Opinion of the Economic and Social Committee 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 — 2016/0359 (COD))

(2017/C 209/04)

Rapporteur: **Antonello PEZZINI**

Co-rapporteur: **Franca SALIS-MADINIER**

Consultation	European Parliament, 16.1.2017
	European Council, 25.1.2017
Legal basis	Article 114 of the Treaty on the Functioning of the European Union
Section responsible	Single Market, Production and Consumption
Adopted in section	9.3.2017
Adopted at plenary	29.3.2017
Plenary session No	524
Outcome of vote	220/2/7
(for/against/abstentions)	

1. **Conclusions and recommendations**

1.1. The EESC supports the proposal for a directive on preventive restructuring and second chances and for this reason puts forward proposals from civil society, which aim to complete the substance of the directive.

1.2. In light of its content and the need to complete the rules of the single market, the EESC would prefer to see the proposal take the form of a regulation and not be afraid to move towards the maximum possible harmonisation of current systems.

1.3. The EESC insists that an obligation on company management to inform and consult employees prior to and during negotiations be formally specified in the directive. In particular, greater attention should be given to workers' interests during the early restructuring phases, and similarly, during the insolvency proceedings, explicit reference should be made to Article 5(2) of Directive 2001/23/EC in order to protect workers' rights in this context.

1.4. The EESC calls on the Commission to include an obligation to 'anticipate' a state of insolvency as a core principle by setting out a code of good conduct. To this end, the EESC suggests that the principle of a 'social warning' be included in the directive in an appropriate manner.

1.5. The EESC recommends that the directive incorporate the key principle of guaranteeing the status of all workers as priority creditors in all Member States. Moreover, the Committee proposes establishing in all Member States — where it does not already exist — a national risk-pooling fund that guarantees the payment of salaries to employees. This fund, which is in operation in some Member States, could be financed through a specific contribution by employers. Member States could participate in governing this fund and act as guarantors.

1.6. The EESC recommends that the Commission rapidly establish procedures and time-scales that would allow the company's difficulties to be identified in good time.

1.7. The professionals, experts and members of the judiciary called to work in this area should have appropriate common training and extensive experience which enables them to work in what, up to now, has been largely uncharted territory.

1.8. It is necessary to check entrepreneurs' reliability criteria. This is linked to honest professional behaviour and evidenced by appropriate certificates issued by the authorities. These certifications could be used to justify the granting of a second chance.

1.9. The EESC urges the directive to consider the abuse of the insolvency procedure by management in order to deny workers their rights as an illegal practice which therefore negates access to a moratorium and denies managers who do so from benefiting from a second chance.

1.10. The EESC welcomes the marginal role granted to the courts, which will intervene only in cases of necessity.

1.11. The EESC highlights the social value of businesses and the efforts to keep them operational with simple, inexpensive and timely procedures. This is in line with the Treaty on European Union (Article 3), while respecting the entrepreneur's good faith.

2. **Business insolvency rules in the EU**

2.1. On 20 May 2015 the European Parliament and the Council of the European Union adopted EU Regulation (EU) 2015/848 ('the Regulation') on insolvency proceedings in different Member States.

2.2. The new regulation embraces fresh perspectives on the objectives of insolvency law, including the notion that insolvency proceedings are no longer to be considered simply in terms of liquidation. Instead they are considered as tools that guarantee the company's resources are preserved — including therefore its employees' right to work — and, where possible, ensure the survival of the company.

2.3. In the various Member States where restructuring procedures take precedence over liquidation procedures the credit recovery rate is 83 %, in comparison with 57 % ([1]).

2.3.1. Moreover, the length of proceedings differs greatly between countries ([2]), varying between a few months to several years.

2.3.2. There are also a number of inconsistencies in access to restructuring procedures before insolvency is declared.

2.3.3. Recent studies ([3]) have highlighted that insolvency laws are not entirely fit for purpose and that there are excessive inconsistencies between Member States' laws. This has resulted in barriers to the movement of investments within the single market.

2.4. For entrepreneurs — who have an economic failure rate of 50 % ([4]) in the first five years of activity — the objective is to benefit from a moratorium when a crisis becomes apparent and, subsequently, to reach settlements with debtors within a maximum term of three years, thus removing the stigma of bankruptcy and encouraging a second chance for honest entrepreneurs.

