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## I

(Legislative acts)

## REGULATIONS

**REGULATION (EU) 2019/1022 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL****of 20 June 2019****establishing a multiannual plan for the fisheries exploiting demersal stocks in the western Mediterranean Sea and amending Regulation (EU) No 508/2014**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 43(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Acting in accordance with the ordinary legislative procedure <sup>(2)</sup>,

Whereas:

- (1) The United Nations Convention of 10 December 1982 on the Law of the Sea, to which the Union is a contracting party, provides for conservation obligations, including the maintaining or restoring of populations of harvested species at levels which can produce the maximum sustainable yield (MSY).
- (2) At the United Nations Summit on Sustainable Development held in New York in 2015, the Union and its Member States committed themselves, by 2020, to effectively regulate harvesting, to end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and to implement science-based management plans, in order to restore fish stocks in the shortest time feasible, at least to levels that can produce MSY as determined by their biological characteristics.
- (3) The Malta MedFish4Ever Ministerial Declaration of 30 March 2017 <sup>(3)</sup> lays down a new framework for fisheries governance in the Mediterranean Sea and provides a work programme with five concrete actions for the next 10 years. One of the commitments made is to establish multiannual plans.
- (4) Regulation (EU) No 1380/2013 of the European Parliament and of the Council <sup>(4)</sup> establishes the rules of the common fisheries policy (CFP) in line with the international obligations of the Union. The CFP is to contribute to the protection of the marine environment, to the sustainable management of all commercially exploited species and, in particular, to the achievement of good environmental status by 2020.

<sup>(1)</sup> OJ C 367, 10.10.2018, p. 103.

<sup>(2)</sup> Position of the European Parliament of 4 April 2019 (not yet published in the Official Journal) and decision of the Council of 6 June 2019.

<sup>(3)</sup> Malta MedFish4Ever Ministerial Declaration. Ministerial conference on the sustainability of Mediterranean fisheries (Malta, 30 March 2017).

<sup>(4)</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ L 354, 28.12.2013, p. 22).

- (5) The objectives of the CFP are, amongst others, to ensure that fishing and aquaculture activities are environmentally, socially and economically sustainable in the long term, to apply the precautionary approach to fisheries management, and to implement the ecosystem-based approach to fisheries management. The CFP also contributes to a fair standard of living for the fisheries sector, including the small-scale, artisanal or coastal fisheries sector. The achievement of those objectives also contributes to the availability of food supplies and provides employment benefits.
- (6) In order to achieve the objectives of the CFP, a number of conservation measures such as multiannual plans, technical measures and the setting and allocation of maximum allowable fishing effort, should be adopted.
- (7) Pursuant to Articles 9 and 10 of Regulation (EU) No 1380/2013, multiannual plans are to be based on scientific, technical and economic advice. In accordance with those provisions, the multiannual plan established by this Regulation ('the plan') should contain objectives, quantifiable targets with clear timeframes, conservation reference points, safeguards and technical measures designed to avoid and reduce unwanted catches.
- (8) 'Best available scientific advice' should be understood to refer to publicly available scientific advice that is supported by the most up-to-date scientific data and methods and that has either been issued or reviewed by an independent scientific body that is recognised at Union or international level.
- (9) The Commission should obtain the best available scientific advice for the stocks within the scope of the plan. In order to do so, it should consult in particular the Scientific, Technical and Economic Committee for Fisheries ('STECF'). The Commission should, in particular, obtain publicly available scientific advice, including advice on mixed fisheries, which takes into account the plan and indicates ranges of  $F_{MSY}$  and conservation reference points ( $B_{PA}$  and  $B_{LIM}$ ).
- (10) Council Regulation (EC) No 1967/2006 <sup>(5)</sup> establishes a management framework for the sustainable exploitation of fishery resources in the Mediterranean Sea and requires the adoption of management plans for fisheries using trawl nets, boat seines, shore seines, surrounding nets and dredges in the territorial waters of the Member States.
- (11) France, Italy and Spain have adopted management plans under Regulation (EC) No 1967/2006. However, there is a lack of consistency between those plans and they do not take account of all the gear exploiting demersal stocks and the straddling distribution of certain stocks and fishing fleets. Besides, those plans have proven ineffective in meeting the objectives of the CFP. Member States and stakeholders have expressed support for the development and implementation of a multi-annual plan at Union level for the stocks concerned.
- (12) STECF has shown that exploitation of many demersal stocks in the western Mediterranean Sea exceeds by far the levels required to achieve MSY.
- (13) It is therefore appropriate to establish a multiannual plan for the conservation and sustainable exploitation of demersal stocks in the western Mediterranean Sea.
- (14) The plan should take account of the mixed nature of the fisheries and the dynamics between the stocks driving them, i.e. hake (*Merluccius merluccius*), red mullet (*Mullus barbatus*), deep-water rose shrimp (*Parapenaeus longirostris*), Norway lobster (*Nephrops norvegicus*), blue and red shrimp (*Aristeus antennatus*) and giant red shrimp (*Aristaeomorpha foliacea*). It should also take account of by-catch species caught in demersal fisheries and demersal stocks for which sufficient data are not available. It should apply to the demersal fisheries (in particular, trawl nets, bottom-set nets, traps and longlines) carried out in Union waters or by Union fishing vessels outside the Union waters of the western Mediterranean Sea.
- (15) Where mortality caused by recreational fishing has a significant impact on the stocks concerned, the Council should be able to set non-discriminatory limits for recreational fishermen. The Council should refer to transparent and objective criteria when setting such limits. Where appropriate, Member States should take necessary and proportionate measures for the monitoring and collection of data for the reliable estimation of actual recreational catch levels. Furthermore, it should be possible to adopt technical conservation measures in respect of recreational fisheries.

<sup>(5)</sup> Council Regulation (EC) No 1967/2006 of 21 December 2006 concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea, amending Regulation (EEC) No 2847/93 and repealing Regulation (EC) No 1626/94 (OJ L 409, 30.12.2006, p. 11).

- (16) The geographical scope of the plan should be based on the geographical distribution of stocks indicated in the best available scientific advice. Future changes to the geographical distribution of stocks as set out in the plan may be needed due to improved scientific information. Therefore, the Commission should be empowered to adopt delegated acts adjusting the geographical distribution of stocks set out in the plan if scientific advice shows a change in the geographical distribution of the relevant stocks.
- (17) The objective of the plan should be to contribute to the achievement of the objectives of the CFP and, in particular, to reaching and maintaining MSY for the target stocks, to implementing the landing obligation for demersal stocks and pelagic by-catches caught in demersal fisheries subject to minimum conservation reference size, and to promoting a fair standard of living for those who depend on fishing activities, bearing in mind coastal fisheries and socioeconomic aspects. The plan should also implement the ecosystem-based approach to fisheries management in order to minimise negative impacts of fishing activities on the marine ecosystem. It should be coherent with Union environmental legislation, in particular the objective of achieving good environmental status by 2020, in accordance with Directive 2008/56/EC of the European Parliament and of the Council <sup>(6)</sup>, and the objectives of Directive 2009/147/EC of the European Parliament and of the Council <sup>(7)</sup> and Council Directive 92/43/EEC <sup>(8)</sup>.
- (18) It is appropriate to establish the target fishing mortality (F) that corresponds to the objective of reaching and maintaining MSY as ranges of values which are consistent with achieving MSY ( $F_{MSY}$ ). Those ranges, based on best available scientific advice, are necessary to provide the flexibility to take account of developments in scientific advice, to contribute to the implementation of the landing obligation and to take into account mixed fisheries. Based on the plan, those ranges are derived to deliver no more than a 5 % reduction in the long-term yield compared to MSY. In addition, the upper limit of the range of  $F_{MSY}$  is capped, so that the probability of the stock falling below the biomass limit reference point ( $B_{LIM}$ ) is no more than 5 %.
- (19) For the purpose of fixing maximum allowable fishing effort, there should be ranges of  $F_{MSY}$  for 'normal use' and, subject to the good status of the stocks concerned, the possibility to set maximum allowable fishing effort above those ranges of  $F_{MSY}$  for the most vulnerable stock if, on the basis of scientific advice, it is necessary for the achievement of the objectives of this Regulation in mixed fisheries, to avoid harm to a stock caused by intra- or inter-species stock dynamics, or to limit the year-on-year variations in maximum allowable fishing effort. A target fishing mortality in line with those ranges of  $F_{MSY}$  should be achieved on a progressive, incremental basis by 2020 where possible, and by 1 January 2025 at the latest.
- (20) For stocks for which targets relating to MSY are available, and for the purpose of the application of safeguards, it is necessary to establish conservation reference points, expressed as precautionary reference points ( $B_{PA}$ ) and limit reference points ( $B_{LIM}$ ).
- (21) Appropriate safeguards should be provided for in order to ensure that the targets are met and to trigger, where needed, remedial measures, inter alia, where stocks fall below the conservation reference points. Remedial measures should include emergency measures in accordance with Articles 12 and 13 of Regulation (EU) No 1380/2013, maximum allowable fishing effort and other specific conservation measures.
- (22) In order to ensure transparent access to fisheries and the achievement of target fishing mortalities, a Union fishing effort regime should be adopted for trawls which are the main gear used to exploit demersal stocks in the western Mediterranean Sea. To that end, it is appropriate to determine fishing effort groups in order for the Council to establish maximum allowable fishing effort, expressed as numbers of fishing days, on an annual basis. Where necessary, the fishing effort regime should incorporate other fishing gear.
- (23) Given the worrying situation of many demersal stocks in the western Mediterranean Sea, and in order to reduce the current high levels of fishing mortality, the fishing effort regime should entail a significant reduction of fishing effort in the first five years of implementation of the plan.

<sup>(6)</sup> Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) (OJ L 164, 25.6.2008, p. 19).

<sup>(7)</sup> Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.1.2010, p. 7).

<sup>(8)</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7).

- (24) Member States should take specific measures to ensure that the fishing effort regime is effective and workable, by including a method for allocating fishing effort quotas in accordance with Article 17 of Regulation (EU) No 1380/2013, by producing a list of vessels, by issuing fishing authorisations and by recording and transmitting relevant fishing effort data.
- (25) In order to contribute to the effective achievement of the objectives of the plan, and in accordance with the principles of good governance laid down in Article 3 of Regulation (EU) No 1380/2013, Member States should be allowed to promote participative management systems at local level.
- (26) In order to protect nursery areas and sensitive habitats, and safeguard small-scale fisheries, the coastal zone should be regularly reserved for more selective fisheries. Therefore, the plan should establish a closure for trawls operating within six nautical miles from the coast except in areas deeper than the 100 m isobath during three months each year. It should be possible for other closure areas to be established, where this can ensure at least a 20 % reduction of catches of juvenile hake.
- (27) Further conservation measures should be taken as regards demersal stocks. In particular, on the basis of scientific advice, it is appropriate to establish additional closures in areas with high aggregations of spawning individuals, in order to protect a severely harmed adult stage of hake.
- (28) The precautionary approach should apply to by-catch stocks and to demersal stocks for which sufficient data are not available. Specific conservation measures should be adopted in accordance with Article 18 of Regulation (EU) No 1380/2013 where scientific advice shows that remedial measures are needed.
- (29) The plan should provide for additional technical conservation measures to be adopted by means of delegated acts. That is necessary to achieve the objectives of the plan, in particular as regards conserving demersal stocks and improving selectivity.
- (30) In order to comply with the landing obligation established by Article 15(1) of Regulation (EU) No 1380/2013, the plan should provide for additional management measures to be further specified in accordance with Article 18 of Regulation (EU) No 1380/2013.
- (31) In order to adapt the plan in a timely manner to technical and scientific progress, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of supplementing this Regulation with remedial and technical conservation measures, implementing the landing obligation and amending certain elements of the plan. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making<sup>(9)</sup>. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.
- (32) The deadline for submitting joint recommendations from Member States having a direct management interest should be established, as required by Regulation (EU) No 1380/2013.
- (33) In order to evaluate progress towards MSY, the plan should allow regular scientific monitoring of the stocks concerned and, where possible, of by-catch stocks.
- (34) In accordance with Article 10(3) of Regulation (EU) No 1380/2013, the Commission should periodically assess the adequacy and effectiveness of this Regulation. That assessment should follow and be based on periodic evaluation of the plan, on the basis of scientific advice by STECF, by 17 July 2024 and every three years thereafter. That period would allow for the full implementation of the landing obligation and for regionalised measures to be adopted and implemented and to have an impact on the stocks and fisheries.

<sup>(9)</sup> OJ L 123, 12.5.2016, p. 1.

- (35) In order to provide legal certainty, it is appropriate to clarify that temporary cessation measures that have been adopted in order to attain the objectives of the plan can be deemed eligible for support under Regulation (EU) No 508/2014 of the European Parliament and of the Council <sup>(10)</sup>.
- (36) In order to achieve a balance between the fishing capacity of the fleet and the available maximum allowable fishing effort, support from the European Maritime and Fisheries Fund for the permanent cessation of fishing activities should be available in the imbalanced fleet segments covered by this Regulation. Regulation (EU) No 508/2014 should therefore be amended accordingly.
- (37) The likely economic and social impact of the plan was duly assessed before it was drafted, in accordance with Article 9(4) of Regulation (EU) No 1380/2013.
- (38) Taking into account that the maximum allowable fishing effort is set for each calendar year, the provisions on the fishing effort regime should apply from 1 January 2020. Taking into account environmental, social and economic sustainability, the provisions on the ranges of  $F_{MSY}$  and on safeguards for stocks below  $B_{PA}$  should apply from 1 January 2025,

HAVE ADOPTED THIS REGULATION:

#### CHAPTER I

#### GENERAL PROVISIONS

##### Article 1

#### Subject matter and scope

1. This Regulation establishes a multiannual plan ('the plan') for the conservation and sustainable exploitation of demersal stocks in the western Mediterranean Sea.
2. This Regulation applies to the following stocks:
  - (a) blue and red shrimp (*Aristeus antennatus*) in GFCM subareas 1, 5, 6 and 7;
  - (b) deep-water rose shrimp (*Parapenaeus longirostris*) in GFCM subareas 1, 5, 6 and 9-10-11;
  - (c) giant red shrimp (*Aristaeomorpha foliacea*) in GFCM subareas 9-10-11;
  - (d) European hake (*Merluccius merluccius*) in GFCM subareas 1-5-6-7 and 9-10-11;
  - (e) Norway lobster (*Nephrops norvegicus*) in GFCM subareas 5, 6, 9 and 11;
  - (f) red mullet (*Mullus barbatus*) in GFCM subareas 1, 5, 6, 7, 9, 10 and 11.
3. This Regulation also applies to by-catch stocks caught in the western Mediterranean Sea when fishing for the stocks listed in paragraph 2. It also applies to any other demersal stocks which are caught in the western Mediterranean Sea and for which sufficient data are not available.
4. This Regulation applies to commercial fisheries catching the demersal stocks referred to in paragraphs 2 and 3, where they are carried out in Union waters or by Union fishing vessels outside the Union waters of the western Mediterranean Sea.
5. This Regulation also specifies details for the implementation of the landing obligation in Union waters of the western Mediterranean Sea for all stocks of species to which the landing obligation applies under Article 15(1) of Regulation (EU) No 1380/2013 which are caught in demersal fisheries.
6. This Regulation provides for technical measures, as set out in Article 13, applicable in the western Mediterranean Sea in respect of any stock.

<sup>(10)</sup> Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council (OJ L 149, 20.5.2014, p. 1).

## Article 2

## Definitions

For the purposes of this Regulation, the following definitions apply in addition to those laid down in Article 4 of Regulation (EU) No 1380/2013, Article 4 of Council Regulation (EC) No 1224/2009<sup>(1)</sup> and Article 2 of Regulation (EC) No 1967/2006:

- (1) 'western Mediterranean Sea' means the waters in GFCM geographical sub-areas (GSAs) 1 (Northern Alboran Sea), 2 (Alboran Island), 5 (Balearic Islands), 6 (Northern Spain), 7 (Gulf of Lions), 8 (Corsica Island), 9 (Ligurian and North Tyrrhenian Sea), 10 (South Tyrrhenian Sea) and 11 (Sardinia Island), as defined in Annex I to Regulation (EU) No 1343/2011 of the European Parliament and of the Council<sup>(12)</sup>;
- (2) 'the stocks concerned' means the stocks listed in Article 1(2);
- (3) 'most vulnerable stock' means the stock for which, at the time of the setting of the maximum allowable fishing effort, the fishing mortality of the previous year is the furthest from the  $F_{MSY}$  point value determined in the best available scientific advice;
- (4) 'range of  $F_{MSY}$ ' means a range of values provided for in the best available scientific advice, in particular by STECF, or a similar independent scientific body recognised at Union or international level, where all levels of fishing mortality within that range result in maximum sustainable yield (MSY) in the long term with a given fishing pattern and under current average environmental conditions, without significantly affecting the reproduction process for the stocks in question. It is derived to deliver no more than a 5 % reduction in long-term yield compared to the MSY. It is capped so that the probability of the stock falling below the limit reference point ( $B_{LIM}$ ) is no more than 5 %;
- (5) ' $F_{MSY}$  point value' means the value of the estimated fishing mortality that, with a given fishing pattern and under current average environmental conditions, gives the long-term maximum yield;
- (6) ' $MSY F_{LOWER}$ ' means the lowest value within the range of  $F_{MSY}$ ;
- (7) ' $MSY F_{UPPER}$ ' means the highest value within the range of  $F_{MSY}$ ;
- (8) 'lower range of  $F_{MSY}$ ' means a range that contains values from  $MSY F_{LOWER}$  to  $F_{MSY}$  point value;
- (9) 'upper range of  $F_{MSY}$ ' means a range that contains values from  $F_{MSY}$  point value to  $MSY F_{UPPER}$ ;
- (10) ' $B_{LIM}$ ' means the limit reference point, expressed as spawning stock biomass and provided for in the best available scientific advice, in particular by STECF, or a similar independent scientific body recognised at Union or international level, below which there may be reduced reproductive capacity;
- (11) ' $B_{PA}$ ' means the precautionary reference point, expressed as spawning stock biomass and provided for in the best available scientific advice, in particular by STECF, or a similar independent scientific body recognised at Union or international level, which ensures that the spawning stock biomass has less than 5 % probability of being below  $B_{LIM}$ ;
- (12) 'fishing effort group' means a fleet management unit of a Member State for which a maximum allowable fishing effort is set;
- (13) 'stock group' means a group of stocks caught together as set out in Annex I;
- (14) 'fishing day' means any continuous period of 24 hours, or part thereof, during which a vessel is present in the western Mediterranean Sea and absent from port.

<sup>(1)</sup> Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 (OJ L 343, 22.12.2009, p. 1).

<sup>(12)</sup> Regulation (EU) No 1343/2011 of the European Parliament and of the Council of 13 December 2011 on certain provisions for fishing in the GFCM (General Fisheries Commission for the Mediterranean) Agreement area and amending Council Regulation (EC) No 1967/2006 concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea (OJ L 347, 30.12.2011, p. 44).



*Article 3***Objectives**

1. The plan shall be based on a fishing effort regime and shall aim to contribute to the achievement of the objectives of the CFP listed in Article 2 of Regulation (EU) No 1380/2013, in particular by applying the precautionary approach to fisheries management, as well as to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce MSY.
2. The plan shall contribute to the elimination of discards by avoiding and reducing, as far as possible, unwanted catches, and to the implementation of the landing obligation established in Article 15 of Regulation (EU) No 1380/2013 for the species which are subject to minimum conservation reference sizes under Union law and to which this Regulation applies.
3. The plan shall implement the ecosystem-based approach to fisheries management in order to ensure that negative impacts of fishing activities on the marine ecosystem are minimised. It shall be coherent with Union environmental legislation, in particular with the objective of achieving good environmental status by 2020 as set out in Article 1(1) of Directive 2008/56/EC.
4. In particular, the plan shall aim to:
  - (a) ensure that the conditions described in descriptor 3 set out in Annex I to Directive 2008/56/EC are fulfilled;
  - (b) contribute to the fulfilment of other relevant descriptors contained in Annex I to Directive 2008/56/EC in proportion to the role played by fisheries in their fulfilment; and
  - (c) contribute to the achievement of the objectives set out in Articles 4 and 5 of Directive 2009/147/EC and Articles 6 and 12 of Directive 92/43/EEC, in particular to minimise the negative impact of fishing activities on vulnerable habitats and protected species.
5. Measures under the plan shall be taken on the basis of the best available scientific advice.

## CHAPTER II

**TARGETS, CONSERVATION REFERENCE POINTS AND SAFEGUARDS***Article 4***Targets**

1. The target fishing mortality, in line with the ranges of  $F_{MSY}$  defined in Article 2, shall be achieved on a progressive, incremental basis by 2020 where possible, and by 1 January 2025 at the latest, for the stocks concerned, and shall be maintained thereafter within the ranges of  $F_{MSY}$ .
2. The ranges of  $F_{MSY}$  based on the plan shall be requested, in particular from STECF, or a similar independent scientific body recognised at Union or international level.
3. In accordance with Article 16(4) of Regulation (EU) No 1380/2013, when the Council fixes maximum allowable fishing effort, it shall establish that fishing effort for each fishing effort group, within the range of  $F_{MSY}$  available at that time for the most vulnerable stock.
4. Notwithstanding paragraphs 1 and 3, maximum allowable fishing effort may be set at levels that are lower than the ranges of  $F_{MSY}$ .
5. Notwithstanding paragraphs 1 and 3, maximum allowable fishing effort may be set above the range of  $F_{MSY}$  available at that time for the most vulnerable stock, provided that all stocks concerned are above the  $B_{PA}$ :
  - (a) if, on the basis of the best available scientific advice or evidence, it is necessary for the achievement of the objectives laid down in Article 3 in the case of mixed fisheries;

- (b) if, on the basis of the best available scientific advice or evidence, it is necessary to avoid serious harm to a stock caused by intra- or inter-species stock dynamics; or
  - (c) in order to limit variations in maximum allowable fishing effort between consecutive years to not more than 20 %.
6. Where ranges of  $F_{MSY}$  cannot be determined for a stock listed in Article 1(2) due to a lack of adequate scientific information, that stock shall be managed in accordance with Article 12 until ranges of  $F_{MSY}$  are available pursuant to paragraph 2 of this Article.

#### Article 5

### Conservation reference points

For the purposes of Article 6, the following conservation reference points shall be requested, in particular from STECF, or a similar independent scientific body recognised at Union or international level, on the basis of the plan:

- (a) precautionary reference points, expressed as spawning stock biomass ( $B_{PA}$ ); and
- (b) limit reference points, expressed as spawning stock biomass ( $B_{LIM}$ ).

#### Article 6

### Safeguards

1. Where scientific advice shows that the spawning stock biomass of any of the stocks concerned is below  $B_{PA}$ , all appropriate remedial measures shall be taken to ensure the rapid return of the stocks concerned to levels above those capable of producing MSY. In particular, notwithstanding Article 4(3), maximum allowable fishing effort shall be set at levels consistent with a fishing mortality that is reduced within the range of  $F_{MSY}$  for the most vulnerable stock, taking into account the decrease in biomass.
2. Where scientific advice shows that the spawning stock biomass of any of the stocks concerned is below  $B_{LIM}$ , further remedial measures shall be taken to ensure the rapid return of the stocks concerned to levels above those capable of producing MSY. In particular, notwithstanding Article 4(3), such remedial measures may include suspending the targeted fishery for the stocks concerned and the adequate reduction of the maximum allowable fishing effort.
3. Remedial measures referred to in this Article may include:
  - (a) measures pursuant to Articles 7, 8 and 11 to 14 of this Regulation; and
  - (b) emergency measures in accordance with Articles 12 and 13 of Regulation (EU) No 1380/2013.
4. The choice of measures referred to in this Article shall be made in accordance with the nature, seriousness, duration and repetition of the situation where the spawning stock biomass is below the levels referred to in Article 5.

#### CHAPTER III

### FISHING EFFORT

#### Article 7

### Fishing effort regime

1. A fishing effort regime shall apply to all vessels fishing with trawls in the areas, stock groups and length categories defined in Annex I.
2. Each year, on the basis of scientific advice, and pursuant to Article 4, the Council shall set a maximum allowable fishing effort for each fishing effort group by Member State.

3. By way of derogation from Article 3(1) and notwithstanding paragraph 2 of this Article, during the first five years of implementation of the plan:
  - (a) for the first year of implementation of the plan, except for GSAs in which the fishing effort has already been reduced by more than 20 % during the baseline period, the maximum allowable fishing effort shall be reduced by 10 % compared to the baseline;
  - (b) for the second to the fifth year of the implementation of the plan, the maximum allowable fishing effort shall be reduced by a maximum of 30 % during that period. The fishing effort decrease may be supplemented with any relevant technical or other conservation measures adopted in accordance with Union law, in order to achieve the  $F_{MSY}$  by 1 January 2025.
4. The baseline referred to in paragraph 3 shall be calculated by each Member State for each fishing effort group or GSA as the average fishing effort, expressed as number of fishing days between 1 January 2015 and 31 December 2017, and shall take account only of vessels active during that period.
5. Where the best available scientific advice shows significant catches of a particular stock with fishing gear other than trawls, maximum allowable fishing effort may be set for such particular gear on the basis of such scientific advice.

