt. II. 3.4.; Stellungnahme des Gesamtverbandes der Deutschen Versicherungswirtschaft v. 22.02.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 8; Stellungnahme des Gravenbrucher Kreises v. 28.02.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 7; Stellungnahme der Bundesrechtsanwaltskammer v. April 2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 5; Stellungnahme des Bundesarbeitskreis Insolvenzgerichte e. V. (BAKInso) v. 10.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 2 Pkt. 5; Stellungnahme der Neuen Insolvenzverwaltervereinigung Deutschlands e. V. (NIVD) v. 27.02.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 5 f. Pkt. 4; Wirtschaftskammer Österreich (WKO) v. 31.01.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 9 f.; Stellungnahme des Bundesverband der Deutschen Industrie e. V. (BDI) v. 15.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 7 Pkt. 3. b); Stellungnahme des Bundesverbandes Deutscher Inkasso-Unternehmen e. V. (BDIU) zum Richtlinienvorschlag COM(2016) 723 final, S. 4 zu Art. 6 und 7; Stellungnahme der Bundessteuerberaterkammer v. 10.05.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 7 zu Art. 7.
- ¹⁷ Vgl. nur: Stellungnahme des VID zum Richtlinienvorschlag COM(2016) 723 final, S. 5, zu Pkt. 1; Stellungnahme der Clearingstelle Mittelstand des Landes NRW v. 30.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 5 f. Pkt. 2.1.; Stellungnahme des Deutschen Bundesrates v. 10.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 3 Pkt. 3; Stellungnahme der Deutschen Kreditwirtschaft v. 29.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 3, S. 4 Pkt. II. 1; Wirtschaftskammer Österreich (WKO) v. 31.01.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 3; auch die von der EU-Kommission in Auftrag gegebene Studie der Universität Leeds verweist auf keine belastbaren empirischen Zusammenhänge: Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States' relevant provisions and practices/Tender No. JUST/2014/JCOO/PR/CIVI/0075, S. 23 ff.
- ¹⁸ Stellungnahme der Clearingstelle Mittelstand des Landes NRW v. 30.03.2017 zum Richtlinienvorschlag COM(2016) 723 final, S. 5 Pkt. 2.1.