2.5. The establishment, by June 2019, of an interconnected digital system of 'insolvency registers' to be set up in each Member State and to be accessible free of charge through the European e-Justice Portal represents an important innovation in the creation of a Single European Judicial Area.

2.6. According to the Commission, 200 000 companies in Europe fail each year, which results in 1,7 million jobs being lost. This could often be avoided if we had more effective insolvency and restructuring procedures.

2.7. The review of the implementation of the 2014 Commission recommendation on restructuring and second chances showed that, despite the reforms in the area of insolvency, there are still clashes between the rules and they remain ineffective or non-existent in some countries. The 2015 Capital Markets Union Action Plan announced a legislative initiative on business insolvency, including early restructuring and second chances.

([1]) World Bank Doing Business Index 2016.
([2]) See SWD(2016) 357 final.
([3]) https://webcast.ec.europa.eu/insolvency-conference; http://ec.europa.eu/justice/civil/files/insolvency/impact_assessment_en.pdf COM(2015) 468 final, 30.9.2015 (Insolvency on pp. 24-25); SWD(2015) 183 final, 30.9.2015 (Insolvency on pp. 73-78), and others.
([4]) Flash Eurobarometer 354 (2012), which also showed that 43 % of Europeans would not start a business because of the fear of failure.

2.8. The Commission initiative should also be viewed in the light of the various recommendations formulated to emphasise, inter alia, that:

— the disparities between national insolvency laws can create unfair competitive advantages or disadvantages;

— the issue of insolvency laws must be considered from an employment law perspective, since the varying definitions of 'employment' and 'employee' may affect workers' rights within the EU in the event of insolvency;

— the lack of harmonisation with regards to ranking creditors may reduce the predictability of the outcomes of judicial proceedings;

— insolvency procedures should not be used abusively or opportunistically by creditors or by one single creditor;

— measures are needed to prevent forum shopping.

3. **The Commission's proposals**

3.1. The Commission's proposal — which has a legal basis in Article 53 and 114 of the TFEU — focuses on three main areas:

— shared principles on the use of early restructuring frameworks, which will help businesses to continue their operations and to preserve employment;

— rules that allow entrepreneurs to benefit from a second chance after being discharged from debt, within a maximum time frame of three years;

— measures for Member States to increase the efficiency of insolvency, restructuring and discharge procedures, with a consequent reduction in delays and excessive costs relating to procedures, the elimination of legal uncertainty for creditors and investors and higher rates of recovery on unpaid debts.

3.2. The new rules set out some basic principles to ensure that insolvency and restructuring frameworks are consistent and effective across the EU:

— businesses in financial difficulty, particularly SMEs, will have access to warning systems in order to identify deteriorations in the business and to ensure restructuring at an early stage;

— flexible preventive restructuring frameworks which should simplify judicial procedures in terms of time-scales, cost and complexity;

— a grace period of a maximum of four months for the debtor before enforcement measures are imposed. This will encourage negotiations that may lead to effective restructuring;

— the absence of possible action to block restructuring plans by creditors and dissenting minority shareholders, while fully safeguarding their legitimate interests;

— protection for new financing and for interim financing in order to increase the chance of effective restructuring;

— full protection of employment law during preventive restructuring proceedings, in compliance with workers' legislation currently in force in the EU;

— standardised training and specialisation for insolvency practitioners and judges throughout the EU;

— full use of new IT technologies for compliance, notifications and online communications, to guarantee greater efficiency and to cut back the length of insolvency, restructuring and second chance procedures.

3.3. The proposal for a new directive also takes into account 'continuity' aspects of procedures, where entrepreneurs keep control of their own activities — i.e. automatic stay, a four-month period during which creditors are not allowed to bring individual proceedings to recover a debt.

4. **Specific comments on the Commission document**

4.1. ***Title I: Debt discharge***

4.1.1. With regard to the optional application of debt discharge procedures to consumers, the EESC, after having drafted several opinions on the subject, is totally opposed to this possibility, which contradicts the requests it has made concerning the urgent need to establish a specific set of arrangements for consumer over-indebtedness.

4.2. ***Title II: Anticipation and warning systems***

4.2.1. The EESC believes it would be helpful to clarify the extent and scope of the directive's application (type of business, number of employees), with particular reference to SMEs and their influence on the local economy.