#### Article 8

##### Recreational fisheries

1. Where scientific advice indicates that recreational fishing is having a significant impact on the fishing mortality of a stock listed in Article 1(2), the Council may set non-discriminatory limits for recreational fishermen.
2. When setting the limits referred to in paragraph 1, the Council shall refer to transparent and objective criteria, including those of an environmental, social and economic nature. The criteria used may include, in particular, the impact of recreational fishing on the environment, the societal importance of that activity and its contribution to the economy in coastal areas.
3. Where appropriate, Member States shall take necessary and proportionate measures for the monitoring and collection of data for a reliable estimation of the actual recreational catch levels.

#### Article 9

##### Obligations of the Member States

1. Member States shall manage the maximum allowable fishing effort in accordance with the conditions laid down in Articles 26 to 34 of Regulation (EC) No 1224/2009.
2. Each Member State shall decide on a method for allocating the maximum allowable fishing effort to individual vessels or groups of vessels flying its flag, in accordance with the criteria set out in Article 17 of Regulation (EU) No 1380/2013.
3. A Member State may amend its fishing effort allocations by transferring fishing days across fishing effort groups of the same geographical area, provided that it applies a conversion factor which is supported by the best available scientific advice. The exchanged fishing days and conversion factor shall be made available immediately, and not later than 10 working days, to the Commission and other Member States.
4. Where a Member State allows vessels flying its flag to fish with trawls, it shall ensure that such fishing is limited to a maximum of 15 hours per fishing day, five fishing days per week or equivalent.

Member States may grant a derogation of up to 18 hours per fishing day to take into account the transit time between port and the fishing ground. Such derogations shall be communicated to the Commission and other Member States concerned without delay.

5. Notwithstanding paragraph 3, where a vessel fishes for two different stock groups during one fishing day, half a fishing day shall be deducted from the maximum allowable fishing effort allocated to that vessel for each stock group.

6. For the vessels flying its flag and fishing for the stocks concerned, each Member State shall issue fishing authorisations for the areas referred to in Annex I and in accordance with Article 7 of Regulation (EC) No 1224/2009.
7. Member States shall ensure that the total capacity, expressed in GT and kW, corresponding to the fishing authorisations issued in accordance with paragraph 6, is not increased during the period of application of the plan.
8. Each Member State shall establish and maintain a list of vessels with fishing authorisations issued in accordance with paragraph 6 and make it available to the Commission and other Member States. Member States shall transmit their lists for the first time within three months after the entry into force of this Regulation and subsequently not later than 30 November each year.
9. Member States shall monitor their fishing effort regime and ensure that the maximum allowable fishing effort referred to in Article 7 does not exceed the established limits.
10. In accordance with the principles of good governance established in Article 3 of Regulation (EU) No 1380/2013, Member States may promote participative management systems at local level in order to achieve the objectives of the plan.

#### *Article 10*

##### **Communication of relevant data**

1. Member States shall record and transmit the fishing effort data to the Commission in accordance with Article 33 of Regulation (EC) No 1224/2009 and Articles 146c, 146d and 146e of Commission Implementing Regulation (EU) No 404/2011 <sup>(13)</sup>.
2. The fishing effort data shall be aggregated per month and contain the information set out in Annex II. The format of the aggregated data shall be the XML Schema Definition based on UN/CEFACT P1000-12.
3. Member States shall transmit the fishing effort data referred to in paragraph 1 to the Commission before the 15th of each month.

#### CHAPTER IV

##### **TECHNICAL CONSERVATION MEASURES**

#### *Article 11*

##### **Closure areas**

1. In addition to what is provided for in Article 13 of Regulation (EC) No 1967/2006, the use of trawls in the western Mediterranean Sea shall be prohibited within six nautical miles from the coast except in areas deeper than the 100 m isobath during three months each year and, where appropriate, consecutively, on the basis of the best available scientific advice. Those three months of annual closure shall be determined by each Member State and shall apply during the most relevant period determined on the basis of the best available scientific advice. That period shall be communicated to the Commission and other Member States concerned without delay.
2. By way of derogation from paragraph 1, and provided that it is justified by particular geographical constraints, such as the limited size of the continental shelf or the long distances to fishing grounds, Member States may establish, on the basis of the best available scientific advice, other closure areas, provided that a reduction of at least 20 % of catches of juvenile hake in each geographical subarea is achieved. Such derogation shall be communicated to the Commission and other Member States concerned without delay.
3. By 17 July 2021 and on the basis of the best available scientific advice, the Member States concerned shall establish other closure areas where there is evidence of a high concentration of juvenile fish, below the minimum conservation reference size, and of spawning grounds of demersal stocks, in particular for the stocks concerned.

<sup>(13)</sup> Commission Implementing Regulation (EU) No 404/2011 of 8 April 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy (OJ L 112, 30.4.2011, p. 1).

4. The other closure areas established pursuant to paragraph 3 shall be assessed, in particular, by STECF, or a similar independent scientific body recognised at Union or international level. If that assessment indicates that those closure areas are not in line with their objectives, Member States shall review those closure areas in light of those recommendations.

5. Where the closure areas referred to in paragraph 3 of this Article affect fishing vessels of several Member States, the Commission is empowered to adopt delegated acts in accordance with Article 8 of Regulation (EU) No 1380/2013 and Article 18 of this Regulation and on the basis of the best available scientific advice, establishing the closure areas concerned.

#### *Article 12*

### **Management of by-catch stocks and demersal stocks for which sufficient data are not available**

1. The stocks referred to in Article 1(3) of this Regulation shall be managed on the basis of the precautionary approach to fisheries management as defined in point 8 of Article 4(1) of Regulation (EU) No 1380/2013.
2. Management measures for the stocks referred to in Article 1(3), in particular technical conservation measures such as those listed in Article 13, shall be established, taking into account the best available scientific advice.

#### *Article 13*

### **Specific conservation measures**

1. The Commission is empowered to adopt delegated acts in accordance with Article 18 of this Regulation and Article 18 of Regulation (EU) No 1380/2013 supplementing this Regulation by establishing the following technical conservation measures:
  - (a) specifications of characteristics of fishing gear and rules governing their use, to ensure or improve selectivity, to reduce unwanted catches or to minimise the negative impact on the ecosystem;
  - (b) specifications of modifications or additional devices to the fishing gear, to ensure or improve selectivity, to reduce unwanted catches or to minimise the negative impact on the ecosystem;
  - (c) limitations or prohibitions on the use of certain fishing gear and on fishing activities, in certain areas or periods to protect spawning fish, fish below the minimum conservation reference size or non-target fish species, or to minimise the negative impact on the ecosystem;
  - (d) the fixing of minimum conservation reference sizes for any of the stocks to which this Regulation applies, to ensure the protection of juveniles of marine organisms; and
  - (e) on recreational fisheries.
2. The measures referred to in paragraph 1 shall contribute to the achievement of the objectives set out in Article 3.

#### CHAPTER V

### **LANDING OBLIGATION**

#### *Article 14*

### **Provisions on the landing obligation**

For all stocks of species in the western Mediterranean Sea to which the landing obligation applies under Article 15(1) of Regulation (EU) No 1380/2013, and for incidental catches of pelagic species in fisheries exploiting the stocks listed in Article 1(2) of this Regulation to which the landing obligation applies, the Commission, after consulting the Member States, is empowered to adopt delegated acts in accordance with Article 18 of this Regulation and Article 18 of Regulation (EU) No 1380/2013 supplementing this Regulation by specifying details of that obligation as provided for in points (a) to (e) of Article 15(5) of Regulation (EU) No 1380/2013.

## CHAPTER VI

**REGIONALISATION***Article 15***Regional cooperation**

1. Article 18(1) to (6) of Regulation (EU) No 1380/2013 shall apply to the measures referred to in Articles 11 to 14 of this Regulation.
2. For the purpose of paragraph 1 of this Article, Member States having a direct management interest may submit joint recommendations in accordance with Article 18(1) of Regulation (EU) No 1380/2013:
  - (a) for the first time not later than 12 months after 16 July 2019 and, thereafter, not later than 12 months after each submission of the evaluation of the plan in accordance with Article 17(2) of this Regulation;
  - (b) by 1 July of the year preceding that in which the measures are to apply; and/or
  - (c) whenever they deem necessary, in particular in the event of an abrupt change in the situation of any of the stocks to which this Regulation applies.
3. The empowerments granted under Articles 11 to 14 of this Regulation shall be without prejudice to powers conferred on the Commission under other provisions of Union law, including under Regulation (EU) No 1380/2013.

## CHAPTER VII

**AMENDMENTS AND FOLLOW UP***Article 16***Amendments of the plan**

1. Where scientific advice shows a change in the geographical distribution of the stocks concerned, the Commission is empowered to adopt delegated acts in accordance with Article 18 amending this Regulation by adjusting the areas specified in Article 1(2) and Annex I in order to reflect that change.
2. Where, on the basis of scientific advice, the Commission considers that the list of the stocks concerned needs to be amended, the Commission may submit a proposal for the amendment of that list.

*Article 17***Monitoring and evaluation of the plan**

1. For the purposes of the annual report provided for in Article 50 of Regulation (EU) No 1380/2013, quantifiable indicators shall include annual estimates of current fishing mortality over  $F_{MSY}$  ( $F/F_{MSY}$ ), spawning stock biomass (SSB) and socioeconomic indicators for the stocks concerned and, where possible, for by-catch stocks. They may be supplemented with other indicators on the basis of scientific advice.
2. By 17 July 2024 and every three years thereafter, the Commission shall report to the European Parliament and to the Council on the results and impact of the plan on the stocks concerned and on the fisheries exploiting those stocks, in particular as regards the achievement of the objectives set out in Article 3.

## CHAPTER VIII

**PROCEDURAL PROVISIONS***Article 18***Exercise of the delegation**

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Articles 11 to 14 and 16 shall be conferred on the Commission for a period of five years from 16 July 2019. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.
3. The delegation of power referred to in Articles 11 to 14 and 16 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated act already in force.
4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.
5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
6. A delegated act adopted pursuant to Articles 11 to 14 and 16 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. The period shall be extended by two months at the initiative of the European Parliament or of the Council.

#### CHAPTER IX

#### EUROPEAN MARITIME AND FISHERIES FUND

##### Article 19

#### **Support from the European Maritime and Fisheries Fund**

Temporary cessation measures adopted in order to achieve the objectives of the plan shall be deemed as the temporary cessation of fishing activities for the purposes of points (a) and (c) of Article 33(1) of Regulation (EU) No 508/2014.

##### Article 20

#### **Amendments to Regulation (EU) No 508/2014 as regards certain rules relating to the European Maritime and Fisheries Fund**

Article 34 of Regulation (EU) No 508/2014 is amended as follows:

(1) paragraph 4 is replaced by the following:

‘4. Support under this Article may be granted until 31 December 2017, unless the permanent cessation measures are adopted in order to achieve the objectives of the multi-annual plan for the conservation and sustainable exploitation of demersal stocks in the western Mediterranean Sea, established by Regulation (EU) 2019/1022 of the European Parliament and of the Council (\*).

(\* Regulation (EU) 2019/1022 of the European Parliament and of the Council of 20 June 2019 establishing a multiannual plan for the fisheries exploiting demersal stocks in the western Mediterranean Sea and amending Regulation (EU) No 508/2014 (OJ L 172, 26.6.2019, p. 1).;

(2) the following paragraph is added:

‘4a. Expenditure related to the permanent cessation measures adopted in order to achieve the objectives of Regulation (EU) 2019/1022 shall be eligible for support from the EMFF as from the entry into force of that Regulation.’.

## CHAPTER X

## FINAL PROVISIONS

## Article 21

**Entry into force and application**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Taking into account environmental, social and economic sustainability, Article 4 and Article 6(1) shall apply from 1 January 2025.

Article 7 shall apply from 1 January 2020.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 June 2019.

*For the European Parliament*

*The President*

A. TAJANI

*For the Council*

*The President*

G. CIAMBA

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## ANNEX I

**Fishing effort regime**

(as referred to in Article 7)

Fishing effort groups are defined as follows:

A) Trawls fishing for red mullet, hake, deep-water rose shrimp and Norway lobster in the continental shelf and upper slope

Gear type	Geographical area	Stock groups	Overall length of vessels	Fishing effort group code
Trawls (TBB, OTB, PTB, TBN, TBS, TB, OTM, PTM, TMS, TM, OTT, OT, PT, TX, OTP, TSP)	GFCM sub-areas 1-2-5-6-7	Red mullet in GSAs 1, 5, 6 and 7; Hake in GSAs 1-5-6-7; Deep-water rose shrimp in GSAs 1, 5 and 6; and Norway lobster in GSAs 5 and 6.	< 12 m	EFF1/MED1_TR1
			≥ 12 m and < 18 m	EFF1/MED1_TR2
			≥ 18 m and < 24 m	EFF1/MED1_TR3
			≥ 24 m	EFF1/MED1_TR4
	GFCM sub-areas 8-9-10-11	Red mullet in GSAs 9, 10 and 11; Hake in GSAs 9-10-11; Deep-water rose shrimp in GSAs 9-10-11; and Norway lobster in GSAs 9 and 10.	< 12 m	EFF1/MED2_TR1
			≥ 12 m and < 18 m	EFF1/MED2_TR2
			≥ 18 m and < 24 m	EFF1/MED2_TR3
			≥ 24 m	EFF1/MED1_TR4

B) Trawls fishing for blue and red shrimp and giant red shrimp in deep-waters

Gear type	Geographical area	Stock groups	Overall length of vessels	Fishing effort group code
Trawls (TBB, OTB, PTB, TBN, TBS, TB, OTM, PTM, TMS, TM, OTT, OT, PT, TX, OTP, TSP)	GFCM sub-areas 1-2-5-6-7	Blue and red shrimp in GSAs 1, 5, 6 and 7.	< 12 m	EFF2/MED1_TR1
			≥ 12 m and < 18 m	EFF2/MED1_TR2
			≥ 18 m and < 24 m	EFF2/MED1_TR3
			≥ 24 m	EFF2/MED1_TR4
	GFCM sub-areas 8-9-10-11	Giant red shrimp in GSAs 9, 10 and 11	< 12 m	EFF2/MED2_TR1
			≥ 12 m and < 18 m	EFF2/MED2_TR2
			≥ 18 m and < 24 m	EFF2/MED2_TR3
			≥ 24 m	EFF2/MED1_TR4

## ANNEX II

**List of information for fishing effort data**

(as referred to in Article 10)

Information	Definition and comments
(1) Member State	Alpha-3 ISO code of the reporting flag Member State
(2) Fishing effort group	Fishing effort group code as set out in Annex I
(3) Fishing effort period	Start date and end date of the month reported
(4) Fishing effort declaration	Total number of fishing days

**Joint statement by the European Parliament and the Council**

The European Parliament and the Council intend to repeal the empowerments to adopt technical measures by means of delegated acts under Article 13 of this Regulation when they adopt a new regulation on technical measures which includes an empowerment covering the same measures.

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# DIRECTIVES

## DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 20 June 2019

**on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the opinion of the Committee of the Regions <sup>(2)</sup>,

Acting in accordance with the ordinary legislative procedure <sup>(3)</sup>,

Whereas:

- (1) The objective of this Directive is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications. Without affecting workers' fundamental rights and freedoms, this Directive aims to remove such obstacles by ensuring that: viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance; and that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length.
- (2) Restructuring should enable debtors in financial difficulties to continue business, in whole or in part, by changing the composition, conditions or structure of their assets and their liabilities or any other part of their capital structure — including by sales of assets or parts of the business or, where so provided under national law, the business as a whole — as well as by carrying out operational changes. Unless otherwise specifically provided for by national law, operational changes, such as the termination or amendment of contracts or the sale or other disposal of assets, should comply with the general requirements that are provided for under national law for such measures, in particular civil law and labour law rules. Any debt-to-equity swaps should also comply with safeguards provided for by national law. Preventive restructuring frameworks should, above all, enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises. Those frameworks should help to prevent job losses and the loss of know-how and skills, and maximise the total value to creditors — in comparison to what they would receive in the event of the liquidation of the enterprise's assets or in the event of the next-best-alternative scenario in the absence of a plan — as well as to owners and the economy as a whole.

<sup>(1)</sup> OJ C 209, 30.6.2017, p. 21.

<sup>(2)</sup> OJ C 342, 12.10.2017, p. 43.

<sup>(3)</sup> Position of the European Parliament of 28 March 2019 (not yet published in the Official Journal) and decision of the Council of 6 June 2019.

- (3) Preventive restructuring frameworks should also prevent the build-up of non-performing loans. The availability of effective preventive restructuring frameworks would ensure that action is taken before enterprises default on their loans, thereby helping to reduce the risk of loans becoming non-performing in cyclical downturns and mitigating the adverse impact on the financial sector. A significant percentage of businesses and jobs could be saved if preventive frameworks existed in all the Member States in which businesses' places of establishment, assets or creditors are situated. In restructuring frameworks the rights of all parties involved, including workers, should be protected in a balanced manner. At the same time, non-viable businesses with no prospect of survival should be liquidated as quickly as possible. Where a debtor in financial difficulties is not economically viable or cannot be readily restored to economic viability, restructuring efforts could result in the acceleration and accumulation of losses to the detriment of creditors, workers and other stakeholders, as well as the economy as a whole.
- (4) There are differences between Member States as regards the range of the procedures available to debtors in financial difficulties in order to restructure their business. Some Member States have a limited range of procedures that allow the restructuring of businesses only at a relatively late stage, in the context of insolvency procedures. In other Member States, restructuring is possible at an earlier stage but the procedures available are not as effective as they could be, or they are very formal, in particular because they limit the use of out-of-court arrangements. Preventive solutions are a growing trend in insolvency law. The trend favours approaches that, unlike the traditional approach of liquidating a business in financial difficulties, have the aim of restoring it to a healthy state or, at least, saving those of its units which are still economically viable. That approach, among other benefits to the economy, often helps to maintain jobs or reduce job losses. Moreover, the degree of involvement of judicial or administrative authorities, or the persons appointed by them, varies from no involvement or minimal involvement in some Member States to full involvement in others. Similarly, national rules giving entrepreneurs a second chance, in particular by granting them discharge from the debts they have incurred in the course of their business, vary between Member States in respect of the length of the discharge period and the conditions for granting such a discharge.
- (5) In many Member States, it takes more than three years for entrepreneurs who are insolvent but honest to be discharged from their debts and make a fresh start. Inefficient discharge of debt and disqualification frameworks result in entrepreneurs having to relocate to other jurisdictions in order to benefit from a fresh start in a reasonable period of time, at considerable additional cost to both their creditors and the entrepreneurs themselves. Long disqualification orders, which often accompany a procedure leading to discharge of debt, create obstacles to the freedom to take up and pursue a self-employed, entrepreneurial activity.
- (6) The excessive length of procedures concerning restructuring, insolvency and discharge of debt in several Member States is an important factor triggering low recovery rates and deterring investors from carrying out business in jurisdictions where procedures risk taking too long and being unduly costly.
- (7) Differences between Member States in relation to procedures concerning restructuring, insolvency and discharge of debt translate into additional costs for investors when assessing the risk of debtors getting into financial difficulties in one or more Member States, or of investing in viable businesses in financial difficulties, as well as additional costs of restructuring enterprises that have establishments, creditors or assets in other Member States. This is most notably the case with restructuring international groups of companies. Investors mention uncertainty about insolvency rules or the risk of lengthy or complex insolvency procedures in another Member State as being one of the main reasons for not investing or not entering into a business relationship with a counterpart outside the Member State where they are based. That uncertainty acts as a disincentive which obstructs the freedom of establishment of undertakings and the promotion of entrepreneurship and harms the proper functioning of the internal market. Micro, small and medium-sized enterprises ('SMEs') in particular do not, for the most part, have the resources needed to assess risks related to cross-border activities.
- (8) The differences among Member States in procedures concerning restructuring, insolvency and discharge of debt lead to uneven conditions for access to credit and to uneven recovery rates in the Member States. A higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal market in general and for a working Capital Markets Union in particular, as well as for the resilience of European economies, including for the preservation and creation of jobs.

- (9) The additional cost of risk-assessment and of cross-border enforcement of claims for creditors of over-indebted entrepreneurs who relocate to another Member State in order to obtain a discharge of debt in a much shorter period of time should also be reduced. The additional costs for entrepreneurs stemming from the need to relocate to another Member State in order to benefit from a discharge of debt should also be reduced. Furthermore, the obstacles stemming from long disqualification orders linked to an entrepreneur's insolvency or over-indebtedness inhibit entrepreneurship.
- (10) Any restructuring operation, in particular one of major size which generates a significant impact, should be based on a dialogue with the stakeholders. That dialogue should cover the choice of the measures envisaged in relation to the objectives of the restructuring operation, as well as alternative options, and there should be appropriate involvement of employees' representatives as provided for in Union and national law.
- (11) The obstacles to the exercise of fundamental freedoms are not limited to purely cross-border situations. An increasingly interconnected internal market, in which goods, services, capital and workers circulate freely, and which has an ever-stronger digital dimension, means that very few enterprises are purely national if all relevant elements are considered, such as their client base, supply chain, scope of activities, investor and capital base. Even purely national insolvencies can have an impact on the functioning of the internal market through the so-called domino effect of insolvencies, whereby a debtor's insolvency may trigger further insolvencies in the supply chain.
- (12) Regulation (EU) 2015/848 of the European Parliament and of the Council <sup>(4)</sup> deals with issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings as well as with the interconnection of insolvency registers. Its scope covers preventive procedures which promote the rescue of economically viable debtors as well as discharge procedures for entrepreneurs and other natural persons. However, that Regulation does not tackle the disparities between national laws regulating those procedures. Furthermore, an instrument limited only to cross-border insolvencies would not remove all obstacles to free movement, nor would it be feasible for investors to determine in advance the cross-border or domestic nature of the potential financial difficulties of the debtor in the future. There is therefore a need to go beyond matters of judicial cooperation and to establish substantive minimum standards for preventive restructuring procedures as well as for procedures leading to a discharge of debt for entrepreneurs.
- (13) This Directive should be without prejudice to the scope of Regulation (EU) 2015/848. It aims to be fully compatible with, and complementary to, that Regulation, by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness. It does not change the approach taken in that Regulation of allowing Member States to maintain or introduce procedures which do not fulfil the condition of publicity for notification under Annex A to that Regulation. Although this Directive does not require that procedures within its scope fulfil all the conditions for notification under that Annex, it aims to facilitate the cross-border recognition of those procedures and the recognition and enforceability of judgments.
- (14) The advantage of the application of Regulation (EU) 2015/848 is that it provides for safeguards against abusive relocation of the debtor's centre of main interests during cross-border insolvency proceedings. Certain restrictions should also apply to procedures not covered by that Regulation.
- (15) It is necessary to lower the costs of restructuring for both debtors and creditors. Therefore, the differences between Member States which hamper the early restructuring of viable debtors in financial difficulties and the possibility of a discharge of debt for honest entrepreneurs should be reduced. Reducing such differences should bring greater transparency, legal certainty and predictability across the Union. It should maximise the returns to all types of creditors and investors and encourage cross-border investment. Greater coherence of restructuring and insolvency procedures should also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union.

<sup>(4)</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141, 5.6.2015, p. 19).

- (16) Removing the barriers to effective preventive restructuring of viable debtors in financial difficulties contributes to minimising job losses and losses of value for creditors in the supply chain, preserves know-how and skills and hence benefits the wider economy. Facilitating a discharge of debt for entrepreneurs would help to avoid their exclusion from the labour market and enable them to restart entrepreneurial activities, drawing lessons from past experience. Moreover, reducing the length of restructuring procedures would result in higher recovery rates for creditors as the passing of time would normally only result in a further loss of value of the debtor or the debtor's business. Finally, efficient preventive restructuring, insolvency and discharge procedures would enable a better assessment of the risks involved in lending and borrowing decisions and facilitate the adjustment for insolvent or over-indebted debtors, minimising the economic and social costs involved in their deleveraging process. This Directive should allow Member States flexibility to apply common principles while respecting national legal systems. Member States should be able to maintain or introduce in their national legal systems preventive restructuring frameworks other than those provided for by this Directive.
- (17) Enterprises, and in particular SMEs, which represent 99 % of all businesses in the Union, should benefit from a more coherent approach at Union level. SMEs are more likely to be liquidated than restructured, since they have to bear costs that are disproportionately higher than those faced by larger enterprises. SMEs, especially when facing financial difficulties, often do not have the necessary resources to cope with high restructuring costs and to take advantage of the more efficient restructuring procedures available only in some Member States. In order to help such debtors restructure at low cost, comprehensive check-lists for restructuring plans, adapted to the needs and specificities of SMEs, should be developed at national level and made available online. In addition, early warning tools should be put in place to warn debtors of the urgent need to act, taking into account the limited resources of SMEs for hiring experts.
- (18) When defining SMEs, Member States could give due consideration to Directive 2013/34/EU of the European Parliament and of the Council <sup>(5)</sup> or the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises <sup>(6)</sup>.
- (19) It is appropriate to exclude from the scope of this Directive debtors which are insurance and re-insurance undertakings as defined in points (1) and (4) of Article 13 of Directive 2009/138/EC of the European Parliament and of the Council <sup>(7)</sup>, credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council <sup>(8)</sup>, investment firms and collective investment undertakings as defined in points (2) and (7) of Article 4(1) of Regulation (EU) No 575/2013, central counterparties as defined in point (1) of Article 2 of Regulation (EU) No 648/2012 of the European Parliament and of the Council <sup>(9)</sup>, central securities depositories as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council <sup>(10)</sup> and other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU of the European Parliament and of the Council <sup>(11)</sup>. Such debtors are subject to special arrangements and the national supervisory and resolution authorities have wide-ranging powers of intervention in relation to them. Member States should be able to exclude other financial entities providing financial services which are subject to comparable arrangements and powers of intervention.

<sup>(5)</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

<sup>(6)</sup> Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

<sup>(7)</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

<sup>(8)</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

<sup>(9)</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

<sup>(10)</sup> Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

<sup>(11)</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

- (20) For similar considerations, it is also appropriate to exclude from the scope of this Directive public bodies under national law. Member States should also be able to limit the access to preventive restructuring frameworks to legal persons, since the financial difficulties of entrepreneurs may be efficiently addressed not only by means of preventive restructuring procedures but also by means of procedures which lead to a discharge of debt or by means of informal restructurings based on contractual agreements. Member States with different legal systems, where the same type of entity has a different legal status in those legal systems, should be able to apply one uniform regime to such entities. A preventive restructuring framework laid down pursuant to this Directive should not affect claims and entitlements against a debtor that arise from occupational pension systems if those claims and entitlements accrued during a period prior to the restructuring.
- (21) Consumer over-indebtedness is a matter of great economic and social concern and is closely related to the reduction of debt overhang. Furthermore, it is often not possible to draw a clear distinction between the debts incurred by entrepreneurs in the course of their trade, business, craft or profession and those incurred outside those activities. Entrepreneurs would not effectively benefit from a second chance if they had to go through separate procedures, with different access conditions and discharge periods, to discharge their business debts and other debts incurred outside their business. For those reasons, although this Directive does not include binding rules on consumer over-indebtedness, it would be advisable for Member States to apply also to consumers, at the earliest opportunity, the provisions of this Directive concerning discharge of debt.
- (22) The earlier a debtor can detect its financial difficulties and can take appropriate action, the higher the probability of avoiding an impending insolvency or, in the case of a business the viability of which is permanently impaired, the more orderly and efficient the liquidation process would be. Clear, up-to-date, concise and user-friendly information on the available preventive restructuring procedures as well as one or more early warning tools should therefore be put in place to incentivise debtors that start to experience financial difficulties to take early action. Early warning tools which take the form of alert mechanisms that indicate when the debtor has not made certain types of payments could be triggered by, for example, non-payment of taxes or social security contributions. Such tools could be developed either by Member States or by private entities, provided that the objective is met. Member States should make information about early warning tools available online, for example on a dedicated website or webpage. Member States should be able to adapt the early warning tools depending on the size of the enterprise and to lay down specific provisions on early warning tools for large-sized enterprises and groups that take into account their peculiarities. This Directive should not impose any liability on Member States for potential damage incurred through restructuring procedures which are triggered by such early warning tools.
- (23) In an effort to increase the support of employees and their representatives, Member States should ensure that employees' representatives are given access to relevant and up-to-date information regarding the availability of early warning tools and it should also be possible for them to provide support to employees' representatives in assessing the economic situation of the debtor.
- (24) A restructuring framework should be available to debtors, including legal entities and, where so provided under national law, natural persons and groups of companies, to enable them to address their financial difficulties at an early stage, when it appears likely that their insolvency can be prevented and the viability of the business can be ensured. A restructuring framework should be available before a debtor becomes insolvent under national law, namely before the debtor fulfils the conditions under national law for entering collective insolvency proceedings, which normally entail a total divestment of the debtor and the appointment of a liquidator. In order to avoid restructuring frameworks being misused, the financial difficulties of the debtor should indicate a likelihood of insolvency and the restructuring plan should be capable of preventing the insolvency of the debtor and ensuring the viability of the business.
- (25) Member States should be able to determine whether claims that fall due or that come into existence after an application to open a preventive restructuring procedure has been submitted or after the procedure has been opened are included in the preventive restructuring measures or the stay of individual enforcement actions. Member States should be able to decide whether the stay of individual enforcement actions has an effect on the interest due on claims.



- (26) Member States should be able to introduce a viability test as a condition for access to the preventive restructuring procedure provided for by this Directive. Such a test should be carried out without detriment to the debtor's assets, which could take the form of, among other things, the granting of an interim stay or the carrying out without undue delay of the test. However, the absence of detriment should not prevent Member States from requiring debtors to prove their viability at their own cost.
- (27) The fact that Member States can limit access to a restructuring framework with regard to debtors that have been sentenced for serious breaches of accounting or book-keeping obligations should not prevent Member States from also limiting the access of debtors to preventive restructuring frameworks where their books and records are incomplete or deficient to a degree that makes it impossible to ascertain the business and financial situation of the debtors.
- (28) Member States should be able to extend the scope of preventive restructuring frameworks provided for by this Directive to situations in which debtors face non-financial difficulties, provided that such difficulties give rise to a real and serious threat to a debtor's actual or future ability to pay its debts as they fall due. The time frame relevant for the determination of such threat may extend to a period of several months, or even longer, in order to account for cases in which the debtor is faced with non-financial difficulties threatening the status of its business as a going concern and, in the medium term, its liquidity. This may be the case, for example, where the debtor has lost a contract which is of key importance to it.
- (29) To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures. Where this Directive is implemented by means of more than one procedure within a restructuring framework, the debtor should have access to all rights and safeguards provided for by this Directive with the aim of achieving an effective restructuring. Except in the event of mandatory involvement of judicial or administrative authorities as provided for under this Directive, Member States should be able to limit the involvement of such authorities to situations in which it is necessary and proportionate, while taking into consideration, among other things, the aim of safeguarding the rights and interests of debtors and of affected parties, as well as the aim of reducing delays and the cost of the procedures. Where creditors or employees' representatives are allowed to initiate a restructuring procedure under national law and where the debtor is an SME, Member States should require the agreement of the debtor as a precondition for the initiation of the procedure, and should also be able to extend that requirement to debtors which are large enterprises.
- (30) To avoid unnecessary costs, to reflect the early nature of preventive restructuring and to encourage debtors to apply for preventive restructuring at an early stage of their financial difficulties, they should, in principle, be left in control of their assets and the day-to-day operation of their business. The appointment of a practitioner in the field of restructuring, to supervise the activity of a debtor or to partially take over control of a debtor's daily operations, should not be mandatory in every case, but made on a case-by-case basis depending on the circumstances of the case or on the debtor's specific needs. Nevertheless, Member States should be able to determine that the appointment of a practitioner in the field of restructuring is always necessary in certain circumstances, such as where: the debtor benefits from a general stay of individual enforcement actions; the restructuring plan needs to be confirmed by means of a cross-class cram-down; the restructuring plan includes measures affecting the rights of workers; or the debtor or its management have acted in a criminal, fraudulent, or detrimental manner in business relations.
- (31) For the purpose of assisting the parties with negotiating and drafting a restructuring plan, Member States should provide for the mandatory appointment of a practitioner in the field of restructuring where: a judicial or administrative authority grants the debtor a general stay of individual enforcement actions, provided that in such case a practitioner is needed to safeguard the interests of the parties; the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down; it was requested by the debtor; or it is requested by a majority of creditors provided that the creditors cover the costs and fees of the practitioner.

- (32) A debtor should be able to benefit from a temporary stay of individual enforcement actions, whether granted by a judicial or administrative authority or by operation of law, with the aim of supporting the negotiations on a restructuring plan, in order to be able to continue operating or at least to preserve the value of its estate during the negotiations. Where so provided by national law, it should also be possible for the stay to apply for the benefit of third-party security providers, including guarantors and collateral givers. However, Member States should be able to provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not fulfil the objective of supporting the negotiations. Grounds for refusal might include a lack of support by the required majorities of creditors or, where so provided under national law, the debtor's actual inability to pay debts as they fall due.
- (33) In order to facilitate and accelerate the course of proceedings, Member States should be able to establish, on a rebuttable basis, presumptions for the presence of grounds for refusal of the stay, where, for example, the debtor shows conduct that is typical of a debtor that is unable to pay debts as they fall due — such as a substantial default vis-à-vis workers or tax or social security agencies — or where a financial crime has been committed by the debtor or the current management of an enterprise which gives reason to believe that a majority of creditors would not support the start of the negotiations.
- (34) A stay of individual enforcement actions could be general, in that it affects all creditors, or it could apply only to some individual creditors or categories of creditors. Member States should be able to exclude certain claims or categories of claims from the scope of the stay, in well-defined circumstances, such as claims which are secured by assets the removal of which would not jeopardise the restructuring of the business or claims of creditors in respect of which a stay would cause unfair prejudice, such as by way of an uncompensated loss or depreciation of collateral.
- (35) In order to provide for a fair balance between the rights of the debtor and those of creditors, a stay of individual enforcement actions should apply for a maximum period of up to four months. Complex restructurings may, however, require more time. Member States should be able to provide that, in such cases, extensions of the initial period of the stay can be granted by the judicial or administrative authority. Where a judicial or administrative authority does not take a decision on the extension of a stay before it lapses, the stay should cease to have effect upon expiry of the stay period. In the interest of legal certainty, the total period of the stay should be limited to 12 months. Member States should be able to provide for an indefinite stay where the debtor becomes insolvent under national law. Member States should be able to decide whether a short interim stay pending a judicial or administrative authority's decision on access to the preventive restructuring framework is subject to the time limits under this Directive.
- (36) To ensure that creditors do not suffer unnecessary detriment, Member States should provide that judicial or administrative authorities can lift a stay of individual enforcement actions if it no longer fulfils the objective of supporting negotiations, for example if it becomes apparent that the required majority of creditors does not support the continuation of the negotiations. The stay should also be lifted if creditors are unfairly prejudiced by it, where Member States provide for such a possibility. Member States should be allowed to limit the possibility to lift the stay to situations where creditors have not had the opportunity to be heard before it came into force or before it was extended. Member States should also be allowed to provide for a minimum period during which the stay cannot be lifted. In establishing whether there is unfair prejudice to creditors, judicial or administrative authorities should be able to take into account whether the stay would preserve the overall value of the estate, and whether the debtor acts in bad faith or with the intention of causing prejudice or generally acts against the legitimate expectations of the general body of creditors.

- (37) This Directive does not cover provisions on compensation or guarantees for creditors of which the collateral is likely to decrease in value during the stay. A single creditor or a class of creditors would be unfairly prejudiced by the stay if, for example, their claims would be made substantially worse-off as a result of the stay than if the stay did not apply, or if the creditor is put more at a disadvantage than other creditors in a similar position. Member States should be able to provide that, whenever unfair prejudice is established in respect of one or more creditors or one or more classes of creditors, the stay can be lifted in respect of those creditors or classes of creditors or in respect of all creditors. Member States should be able to decide who is entitled to request the lifting of the stay.
- (38) A stay of individual enforcement actions should also result in the suspension of a debtor's obligation to file for, or the opening at a creditor's request of, an insolvency procedure which could end in liquidation of the debtor. Such insolvency procedures should, in addition to those limited by law to having as the only possible outcome the liquidation of the debtor, also include procedures that could lead to a restructuring of the debtor. The suspension of the opening of an insolvency procedure at the request of creditors should apply not only where Member States provide for a general stay of individual enforcement actions covering all creditors, but also where Member States provide for the option of a stay of individual enforcement actions covering only a limited number of creditors. Nevertheless, Member States should be able to provide that insolvency proceedings can be opened at the request of public authorities which are not acting in a creditor capacity, but in the general interest, such as a public prosecutor.
- (39) This Directive should not prevent debtors from paying, in the ordinary course of business, claims of unaffected creditors, and claims of affected creditors that arise during the stay of individual enforcement actions. To ensure that creditors with claims that came into existence before the opening of a restructuring procedure or a stay of individual enforcement actions do not put pressure on the debtor to pay those claims, which otherwise would be reduced through the implementation of the restructuring plan, Member States should be able to provide for the suspension of the obligation on the debtor with respect to payment of those claims.
- (40) When a debtor enters an insolvency procedure, some suppliers can have contractual rights, provided for in so-called ipso facto clauses, entitling them to terminate the supply contract solely on account of the insolvency, even if the debtor has duly met its obligations. Ipso facto clauses could also be triggered when a debtor applies for preventive restructuring measures. Where such clauses are invoked when the debtor is merely negotiating a restructuring plan or requesting a stay of individual enforcement actions or invoked in connection with any event connected with the stay, early termination can have a negative impact on the debtor's business and the successful rescue of the business. Therefore, in such cases, it is necessary to provide that creditors are not allowed to invoke ipso facto clauses which make reference to negotiations on a restructuring plan or a stay or any similar event connected to the stay.
- (41) Early termination can endanger the ability of a business to continue operating during restructuring negotiations, especially when contracts for essential supplies such as gas, electricity, water, telecommunication and card payment services are concerned. Member States should provide that creditors to which a stay of individual enforcement actions applies, and whose claims came into existence prior to the stay and have not been paid by a debtor, are not allowed to withhold performance of, terminate, accelerate or, in any other way, modify essential executory contracts during the stay period, provided that the debtor complies with its obligations under such contracts which fall due during the stay. Executory contracts are, for example, lease and licence agreements, long-term supply contracts and franchise agreements.
- (42) This Directive lays down minimum standards for the content of a restructuring plan. However, Member States should be able to require additional explanations in the restructuring plan, concerning for example the criteria according to which creditors have been grouped, which may be relevant in cases where a debt is only partially secured. Member States should not be obliged to require an expert opinion regarding the value of assets which need to be indicated in the plan.

- (43) Creditors affected by a restructuring plan, including workers, and, where allowed under national law, equity-holders, should have a right to vote on the adoption of a restructuring plan. Member States should be able to provide for limited exceptions to this rule. Parties unaffected by the restructuring plan should have no voting rights in relation to the plan, nor should their support be required for the approval of any plan. The concept of 'affected parties' should only include workers in their capacity as creditors. Therefore, if Member States decide to exempt the claims of workers from the preventive restructuring framework, workers should not be considered as affected parties. The vote on the adoption of a restructuring plan could take the form of a formal voting process or of a consultation and agreement with the required majority of affected parties. However, where the vote takes the form of an agreement with the requisite majority, affected parties which were not involved in the agreement could nevertheless be offered the opportunity to join the restructuring plan.
- (44) To ensure that rights which are substantially similar are treated equitably and that restructuring plans can be adopted without unfairly prejudicing the rights of affected parties, affected parties should be treated in separate classes which correspond to the class formation criteria under national law. 'Class formation' means the grouping of affected parties for the purposes of adopting a plan in such a way as to reflect their rights and the seniority of their claims and interests. As a minimum, secured and unsecured creditors should always be treated in separate classes. Member States should, however, be able to require that more than two classes of creditors are formed, including different classes of unsecured or secured creditors and classes of creditors with subordinated claims. Member States should also be able to treat types of creditors that lack a sufficient commonality of interest, such as tax or social security authorities, in separate classes. It should be possible for Member States to provide that secured claims can be divided into secured and unsecured parts based on collateral valuation. It should also be possible for Member States to lay down specific rules supporting class formation where non-diversified or otherwise especially vulnerable creditors, such as workers or small suppliers, would benefit from such class formation.
- (45) Member States should be able to provide that debtors that are SMEs, can, on account of their relatively simple capital structure, be exempted from the obligation to treat affected parties in separate classes. In cases where SMEs have opted to create only one voting class and that class votes against the plan, it should be possible for debtors to submit another plan, in line with the general principles of this Directive.
- (46) Member States should in any case ensure that adequate treatment is given in their national law to matters of particular importance for class formation purposes, such as claims from connected parties, and that their national law contains rules that deal with contingent claims and contested claims. Member States should be allowed to regulate how contested claims are to be handled for the purposes of allocating voting rights. The judicial or administrative authority should examine class formation, including the selection of creditors affected by the plan, when a restructuring plan is submitted for confirmation. However, Member States should be able to provide that such authority can also examine class formation at an earlier stage should the proposer of the plan seek validation or guidance in advance.
- (47) Requisite majorities should be established by national law to ensure that a minority of affected parties in each class cannot obstruct the adoption of a restructuring plan which does not unfairly reduce their rights and interests. Without a majority rule binding dissenting secured creditors, early restructuring would not be possible in many cases, for example where a financial restructuring is needed but the business is otherwise viable. To ensure that parties have a say on the adoption of restructuring plans proportionate to the stakes they have in the business, the required majority should be based on the amount of the creditors' claims or equity holders' interests in any given class. Member States should, in addition, be able to require a majority in the number of affected parties in each class. Member States should be able to lay down rules in relation to affected parties with a right to vote which do not exercise that right in a correct manner or are not represented, such as rules allowing those affected parties to be taken into account for a participation threshold or for the calculation of a majority. Member States should also be able to provide for a participation threshold for the vote.

- (48) Confirmation of a restructuring plan by a judicial or administrative authority is necessary to ensure that the reduction of the rights of creditors or interests of equity holders is proportionate to the benefits of the restructuring and that they have access to an effective remedy. Confirmation is particularly necessary where: there are dissenting affected parties; the restructuring plan contains provisions on new financing; or the plan involves a loss of more than 25 % of the work force. Member States should, however, be able to provide that confirmation by a judicial or administrative authority is necessary also in other cases. A confirmation of a plan which involves the loss of more than 25 % of the work force should only be necessary where national law allows preventive restructuring frameworks to provide for measures that have a direct effect on employment contracts.
- (49) Member States should ensure that a judicial or administrative authority is able to reject a plan where it has been established that it reduces the rights of dissenting creditors or equity holders either to a level below what they could reasonably expect to receive in the event of the liquidation of the debtor's business, whether by piecemeal liquidation or by a sale as a going concern, depending on the particular circumstances of each debtor, or to a level below what they could reasonably expect in the event of the next-best-alternative scenario where the restructuring plan is not confirmed. However, where the plan is confirmed through a cross-class cram-down, reference should be made to the protection mechanism used in such scenario. Where Member States opt to carry out a valuation of the debtor as a going concern, the going-concern value should take into account the debtor's business in the longer term, as opposed to the liquidation value. The going-concern value is, as a rule, higher than the liquidation value because it is based on the assumption that the business continues its activity with the minimum of disruption, has the confidence of financial creditors, shareholders and clients, continues to generate revenues, and limits the impact on workers.
- (50) While compliance with the best-interests-of-creditors test should be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground in order to avoid a valuation being made in every case, Member States should be able to provide that other conditions for confirmation can be examined *ex officio*. Member States should be able to add other conditions which need to be complied with in order to confirm a restructuring plan, such as whether equity holders are adequately protected. Judicial or administrative authorities should be able to refuse to confirm restructuring plans which have no reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business. However, Member States should not be required to ensure that such assessment is made *ex officio*.
- (51) Notification to all affected parties should be one of the conditions for confirmation of a restructuring plan. Member States should be able to define the form of the notification, to identify the time when it is to be made, as well as to lay down provisions for the treatment of unknown claims as regards notification. They should also be able to provide that non-affected parties have to be informed about the restructuring plan.
- (52) Satisfying the 'best-interest-of-creditors' test should be considered to mean that no dissenting creditor is worse off under a restructuring plan than it would be either in the case of liquidation, whether piecemeal liquidation or sale of the business as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not to be confirmed. Member States should be able to choose one of those thresholds when implementing the best-interest-of-creditors test in national law. That test should be applied in any case where a plan needs to be confirmed in order to be binding for dissenting creditors or, as the case may be, dissenting classes of creditors. As a consequence of the best-interest-of-creditors test, where public institutional creditors have a privileged status under national law, Member States could provide that the plan cannot impose a full or partial cancellation of the claims of those creditors.
- (53) While a restructuring plan should always be adopted if the required majority in each affected class supports the plan, it should still be possible for a restructuring plan which is not supported by the required majority in each affected class to be confirmed by a judicial or administrative authority, upon the proposal of a debtor or with the debtor's agreement. In the case of a legal person, Member States should be able to decide if, for the purpose of adopting or confirming a restructuring plan, the debtor is to be understood as the legal person's management board or a certain majority of shareholders or equity holders. For the plan to be confirmed in the case of a cross-class cram-down, it should be supported by a majority of voting classes of affected parties. At least one of those classes should be a secured creditor class or senior to the ordinary unsecured creditors class.

- (54) It should be possible that, where a majority of voting classes does not support the restructuring plan, the plan can nevertheless be confirmed if it is supported by at least one affected or impaired class of creditors which, upon a valuation of the debtor as a going concern, receive payment or keep any interest, or, where so provided under national law, can reasonably be presumed to receive payment or keep any interest, if the normal ranking of liquidation priorities is applied under national law. In such a case, Member States should be able to increase the number of classes which are required to approve the plan, without necessarily requiring that all those classes should, upon a valuation of the debtor as a going concern, receive payment or keep any interest under national law. However, Member States should not require the consent of all classes. Accordingly, where there are only two classes of creditors, the consent of at least one class should be deemed to be sufficient, if the other conditions for the application of a cross-class cram-down are met. The impairment of creditors should be understood to mean that there is a reduction in the value of their claims.
- (55) In the case of a cross-class cram-down, Member States should ensure that dissenting classes of affected creditors are not unfairly prejudiced under the proposed plan and Member States should provide sufficient protection for such dissenting classes. Member States should be able to protect a dissenting class of affected creditors by ensuring that it is treated at least as favourably as any other class of the same rank and more favourably than any more junior class. Alternatively, Member States could protect a dissenting class of affected creditors by ensuring that such dissenting class is paid in full if a more junior class receives any distribution or keeps any interest under the restructuring plan (the 'absolute priority rule'). Member States should have discretion in implementing the concept of 'payment in full', including in relation to the timing of the payment, as long as the principal of the claim and, in the case of secured creditors, the value of the collateral are protected. Member States should also be able to decide on the choice of the equivalent means by which the original claim could be satisfied in full.
- (56) Member States should be able to derogate from the absolute priority rule, for example where it is considered fair that equity holders keep certain interests under the plan despite a more senior class being obliged to accept a reduction of its claims, or that essential suppliers covered by the provision on the stay of individual enforcement actions are paid before more senior classes of creditors. Member States should be able to choose which of the above-mentioned protection mechanisms they put in place.
- (57) While shareholders' or other equity holders' legitimate interests should be protected, Member States should ensure that they cannot unreasonably prevent the adoption of restructuring plans that would bring the debtor back to viability. Member States should be able to use different means to achieve that goal, for example by not giving equity holders the right to vote on a restructuring plan and by not making the adoption of a restructuring plan conditional on the agreement of equity holders that, upon a valuation of the enterprise, would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied. However, where equity holders have the right to vote on a restructuring plan, a judicial or administrative authority should be able to confirm the plan by applying the rules on cross-class cram down notwithstanding the dissent of one or more classes of equity holders. Member States that exclude equity holders from voting should not be required to apply the absolute priority rule in the relationship between creditors and equity holders. Another possible means of ensuring that equity holders do not unreasonably prevent the adoption of restructuring plans would be to ensure that restructuring measures that directly affect equity holders' rights, and that need to be approved by a general meeting of shareholders under company law, are not subject to unreasonably high majority requirements and that equity holders have no competence in terms of restructuring measures that do not directly affect their rights.
- (58) Several classes of equity holders can be needed where different classes of shareholdings with different rights exist. Equity holders of SMEs that are not mere investors, but are the owners of the enterprise and contribute to the enterprise in other ways, such as managerial expertise, might not have an incentive to restructure under such conditions. For this reason, the cross-class cram-down should remain optional for debtors that are SMEs.
- (59) The restructuring plan should, for the purposes of its implementation, make it possible for equity holders of SMEs to provide non-monetary restructuring assistance by drawing on, for example, their experience, reputation or business contacts.