4.2.2. There is broad agreement on the need to help businesses to restructure in time, so as to save jobs and maintain their value, as well as to support honest entrepreneurs.

4.2.3. It would be useful and appropriate to lay down criteria according to which management can be considered 'honest'. These objective criteria should be defined and formalised in the directive. A recent occurrence which should not be overlooked is the tactical use of insolvency procedures to avoid legal liability and deny workers their rights. A deterrent against the use of such practices must be provided, by denying those who resort to them a moratorium and a second chance.

4.2.4. Employees and trade union organisations must be involved at all stages, with effective consultation and sufficient information provided beforehand. Employee representatives and trade union organisations must have the right to propose alternative solutions to safeguard employment and have the right to refer to an expert.

4.2.5. When it exhibits key common elements that could be shared, the preventive restructuring framework should adhere to a common, uniform EU protocol.

4.2.6. The EESC proposes that procedures for creating a national risk-pooling fund that guarantees the payment of employees' wages be established in all Member States. This fund could be financed through a specific contribution by employers. Member States could participate in governing this fund and act as guarantors ([5]).

4.2.7. In order to safeguard jobs and to avoid redundancies, the concept of a 'social warning' must be supported. This is an obligation on the company to inform and provide all stakeholders with sufficient warning of the difficulties that the company is facing. This provision, to be adopted as appropriate in accordance with each specific case, will also be a useful test for clearly establishing that the entrepreneur's behaviour is honest and socially responsible.

4.2.7.1. A culture of sharing with workers' representatives, trade union organisations, other representative organisations and other stakeholders must be promoted.

4.2.8. The objective is to reduce action taken by judicial/administrative authorities, which are too often called upon prematurely to solve insolvency issues using drastic measures.

4.2.9. At national and European level, the principle of informing and consulting employee representatives as appropriate (EWC Directive 2009/38/EC) should be applied and their rights and their protection recognised when launching alerts, since they are often the first to become aware of the company malfunctioning (the whistleblower as a means of prevention).

4.2.10. Article 3(3) should be clarified. In particular, the criteria by which businesses could be excluded from the early warning mechanism (i.e. number of employees, turnover, etc.) should be specified.

([5]) This proposal was made back in 1764 by Cesare Beccaria in his treatise 'On Crimes and Punishments'.

4.3. ***Title III: Preventive restructuring frameworks***

4.3.1. A favourable, proactive general framework should be established based on harmonising experience and procedures.

4.3.2. In order to achieve what has been set out under Article 114 of TFEU — i.e. to establish the internal market — the Commission must lay down harmonised insolvency procedures, including through the use of delegated acts. At present these appear to vary too much between individual Member States.

4.3.3. Similarly, appropriate pre-insolvency procedures which take account of the reasons behind obstacles to normal financial flows — which are sometimes linked to delayed payments ([6]) – must be proposed and harmonised at Community level.

4.3.4. Rules of good conduct between clients and service providers should be established which impose maximum time limits on payment for services.

4.3.5. In other cases, failures occur for political reasons beyond the entrepreneur's power.

4.3.6. Protection for new funding and interim funding must be guaranteed through common rules and a code of conduct applied in a consistent manner in different countries. Such rules should also be able to protect legitimate positions put forward by minorities.

4.3.7. Some regional administrations in European countries have already established joint bodies ([7]), tasked with intervening swiftly when there is a need for action to support a company in difficulty ([8]).

4.3.8. It would be helpful to carry out a study into these organisations and to draw useful lessons from the most significant examples.

4.3.9. Establishing joint bodies, with strong powers, a clear vision, foresight and with solid social aims, could help to overcome gaps in anticipation and strategic innovation which have weakened the world of work as a whole and contributed to the economic crisis that has affected Europe, in various forms, since 2008.

4.3.10. The early restructuring tools and the second chance mechanism are both benefits for entrepreneurs who, having adhered to the warning and anticipation procedures, request access to them. Both aim to establish the conditions for involving creditors (firstly workers and trade unions).

4.3.10.1. For this reason, it seems essential that the entrepreneur who has requested access to these benefits immediately make their accounting records (balance sheets and related attachments, banking and insurance documents and stock records, etc.) available to their stakeholders (workers, unions, creditors in general, bodies appointed to reach a settlement for the crisis) and consent to all forms of checks on their activities.