- (60) Throughout the preventive restructuring procedures, workers should enjoy full labour law protection. In particular, this Directive should be without prejudice to workers' rights guaranteed by Council Directives 98/59/EC<sup>(12)</sup> and 2001/23/EC<sup>(13)</sup>, and Directives 2002/14/EC<sup>(14)</sup>, 2008/94/EC<sup>(15)</sup> and 2009/38/EC<sup>(16)</sup> of the European Parliament and of the Council. The obligations concerning information and consultation of employees under national law transposing those Directives remain fully intact. This includes obligations to inform and consult employees' representatives on the decision to have recourse to a preventive restructuring framework in accordance with Directive 2002/14/EC.
- (61) Employees and their representatives should be provided with information regarding the proposed restructuring plan in so far as provided for in Union law, in order to allow them to undertake an in-depth assessment of the various scenarios. Furthermore, employees and their representatives should be involved to the extent necessary to fulfil the consultation requirements laid down in Union law. Given the need to ensure an appropriate level of protection of workers, Member States should be required to exempt workers' outstanding claims from any stay of individual enforcement actions, irrespective of the question of whether those claims arise before or after the stay is granted. A stay of enforcement of workers' outstanding claims should be allowed only for the amounts and for the period for which the payment of such claims is effectively guaranteed at a similar level by other means under national law. Where national law provides for limitations on the liability of guarantee institutions, either in terms of the length of the guarantee or the amount paid to workers, workers should be able to enforce any shortfall in their claims against the employer even during the stay period. Alternatively, Member States should be able to exclude workers' claims from the scope of the preventive restructuring frameworks and provide for their protection under national law.
- (62) Where a restructuring plan entails the transfer of a part of an undertaking or business, workers' rights arising from a contract of employment or from an employment relationship, in particular the right to wages, should be safeguarded in accordance with Articles 3 and 4 of Directive 2001/23/EC, without prejudice to the specific rules applying in the event of insolvency proceedings under Article 5 of that Directive and in particular the possibilities provided for in Article 5(2) of that Directive. This Directive should be without prejudice to the rights to information and consultation, which are guaranteed by Directive 2002/14/EC, including on decisions likely to lead to substantial changes in work organisation or in contractual relations with a view to reaching an agreement on such decisions. Furthermore, under this Directive, workers whose claims are affected by a restructuring plan should have the right to vote on the plan. For the purposes of voting on the restructuring plan, Member States should be able to decide to place workers in a class separate from other classes of creditors.
- (63) Judicial or administrative authorities should only decide on the valuation of a business — either in liquidation or in the next-best-alternative scenario, if the restructuring plan was not confirmed — if a dissenting affected party challenges the restructuring plan. This should not prevent Member States from carrying out valuations in another context under national law. However, it should be possible that such a decision also consists of an approval of a valuation by an expert or of a valuation submitted by the debtor or another party at an earlier stage of the process. Where the decision to carry out a valuation is taken, Member States should be able to provide for special rules, separate from general civil procedural law, for a valuation in restructuring cases, with a view to ensuring that it is carried out in an expedited manner. Nothing in this Directive should affect the rules on burden of proof under national law in the case of a valuation.
- (64) The binding effects of a restructuring plan should be limited to the affected parties that were involved in the adoption of the plan. Member States should be able to determine what it means for a creditor to be involved, including in the case of unknown creditors or creditors of future claims. For example, Member States should be able to decide how to deal with creditors that have been notified correctly but that did not participate in the procedures.

<sup>(12)</sup> Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225, 12.8.1998, p. 16).

<sup>(13)</sup> Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

<sup>(14)</sup> Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ L 80, 23.3.2002, p. 29).

<sup>(15)</sup> Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ L 283, 28.10.2008, p. 36).

<sup>(16)</sup> Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works council or a procedure in Community-scale undertakings and community-scale groups of undertakings for the purpose of informing and consulting employees (OJ L 122, 16.5.2009, p. 28).

- (65) Interested affected parties should be able to appeal a decision on the confirmation of a restructuring plan issued by an administrative authority. Member States should also be able to introduce the option of appealing a decision on the confirmation of a restructuring plan issued by a judicial authority. However, in order to ensure the effectiveness of the plan, to reduce uncertainty and to avoid unjustifiable delays, appeals should, as a rule, not have suspensive effects and therefore not preclude the implementation of a restructuring plan. Member States should be able to determine and limit the grounds for appeal. Where the decision on the confirmation of the plan is appealed, Member States should be able to allow the judicial authority to issue a preliminary or summary decision that protects the execution and implementation of the plan against the consequences of the pending appeal being upheld. Where an appeal is upheld, judicial or administrative authorities should be able to consider, as an alternative to setting aside the plan, an amendment of the plan, where Member States provide for such a possibility, as well as a confirmation of the plan without amendments. It should be possible for any amendments to the plan to be proposed or voted on by the parties, on their own initiative or at the request of the judicial authority. Member States could also provide for compensation for monetary losses for the party whose appeal was upheld. National law should be able to deal with a potential new stay or extension of the stay in event of the judicial authority deciding that the appeal has suspensive effect.
- (66) The success of a restructuring plan often depends on whether financial assistance is extended to the debtor to support, firstly, the operation of the business during restructuring negotiations and, secondly, the implementation of the restructuring plan after its confirmation. Financial assistance should be understood in a broad sense, including the provision of money or third-party guarantees and the supply of stock, inventory, raw materials and utilities, for example through granting the debtor a longer repayment period. Interim financing and new financing should therefore be exempt from avoidance actions which seek to declare such financing void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures.
- (67) National insolvency laws providing for avoidance actions of interim and new financing or providing that new lenders may incur civil, administrative or criminal sanctions for extending credit to debtors in financial difficulties could jeopardise the availability of financing necessary for the successful negotiation and implementation of a restructuring plan. This Directive should be without prejudice to other grounds for declaring new or interim financing void, voidable or unenforceable, or for triggering civil, criminal or administrative liability for providers of such financing, as laid down in national law. Such other grounds could include, among other things, fraud, bad faith, a certain type of relationship between the parties which could be associated with a conflict of interest, such as in the case of transactions between related parties or between shareholders and the company, and transactions where a party received value or collateral without being entitled to it at the time of the transaction or in the manner performed.
- (68) When interim financing is extended, the parties do not know whether the restructuring plan will be eventually confirmed or not. Therefore, Member States should not be required to limit the protection of interim finance to cases where the plan is adopted by creditors or confirmed by a judicial or administrative authority. To avoid potential abuses, only financing that is reasonably and immediately necessary for the continued operation or survival of the debtor's business or the preservation or enhancement of the value of that business pending the confirmation of that plan should be protected. Furthermore, this Directive should not prevent Member States from introducing an *ex ante* control mechanism for interim financing. Member States should be able to limit the protection for new financing to cases where the plan is confirmed by a judicial or administrative authority and for interim financing to cases where it is subject to *ex ante* control. An *ex ante* control mechanism for interim financing or other transactions could be exercised by a practitioner in the field of restructuring, by a creditor's committee or by a judicial or administrative authority. Protection from avoidance actions and protection from personal liability are minimum guarantees that should be granted to interim financing and new financing. However, encouraging new lenders to take the enhanced risk of investing in a viable debtor in financial difficulties could require further incentives such as, for example, giving such financing priority at least over unsecured claims in subsequent insolvency procedures.



- (69) In order to promote a culture that encourages early preventive restructuring, it is desirable that transactions which are reasonable and immediately necessary for the negotiation or implementation of a restructuring plan also be given protection from avoidance actions in subsequent insolvency procedures. Judicial or administrative authorities should be able, when determining the reasonableness and immediate necessity of costs and fees, for instance, to consider projections and estimates submitted to affected parties, a creditor's committee, a practitioner in the field of restructuring or the judicial or administrative authority itself. To this end, Member States should also be able to require debtors to provide and update relevant estimates. Such protection should enhance certainty in respect of transactions with businesses that are known to be in financial difficulties and remove the fear of creditors and investors that all such transactions could be declared void in the event that the restructuring fails. Member States should be able to provide for a point in time prior to the opening of a preventive restructuring procedure and to the granting of the stay of individual enforcement actions, from which fees and costs of negotiating, adopting, confirming or seeking professional advice for the restructuring plan start to benefit from protection against avoidance actions. In the case of other payments and disbursements and the protection of the payment of workers' wages, such a starting point could also be the granting of the stay or the opening of the preventive restructuring procedure.
- (70) To further promote preventive restructuring, it is important to ensure that directors are not dissuaded from exercising reasonable business judgment or taking reasonable commercial risks, particularly where to do so would improve the chances of a restructuring of potentially viable businesses. Where the company experiences financial difficulties, directors should take steps to minimise losses and to avoid insolvency, such as: seeking professional advice, including on restructuring and insolvency, for instance by making use of early warning tools where applicable; protecting the assets of the company so as to maximise value and avoid loss of key assets; considering the structure and functions of the business to examine viability and reduce expenditure; refraining from committing the company to the types of transaction that might be subject to avoidance unless there is an appropriate business justification; continuing to trade in circumstances where it is appropriate to do so in order to maximise going-concern value; holding negotiations with creditors and entering preventive restructuring procedures.
- (71) Where the debtor is close to insolvency, it is also important to protect the legitimate interests of creditors from management decisions that may have an impact on the constitution of the debtor's estate, in particular where those decisions could have the effect of further diminishing the value of the estate available for restructuring efforts or for distribution to creditors. It is therefore necessary to ensure that, in such circumstances, directors avoid any deliberate or grossly negligent actions that result in personal gain at the expense of stakeholders, and avoid agreeing to transactions at below market value, or taking actions leading to unfair preference being given to one or more stakeholders. Member States should be able to implement the corresponding provisions of this Directive by ensuring that judicial or administrative authorities, when assessing whether a director is to be held liable for breaches of duty of care, take the rules on duties of directors laid down in this Directive into account. This Directive is not intended to establish any hierarchy among the different parties whose interests need to be given due regard. However, Member States should be able to decide on establishing such a hierarchy. This Directive should be without prejudice to Member States' national rules on the decision-making processes in a company.
- (72) Entrepreneurs exercising a trade, business, craft or independent, self-employed profession can run the risk of becoming insolvent. The differences between the Member States in terms of opportunities for a fresh start could incentivise over-indebted or insolvent entrepreneurs to relocate to a Member State other than the Member State where they are established, in order to benefit from shorter discharge periods or more attractive conditions for discharge, leading to additional legal uncertainty and costs for the creditors when recovering their claims. Furthermore, the effects of insolvency, in particular the social stigma, the legal consequences, such as disqualifying entrepreneurs from taking up and pursuing entrepreneurial activity, and the continual inability to pay off debts, constitute important disincentives for entrepreneurs seeking to set up a business or have a second chance, even if evidence shows that entrepreneurs who have become insolvent have more chances of being successful the next time.

- (73) Steps should therefore be taken to reduce the negative effects of over-indebtedness or insolvency on entrepreneurs, in particular by allowing for a full discharge of debt after a certain period of time and by limiting the length of disqualification orders issued in connection with a debtor's over-indebtedness or insolvency. The concept of 'insolvency' should be defined by national law and it could take the form of over-indebtedness. The concept of 'entrepreneur' within the meaning of this Directive should have no bearing on the position of managers or directors of a company, which should be treated in accordance with national law. Member States should be able to decide how to obtain access to discharge, including the possibility of requiring the debtor to request discharge.
- (74) Member States should be able to provide for the possibility to adjust the repayment obligations of insolvent entrepreneurs when there is a significant change in their financial situation, regardless of whether it improves or deteriorates. This Directive should not require that a repayment plan be supported by a majority of creditors. Member States should be able to provide that entrepreneurs are not prevented from starting a new activity in the same or different field during the implementation of the repayment plan.
- (75) A discharge of debt should be available in procedures that include a repayment plan, a realisation of assets, or a combination of both. In implementing those rules, Member States should be able to choose freely among those options. If more than one procedure leading to discharge of debt is available under national law, Member States should ensure that at least one of those procedures gives insolvent entrepreneurs the opportunity of having a full discharge of debt within a period that does not exceed three years. In the case of procedures which combine a realisation of assets and a repayment plan, the discharge period should start, at the latest, from the date the repayment plan is confirmed by a court or starts being implemented, for example from the first instalment under the plan, but it could also start earlier, such as when a decision to open the procedure is taken.
- (76) In procedures that do not include a repayment plan, the discharge period should start, at the latest, from the date when a decision to open the procedure is taken by a judicial or administrative authority, or the date of the establishment of the insolvency estate. For the purposes of calculating the duration of the discharge period under this Directive, Member States should be able to provide that the concept of 'opening of procedure' does not include preliminary measures, such as preservation measures or the appointment of a preliminary insolvency practitioner, unless such measures allow for the realisation of assets, including the disposal and the distribution of assets to creditors. The establishment of the insolvency estate should not necessarily entail a formal decision or confirmation by a judicial or administrative authority, where such decision is not required under national law, and could consist in the submission of the inventory of assets and liabilities.
- (77) Where the procedural path leading to a discharge of debt entails the realisation of an entrepreneur's assets, Member States should not be prevented from providing that the request for discharge is treated separately from the realisation of assets, provided that such request constitutes an integral part of the procedural path leading to the discharge under this Directive. Member States should be able to decide on the rules on the burden of proof in order for the discharge to operate, which means that it should be possible for entrepreneurs to be required by law to prove compliance with their obligations.
- (78) A full discharge of debt or the ending of disqualifications after a period no longer than three years is not appropriate in all circumstances, therefore derogations from this rule which are duly justified by reasons laid down in national law might need to be introduced. For instance, such derogations should be introduced in cases where the debtor is dishonest or has acted in bad faith. Where entrepreneurs do not benefit from a presumption of honesty and good faith under national law, the burden of proof concerning their honesty and good faith should not make it unnecessarily difficult or onerous for them to enter the procedure.

- (79) In establishing whether an entrepreneur was dishonest, judicial or administrative authorities might take into account circumstances such as: the nature and extent of the debt; the time when the debt was incurred; the efforts of the entrepreneur to pay the debt and comply with legal obligations, including public licensing requirements and the need for proper bookkeeping; actions on the entrepreneur's part to frustrate recourse by creditors; the fulfilment of duties in the likelihood of insolvency, which are incumbent on entrepreneurs who are directors of a company; and compliance with Union and national competition and labour law. It should also be possible to introduce derogations where the entrepreneur has not complied with certain legal obligations, including obligations to maximise returns to creditors, which could take the form of a general obligation to generate income or assets. It should furthermore be possible to introduce specific derogations where it is necessary to guarantee the balance between the rights of the debtor and the rights of one or more creditors, such as where the creditor is a natural person who needs more protection than the debtor.
- (80) A derogation could also be justified where the costs of the procedure leading to a discharge of debt, including the fees of judicial and administrative authorities and of practitioners, are not covered. Member States should be able to provide that the benefits of that discharge can be revoked where, for example, the financial situation of the debtor improves significantly due to unexpected circumstances, such as winning a lottery, or coming in the possession of an inheritance or a donation. Member States should not be prevented from providing additional derogations in well-defined circumstances and when duly justified.
- (81) Where there is a duly justified reason under national law, it could be appropriate to limit the possibility of discharge for certain categories of debt. It should be possible for Member States to exclude secured debts from eligibility for discharge only up to the value of the collateral as determined by national law, while the rest of the debt should be treated as unsecured debt. Member States should be able to exclude further categories of debt when duly justified.
- (82) Member States should be able to provide that judicial or administrative authorities can verify, either *ex officio* or at the request of a person with a legitimate interest, whether entrepreneurs have fulfilled the conditions for obtaining a full discharge of debt.
- (83) If an entrepreneur's permit or licence to carry on a certain craft, business, trade or profession has been denied or revoked as a result of a disqualification order, this Directive should not prevent Member States from requiring the entrepreneur to submit an application for a new permit or licence after the disqualification has expired. Where a Member State authority adopts a decision concerning a specifically supervised activity, it should be possible to also take into account, even after the expiry of the disqualification period, the fact that the insolvent entrepreneur has obtained a discharge of debt in accordance with this Directive.
- (84) Personal and professional debts that cannot be reasonably separated, for example where an asset is used in the course of the professional activity of the entrepreneur as well as outside that activity, should be treated in a single procedure. Where Member States provide that such debts are subject to different insolvency procedures, coordination of those procedures is needed. This Directive should be without prejudice to Member States being able to choose to treat all the debts of an entrepreneur in a single procedure. Member States in which entrepreneurs are allowed to continue their business on their own account during insolvency proceedings should not be prevented from providing that such entrepreneurs can be made subject to new insolvency proceedings, where such continued business becomes insolvent.
- (85) It is necessary to maintain and enhance the transparency and predictability of the procedures in delivering outcomes that are favourable to the preservation of businesses and to allowing entrepreneurs to have a second chance or that permit the efficient liquidation of non-viable enterprises. It is also necessary to reduce the excessive length of insolvency procedures in many Member States, which results in legal uncertainty for creditors and investors and low recovery rates. Finally, given the enhanced cooperation mechanisms between courts and practitioners in cross-border cases, set up under Regulation (EU) 2015/848, the professionalism of all actors involved needs to be brought to comparable high levels across the Union. To achieve those objectives, Member States should ensure that members of the judicial and administrative authorities dealing with procedures concerning preventive restructuring, insolvency and discharge of debt are suitably trained and have the necessary expertise for their responsibilities. Such training and expertise could be acquired also during the exercise of the duties as a member of a judicial or administrative authority or, prior to appointment to such duties, during the exercise of other relevant duties.

- (86) Such training and expertise should enable decisions with a potentially significant economic and social impact to be taken in an efficient manner, and should not be understood to mean that members of a judicial authority have to deal exclusively with matters concerning restructuring, insolvency and discharge of debt. Member States should ensure that procedures concerning restructuring, insolvency and discharge of debt can be carried out in an efficient and expeditious manner. The creation of specialised courts or chambers, or the appointment of specialised judges in accordance with national law, as well as concentrating jurisdiction in a limited number of judicial or administrative authorities would be efficient ways of achieving the objectives of legal certainty and effectiveness of procedures. Member States should not be obliged to require that procedures concerning restructuring, insolvency and discharge of debt be prioritised over other procedures.
- (87) Member States should also ensure that practitioners in the field of restructuring, insolvency, and discharge of debt that are appointed by judicial or administrative authorities ('practitioners') are: suitably trained; appointed in a transparent manner with due regard to the need to ensure efficient procedures; supervised when carrying out their tasks; and perform their tasks with integrity. It is important that practitioners adhere to standards for such tasks, such as obtaining insurance for professional liability. Suitable training, qualifications and expertise for practitioners could also be acquired while practising their profession. Member States should not be obliged to provide the necessary training themselves, but this could be provided by, for example, professional associations or other bodies. Insolvency practitioners as defined in Regulation (EU) 2015/848 should be included in the scope of this Directive.
- (88) This Directive should not prevent Member States from providing that practitioners are chosen by a debtor, by creditors or by a creditors' committee from a list or a pool that is pre-approved by a judicial or administrative authority. In choosing a practitioner, the debtor, the creditors or the creditors' committee could be granted a margin of appreciation as to the practitioner's expertise and experience in general and the demands of the particular case. Debtors who are natural persons could be exempted from such a duty altogether. In cases with cross-border elements, the appointment of the practitioner should take into account, among other things, the practitioner's ability to comply with the obligations, under Regulation (EU) 2015/848, to communicate and cooperate with insolvency practitioners and judicial and administrative authorities from other Member States, as well as their human and administrative resources to deal with potentially complex cases. Member States should not be prevented from providing for a practitioner to be selected by other methods, such as random selection by a software programme, provided that it is ensured that in using those methods due consideration is given to the practitioner's experience and expertise. Member States should be able to decide on the means for objecting to the selection or appointment of a practitioner or for requesting the replacement of the practitioner, for example through a creditors' committee.
- (89) Practitioners should be subject to oversight and regulatory mechanisms which should include effective measures regarding the accountability of practitioners who have failed in their duties, such as: a reduction in a practitioner's fee; the exclusion from the list or pool of practitioners who can be appointed in insolvency cases; and, where appropriate, disciplinary, administrative or criminal sanctions. Such oversight and regulatory mechanisms should be without prejudice to provisions under national law on civil liability for damages for breach of contractual or non-contractual obligations. Member States should not be required to set up specific authorities or bodies. Member States should ensure that information about the authorities or bodies exercising oversight over practitioners is publicly available. For instance, a mere reference to the judicial or administrative authority should be sufficient as information. It should be possible, in principle, to attain such standards without the need to create new professions or qualifications under national law. Member States should be able to extend the provisions on the training and supervision of practitioners to other practitioners not covered by this Directive. Member States should not be obliged to provide that disputes over remuneration of practitioners are to be prioritised over other procedures.
- (90) To further reduce the length of procedures, to facilitate better participation of creditors in procedures concerning restructuring, insolvency and discharge of debt and to ensure similar conditions among creditors irrespective of where they are located in the Union, Member States should put in place provisions enabling debtors, creditors, practitioners and judicial and administrative authorities to use electronic means of communication. Therefore, it should be possible that procedural steps such as the filing of claims by creditors, the notification of creditors, or the lodging of challenges and appeals, can be carried out by electronic means of communication. Member States should be able to provide that notifications of a creditor can only be performed electronically if the creditor concerned has previously consented to electronic communication.

- (91) Parties to procedures concerning restructuring, insolvency and discharge of debt should not be obliged to use electronic means of communication if such use is not mandatory under national law, without prejudice to Member States being able to establish a mandatory system of electronic filing and service of documents in procedures concerning restructuring, insolvency and discharge of debt. Member States should be able to choose the means of electronic communications. Examples of such means could include a purpose-built system for the electronic transmission of such documents or the use of email, without preventing Member States from being able to put in place features to ensure the security of electronic transmissions, such as electronic signature, or trust services, such as electronic registered delivery services, in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council <sup>(17)</sup>.
- (92) It is important to gather reliable and comparable data on the performance of procedures concerning restructuring, insolvency and discharge of debt in order to monitor the implementation and application of this Directive. Therefore, Member States should collect and aggregate data that are sufficiently granular to enable an accurate assessment of how the Directive is working in practice and should communicate those data to the Commission. The communication form for the transmission of such data to the Commission should be established by the Commission assisted by a Committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council <sup>(18)</sup>. The form should provide a shortlist of the main outcomes of procedures that are common to all Member States. For example, in the case of a restructuring procedure, those main outcomes could be the following: the plan being confirmed by a court; the plan not being confirmed by a court; the restructuring procedures being converted to liquidation procedures or closed because of the opening of liquidation procedures before the plan was confirmed by a court. Member States should not be required to provide a break-down by types of outcome in respect of the procedures which end before any relevant measures are taken, but could instead provide a common number for all procedures which are declared inadmissible, rejected or withdrawn before being opened.
- (93) The communication form should provide a list of options which could be taken into account by the Member States when determining the size of a debtor, by reference to one or more of the elements of the definition of SMEs and large enterprises common to all Member States. The list should include the option of determining the size of a debtor based on the number of workers only. The form should: define the elements of average cost and average recovery rates for which Member States should be able to collect data voluntarily; provide guidance on elements which could be taken into account when Member States make use of a sampling technique, for example on sample sizes to ensure representativeness in terms of geographical distribution, size of debtors and industry; and include the opportunity for Member States to provide any additional information available, for example on the total amount of assets and liabilities of debtors.
- (94) The stability of financial markets relies heavily on financial collateral arrangements, in particular, when collateral security is provided in connection with the participation in designated systems or in central bank operations and when margins are provided to central counterparties. As the value of financial instruments given as collateral security may be very volatile, it is crucial to realise their value quickly before it goes down. Therefore, the provisions of Directives 98/26/EC <sup>(19)</sup> and 2002/47/EC <sup>(20)</sup> of the European Parliament and of the Council and Regulation (EU) No 648/2012 should apply notwithstanding the provisions of this Directive. Member States should be allowed to exempt netting arrangements, including close-out netting, from the effects of the stay of individual enforcement actions even in circumstances where they are not covered by Directives 98/26/EC, 2002/47/EC and Regulation (EU) No 648/2012, if such arrangements are enforceable under the laws of the relevant Member State even if insolvency proceedings are opened.

<sup>(17)</sup> Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73).

<sup>(18)</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

<sup>(19)</sup> Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

<sup>(20)</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43).

This could be the case for a significant number of master agreements widely used in the financial, energy and commodity markets, both by non-financial and financial counterparties. Such arrangements reduce systemic risks especially in derivatives markets. Such arrangements might therefore be exempt from restrictions that insolvency laws impose on executory contracts. Accordingly, Member States should also be allowed to exempt from the effects of the stay of individual enforcement actions statutory netting arrangements, including close-out netting arrangements, which operate upon the opening of insolvency procedures. The amount resulting from the operation of netting arrangements, including close-out netting arrangements should, however, be subject to the stay of individual enforcement actions.

- (95) Member States that are parties to the Convention on international interests in mobile equipment, signed at Cape Town on 16 November 2001, and its Protocols should be able to continue to comply with their existing international obligations. The provisions of this Directive regarding preventive restructuring frameworks should apply with the derogations necessary to ensure an application of those provisions without prejudice to the application of that Convention and its Protocols.
- (96) The effectiveness of the process of adoption and implementation of the restructuring plan should not be jeopardised by company law. Therefore, Member States should be able to derogate from the requirements laid down in Directive (EU) 2017/1132 of the European Parliament and of the Council <sup>(21)</sup> concerning the obligations to convene a general meeting and to offer on a pre-emptive basis shares to existing shareholders, to the extent and for the period necessary to ensure that shareholders do not frustrate restructuring efforts by abusing their rights under that Directive. For example, Member States might need to derogate from the obligation to convene a general meeting of shareholders or from the normal time periods, for cases where urgent action is to be taken by the management to safeguard the assets of the company, for instance through requesting a stay of individual enforcement actions and when there is a serious and sudden loss of subscribed capital and a likelihood of insolvency. Derogations from company law might also be required when the restructuring plan provides for the emission of new shares which could be offered with priority to creditors as debt-to-equity swaps, or for the reduction of the amount of subscribed capital in the event of a transfer of parts of the undertaking. Such derogations should be limited in time to the extent that Member States consider such derogations necessary for the establishment of a preventive restructuring framework. Member States should not be obliged to derogate from company law, wholly or partially, for an indefinite or for a limited period of time, if they ensure that their company law requirements do not jeopardise the effectiveness of the restructuring process or if Member States have other, equally effective tools in place to ensure that shareholders do not unreasonably prevent the adoption or implementation of a restructuring plan which would restore the viability of the business. In this context, Member States should attach particular importance to the effectiveness of provisions relating to a stay of individual enforcement actions and confirmation of the restructuring plan which should not be unduly impaired by calls for, or the results of, general meetings of shareholders. Directive (EU) 2017/1132 should therefore be amended accordingly. Member States should enjoy a margin of appreciation in assessing which derogations are needed in the context of national company law in order to effectively implement this Directive, and should also be able to provide for similar exemptions from Directive (EU) 2017/1132 in the case of insolvency proceedings not covered by this Directive but which allow for restructuring measures to be taken.
- (97) In respect of the establishment of, and subsequent changes to, the data communication form, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011.
- (98) A study should be carried out by the Commission in order to evaluate the necessity of submitting legislative proposals to deal with the insolvency of persons not exercising a trade, business, craft or profession, who, as consumers, in good faith, are temporarily or permanently unable to pay debts as they fall due. Such study should investigate whether access to basic goods and services needs to be safeguarded for those persons to ensure that they benefit from decent living conditions.
- (99) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents <sup>(22)</sup>, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

<sup>(21)</sup> Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L 169, 30.6.2017, p. 46).

<sup>(22)</sup> OJ C 369, 17.12.2011, p. 14.

(100) Since the objectives of this Directive cannot be sufficiently achieved by the Member States because differences between national restructuring and insolvency frameworks would continue to raise obstacles to the free movement of capital and the freedom of establishment, but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(101) On 7 June 2017, the European Central Bank delivered an opinion <sup>(23)</sup>,

HAVE ADOPTED THIS DIRECTIVE:

#### TITLE I

### GENERAL PROVISIONS

#### Article 1

#### Subject matter and scope

1. This Directive lays down rules on:
  - (a) preventive restructuring frameworks available for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor;
  - (b) procedures leading to a discharge of debt incurred by insolvent entrepreneurs; and
  - (c) measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.
2. This Directive does not apply to procedures referred to in paragraph 1 of this Article that concern debtors that are:
  - (a) insurance undertakings or reinsurance undertakings as defined in points (1) and (4) of Article 13 of Directive 2009/138/EC;
  - (b) credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013;
  - (c) investment firms or collective investment undertakings as defined in points (2) and (7) of Article 4(1) of Regulation (EU) No 575/2013;
  - (d) central counter parties as defined in point (1) of Article 2 of Regulation (EU) No 648/2012;
  - (e) central securities depositories as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014;
  - (f) other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU;
  - (g) public bodies under national law; and
  - (h) natural persons who are not entrepreneurs.
3. Member States may exclude from the scope of this Directive procedures referred to in paragraph 1 that concern debtors which are financial entities, other than those referred to in paragraph 2, providing financial services which are subject to special arrangements under which the national supervisory or resolution authorities have wide-ranging powers of intervention comparable to those laid down in Union and national law in relation to the financial entities referred to in paragraph 2. Member States shall communicate those special arrangements to the Commission.
4. Member States may extend the application of the procedures referred to in point (b) of paragraph 1 to insolvent natural persons who are not entrepreneurs.

Member States may restrict the application of point (a) of paragraph 1 to legal persons.

<sup>(23)</sup> OJ C 236, 21.7.2017, p. 2.

5. Member States may provide that the following claims are excluded from, or are not affected by, preventive restructuring frameworks referred to in point (a) of paragraph 1:

- (a) existing and future claims of existing or former workers;
- (b) maintenance claims arising from a family relationship, parentage, marriage or affinity; or
- (c) claims that arise from tortious liability of the debtor.

6. Member States shall ensure that preventive restructuring frameworks have no impact on accrued occupational pension entitlements.

## Article 2

### Definitions

1. For the purposes of this Directive, the following definitions apply:

- (1) 'restructuring' means measures aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements;
- (2) 'affected parties' means creditors, including, where applicable under national law, workers, or classes of creditors and, where applicable, under national law, equity holders, whose claims or interests, respectively, are directly affected by a restructuring plan;
- (3) 'equity holder' means a person that has an ownership interest in a debtor or a debtor's business, including a shareholder, in so far as that person is not a creditor;
- (4) 'stay of individual enforcement actions' means a temporary suspension, granted by a judicial or administrative authority or applied by operation of law, of the right of a creditor to enforce a claim against a debtor and, where so provided for by national law, against a third-party security provider, in the context of a judicial, administrative or other procedure, or of the right to seize or realise out of court the assets or business of the debtor;
- (5) 'executory contract' means a contract between a debtor and one or more creditors under which the parties still have obligations to perform at the time the stay of individual enforcement actions is granted or applied;
- (6) 'best-interest-of-creditors test' means a test that is satisfied if no dissenting creditor would be worse off under a restructuring plan than such a creditor would be if the normal ranking of liquidation priorities under national law were applied, either in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not confirmed;
- (7) 'new financing' means any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan and that is included in that restructuring plan;
- (8) 'interim financing' means any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business;
- (9) 'entrepreneur' means a natural person exercising a trade, business, craft or profession;
- (10) 'full discharge of debt' means that enforcement against entrepreneurs of their outstanding dischargeable debts is precluded or that outstanding dischargeable debts as such are cancelled, as part of a procedure which could include a realisation of assets or a repayment plan or both;
- (11) 'repayment plan' means a programme of payments of specified amounts on specified dates by an insolvent entrepreneur to creditors, or a periodic transfer to creditors of a certain part of entrepreneur's disposable income during the discharge period;



- (12) ‘practitioner in the field of restructuring’ means any person or body appointed by a judicial or administrative authority to carry out, in particular, one or more of the following tasks:
- (a) assisting the debtor or the creditors in drafting or negotiating a restructuring plan;
  - (b) supervising the activity of the debtor during the negotiations on a restructuring plan, and reporting to a judicial or administrative authority;
  - (c) taking partial control over the assets or affairs of the debtor during negotiations.
2. For the purposes of this Directive, the following concepts are to be understood as defined by national law:
- (a) insolvency;
  - (b) likelihood of insolvency;
  - (c) micro, small and medium-sized enterprises (‘SMEs’).

### Article 3

#### **Early warning and access to information**

1. Member States shall ensure that debtors have access to one or more clear and transparent early warning tools which can detect circumstances that could give rise to a likelihood of insolvency and can signal to them the need to act without delay.

For the purposes of the first subparagraph, Member States may make use of up-to-date IT technologies for notifications and for communication.

2. Early warning tools may include the following:

- (a) alert mechanisms when the debtor has not made certain types of payments;
- (b) advisory services provided by public or private organisations.
- (c) incentives under national law for third parties with relevant information about the debtor, such as accountants, tax and social security authorities, to flag to the debtor a negative development.

3. Member States shall ensure that debtors and employees’ representatives have access to relevant and up-to-date information about the availability of early warning tools as well as of the procedures and measures concerning restructuring and discharge of debt.

4. Member States shall ensure that information on access to early warning tools is publicly available online and that, in particular for SMEs, it is easily accessible and presented in a user-friendly manner.

5. Member States may provide support to employees’ representatives for the assessment of the economic situation of the debtor.

## TITLE II

### **PREVENTIVE RESTRUCTURING FRAMEWORKS**

#### CHAPTER 1

#### ***Availability of preventive restructuring frameworks***

### Article 4

#### **Availability of preventive restructuring frameworks**

1. Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity.

2. Member States may provide that debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations under national law are allowed to access a preventive restructuring framework only after those debtors have taken adequate measures to remedy the issues that gave rise to the sentence, with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations.

3. Member States may maintain or introduce a viability test under national law, provided that such a test has the purpose of excluding debtors that do not have a prospect of viability, and that it can be carried out without detriment to the debtors' assets.

4. Member States may limit the number of times within a certain period a debtor can access a preventive restructuring framework as provided for under this Directive.

5. The preventive restructuring framework provided for under this Directive may consist of one or more procedures, measures or provisions, some of which may take place out of court, without prejudice to any other restructuring frameworks under national law.

Member States shall ensure that such restructuring framework affords debtors and affected parties the rights and safeguards provided for in this Title in a coherent manner.

6. Member States may put in place provisions limiting the involvement of a judicial or administrative authority in a preventive restructuring framework to where it is necessary and proportionate while ensuring that rights of any affected parties and relevant stakeholders are safeguarded.

7. Preventive restructuring frameworks provided for under this Directive shall be available on application by debtors.

8. Member States may also provide that preventive restructuring frameworks provided for under this Directive are available at the request of creditors and employees' representatives, subject to the agreement of the debtor. Member States may limit that requirement to obtain the debtor's agreement to cases where debtors are SMEs.

## CHAPTER 2

### ***Facilitating negotiations on preventive restructuring plans***

#### *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 their business.

2. Where necessary, the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall be decided on a case-by-case basis, except in certain circumstances where Member States may require the mandatory appointment of such a practitioner in every case.

3. Member States shall provide for the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in negotiating and drafting the plan, at least in the following cases:

- (a) where a general stay of individual enforcement actions, in accordance with Article 6(3), is granted by a judicial or administrative authority, and the judicial or administrative authority decides that such a practitioner is necessary to safeguard the interest of the parties;
- (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; or
- (c) where it is requested by the debtor or by a majority of the creditors, provided that, in the latter case, the cost of the practitioner is borne by the creditors.

#### *Article 6*

#### **Stay of individual enforcement actions**

1. Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework.

Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the objective set out in the first subparagraph.

2. Without prejudice to paragraphs 4 and 5, Member States shall ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims.

3. Member States may provide that a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors.

Where a stay is limited, the stay shall only apply to creditors that have been informed, in accordance with national law, of negotiations as referred to in paragraph 1 on the restructuring plan or of the stay.

4. Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where:

- (a) enforcement is not likely to jeopardise the restructuring of the business; or
- (b) the stay would unfairly prejudice the creditors of those claims.

5. Paragraph 2 shall not apply to workers' claims.

By way of derogation from the first subparagraph, Member States may apply paragraph 2 to workers' claims if, and to the extent that, Member States ensure that the payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection.

6. The initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months.

7. Notwithstanding paragraph 6, Member States may enable judicial or administrative authorities to extend the duration of a stay of individual enforcement actions or to grant a new stay of individual enforcement actions, at the request of the debtor, a creditor or, where applicable, a practitioner in the field of restructuring. Such extension or new stay of individual enforcement actions shall be granted only if well-defined circumstances show that such extension or new stay is duly justified, such as:

- (a) relevant progress has been made in the negotiations on the restructuring plan;
- (b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties; or
- (c) insolvency proceedings which could end in the liquidation of the debtor under national law have not yet been opened in respect of the debtor.

8. The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed 12 months.

Where Member States choose to implement this Directive by means of one or more procedures or measures which do not fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848, the total duration of the stay under such procedures shall be limited to no more than four months if the centre of main interests of the debtor has been transferred from another Member State within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings.

9. Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions in the following cases:

- (a) the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan, for example if it becomes apparent that a proportion of creditors which, under national law, could prevent the adoption of the restructuring plan do not support the continuation of the negotiations;
- (b) at the request of the debtor or the practitioner in the field of restructuring;

- (c) where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions; or
- (d) where so provided for in national law, if the stay gives rise to the insolvency of a creditor.

Member States may limit the power, under the first subparagraph, to lift the stay of individual enforcement actions to situations where creditors had not had the opportunity to be heard before the stay came into force or before an extension of the period was granted by a judicial or administrative authority.

Member States may provide for a minimum period, which does not exceed the period referred to in paragraph 6, during which a stay of individual enforcement actions cannot be lifted.

#### Article 7

### Consequences of the stay of individual enforcement actions

1. Where an obligation on a debtor, provided for under national law, to file for the opening of insolvency proceedings which could end in the liquidation of the debtor, arises during a stay of individual enforcement actions, that obligation shall be suspended for the duration of that stay.
2. A stay of individual enforcement actions in accordance with Article 6 shall suspend, for the duration of the stay, the opening, at the request of one or more creditors, of insolvency proceedings which could end in the liquidation of the debtor.
3. Member States may derogate from paragraphs 1 and 2 in situations where a debtor is unable to pay its debts as they fall due. In such cases, Member States shall ensure that a judicial or administrative authority can decide to keep in place the benefit of the stay of individual enforcement actions, if, taking into account the circumstances of the case, the opening of insolvency proceedings which could end in the liquidation of the debtor would not be in the general interest of creditors.
4. Member States shall provide for rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating or, in any other way, modifying essential executory contracts to the detriment of the debtor, for debts that came into existence prior to the stay, solely by virtue of the fact that they were not paid by the debtor. 'Essential executory contracts' shall be understood to mean executory contracts which are necessary for the continuation of the day-to-day operations of the business, including contracts concerning supplies, the suspension of which would lead to the debtor's activities coming to a standstill.

The first subparagraph shall not preclude Member States from affording such creditors appropriate safeguards with a view to preventing unfair prejudice being caused to such creditors as a result of that subparagraph.

Member States may provide that this paragraph also applies to non-essential executory contracts.

5. Member States shall ensure that creditors are not allowed to 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:
  - (a) a request for the opening of preventive restructuring proceedings;
  - (b) a request for a stay of individual enforcement actions;
  - (c) the opening of preventive restructuring proceedings; or
  - (d) the granting of a stay of individual enforcement actions as such.
6. Member States may provide that a stay of individual enforcement actions does not apply to netting arrangements, including close-out netting arrangements, on financial markets, energy markets and commodity markets, even in circumstances where Article 31(1) does not apply, if such arrangements are enforceable under national insolvency law. The stay shall, however, apply to the enforcement by a creditor of a claim against a debtor arising as a result of the operation of a netting arrangement.

The first subparagraph shall not apply to contracts for the supply of goods, services or energy necessary for the operation of the debtor's business, unless such contracts take the form of a position traded on an exchange or other market, such that it can be substituted at any time at current market value.

7. Member States shall ensure that the expiry of a stay of individual enforcement actions without the adoption of a restructuring plan does not, of itself, give rise to the opening of an insolvency procedure which could end in the liquidation of the debtor, unless the other conditions for such opening laid down by national law are fulfilled.

#### CHAPTER 3

### **Restructuring plans**

#### Article 8

### **Content of restructuring plans**

1. Member States shall require that restructuring plans submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10, contain at least the following information:

- (a) the identity of the debtor;
- (b) the debtor's assets and liabilities at the time of submission of the restructuring plan, including a value for the assets, a description of the economic situation of the debtor and the position of workers, and a description of the causes and the extent of the difficulties of the debtor;
- (c) the affected parties, whether named individually or described by categories of debt in accordance with national law, as well as their claims or interests covered by the restructuring plan;
- (d) where applicable, the classes into which the affected parties have been grouped, for the purpose of adopting the restructuring plan, and the respective values of claims and interests in each class;
- (e) where applicable, the parties, whether named individually or described by categories of debt in accordance with national law, which are not affected by the restructuring plan, together with a description of the reasons why it is proposed not to affect them;
- (f) where applicable, the identity of the practitioner in the field of restructuring;
- (g) the terms of the restructuring plan, including, in particular:
  - (i) any proposed restructuring measures as referred to in point (1) of Article 2(1);
  - (ii) where applicable, the proposed duration of any proposed restructuring measures;
  - (iii) the arrangements with regard to informing and consulting the employees' representatives in accordance with Union and national law;
  - (iv) where applicable, overall consequences as regards employment such as dismissals, short-time working arrangements or similar;
  - (v) the estimated financial flows of the debtor, if provided for by national law; and
  - (vi) any new financing anticipated as part of the restructuring plan, and the reasons why the new financing is necessary to implement that plan;
- (h) a statement of reasons which explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary pre-conditions for the success of the plan. Member States may require that that statement of reasons be made or validated either by an external expert or by the practitioner in the field of restructuring if such a practitioner is appointed.

2. Member States shall make available online a comprehensive check-list for restructuring plans, adapted to the needs of SMEs. The check-list shall include practical guidelines on how the restructuring plan has to be drafted under national law.

The check-list shall be made available in the official language or languages of the Member State. Member States shall consider making the check-list available in at least one other language, in particular in a language used in international business.

*Article 9***Adoption of restructuring plans**

1. Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Article 4, debtors have the right to submit restructuring plans for adoption by the affected parties.

Member States may also provide that creditors and practitioners in the field of restructuring have the right to submit restructuring plans, and provide for conditions under which they may do so.

2. Member States shall ensure that affected parties have a right to vote on the adoption of a restructuring plan.

Parties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan.

3. Notwithstanding paragraph 2, Member States may exclude from the right to vote the following:

- (a) equity holders;
- (b) creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or
- (c) any related party of the debtor or the debtor's business, with a conflict of interest under national law.

4. Member States shall ensure that affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. As a minimum, creditors of 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' claims are treated in a separate class of their own.

Member States may provide that debtors that are SMEs can opt not to treat affected parties in separate classes.

Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers.

5. Voting rights and the formation of classes shall be examined by a judicial or administrative authority when a request for confirmation of the restructuring plan is submitted.

Member States may require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage than that referred to in the first subparagraph.

6. A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.

Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75 % of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class.

7. Notwithstanding paragraphs 2 to 6, Member States may provide that a formal vote on the adoption of a restructuring plan can be replaced by an agreement with the requisite majority.

*Article 10***Confirmation of restructuring plans**

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

- (a) restructuring plans which affect the claims or interests of dissenting affected parties;
- (b) restructuring plans which provide for new financing;
- (c) restructuring plans which involve the loss of more than 25 % of the workforce, if such loss is permitted under national law.

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;
- (b) creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim;
- (c) notification of the restructuring plan has been given in accordance with national law to all affected parties;
- (d) where there are dissenting creditors, the restructuring plan satisfies the best-interest-of-creditors test;
- (e) where applicable, any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors.

Compliance with point (d) of the first subparagraph shall be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground.

3. Member States shall ensure that judicial or administrative authorities are able to refuse to confirm a restructuring plan where that plan would not have a reasonable prospect of preventing the insolvency of the debtor or 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, the decision is taken in an efficient manner with a view to expeditious treatment of the matter.

#### Article 11

##### **Cross-class cram-down**

1. Member States shall ensure that a restructuring plan which is not approved by affected parties, as provided for in Article 9(6), in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions:

- (a) it complies with Article 10(2) and (3);
- (b) it has been approved by:
  - (i) a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; or, failing that,
  - (ii) at least one of the voting classes of affected parties or where so provided under national law, impaired parties, other than an equity-holders class or any other class which, upon a valuation of the debtor as a going concern, would not receive any payment or keep any interest, or, where so provided under national law, which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law;
- (c) it ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class; and
- (d) no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests.

By way of derogation from the first subparagraph, Member States may limit the requirement to obtain the debtor's agreement to cases where debtors are SMEs.

Member States may increase the minimum number of classes of affected parties or, where so provided under national law, impaired parties, required to approve the plan as laid down in point (b)(ii) of the first subparagraph.

2. By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan.

Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties.

#### Article 12

##### **Equity holders**

1. Where Member States exclude equity holders from the application of Articles 9 to 11, they shall ensure by other means that those equity holders are not allowed to unreasonably prevent or create obstacles to the adoption and confirmation of a restructuring plan.
2. Member States shall also ensure that equity holders are not allowed to unreasonably prevent or create obstacles to the implementation of a restructuring plan.
3. Member States may adapt what it means to unreasonably prevent or create obstacles under this Article to take into account, inter alia: whether the debtor is an SME or a large enterprise; the proposed restructuring measures touching upon the rights of equity holders; the type of equity holder; whether the debtor is a legal or a natural person; or whether partners in a company have limited or unlimited liability.

#### Article 13

##### **Workers**

1. Member States shall ensure that individual and collective workers' rights, under Union and national labour law, such as the following, are not affected by the preventive restructuring framework:
  - (a) the right to collective bargaining and industrial action; and
  - (b) the right to information and consultation in accordance with Directive 2002/14/EC and Directive 2009/38/EC, in particular:
    - (i) information to employees' representatives about the recent and probable development of the undertaking's or the establishment's activities and economic situation, enabling them to communicate to the debtor concerns about the situation of the business and as regards the need to consider restructuring mechanisms;
    - (ii) information to employees' representatives about any preventive restructuring procedure which could have an impact on employment, such as on the ability of workers to recover their wages and any future payments, including occupational pensions;
    - (iii) information to and consultation of employees' representatives about restructuring plans before they are submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10;
  - (c) the rights guaranteed by Directives 98/59/EC, 2001/23/EC and 2008/94/EC.
2. Where the restructuring plan includes measures leading to changes in the work organisation or in contractual relations with workers, those measures shall be approved by those workers, if national law or collective agreements provide for such approval in such cases.

#### Article 14

##### **Valuation by the judicial or administrative authority**

1. The judicial or administrative authority shall take a decision on the valuation of the debtor's business only where a restructuring plan is challenged by a dissenting affected party on the grounds of either:
  - (a) an alleged failure to satisfy the best-interest-of-creditors test under point (6) of Article 2(1); or
  - (b) an alleged breach of the conditions for a cross-class cram-down under point (ii) of Article 11(1)(b).



2. Member States shall ensure that, for the purpose of taking a decision on a valuation in accordance with paragraph 1, judicial or administrative authorities may appoint or hear properly qualified experts.
3. For the purposes of paragraph 1, Member States shall ensure that a dissenting affected party may lodge a challenge with the judicial or administrative authority called upon to confirm the restructuring plan.

Member States may provide that such a challenge can be lodged in the context of an appeal against a decision on the confirmation of a restructuring plan.

#### *Article 15*

### **Effects of restructuring plans**

1. Member States shall ensure that restructuring plans that are confirmed by a judicial or administrative authority are binding upon all affected parties named or described in accordance with point (c) of Article 8(1).
2. Member States shall ensure that creditors that are not involved in the adoption of a restructuring plan under national law are not affected by the plan.

#### *Article 16*

### **Appeals**

1. Member States shall ensure that any appeal provided for under national law against a decision to confirm or reject a restructuring plan taken by a judicial authority is brought before a higher judicial authority.

Member States shall ensure that an appeal against a decision to confirm or reject a restructuring plan taken by an administrative authority is brought before a judicial authority.

2. Appeals shall be resolved in an efficient manner with a view to expeditious treatment.
3. An appeal against a decision confirming a restructuring plan shall have no suspensive effects on the execution of that plan.

By way of derogation from the first subparagraph, Member States may provide that judicial authorities can suspend the execution of the restructuring plan or parts thereof where necessary and appropriate to safeguard the interests of a party.

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 restructuring plan, either with amendments, where so provided under national law, or without amendments.

Member States may provide that, where a plan is confirmed under point (b) of the first subparagraph, compensation is granted to any party that incurred monetary losses and whose appeal is upheld.

#### *CHAPTER 4*

### ***Protection for new financing, interim financing and other restructuring related transactions***

#### *Article 17*

### **Protection for new financing and interim financing**

1. Member States shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor:
  - (a) new financing and interim financing shall not be declared void, voidable or unenforceable; and

- (b) the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.
2. Member States may provide that paragraph 1 shall only apply to new financing if the restructuring plan has been confirmed by a judicial or administrative authority, and to interim financing which has been subject to *ex ante* control.
3. Member States may exclude from the application of paragraph 1 interim financing which is granted after the debtor has become unable to pay its debts as they fall due.
4. Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims.

#### Article 18

##### **Protection for other restructuring related transactions**

1. Without prejudice to Article 17, Member States shall ensure that, in the event of any subsequent insolvency of a debtor, transactions that are reasonable and immediately necessary for the negotiation of a restructuring plan are not declared void, voidable or unenforceable on the ground that such transactions are detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.
2. Member States may provide that paragraph 1 only applies where the plan is confirmed by a judicial or administrative authority or where such transactions were subject to *ex ante* control.
3. Member States may exclude from the application of paragraph 1 transactions that are carried out after the debtor has become unable to pay its debts as they fall due.
4. Transactions referred to in paragraph 1 shall include, as a minimum:
- (a) the payment of fees for and costs of negotiating, adopting or confirming a restructuring plan;
  - (b) the payment of fees for and costs of seeking professional advice closely connected with the restructuring;
  - (c) the payment of workers' wages for work already carried out without prejudice to other protection provided in Union or national law;
  - (d) any payments and disbursements made in the ordinary course of business other than those referred to in points (a) to (c).
5. Without prejudice to Article 17, Member States shall ensure that, in the event of any subsequent insolvency of the debtor, transactions that are reasonable and immediately necessary for the implementation of a restructuring plan, and that are carried out in accordance with the restructuring plan confirmed by a judicial or administrative authority, are not declared void, voidable or unenforceable on the ground that such transactions are detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

#### CHAPTER 5

##### **Duties of directors**

#### Article 19

##### **Duties of directors where there is a likelihood of insolvency**

Member States shall ensure that, where there is a likelihood of insolvency, directors, have due regard, as a minimum, to the following:

- (a) the interests of creditors, equity holders and other stakeholders;
- (b) the need to take steps to avoid insolvency; and
- (c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business.