4.3.10.2. This would not only respect the principle of transparency, but would also make some of the key principles mentioned in and underpinning this proposal for a directive more effective.

4.3.10.3. Immediate access to all the company's documentation could allow:

— all players involved to understand the company's current economic situation with a view to identifying the appropriate measures to rectify the state of crisis as quickly as possible;

— the provision of appropriate information to creditors (workers and others, including their experts) taking part in negotiations to approve the plan and/or proposed alternative measures, enabling them to express their opinion or vote with full knowledge of the restructuring plan (Article 8);

([6]) According to studies carried out by the Avignon Academy, delays in payments lead to at least 30 % of business failures.
([7]) Composed of experts from the regional authorities and representatives of credit organisations and the social partners.
([8]) See, for example, the *Organismo di vigilanza e di sostegno delle aziende in difficoltà* (body for supervision and support to companies in difficulty) established by the business department of the Autonomous Region of Sicily in March 2016.

— the provision of adequate information to practitioners (Article 17(3)), as well as to judicial authorities and their experts (Article 13) in cases where they are called to assess the restructuring plan;

— a more accurate assessment of the entrepreneur's honesty (Article 22(1)), given that examining the document will show how the entrepreneur became indebted (whether in good or bad faith) and whether the procedure was adopted in good time, after the first indications that the company was in crisis.

4.3.11. The impact assessment of the restructuring should include the effects on employment, since if they are known in advance, it is possible to take appropriate steps to safeguard jobs, such as measures relating to training and the development of workers' skills.

4.3.12. With regard to Chapter 5, Article 18: directors should be prevented from reducing company assets below the level necessary to pay accrued commitments to employees.

4.4. ***Title IV: Access to debt discharge (second chance)***

4.4.1. In its 2013 opinion on insolvency proceedings, which also apply to this opinion, the EESC highlighted, inter alia, the fact that:

— entrepreneurs who have learned from their previous failure and are able to start again with a renewed business plan should benefit from the 'second chance' proposed;

— employees should be better protected and recognised as 'privileged creditors' in all Member States;

— resorting systematically to the courts does not seem to be the best solution and the Committee asked the Commission to consider the possibility of establishing new bodies;

— the obligation for Member States to improve publicity rules, setting up an electronic register of relevant legal decisions was a positive step.

4.4.2. The rules on second chances, reserved for entrepreneurs after a first failure, must be clear and common to all EU countries, as set out under Article 114 on the Single Market. They must be supported by employees who have not incurred damages or harm as a result of the entrepreneur's first failure.

4.4.3. Too often the rigidity of procedures in many countries has encouraged drastic action by insolvency practitioners.

4.4.4. The action to be taken, in a consistent and open manner in all EU Member States, must transform the old role of insolvency practitioners into a new role of 'practitioners for the development of employment'. This must be done through broad and in-depth cultural and technical training, using in particular the IT processes provided by the European e-Justice Portal and implemented by Regulation (EU) 2015/848.

4.4.5. The EESC welcomes the proposed simplified access to a second chance. As such, it seems significant that the over-indebted entrepreneur may be discharged of their debts, after the prescribed discharge period has elapsed, without having to re-apply to a judicial or administrative authority — Article 20(2).

4.5. ***Title V: Measures to increase the effectiveness of the procedures.***

4.5.1. It would be helpful if the initial and further training for 'members of the judiciary and administrative authorities dealing with restructuring, insolvency and second chance matters' was organised directly by the Commission (including through agencies).

4.5.2. The requirements for practitioners operating in the EU must be harmonised, including: minimum standards should be set for the aforementioned practitioners, such as training and professional qualifications, registered status as a practitioner, liability and the professional code of ethics.

4.5.3. Internal supervision tools are also needed, including: accounting, reporting and audit practices to unlock and enhance the effectiveness of the procedures.

4.6. ***Title VI: Monitoring of procedures***

4.6.1. As has been highlighted under point 4.3.10.1, only full and timely access to the company's documentation can guarantee the authenticity and completeness of the data to be collected for the purpose of making the monitoring procedure more effective (Article 29).

4.6.2. The clarity and completeness of this documentation must be reiterated by the Implementing Act issued pursuant to Regulation (EU) No 182/2011.

Brussels, 29 March 2017.

The President
of the European Economic and Social Committee
Georges DASSIS