## TITLE III

**DISCHARGE OF DEBT AND DISQUALIFICATIONS***Article 20***Access to discharge**

1. Member States shall ensure that insolvent entrepreneurs have access to at least one procedure that can lead to a full discharge of debt in accordance with this Directive.

Member States may require that the trade, business, craft or profession to which an insolvent entrepreneur's debts are related has ceased.

2. Member States in which a full discharge of debt is conditional on a partial repayment of debt by the entrepreneur shall ensure that the related repayment obligation is based on the individual situation of the entrepreneur and, in particular, is proportionate to the entrepreneur's seizable or disposable income and assets during the discharge period, and takes into account the equitable interest of creditors.

3. Member States shall ensure that entrepreneurs who have been discharged from their debts may benefit from existing national frameworks providing for business support for entrepreneurs, including access to relevant and up-to-date information about these frameworks.

*Article 21***Discharge period**

1. Member States shall ensure that the period after which insolvent entrepreneurs are able to be fully discharged from their debts is no longer than three years starting at the latest from the date of either:

- (a) in the case of a procedure which includes a repayment plan, the decision by a judicial or administrative authority to confirm the plan or the start of the implementation of the plan; or
- (b) in the case of any other procedure, the decision by the judicial or administrative authority to open the procedure, or the establishment of the entrepreneur's insolvency estate.

2. Member States shall ensure that insolvent entrepreneurs who have complied with their obligations, where such obligations exist under national law, are discharged of their debt on expiry of the discharge period without the need to apply to a judicial or administrative authority to open a procedure additional to those referred to in paragraph 1.

Without prejudice to the first subparagraph, Member States may maintain or introduce provisions allowing the judicial or administrative authority to verify whether the entrepreneurs have fulfilled the obligations for obtaining a discharge of debt.

3. Member States may provide that a full discharge of debt does not hinder the continuation of an insolvency procedure that entails the realisation and distribution of assets of an entrepreneur that formed part of the insolvency estate of that entrepreneur as at the date of expiry of the discharge period.

*Article 22***Disqualification period**

1. Member States shall ensure that, where an insolvent entrepreneur obtains a discharge of debt in accordance with this Directive, any disqualifications from taking up or pursuing a trade, business, craft or profession on the sole ground that the entrepreneur is insolvent, shall cease to have effect, at the latest, at the end of the discharge period.

2. Member States shall ensure that, on expiry of the discharge period, the disqualifications referred to in paragraph 1 of this Article cease to have effect without the need to apply to a judicial or administrative authority to open a procedure additional to those referred to in Article 21(1).

*Article 23***Derogations**

1. By way of derogation from Articles 20 to 22, Member States shall maintain or introduce provisions denying or restricting access to discharge of debt, revoking the benefit of such discharge or providing for longer periods for obtaining a full discharge of debt or longer disqualification periods, where the insolvent entrepreneur acted dishonestly or in bad faith under national law towards creditors or other stakeholders when becoming indebted, during the insolvency proceedings or during the payment of the debt, without prejudice to national rules on burden of proof.

2. By way of derogation from Articles 20 to 22, Member States may maintain or introduce provisions denying or restricting access to discharge of debt, revoking the benefit of discharge or providing for longer periods for obtaining a full discharge of debt or longer disqualification periods in certain well-defined circumstances and where such derogations are duly justified, such as where:

- (a) the insolvent entrepreneur has substantially violated obligations under a repayment plan or any other legal obligation aimed at safeguarding the interests of creditors, including the obligation to maximise returns to creditors;
- (b) the insolvent entrepreneur has failed to comply with information or cooperation obligations under Union and national law;
- (c) there are abusive applications for a discharge of debt;
- (d) there is a further application for a discharge within a certain period after the insolvent entrepreneur was granted a full discharge of debt or was denied a full discharge of debt due to a serious violation of information or cooperation obligations;
- (e) the cost of the procedure leading to the discharge of debt is not covered; or
- (f) a derogation is necessary to guarantee the balance between the rights of the debtor and the rights of one or more creditors.

3. By way of derogation from Article 21, Member States may provide for longer discharge periods in cases where:

- (a) protective measures are approved or ordered by a judicial or administrative authority in order to safeguard the main residence of the insolvent entrepreneur and, where applicable, of the entrepreneur's family, or the essential assets for the continuation of the entrepreneur's trade, business, craft or profession; or
- (b) the main residence of the insolvent entrepreneur and, where applicable, of the entrepreneur's family, is not realised.

4. Member States may exclude specific categories of debt from discharge of debt, or restrict access to discharge of debt or lay down a longer discharge period where such exclusions, restrictions or longer periods are duly justified, such as in the case of:

- (a) secured debts;
- (b) debts arising from or in connection with criminal penalties;
- (c) debts arising from tortious liability;
- (d) debts regarding maintenance obligations arising from a family relationship, parentage, marriage or affinity;
- (e) debts incurred after the application for or opening of the procedure leading to a discharge of debt; and
- (f) debts arising from the obligation to pay the cost of the procedure leading to a discharge of debt.

5. By way of derogation from Article 22, Member States may provide for longer or indefinite disqualification periods where the insolvent entrepreneur is a member of a profession:

- (a) to which specific ethical rules or specific rules on reputation or expertise apply, and the entrepreneur has infringed those rules; or
- (b) dealing with the management of the property of others.

The first subparagraph shall also apply where an insolvent entrepreneur requests access to a profession as referred to in point (a) or (b) of that subparagraph.

6. This Directive is without prejudice to national rules regarding disqualifications ordered by a judicial or administrative authority other than those referred to in Article 22.

#### Article 24

### **Consolidation of proceedings regarding professional and personal debts**

1. Member States shall ensure that, where insolvent entrepreneurs have professional debts incurred in the course of their trade, business, craft or profession as well as personal debts incurred outside those activities, which cannot be reasonably separated, such debts, if dischargeable, shall be treated in a single procedure for the purposes of obtaining a full discharge of debt.

2. Member States may provide that, where professional debts and personal debts can be separated, those debts are to be treated, for the purposes of obtaining a full discharge of debt, either in separate but coordinated procedures or in the same procedure.

#### TITLE IV

### **MEASURES TO INCREASE THE EFFICIENCY OF PROCEDURES CONCERNING RESTRUCTURING, INSOLVENCY AND DISCHARGE OF DEBT**

#### Article 25

### **Judicial and administrative authorities**

Without prejudice to judicial independence and to any differences in the organisation of the judiciary across the Union, Member States shall ensure that:

- (a) members of the judicial and administrative authorities dealing with procedures concerning restructuring, insolvency and discharge of debt receive suitable training and have the necessary expertise for their responsibilities; and
- (b) procedures concerning restructuring, insolvency and discharge of debt are dealt with in an efficient manner, with a view to the expeditious treatment of procedures.

#### Article 26

### **Practitioners in procedures concerning restructuring, insolvency and discharge of debt**

1. Member States shall ensure that:

- (a) practitioners appointed by a judicial or administrative authority in procedures concerning restructuring, insolvency and discharge of debt ('practitioners') receive suitable training and have the necessary expertise for their responsibilities;
- (b) the conditions for eligibility, as well as the process for the appointment, removal and resignation of practitioners are clear, transparent and fair;
- (c) in appointing a practitioner for a particular case, including cases with cross-border elements, due consideration is given to the practitioner's experience and expertise, and to the specific features of the case; and
- (d) in order to avoid any conflict of interest, debtors and creditors have the opportunity to either object to the selection or appointment of a practitioner or request the replacement of the practitioner.

2. The Commission shall facilitate the sharing of best practices between Member States with a view to improving the quality of training across the Union, including by means of the exchange of experiences and capacity building tools.

*Article 27***Supervision and remuneration of practitioners**

1. Member States shall put in place appropriate oversight and regulatory mechanisms to ensure that the work of practitioners is effectively supervised, with a view to ensuring that their services are provided in an effective and competent way, and, in relation to the parties involved, are provided impartially and independently. Those mechanisms shall also include measures for the accountability of practitioners who have failed in their duties.
2. Member States shall ensure that information about the authorities or bodies exercising oversight over practitioners is publicly available.
3. Member States may encourage the development of and adherence to codes of conduct by practitioners.
4. Member States shall ensure that the remuneration of practitioners is governed by rules that are consistent with the objective of an efficient resolution of procedures.

Member States shall ensure that appropriate procedures are in place to resolve any disputes over remuneration.

*Article 28***Use of electronic means of communication**

Member States shall ensure that, in procedures concerning restructuring, insolvency and discharge of debt, the parties to the procedure, the practitioner and the judicial or administrative authority are able to perform by use of electronic means of communication, including in cross-border situations, at least the following actions:

- (a) filing of claims;
- (b) submission of restructuring or repayment plans;
- (c) notifications to creditors;
- (d) lodging of challenges and appeals.

## TITLE V

**MONITORING OF PROCEDURES CONCERNING RESTRUCTURING, INSOLVENCY AND DISCHARGE OF DEBT***Article 29***Data collection**

1. Member States shall collect and aggregate, on an annual basis, at national level, data on procedures concerning restructuring, insolvency and discharge of debt, broken down by each type of procedure, and covering at least the following elements:
  - (a) the number of procedures that were applied for or opened, where such opening is provided for under national law, and of procedures that are pending or were closed;
  - (b) the average length of procedures from the submission of the application, or from the opening thereof, where such opening is provided for under national law, to their closure;
  - (c) the number of procedures other than those required under point (d), broken down by types of outcome;
  - (d) the number of applications for restructuring procedures that were declared inadmissible, were rejected or were withdrawn before being opened.
2. Member States shall collect and aggregate, on an annual basis, at national level, data on the number of debtors which were subject to restructuring procedures or insolvency procedures and which, within the three years prior to the submission of the application or the opening of such procedures, where such opening is provided for under national law, had a restructuring plan confirmed under a previous restructuring procedure implementing Title II.

3. Member States may collect and aggregate, on an annual basis, at national level, data on:
  - (a) the average cost of each type of procedure;
  - (b) the average recovery rates for secured and unsecured creditors and, where applicable, other types of creditors, separately;
  - (c) the number of entrepreneurs who, after having undergone a procedure under point (b) of Article 1(1), launch a new business;
  - (d) the number of job losses linked to restructuring and insolvency procedures.
4. Member States shall break down the data referred to in points (a) to (c) of paragraph 1 and, where applicable and available, the data referred to in paragraph 3 by:
  - (a) the size of the debtors that are not natural persons;
  - (b) whether debtors subject to procedures concerning restructuring or insolvency are natural or legal persons; and
  - (c) whether the procedures leading to a discharge of debt concern only entrepreneurs or all natural persons.
5. Member States may collect and aggregate the data referred to in paragraphs 1 to 4 through a sample technique that ensures that the samples are representative in terms of size and diversity.
6. Member States shall collect and aggregate the data referred to in paragraphs 1, 2, 4 and, where applicable, paragraph 3, for full calendar years ending on 31 December of each year, starting with the first full calendar year following the date of application of implementing acts referred to in paragraph 7. The data shall be communicated annually to the Commission, on the basis of a standard data communication form, by 31 December of the calendar year following the year for which data are collected.
7. The Commission shall establish the communication form referred to in paragraph 6 of this Article by way of implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 30(2).
8. The Commission shall publish on its website the data communicated in accordance with paragraph 6 in an accessible and user-friendly manner.

#### *Article 30*

### **Committee procedure**

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Where the committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

#### TITLE VI

### **FINAL PROVISIONS**

#### *Article 31*

### **Relationship with other acts and international instruments**

1. The following acts shall apply notwithstanding this Directive:
  - (a) Directive 98/26/EC;
  - (b) Directive 2002/47/EC; and
  - (c) Regulation (EU) No 648/2012.

2. This Directive shall be without prejudice to the safeguarding requirements of funds for payment institutions laid down under Directive (EU) 2015/2366 of the European Parliament and of the Council <sup>(24)</sup> and for electronic money institutions laid down under Directive 2009/110/EC of the European Parliament and of the Council <sup>(25)</sup>.

3. This Directive shall be without prejudice to the application of the Convention on international interests in mobile equipment and its Protocol on matters specific to aircraft equipment, signed at Cape Town on 16 November 2001, to which some Member States are party at the time of the adoption of this Directive.

#### Article 32

### Amendment of Directive (EU) 2017/1132

In Article 84 of Directive (EU) 2017/1132, the following paragraph is added:

'4. Member States shall derogate from Article 58(1), Article 68, Articles 72, 73, and 74, point (b) of Article 79(1), Article 80(1) and Article 81 to the extent and for the period that such derogations are necessary for the establishment of the preventive restructuring frameworks provided for in Directive (EU) 2019/1023 of the European Parliament and of the Council (\*).

The first subparagraph shall be without prejudice to the principle of equal treatment of shareholders.

(\*) Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (OJ L 172, 26.6.2019, p. 18).'

#### Article 33

### Review clause

No later than 17 July 2026 and every five years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application and impact of this Directive, including on the application of the class formation and voting rules in respect of vulnerable creditors, such as workers. On the basis of that assessment, the Commission shall submit, if appropriate, a legislative proposal, considering additional measures to consolidate and harmonise the legal framework on restructuring, insolvency and discharge of debt.

#### Article 34

### Transposition

1. Member States shall adopt and publish, by 17 July 2021, the laws, regulations and administrative provisions necessary to comply with this Directive, with the exception of the provisions necessary to comply with points (a), (b) and (c) of Article 28 which shall be adopted and published by 17 July 2024 and the provisions necessary to comply with point (d) of Article 28 which shall be adopted and published by 17 July 2026. They shall immediately communicate the text of those provisions to the Commission.

They shall apply the laws, regulations and administrative provisions necessary to comply with this Directive from 17 July 2021, with the exception of the provisions necessary to comply with points (a), (b) and (c) of Article 28, which shall apply from 17 July 2024 and of the provisions necessary to comply with point (d) of Article 28, which shall apply from 17 July 2026.

<sup>(24)</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35).

<sup>(25)</sup> Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ L 267, 10.10.2009, p. 7).



2. By way of derogation from paragraph 1, Member States that encounter particular difficulties in implementing this Directive shall be able to benefit from an extension of a maximum of one year of the implementation period provided for in paragraph 1. Member States shall notify to the Commission the need to make use of this option to extend the implementation period by 17 January 2021.
3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 35*

**Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 36*

This Directive is addressed to the Member States.

Done at Brussels, 20 June 2019.

*For the European Parliament*  
*The President*  
A. TAJANI

*For the Council*  
*The President*  
G. CIAMBA

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**DIRECTIVE (EU) 2019/1024 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**of 20 June 2019**  
**on open data and the re-use of public sector information**  
**(recast)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure <sup>(2)</sup>,

Whereas:

- (1) Directive 2003/98/EC of the European Parliament and of the Council <sup>(3)</sup> has been substantially amended. Since further amendments are to be made, that Directive should be recast in the interests of clarity.
- (2) Pursuant to Article 13 of Directive 2003/98/EC and five years after the adoption of Directive 2013/37/EU of the European Parliament and of the Council <sup>(4)</sup>, which amended Directive 2003/98/EC, the Commission, after consulting the relevant stakeholders, evaluated and reviewed the functioning of Directive 2003/98/EC in the framework of a regulatory fitness and performance programme.
- (3) Following the stakeholder consultation and in the light of the result of the impact assessment, the Commission considered that action at Union level was necessary in order to address the remaining and emerging barriers to a wide re-use of public sector and publicly funded information across the Union, in order to bring the legislative framework up to date with the advances in digital technologies and to further stimulate digital innovation, especially with regard to artificial intelligence.
- (4) The substantive changes introduced to the legal text so as to fully exploit the potential of public sector information for the European economy and society should focus on the following areas: the provision of real-time access to dynamic data via adequate technical means, the increase of the supply of valuable public data for re-use, including from public undertakings, research performing organisations and research funding organisations, the tackling of the emergence of new forms of exclusive arrangements, the use of exceptions to the principle of charging the marginal cost and the relationship between this Directive and certain related legal instruments, including Regulation (EU) 2016/679 of the European Parliament and of the Council <sup>(5)</sup> and Directives 96/9/EC <sup>(6)</sup>, 2003/4/EC <sup>(7)</sup> and 2007/2/EC <sup>(8)</sup> of the European Parliament and of the Council.

<sup>(1)</sup> OJ C 62, 15.2.2019, p. 238.

<sup>(2)</sup> Position of the European Parliament of 4 April 2019 (not yet published in the Official Journal) and Decision of the Council of 6 June 2019.

<sup>(3)</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (OJ L 345, 31.12.2003, p. 90).

<sup>(4)</sup> Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information (OJ L 175, 27.6.2013, p. 1).

<sup>(5)</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

<sup>(6)</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

<sup>(7)</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41, 14.2.2003, p. 26).

<sup>(8)</sup> Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) (OJ L 108, 25.4.2007, p. 1).

- (5) Access to information is a fundamental right. The Charter of Fundamental Rights of the European Union (Charter) provides that everyone has the right to freedom of expression, including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
- (6) Article 8 of the Charter guarantees the right to the protection of personal data and provides that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, and subject to control by an independent authority.
- (7) The Treaty on the Functioning of the European Union (TFEU) provides for the establishment of an internal market and of a system ensuring that competition in the internal market is not distorted. Harmonisation of the rules and practices in the Member States relating to the exploitation of public sector information contributes to the achievement of those objectives.
- (8) The public sector in Member States collects, produces, reproduces and disseminates a wide range of information in many areas of activity, such as social, political, economic, legal, geographical, environmental, meteorological, seismic, touristic, business, patent-related and educational areas. Documents produced by public sector bodies of the executive, legislature or judiciary constitute a vast, diverse and valuable pool of resources that can benefit society. Providing that information, which includes dynamic data, in a commonly used electronic format allows citizens and legal entities to find new ways to use them and create new, innovative products and services. Member States and public sector bodies may be able to benefit from and receive adequate financial support from relevant Union funds and programmes, ensuring a wide use of digital technologies or the digital transformation of public administrations and public services, in their efforts to make data easily available for re-use.
- (9) Public sector information represents an extraordinary source of data that can contribute to improving the internal market and to the development of new applications for consumers and legal entities. Intelligent data usage, including their processing through artificial intelligence applications, can have a transformative effect on all sectors of the economy.
- (10) Directive 2003/98/EC established a set of minimum rules governing the re-use and the practical arrangements for facilitating re-use of existing documents held by public sector bodies of the Member States, including executive, legislative and judicial bodies. Since the adoption of the first set of rules on re-use of public sector information, the amount of data in the world, including public data, has increased exponentially and new types of data are being generated and collected. In parallel, there is a continuous evolution in technologies for analysis, exploitation and processing of data, such as machine learning, artificial intelligence and the internet of things. That rapid technological evolution makes it possible to create new services and new applications, which are built upon the use, aggregation or combination of data. The rules originally adopted in 2003, and amended in 2013, no longer keep pace with those rapid changes, and as a result, the economic and social opportunities offered by the re-use of public data risk being missed.
- (11) The evolution towards a data-based society, where data from different domains and activities are used, influences the life of every citizen in the Union, inter alia, by enabling them to gain new ways of accessing and acquiring knowledge.
- (12) Digital content plays an important role in that evolution. Content production has given rise to rapid job creation in recent years and continues to do so. Most of those jobs are created by innovative start-ups and small and medium-sized enterprises (SMEs).
- (13) One of the principal aims of the establishment of an internal market is the creation of conditions conducive to the development of services and products Union-wide and within Member States. Public sector information or information collected, produced, reproduced, and disseminated within the exercise of a public task or a service of general interest, is an important primary material for digital content products and services and will become an

even more important content resource with the development of advanced digital technologies, such as artificial intelligence, distributed ledger technologies and the internet of things. Broad, cross-border geographical coverage will also be essential in that context. Increased possibilities of re-using such information is expected, inter alia, to allow all Union businesses, including microenterprises and SMEs, as well as civil society, to exploit its potential and contribute to economic development and high-quality job creation and protection, especially for the benefit of local communities, and to important societal goals such as accountability and transparency.

- (14) Allowing the re-use of documents held by a public sector body adds value for the benefit of re-users, end users and society in general and in many cases for the benefit of the public sector body itself, by promoting transparency and accountability and by providing feedback from re-users and end users, which allows the public sector body concerned to improve the quality of the information collected and the performance of its tasks.
- (15) There are considerable differences in the rules and practices in the Member States relating to the exploitation of public sector information resources, which constitute barriers to bringing out the full economic potential of that key document resource. The fact that practice in public sector bodies in exploiting public sector information continues to vary among Member States should be taken into account. Minimum harmonisation of national rules and practices on the re-use of public sector documents should therefore be pursued where the differences in national regulations and practices or the absence of clarity hinder the smooth functioning of the internal market and the proper development of the information society in the Union.
- (16) Open data as a concept is generally understood to denote data in an open format that can be freely used, re-used and shared by anyone for any purpose. Open data policies which encourage the wide availability and re-use of public sector information for private or commercial purposes, with minimal or no legal, technical or financial constraints, and which promote the circulation of information not only for economic operators but primarily for the public, can play an important role in promoting social engagement, and kick-start and promote the development of new services based on novel ways to combine and make use of such information. Member States are therefore encouraged to promote the creation of data based on the principle of 'open by design and by default', with regard to all documents falling within the scope of this Directive. In doing so they should ensure a consistent level of protection of public interest objectives, such as public security, including where sensitive critical infrastructure protection related information are concerned. They should also ensure the protection of personal data, including where information in an individual data set does not present a risk of identifying or singling out a natural person, but when that information is combined with other available information, it could entail such a risk.
- (17) Moreover, without minimum harmonisation at Union level, legislative activity at national level, which has already been initiated in a number of Member States in order to respond to the technological challenges, might result in even more significant divergence. The impact of such legislative divergence and uncertainties will become more significant with the further development of the information society, which has already greatly increased cross-border exploitation of information.
- (18) Member States have established re-use policies under Directive 2003/98/EC and some of them have been adopting ambitious open data approaches to make the re-use of accessible public data easier for citizens and legal entities beyond the minimum level set by that Directive. There is a risk that diverging rules across Member States act as a barrier to the cross-border offer of products and services and prevent comparable public data sets from being re-usable for pan-Union applications based on them. Therefore, minimum harmonisation is required to determine what public data are available for re-use in the internal information market, consistent with and not affecting the relevant access regimes, both general and sectoral, such as that defined in Directive 2003/4/EC. The provisions of Union and national law that go beyond those minimum requirements, in particular in cases of sectoral law, should continue to apply. Examples of provisions that exceed the minimum harmonisation level of this Directive include lower thresholds for permissible charges for re-use than the thresholds provided for in this Directive or less restrictive licensing terms than those referred to in this Directive. In particular, this Directive is without prejudice to provisions that exceed the minimum harmonisation level of this Directive as laid down in Commission delegated regulations adopted under Directive 2010/40/EU of the European Parliament and of the Council <sup>(9)</sup>.

<sup>(9)</sup> Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport (OJ L 207, 6.8.2010, p. 1).

- (19) Moreover, Member States are encouraged to go beyond the minimum requirements set out in this Directive by applying its requirements to documents held by public undertakings, which are related to activities that have been found, pursuant to Article 34 of Directive 2014/25/EU of the European Parliament and of the Council <sup>(10)</sup>, to be directly exposed to competition. Member States may also decide to apply the requirements of this Directive to private undertakings, in particular those that provide services of general interest.
- (20) A general framework for the conditions governing re-use of public sector documents is needed in order to ensure fair, proportionate and non-discriminatory conditions for the re-use of such information. Public sector bodies collect, produce, reproduce and disseminate documents to fulfil their public tasks. Public undertakings collect, produce, reproduce and disseminate documents to provide services in the general interest. Use of such documents for other reasons constitutes re-use. Member States' policies can go beyond the minimum standards established in this Directive, thus allowing for more extensive re-use. When transposing this Directive, Member States can use terms other than 'document', provided that they retain the full scope of the definition of 'document' set out in this Directive.
- (21) This Directive should apply to documents the supply of which forms part of the public tasks of the public sector bodies concerned, as defined by law or by other binding rules in the Member States. In the absence of such rules the public tasks should be defined in accordance with common administrative practice in the Member States, provided that the scope of the public tasks is transparent and subject to review. The public tasks could be defined generally or on a case-by-case basis for individual public sector bodies.
- (22) This Directive should apply to documents that are made accessible for re-use when public sector bodies license, sell, disseminate, exchange or provide information. To avoid cross-subsidies, re-use should include further use of documents within the organisation itself for activities falling outside the scope of its public tasks. Activities falling outside the public task typically include supply of documents that are produced and charged for exclusively on a commercial basis and in competition with others in the market.
- (23) This Directive does not restrict or impair the performance of the statutory tasks of public authorities and other public sector bodies. This Directive lays down an obligation for Member States to make all existing documents re-usable unless access is restricted or excluded under national rules on access to documents or subject to the other exceptions laid down in this Directive. This Directive builds on the existing access regimes in the Member States and does not change the national rules for access to documents. It does not apply to cases in which citizens or legal entities can, under the relevant access regime, obtain a document only if they can prove a particular interest. At Union level, Article 41 on the right to good administration and Article 42 on the right of access to documents in the Charter recognise the right of any citizen of the Union and any natural or legal person residing or having its registered office in a Member State to have access to documents held by the European Parliament, the Council and the Commission. Public sector bodies should be encouraged to make available for re-use any documents held by them. Public sector bodies should promote and encourage re-use of documents, including official texts of a legislative and administrative nature in those cases where the public sector body has the right to authorise their re-use.
- (24) Member States often entrust the provision of services in the general interest with entities outside of the public sector while maintaining a high degree of control over such entities. At the same time, Directive 2003/98/EC applies only to documents held by public sector bodies, while excluding public undertakings from its scope. This leads to poor availability for re-use of documents produced in the performance of services in the general interest in a number of areas, in particular in the utility sectors. It also greatly reduces the potential for the creation of cross-border services based on documents held by public undertakings that provide services in the general interest.
- (25) Directive 2003/98/EC should therefore be amended in order to ensure that it can be applied to the re-use of existing documents produced in the performance of services in the general interest by public undertakings pursuing one of the activities referred to in Articles 8 to 14 of Directive 2014/25/EU, as well as by public

<sup>(10)</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

undertakings acting as public service operators pursuant to Article 2 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council <sup>(1)</sup>, public undertakings acting as air carriers fulfilling public service obligations pursuant to Article 16 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council <sup>(2)</sup>, and public undertakings acting as Community shipowners fulfilling public service obligations pursuant to Article 4 of Council Regulation (EEC) No 3577/92 <sup>(3)</sup>.

- (26) This Directive does not contain a general obligation to allow the re-use of documents produced by public undertakings. The decision whether or not to authorise re-use should remain with the public undertaking concerned, except where otherwise required by this Directive or by Union or national law. Only after the public undertaking has made a document available for re-use, should it observe the relevant obligations laid down in Chapters III and IV of this Directive, in particular as regards format, charging, transparency, licences, non-discrimination and prohibition of exclusive arrangements. On the other hand, public undertakings should not be required to comply with the requirements laid down in Chapter II, such as the rules applicable to processing of requests. When allowing the re-use of documents, particular attention should be given to sensitive critical infrastructure protection related information as defined in Council Directive 2008/114/EC <sup>(4)</sup> and of essential services within the meaning of Directive (EU) 2016/1148 of the European Parliament and of the Council <sup>(5)</sup>.
- (27) The volume of research data generated is growing exponentially and has potential for re-use beyond the scientific community. In order to be able to address mounting societal challenges efficiently and in a holistic manner, it has become crucial and urgent to be able to access, blend and re-use data from different sources, as well as across sectors and disciplines. Research data includes statistics, results of experiments, measurements, observations resulting from fieldwork, survey results, interview recordings and images. It also includes meta-data, specifications and other digital objects. Research data is different from scientific articles reporting and commenting on findings resulting from their scientific research. For many years, the open availability and re-usability of scientific research data stemming from public funding has been subject to specific policy initiatives. Open access is understood as the practice of providing online access to research outputs free of charge for the end user and without restrictions on use and re-use beyond the possibility to require acknowledgement of authorship. Open access policies aim in particular to provide researchers and the public at large with access to research data as early as possible in the dissemination process and to facilitate its use and re-use. Open access helps enhance quality, reduce the need for unnecessary duplication of research, speed up scientific progress, combat scientific fraud, and it can overall favour economic growth and innovation. Beside open access, commendable efforts are being made to ensure that data management planning becomes a standard scientific practice and to support the dissemination of research data that are findable, accessible, interoperable and re-usable (the FAIR principle).
- (28) For the reasons explained above, it is appropriate to set an obligation on Member States to adopt open access policies with respect to publicly funded research data and ensure that such policies are implemented by all research performing organisations and research funding organisations. Research performing organisations and research funding organisations could also be organised as public sector bodies or public undertakings. This Directive applies to such hybrid organisations only in their capacity as research performing organisations and to their research data. Open access policies typically allow for a range of exceptions from making scientific research results openly available. The Commission Recommendation of 25 April 2018 on access to and preservation of scientific information describes, among other things, relevant elements of open access policies. Additionally, the conditions, under which certain research data can be re-used, should be improved. For that reason, certain obligations stemming from this Directive should be extended to research data resulting from scientific research activities subsidised by public funding or co-funded by public and private-sector entities. Under the national open access policies, publicly funded research data should be made open as the default option. However, in this

<sup>(1)</sup> Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

<sup>(2)</sup> Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3).

<sup>(3)</sup> Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p. 7).

<sup>(4)</sup> Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection (OJ L 345, 23.12.2008, p. 75).

<sup>(5)</sup> Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (OJ L 194, 19.7.2016, p. 1).

context, concerns in relation to privacy, protection of personal data, confidentiality, national security, legitimate commercial interests, such as trade secrets, and to intellectual property rights of third parties should be duly taken into account, according to the principle 'as open as possible, as closed as necessary'. Moreover, research data which are excluded from access on grounds of national security, defence or public security should not be covered by this Directive. In order to avoid any administrative burden, obligations stemming from this Directive should apply only to such research data that have already been made publicly available by researchers, research performing organisations or research funding organisations through an institutional or subject-based repository and should not impose extra costs for the retrieval of the datasets or require additional curation of data. Member States may extend the application of this Directive to research data made publicly available through other data infrastructures than repositories, through open access publications, as an attached file to an article, a data paper or a paper in a data journal. Documents other than research data should continue to be exempt from the scope of this Directive.

- (29) The definition of 'public sector body' is based on the definition in point (1) of Article 2(1) of Directive 2014/24/EU of the European Parliament and of the Council<sup>(16)</sup>. The definition of 'body governed by public law' set out in that Directive and the definition of 'public undertaking' set out in Directive 2014/25/EU should apply to this Directive.
- (30) This Directive lays down the definition of the term 'document' and that definition should include any part of a document. The term 'document' should cover any representation of acts, facts or information — and any compilation of such acts, facts or information — whatever its medium (paper, or electronic form or as a sound, visual or audiovisual recording). The definition of 'document' is not intended to cover computer programmes. Member States may extend the application of this Directive to computer programmes.
- (31) Public sector bodies are increasingly making their documents available for re-use in a proactive manner, by ensuring online discoverability and actual availability of documents and associated metadata in an open format that can be machine-readable and that ensure interoperability, re-use and accessibility. Documents should also be made available for re-use following a request lodged by a re-user. In those cases, the time limit for replying to requests for re-use should be reasonable and in accordance with the equivalent time for requests to access the document under the relevant access regimes. Public undertakings, educational establishments, research performing organisations and research funding organisations should however be exempt from that requirement. Reasonable time limits throughout the Union will stimulate the creation of new aggregated information products and services at pan-Union level. This is particularly important for dynamic data (including environmental, traffic, satellite, meteorological and sensor generated data), the economic value of which depends on the immediate availability of the information and of regular updates. Dynamic data should therefore be made available immediately after collection, or in the case of a manual update immediately after the modification of the dataset, via an application programming interface (API) so as to facilitate the development of internet, mobile and cloud applications based on such data. Where this is not possible due to technical or financial constraints, public sector bodies should make the documents available in a timeframe that allows their full economic potential to be exploited. Specific measures should be taken in order to lift relevant technical and financial constraints. Should a licence be used, the timely availability of documents may be a part of the terms of the licence. Where data verification is essential in the light of justified public interest reasons, in particular for public health and safety, dynamic data should be made available immediately after verification. Such essential verification should not affect the frequency of the updates.
- (32) In order to get access to the data opened for re-use by this Directive, it would be useful to ensure access to dynamic data through well-designed APIs. An API is a set of functions, procedures, definitions and protocols for machine-to-machine communication and the seamless exchange of data. APIs should be supported by clear technical documentation that is complete and available online. Where possible, open APIs should be used. Union or internationally recognised standard protocols should be applied and international standards for datasets should be used where applicable. APIs can have different levels of complexity and can mean a simple link to a database to retrieve specific datasets, a web interface, or more complex set-ups. There is general value in re-using and sharing data via a suitable use of APIs as this will help developers and start-ups to create new services and products. It is also a crucial ingredient of creating valuable ecosystems around data assets that are often unused. The set-up and use of API needs to be based on several principles: availability, stability, maintenance over

<sup>(16)</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

lifecycle, uniformity of use and standards, user-friendliness as well as security. For dynamic data, meaning frequently updated data, often in real time, public sector bodies and public undertakings should make this available for re-use immediately after collection by ways of suitable APIs and, where relevant, as a bulk download, save for cases where this would impose a disproportionate effort. Assessment of the proportionality of the effort should take into account the size and operating budget of the public sector body or the public undertaking in question.

- (33) The possibilities for re-use can be improved by limiting the need to digitise paper-based documents or to process digital files to make them mutually compatible. Therefore, public sector bodies should make documents available in any pre-existing format or language, through electronic means where possible and appropriate. Public sector bodies should view requests for extracts from existing documents favourably when to grant such a request would involve only a simple operation. Public sector bodies should not, however, be obliged to provide an extract from a document or to modify the format of the requested information where this involves a disproportionate effort. To facilitate re-use, public sector bodies should make their own documents available in a format which, as far as possible and appropriate, is not dependent on the use of specific software. Where possible and appropriate, public sector bodies should take into account the possibilities for the re-use of documents by and for persons with disabilities by providing the information in an accessible format in accordance with the requirements of Directive (EU) 2016/2102 of the European Parliament and of the Council <sup>(17)</sup>.
- (34) To facilitate re-use, public sector bodies should, where possible and appropriate, make documents, including those published on websites, available through an open and machine-readable format and together with their metadata, at the best level of precision and granularity, in a format that ensures interoperability, for example by processing them in a way consistent with the principles governing the compatibility and usability requirements for spatial information under Directive 2007/2/EC.
- (35) A document should be considered to be in a machine-readable format if it is in a file format that is structured in such a way that software applications can easily identify, recognise and extract specific data from it. Data encoded in files that are structured in a machine-readable format should be considered to be machine-readable data. A machine-readable format can be open or proprietary. They can be formal standards or not. Documents encoded in a file format that limits automatic processing, because the data cannot, or cannot easily, be extracted from them, should not be considered to be in a machine-readable format. Member States should, where possible and appropriate, encourage the use of a Union or internationally recognised open, machine-readable format. The European interoperability framework should be taken into account, where applicable, when designing technical solutions for the re-use of documents.
- (36) Charges for the re-use of documents constitute an important market entry barrier for start-ups and SMEs. Documents should therefore be made available for re-use free of charge and, where charges are necessary, they should in principle be limited to the marginal costs. Where public sector bodies carry out a particularly extensive search for requested information or extremely costly modifications of the format of requested information, either voluntarily or as required under national law, marginal costs may cover the costs associated with such activities. In exceptional cases, the necessity of not hindering the normal running of public sector bodies that are required to generate revenue to cover a substantial part of their costs relating to the performance of their public tasks should be taken into consideration. This also applies where a public sector body has made data available as open data but is obliged to generate revenue to cover a substantial part of their costs relating to the performance of other public tasks. The role of public undertakings in a competitive economic environment should also be acknowledged. In such cases, public sector bodies and public undertakings should therefore be able to charge above marginal costs. Those charges should be set according to objective, transparent and verifiable criteria and the total income from supplying and allowing re-use of documents should not exceed the cost of collection and production, including purchasing from third parties, reproduction, maintenance, storage

<sup>(17)</sup> Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies (OJ L 327, 2.12.2016, p. 1).



and dissemination, together with a reasonable return on investment. Where applicable, it should also be possible to include in the eligible cost the costs of anonymisation of personal data and costs of measures taken to protect the confidentiality of data. Member States may require public sector bodies and public undertakings to disclose those costs. The requirement to generate revenue to cover a substantial part of the public sector bodies' costs relating to the performance of their public tasks or the scope of the services of general interest entrusted with public undertakings does not have to be a legal requirement and may stem, for example, from administrative practices in Member States. Such a requirement should be regularly reviewed by the Member States.

- (37) The return on investment can be understood as a percentage, in addition to marginal costs, allowing for the recovery of the cost of capital and the inclusion of a real rate of return. As the cost of capital is closely linked to credit institutions' interest rates, which are themselves based on the fixed rate of the European Central Bank (ECB) on main refinancing operations, the reasonable return on investment should not be more than 5 % above the ECB's fixed interest rate.
- (38) Libraries, including university libraries, museums and archives should be able to charge above marginal costs in order not to hinder their normal running. In the case of such public sector bodies, the total income from supplying and allowing re-use of documents over the appropriate accounting period should not exceed the cost of collection, production, reproduction, dissemination, preservation and rights clearance, together with a reasonable return on investment. Where applicable, the costs of anonymisation of personal data or of commercially sensitive information should also be included in the eligible cost. For the purpose of libraries, including university libraries, museums and archives, and bearing in mind their particularities, the prices charged by the private sector for the re-use of identical or similar documents could be considered when calculating a reasonable return on investment.
- (39) The upper limits for charges set in this Directive are without prejudice to the right of Member States to apply lower charges or no charges at all.
- (40) Member States should lay down the criteria for charging above marginal costs. For example, they should be able to lay down such criteria in national rules or to designate an appropriate body or appropriate bodies, other than the public sector body itself, competent to lay down such criteria. That body should be organised in accordance with the constitutional and legal systems of the Member States. It could be an existing body with budgetary executive powers and under political responsibility.
- (41) Ensuring that the conditions for re-use of public sector documents are clear and publicly available is a precondition for the development of a Union-wide information market. Therefore, all applicable conditions for the re-use of documents should be made clear to the potential re-users. Member States should encourage the creation of indices accessible on line, where appropriate, of available documents so as to promote and facilitate requests for re-use. Applicants for re-use of documents held by entities other than public undertakings, educational establishments, research performing organisations and research funding organisations should be informed of available means of redress relating to decisions or practices affecting them. This will be particularly important for start-ups and SMEs, which may not be familiar with interactions with public sector bodies from other Member States and corresponding means of redress.
- (42) The means of redress should include the possibility of review by an impartial review body. That body could be an already existing national authority, such as the national competition authority, the supervisory authority established in accordance with Regulation (EU) 2016/679, the national access to documents authority or a national judicial authority. That body should be organised in accordance with the constitutional and legal systems of Member States. Recourse to that body should not pre-empt any means of redress otherwise available to applicants for re-use. It should however be distinct from the Member State mechanism laying down the criteria for charging above marginal costs. The means of redress should include the possibility of review of negative decisions but also of decisions which, although permitting re-use, could still affect applicants on other grounds, in particular by the charging rules applied. The review process should be swift, in accordance with the needs of a rapidly changing market.
- (43) Making public all generally available documents held by the public sector — concerning not only the political process but also the legal and administrative process — is a fundamental instrument for extending the right to knowledge, which is a basic principle of democracy. That objective is applicable to institutions at every level, be it local, national or international.

- (44) The re-use of documents should not be subject to conditions. However, in some cases justified by a public interest objective, a licence may be issued imposing conditions on the re-use by the licensee dealing with issues such as liability, the protection of personal data, the proper use of documents, guaranteeing non-alteration and the acknowledgement of source. If public sector bodies license documents for re-use, the licence conditions should be objective, proportionate and non-discriminatory. Standard licences that are available online may also play an important role in this respect. Therefore Member States should provide for the availability of standard licences. Any licences for the re-use of public sector information should, in any event, place as few restrictions on re-use as possible, for example limiting restrictions to an indication of source. Open licences in the form of standardised public licences available online which allow data and content to be freely accessed, used, modified and shared by anyone for any purpose, and which rely on open data formats, should play an important role in this respect. Therefore, Member States should encourage the use of open licences that should eventually become common practice across the Union. Without prejudice to liability requirements laid down in Union or national law where a public sector body or a public undertaking makes documents available for re-use without any other conditions or restrictions, that public sector body or public undertaking may be allowed to waive all liability with regards to the documents made available for re-use.
- (45) If the competent authority decides no longer to make available certain documents for re-use, or to cease updating those documents, it should make those decisions publicly known, at the earliest opportunity, by electronic means where possible.
- (46) Conditions for re-use should be non-discriminatory for comparable categories of re-use. In that regard, the prohibition of discrimination should not, for example, prevent the exchange of information between public sector bodies free of charge for the exercise of public tasks, whilst other parties are charged for re-use of the same documents. Neither should it prevent the adoption of a differentiated charging policy for commercial and non-commercial re-use.
- (47) Member States should in particular ensure that re-use of documents of public undertakings does not lead to market distortion and that fair competition is not undermined.
- (48) Public sector bodies should comply with Union and national competition rules when establishing the principles for re-use of documents avoiding as far as possible exclusive agreements between themselves and private partners. However, in order to provide a service of general economic interest, an exclusive right to re-use specific public sector documents may sometimes be necessary. This may be the case if no commercial publisher would publish the information without such an exclusive right. In this regard, it is appropriate to take into account public service contracts that are excluded from the scope of Directive 2014/24/EU pursuant to Article 11 of that Directive and innovation partnerships as referred to in Article 31 of Directive 2014/24/EU.
- (49) There are numerous cooperation arrangements between libraries, including university libraries, museums, archives and private partners, which involve digitisation of cultural resources granting exclusive rights to private partners. Practice has shown that such public-private partnerships can facilitate worthwhile use of cultural collections and at the same time accelerate access to the cultural heritage for members of the public. It is therefore appropriate to take into account current divergences between Member States with regard to digitisation of cultural resources, by a specific set of rules pertaining to agreements on digitisation of such resources. Where an exclusive right relates to digitisation of cultural resources, a certain period of exclusivity might be necessary in order to give the private partner the possibility to recoup its investment. That period should, however, be limited to as short a time as possible in order to comply with the principle that public domain material should stay in the public domain once it is digitised. The period of an exclusive right to digitise cultural resources should in general not exceed 10 years. Any period of exclusivity longer than 10 years should be subject to review, taking into account technological, financial and administrative changes in the environment since the arrangement was entered into. In addition, any public private partnership for the digitisation of cultural resources should grant the partner cultural institution full rights with respect to the post-termination use of digitised cultural resources.
- (50) Arrangements between data holders and data re-users which do not expressly grant exclusive rights but which can reasonably be expected to restrict the availability of documents for re-use should be subject to additional public scrutiny. The essential aspects of such arrangements should therefore be published online at least two months before coming into effect, namely two months before the agreed date on which the performance of the

obligations of the parties is set to begin. The publication should give interested parties an opportunity to request the re-use of the documents covered by those arrangements and prevent the risk of restricting the range of potential re-users. In any event, the essential aspects of such arrangements in their final form agreed by the parties should also be made public online without undue delay following their conclusion.

- (51) This Directive aims to minimise the risk of excessive first-mover advantage that could limit the number of potential re-users of the data. Where contractual arrangements are likely, in addition to a Member State's obligations under this Directive to grant documents, to entail a transfer of that Member State's resources within the meaning of Article 107(1) TFEU, this Directive should be without prejudice to the application of the competition and State aid rules laid down in Articles 101 to 109 TFEU. It follows from the State aid rules laid down in Articles 107, 108 and 109 TFEU that a Member State must check *ex ante* whether State aid may be involved in the relevant contractual arrangement and ensure that it complies with the State aid rules.
- (52) This Directive does not affect the protection of individuals with regard to the processing of personal data under Union and national law, particularly Regulation (EU) 2016/679 and Directive 2002/58/EC of the European Parliament and of the Council <sup>(18)</sup> and including any supplementing provisions of national law. This means, *inter alia*, that the re-use of personal data is permissible only if the principle of purpose limitation as set out in point (b) of Article 5(1) and Article 6 of Regulation (EU) 2016/679 is met. Anonymous information is information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or is no longer identifiable. Rendering information anonymous is a means of reconciling the interests in making public sector information as re-usable as possible with the obligations under data protection law, but it comes at a cost. It is appropriate to consider that cost to be one of the cost items to be considered to be part of the marginal cost of dissemination as referred to in this Directive.
- (53) When taking decisions on the scope and conditions for the re-use of public sector documents containing personal data, for example in the health sector, data protection impact assessments may have to be performed in accordance with Article 35 of Regulation (EU) 2016/679.
- (54) The intellectual property rights of third parties are not affected by this Directive. For the avoidance of doubt, the term 'intellectual property rights' refers to copyright and related rights only, including *sui generis* forms of protection. This Directive does not apply to documents covered by industrial property rights, such as patents and registered designs and trade marks. The Directive neither affects the existence or ownership of intellectual property rights of public sector bodies, nor does it limit the exercise of these rights in any way beyond the boundaries set by this Directive. The obligations imposed in accordance with this Directive should apply only insofar as they are compatible with international agreements on the protection of intellectual property rights, in particular the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the WIPO Copyright Treaty (WCT). Public sector bodies should, however, exercise their copyright in a way that facilitates re-use.
- (55) Taking into account Union law and the international obligations of Member States and of the Union, particularly under the Berne Convention and the TRIPS Agreement, documents for which third parties hold intellectual property rights should be excluded from the scope of this Directive. If a third party was the initial owner of the intellectual property rights for a document held by libraries, including university libraries, museums and archives and the term of protection of those rights has not expired, that document should, for the purpose of this Directive, be considered to be a document for which third parties hold intellectual property rights.
- (56) This Directive should be without prejudice to the rights, including economic and moral rights, that employees of public sector bodies may enjoy under national law.
- (57) Moreover, where any document is made available for re-use, the public sector body concerned should retain the right to exploit that document.

<sup>(18)</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

- (58) This Directive is without prejudice to Directive 2014/24/EU.
- (59) Tools that help potential re-users to find documents available for re-use and the conditions for re-use can facilitate considerably the cross-border use of public sector documents. Member States should therefore ensure that practical arrangements are in place that help re-users in their search for documents available for re-use. Examples of such practical arrangements are assets lists, which should preferably be accessible online, of main documents (documents that are extensively re-used or that have the potential to be extensively re-used), and portal sites that are linked to decentralised assets lists. Member States should also facilitate the long-term availability for re-use of public sector information, in accordance with the applicable preservation policies.
- (60) The Commission should facilitate the cooperation among Member States and support the design, testing, implementation and deployment of interoperable electronic interfaces that enable more efficient and secure public services.
- (61) This Directive is without prejudice to Directive 2001/29/EC of the European Parliament and of the Council <sup>(19)</sup>. It provides for conditions within which public sector bodies can exercise their intellectual property rights in the internal information market when allowing re-use of documents. Where public sector bodies are holders of the right provided for in Article 7(1) of Directive 96/9/EC, they should not exercise that right in order to prevent re-use or to restrict the re-use of existing documents beyond the limits provided for in this Directive.
- (62) The Commission has supported the development of an online open data maturity report with relevant performance indicators for the re-use of public sector information in all the Member States. A regular update of that report will contribute to the exchange of information between the Member States and the availability of information on policies and practices across the Union.
- (63) It is necessary to ensure that the Member States monitor the extent of the re-use of public sector information, the conditions under which it is made available, and the redress practices.
- (64) The Commission may assist the Member States in implementing this Directive in a consistent way by issuing and updating existing guidelines, particularly on recommended standard licences, datasets and charging for the re-use of documents, after consulting interested parties.
- (65) One of the principal aims of the establishment of the internal market is the creation of conditions conducive to the development of Union-wide services. Libraries, including university libraries, museums and archives hold a significant amount of valuable public sector information resources, in particular since digitisation projects have multiplied the amount of digital public domain material. Those cultural heritage collections and related metadata are a potential base for digital content products and services and have a huge potential for innovative re-use in sectors such as learning and tourism. Other types of cultural establishment, such as orchestras, operas, ballets and theatres, including the archives that are part of those establishments, should remain outside the scope of this Directive because of their specificity as performing arts and the fact that almost all of their material is subject to third-party intellectual property rights.
- (66) In order to provide for conditions supporting the re-use of documents which is associated with important socio-economic benefits having a particular high value for the economy and society, a list of thematic categories of high-value datasets should be set out in an Annex. By way of illustration, and without prejudice to the implementing acts identifying the high-value datasets to which the specific requirements set out in this Directive should apply, taking into account the Commission guidelines on recommended standard licences, datasets and charging for the reuse of documents, the thematic categories could, inter alia, cover postcodes, national and local maps (geospatial), energy consumption and satellite images (earth observation and environment), in situ data from instruments and weather forecasts (meteorological), demographic and economic indicators (statistics), business registers and registration identifiers (companies and company ownership), road signs and inland waterways (mobility).

<sup>(19)</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

- (67) In order to amend the list of thematic categories of high-value datasets by adding further thematic categories, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making <sup>(20)</sup>. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.
- (68) An Union-wide list of datasets with a particular potential to generate socioeconomic benefits together with harmonised re-use conditions constitutes an important enabler of cross-border data applications and services. In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission to support the re-use of documents associated with important socioeconomic benefits by adopting a list of specific high-value datasets to which specific requirements of this Directive apply, along with the arrangements for their publication and re-use. Consequently, those specific requirements will not apply prior to the adoption by the Commission of implementing acts. The list should take into account sectoral Union legal acts that regulate the publication of datasets, such as Directives 2007/2/EC and 2010/40/EU, to ensure that datasets are made available under corresponding standards and sets of metadata. The list should be based on the thematic categories set out in this Directive. In preparing the list, the Commission should carry out appropriate consultations, including at expert level. Moreover, when deciding on the inclusion in the list of data held by public undertakings or on their free availability, the effects on competition in the relevant markets should be taken into account. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council <sup>(21)</sup>.
- (69) For the purpose of ensuring their maximum impact and to facilitate re-use, the high-value datasets should be made available for re-use with minimal legal restrictions and free of charge. They should also be published via APIs. However, this does not preclude public sector bodies from charging for services that they provide in relation to the high-value datasets in their exercise of public authority, in particular certifying the authenticity or veracity of documents.
- (70) Since the objectives of this Directive, namely to facilitate the creation of Union-wide information products and services based on public sector documents, to ensure the effective cross-border use of public sector documents on the one hand by private businesses, particularly by SMEs, for added-value information products and services, and on the other hand by citizens to facilitate the free circulation of information and communication, cannot be sufficiently achieved by the Member States but can rather, by reason of the pan-Union scope of the proposed action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (71) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter, including the right to privacy, the protection of personal data, the right to property and the integration of persons with disabilities. Nothing in this Directive should be interpreted or implemented in a manner that is inconsistent with the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms.
- (72) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council <sup>(22)</sup> and delivered an opinion on 10 July 2018 <sup>(23)</sup>.

<sup>(20)</sup> OJ L 123, 12.5.2016, p. 1.

<sup>(21)</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

<sup>(22)</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

<sup>(23)</sup> OJ C 305, 30.8.2018, p. 7.

- (73) The Commission should carry out an evaluation of this Directive. Pursuant to the Interinstitutional Agreement of 13 April 2016 on Better Law-Making, that evaluation should be based on the five criteria of efficiency, effectiveness, relevance, coherence and value added and should provide the basis for impact assessments of options for further action.
- (74) This Directive should be without prejudice to the obligations of the Member States relating to the time-limit for the transposition into national law of the Directives set out in Annex II, Part B,

HAVE ADOPTED THIS DIRECTIVE:

#### CHAPTER I

#### GENERAL PROVISIONS

#### Article 1

#### Subject matter and scope

1. In order to promote the use of open data and stimulate innovation in products and services, this Directive establishes a set of minimum rules governing the re-use and the practical arrangements for facilitating the re-use of:

- (a) existing documents held by public sector bodies of the Member States;
- (b) existing documents held by public undertakings that are:
- (i) active in the areas defined in Directive 2014/25/EU;
  - (ii) acting as public service operators pursuant to Article 2 of Regulation (EC) No 1370/2007;
  - (iii) acting as air carriers fulfilling public service obligations pursuant to Article 16 of Regulation (EC) No 1008/2008; or
  - (iv) acting as Community shipowners fulfilling public service obligations pursuant to Article 4 of Regulation (EEC) No 3577/92;
- (c) research data pursuant to the conditions set out in Article 10.

2. This Directive does not apply to:

- (a) documents the supply of which is an activity falling outside the scope of the public task of the public sector bodies concerned as defined by law or by other binding rules in the Member State, or, in the absence of such rules, as defined in accordance with common administrative practice in the Member State in question, provided that the scope of the public tasks is transparent and subject to review;
- (b) documents held by public undertakings:
- (i) produced outside the scope of the provision of services in the general interest as defined by law or other binding rules in the Member State;
  - (ii) related to activities directly exposed to competition and therefore, pursuant to Article 34 of Directive 2014/25/EU, not subject to procurement rules;
- (c) documents for which third parties hold intellectual property rights;
- (d) documents, such as sensitive data, which are excluded from access by virtue of the access regimes in the Member State, including on grounds of:
- (i) the protection of national security (namely, State security), defence, or public security;
  - (ii) statistical confidentiality;
  - (iii) commercial confidentiality (including business, professional or company secrets);
- (e) documents access to which is excluded or restricted on grounds of sensitive critical infrastructure protection related information as defined in point (d) of Article 2 of Directive 2008/114/EC;

- (f) documents access to which is restricted by virtue of the access regimes in the Member States, including cases whereby citizens or legal entities have to prove a particular interest to obtain access to documents;
  - (g) logos, crests and insignia;
  - (h) documents, access to which is excluded or restricted by virtue of the access regimes on grounds of protection of personal data, and parts of documents accessible by virtue of those regimes which contain personal data the re-use of which has been defined by law as being incompatible with the law concerning the protection of individuals with regard to the processing of personal data or as undermining the protection of privacy and the integrity of the individual, in particular in accordance with Union or national law regarding the protection of personal data;
  - (i) documents held by public service broadcasters and their subsidiaries, and by other bodies or their subsidiaries for the fulfilment of a public service broadcasting remit;
  - (j) documents held by cultural establishments other than libraries, including university libraries, museums and archives;
  - (k) documents held by educational establishments of secondary level and below, and, in the case of all other educational establishments, documents other than those referred to in point (c) of paragraph 1;
  - (l) documents other than those referred to in point (c) of paragraph 1 held by research performing organisations and research funding organisations, including organisations established for the transfer of research results.
3. This Directive builds on, and is without prejudice to, Union and national access regimes.
4. This Directive is without prejudice to Union and national law on the protection of personal data, in particular Regulation (EU) 2016/679 and Directive 2002/58/EC and the corresponding provisions of national law.
5. The obligations imposed in accordance with this Directive shall apply only insofar as they are compatible with the provisions of international agreements on the protection of intellectual property rights, in particular the Berne Convention, the TRIPS Agreement and the WCT.
6. The right for the maker of a database provided for in Article 7(1) of Directive 96/9/EC shall not be exercised by public sector bodies in order to prevent the re-use of documents or to restrict re-use beyond the limits set by this Directive.
7. This Directive governs the re-use of existing documents held by public sector bodies and public undertakings of the Member States, including documents to which Directive 2007/2/EC applies.

## Article 2

### Definitions

For the purpose of this Directive, the following definitions apply:

- (1) 'public sector body' means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;
- (2) 'bodies governed by public law' means bodies that have all of the following characteristics:
  - (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
  - (b) they have legal personality; and
  - (c) they are financed, for the most part by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

- (3) 'public undertaking' means any undertaking active in the areas set out in point (b) of Article 1(1) over which the public sector bodies may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public sector bodies shall be presumed in any of the following cases in which those bodies, directly or indirectly:
  - (a) hold the majority of the undertaking's subscribed capital;
  - (b) control the majority of the votes attaching to shares issued by the undertaking;
  - (c) can appoint more than half of the undertaking's administrative, management or supervisory body;
- (4) 'university' means any public sector body that provides post-secondary-school higher education leading to academic degrees;
- (5) 'standard licence' means a set of predefined re-use conditions in a digital format, preferably compatible with standardised public licences available online;
- (6) 'document' means:
  - (a) any content whatever its medium (paper or electronic form or as a sound, visual or audiovisual recording); or
  - (b) any part of such content;
- (7) 'anonymisation' means the process of changing documents into anonymous documents which do not relate to an identified or identifiable natural person, or the process of rendering personal data anonymous in such a manner that the data subject is not or no longer identifiable;
- (8) 'dynamic data' means documents in a digital form, subject to frequent or real-time updates, in particular because of their volatility or rapid obsolescence; data generated by sensors are typically considered to be dynamic data;
- (9) 'research data' means documents in a digital form, other than scientific publications, which are collected or produced in the course of scientific research activities and are used as evidence in the research process, or are commonly accepted in the research community as necessary to validate research findings and results;
- (10) 'high-value datasets' means documents the re-use of which is associated with important benefits for society, the environment and the economy, in particular because of their suitability for the creation of value-added services, applications and new, high-quality and decent jobs, and of the number of potential beneficiaries of the value-added services and applications based on those datasets;
- (11) 're-use' means the use by persons or legal entities of documents held by:
  - (a) public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced, except for the exchange of documents between public sector bodies purely in pursuit of their public tasks; or
  - (b) public undertakings, for commercial or non-commercial purposes other than for the initial purpose of providing services in the general interest for which the documents were produced, except for the exchange of documents between public undertakings and public sector bodies purely in pursuit of the public tasks of public sector bodies;
- (12) 'personal data' means personal data as defined in point (1) of Article 4 of Regulation (EU) 2016/679;
- (13) 'machine-readable format' means a file format structured so that software applications can easily identify, recognise and extract specific data, including individual statements of fact, and their internal structure;
- (14) 'open format' means a file format that is platform-independent and made available to the public without any restriction that impedes the re-use of documents;
- (15) 'formal open standard' means a standard which has been laid down in written form, detailing specifications for the requirements on how to ensure software interoperability;



- (16) 'reasonable return on investment' means a percentage of the overall charge, in addition to that needed to recover the eligible costs, not exceeding 5 percentage points above the fixed interest rate of the ECB;
- (17) 'third party' means any natural or legal person other than a public sector body or a public undertaking that holds the data.

### Article 3

#### General principle

1. Subject to paragraph 2 of this Article, Member States shall ensure that documents to which this Directive applies in accordance with Article 1 shall be re-usable for commercial or non-commercial purposes in accordance with Chapters III and IV.
2. For documents in which libraries, including university libraries, museums and archives hold intellectual property rights and for documents held by public undertakings, Member States shall ensure that, where the re-use of such documents is allowed, those documents shall be re-usable for commercial or non-commercial purposes in accordance with Chapters III and IV.

### CHAPTER II

#### REQUESTS FOR RE-USE

### Article 4

#### Processing of requests for re-use

1. Public sector bodies shall, through electronic means where possible and appropriate, process requests for re-use and shall make the document available for re-use to the applicant or, if a licence is needed, finalise the licence offer to the applicant within a reasonable time that is consistent with the time frames laid down for the processing of requests for access to documents.
2. Where no time limits or other rules regulating the timely provision of documents have been established, public sector bodies shall process the request and shall deliver the documents for re-use to the applicant or, if a licence is needed, finalise the licence offer to the applicant as soon as possible, and in any event within 20 working days of receipt. That time frame may be extended by a further 20 working days in the case of extensive or complex requests. In such cases, the applicant shall be notified as soon as possible, and in any event within three weeks of the initial request, that more time is needed to process the request and the reasons why.
3. In the event of a negative decision, the public sector bodies shall communicate the grounds for refusal to the applicant on the basis of the relevant provisions of the access regime in that Member State or of the provisions transposing this Directive, in particular points (a) to (h) of Article 1(2) or Article 3. Where a negative decision is based on point (c) of Article 1(2), the public sector body shall include a reference to the natural or legal person who is the rightsholder, where known, or alternatively to the licensor from which the public sector body has obtained the relevant material. Libraries, including university libraries, museums and archives, shall not be required to include such a reference.
4. Any decision on re-use shall contain a reference to the means of redress where the applicant wishes to challenge the decision. The means of redress shall include the possibility of review by an impartial review body with the appropriate expertise, such as the national competition authority, the relevant access to documents authority, the supervisory authority established in accordance with Regulation (EU) 2016/679 or a national judicial authority, whose decisions are binding upon the public sector body concerned.
5. For the purposes of this Article, Member States shall establish practical arrangements to facilitate effective re-use of documents. Those arrangements may in particular include the means to supply adequate information on the rights provided for in this Directive and to offer relevant assistance and guidance.
6. The following entities shall not be required to comply with this Article:
  - (a) public undertakings;
  - (b) educational establishments, research performing organisations and research funding organisations.

## CHAPTER III

**CONDITIONS FOR RE-USE***Article 5***Available formats**

1. Without prejudice to Chapter V, public sector bodies and public undertakings shall make their documents available in any pre-existing format or language and, where possible and appropriate, by electronic means, in formats that are open, machine-readable, accessible, findable and re-usable, together with their metadata. Both the format and the metadata shall, where possible, comply with formal open standards.
2. Member States shall encourage public sector bodies and public undertakings to produce and make available documents falling within the scope of this Directive in accordance with the principle of 'open by design and by default'.
3. Paragraph 1 shall not imply an obligation for public sector bodies to create or adapt documents or provide extracts in order to comply with that paragraph where this would involve disproportionate effort, going beyond a simple operation.
4. Public sector bodies shall not be required to continue the production and storage of a certain type of document with a view to the re-use of such documents by a private or public sector organisation.
5. Public sector bodies shall make dynamic data available for re-use immediately after collection, via suitable APIs and, where relevant, as a bulk download.
6. Where making dynamic data available for re-use immediately after collection, as referred to in paragraph 5, would exceed the financial and technical capacities of the public sector body, thereby imposing a disproportionate effort, those dynamic data shall be made available for re-use within a time frame or with temporary technical restrictions that do not unduly impair the exploitation of their economic and social potential.
7. Paragraphs 1 to 6 shall apply to existing documents held by public undertakings which are available for re-use.
8. The high-value datasets, as listed in accordance with Article 14(1) shall be made available for re-use in machine-readable format, via suitable APIs and, where relevant, as a bulk download.

*Article 6***Principles governing charging**

1. The re-use of documents shall be free of charge.

However, the recovery of the marginal costs incurred for the reproduction, provision and dissemination of documents as well as for anonymisation of personal data and measures taken to protect commercially confidential information may be allowed.

2. By way of exception, paragraph 1 shall not apply to the following:
  - (a) public sector bodies that are required to generate revenue to cover a substantial part of their costs relating to the performance of their public tasks;
  - (b) libraries, including university libraries, museums and archives;
  - (c) public undertakings.
3. Member States shall publish online a list of the public sector bodies referred to in point (a) of paragraph 2.
4. In the cases referred to in points (a) and (c) of paragraph 2, the total charges shall be calculated in accordance with objective, transparent and verifiable criteria. Such criteria shall be laid down by Member States.

The total income from supplying and allowing the re-use of documents over the appropriate accounting period shall not exceed the cost of their collection, production, reproduction, dissemination and data storage, together with a reasonable return on investment, and — where applicable — the anonymisation of personal data and measures taken to protect commercially confidential information.

Charges shall be calculated in accordance with the applicable accounting principles.

5. Where charges are made by the public sector bodies referred to in point (b) of paragraph 2, the total income from supplying and allowing the re-use of documents over the appropriate accounting period shall not exceed the cost of collection, production, reproduction, dissemination, data storage, preservation and rights clearance and, where applicable, the anonymisation of personal data and measures taken to protect commercially confidential information, together with a reasonable return on investment.

Charges shall be calculated in accordance with the accounting principles applicable to the public sector bodies involved.

6. The re-use of the following shall be free of charge for the user:

- (a) subject to Article 14(3), (4) and (5), the high-value datasets, as listed in accordance with paragraph 1 of that Article;
- (b) research data referred to in point (c) of Article 1(1).

#### *Article 7*

### **Transparency**

1. In the case of standard charges for the re-use of documents, any applicable conditions and the actual amount of those charges, including the calculation basis for such charges, shall be pre-established and published, through electronic means where possible and appropriate.
2. In the case of charges for the re-use other than those referred to in paragraph 1, the factors that are taken into account in the calculation of those charges shall be indicated at the outset. Upon request, the holder of the documents in question shall also indicate the way in which such charges have been calculated in relation to a specific re-use request.
3. Public sector bodies shall ensure that applicants for re-use of documents are informed of available means of redress relating to decisions or practices affecting them.

#### *Article 8*

### **Standard licences**

1. The re-use of documents shall not be subject to conditions, unless such conditions are objective, proportionate, non-discriminatory and justified on grounds of a public interest objective.

When re-use is subject to conditions, those conditions shall not unnecessarily restrict possibilities for re-use and shall not be used to restrict competition.

2. In Member States where licences are used, Member States shall ensure that standard licences for the re-use of public sector documents, which can be adapted to meet particular licence applications, are available in digital format and can be processed electronically. Member States shall encourage the use of such standard licences.

#### *Article 9*

### **Practical arrangements**

1. Member States shall make practical arrangements facilitating the search for documents available for re-use, such as asset lists of main documents with relevant metadata, accessible where possible and appropriate online and in machine-readable format, and portal sites that are linked to the asset lists. Where possible, Member States shall facilitate the cross-linguistic search for documents, in particular by enabling metadata aggregation at Union level.

Member States shall also encourage public sector bodies to make practical arrangements facilitating the preservation of documents available for re-use.

2. Member States shall, in cooperation with the Commission, continue efforts to simplify access to datasets, in particular by providing a single point of access and by progressively making available suitable datasets held by public sector bodies with regard to the documents to which this Directive applies, as well as to data held by Union institutions, in formats that are accessible, readily findable and re-usable by electronic means.

*Article 10***Research data**

1. Member States shall support the availability of research data by adopting national policies and relevant actions aiming at making publicly funded research data openly available ('open access policies'), following the principle of 'open by default' and compatible with the FAIR principles. In that context, concerns relating to intellectual property rights, personal data protection and confidentiality, security and legitimate commercial interests, shall be taken into account in accordance with the principle of 'as open as possible, as closed as necessary'. Those open access policies shall be addressed to research performing organisations and research funding organisations.
2. Without prejudice to point (c) of Article 1(2), research data shall be re-usable for commercial or non-commercial purposes in accordance with Chapters III and IV, insofar as they are publicly funded and researchers, research performing organisations or research funding organisations have already made them publicly available through an institutional or subject-based repository. In that context, legitimate commercial interests, knowledge transfer activities and pre-existing intellectual property rights shall be taken into account.

## CHAPTER IV

**NON-DISCRIMINATION AND FAIR TRADING***Article 11***Non-discrimination**

1. Any applicable conditions for the re-use of documents shall be non-discriminatory for comparable categories of re-use, including for cross-border re-use.
2. If documents are re-used by a public sector body as input for its commercial activities which fall outside the scope of its public tasks, the same charges and other conditions shall apply to the supply of the documents for those activities as apply to other users.

*Article 12***Exclusive arrangements**

1. The re-use of documents shall be open to all potential actors in the market, even if one or more market actors already exploit added-value products based on those documents. Contracts or other arrangements between the public sector bodies or public undertakings holding the documents and third parties shall not grant exclusive rights.
2. However, where an exclusive right is necessary for the provision of a service in the public interest, the validity of the reason for granting such an exclusive right shall be subject to regular review, and shall, in any event, be reviewed every three years. The exclusive arrangements established on or after 16 July 2019 shall be made publicly available online at least two months before they come into effect. The final terms of such arrangements shall be transparent and shall be made publicly available online.

This paragraph shall not apply to digitisation of cultural resources.

3. Notwithstanding paragraph 1, where an exclusive right relates to the digitisation of cultural resources, the period of exclusivity shall in general not exceed 10 years. Where that period exceeds 10 years, its duration shall be subject to review during the 11th year and, if applicable, every seven years thereafter.

The arrangements granting exclusive rights referred to in the first subparagraph shall be transparent and made public.

In the case of an exclusive right referred to in the first subparagraph, the public sector body concerned shall be provided free of charge with a copy of the digitised cultural resources as part of those arrangements. That copy shall be available for re-use at the end of the period of exclusivity.

4. Legal or practical arrangements that, without expressly granting an exclusive right, aim at, or could reasonably be expected to lead to, a restricted availability for the re-use of documents by entities other than the third party participating in the arrangement, shall be made publicly available online at least two months before their coming into effect. The effect of such legal or practical arrangements on the availability of data for re-use shall be subject to regular reviews and shall, in any event, be reviewed every three years. The final terms of such arrangements shall be transparent and made publicly available online.

5. Exclusive arrangements existing on 17 July 2013 that do not qualify for the exceptions set out in paragraphs 2 and 3 and that were entered into by public sector bodies shall be terminated at the end of the contract and in any event not later than on 18 July 2043.

Exclusive arrangements existing on 16 July 2019 that do not qualify for the exceptions set out in paragraphs 2 and 3, and that were entered into by public undertakings, shall be terminated at the end of the contract and in any event not later than on 17 July 2049.

## CHAPTER V

### HIGH-VALUE DATASETS

#### *Article 13*

#### **Thematic categories of high-value datasets**

1. In order to provide for conditions to support the re-use of high-value datasets, a list of thematic categories of such datasets is set out in Annex I.
2. The Commission is empowered to adopt delegated acts in accordance with Article 15 in order to amend Annex I by adding new thematic categories of high-value datasets in order to reflect technological and market developments.

#### *Article 14*

#### **Specific high-value datasets and arrangements for publication and re-use**

1. The Commission shall adopt implementing acts laying down a list of specific high-value datasets belonging to the categories set out in Annex I and held by public sector bodies and public undertakings among the documents to which this Directive applies.

Such specific high-value datasets shall be:

- (a) available free of charge, subject to paragraphs 3, 4 and 5;
- (b) machine readable;
- (c) provided via APIs; and
- (d) provided as a bulk download, where relevant.

Those implementing acts may specify the arrangements for the publication and re-use of high-value datasets. Such arrangements shall be compatible with open standard licences.

The arrangements may include terms applicable to re-use, formats of data and metadata and technical arrangements for dissemination. Investments made by the Member States in open data approaches, such as investments into the development and roll-out of certain standards, shall be taken into account and balanced against the potential benefits from inclusion in the list.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 16(2).

2. The identification of specific high-value datasets pursuant to paragraph 1 shall be based on the assessment of their potential to:

- (a) generate significant socioeconomic or environmental benefits and innovative services;
- (b) benefit a high number of users, in particular SMEs;
- (c) assist in generating revenues; and
- (d) be combined with other datasets.

For the purpose of identifying such specific high-value datasets, the Commission shall carry out appropriate consultations, including at expert level, conduct an impact assessment and ensure complementarity with existing legal acts, such as Directive 2010/40/EU, with respect to the re-use of documents. That impact assessment shall include a cost-benefit analysis and an analysis of whether providing high-value datasets free of charge by public sector bodies that are required to generate revenue to cover a substantial part of their costs relating to the performance of their public tasks would lead to a substantial impact on the budget of such bodies. With regard to high-value datasets held by public undertakings, the impact assessment shall give special consideration to the role of public undertakings in a competitive economic environment.

3. By way of derogation from point (a) of the second subparagraph of paragraph 1, the implementing acts referred to in paragraph 1 shall provide that the availability of high-value datasets free of charge is not to apply to specific high-value datasets held by public undertakings where that would lead to a distortion of competition in the relevant markets.

4. The requirement to make high-value datasets available free of charge pursuant to point (a) of the second subparagraph of paragraph 1 shall not apply to libraries, including university libraries, museums and archives.

5. Where making high-value datasets available free of charge by public sector bodies that are required to generate revenue to cover a substantial part of their costs relating to the performance of their public tasks would lead to a substantial impact on the budget of the bodies involved, Member States may exempt those bodies from the requirement to make those high-value datasets available free of charge for a period of no more than two years following the entry into force of the relevant implementing act adopted in accordance with paragraph 1.

## CHAPTER VI

### FINAL PROVISIONS

#### Article 15

#### Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 13(2) shall be conferred on the Commission for a period of five years from 16 July 2019. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

3. The delegation of power referred to in Article 13(2) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.

5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

6. A delegated act adopted pursuant to Article 13(2) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of three months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.

#### Article 16

#### Committee procedure

1. The Commission shall be assisted by a Committee on open data and the re-use of public sector information. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

*Article 17***Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 17 July 2021. They shall immediately communicate the text of those measures to the Commission.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 18***Commission evaluation**

1. No sooner than 17 July 2025, the Commission shall carry out an evaluation of this Directive, and submit a report on the main findings of that evaluation to the European Parliament and to the Council as well as to the European Economic and Social Committee.

Member States shall provide the Commission with the information necessary for the preparation of that report.

2. The evaluation shall, in particular, address the scope and social and economic impact of this Directive, including:

- (a) the extent of the increase in re-use of public sector documents to which this Directive applies, especially by SMEs;
- (b) the impact of the high-value datasets;
- (c) the effects of the principles applied to charging and the re-use of official texts of a legislative and administrative nature;
- (d) the re-use of documents held by other entities than public sector bodies,
- (e) the availability and the use of APIs;
- (f) the interaction between data protection rules and re-use possibilities;
- (g) further possibilities of improving the proper functioning of the internal market and supporting economic and labour market development.

*Article 19***Repeal**

Directive 2003/98/EC, as amended by the Directive listed in Annex II, Part A, is repealed with effect from 17 July 2021, without prejudice to the obligations of the Member States relating to the time-limits for the transposition into national law and the dates of application of the Directives set out in Annex II, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

*Article 20***Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

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*Article 21***Addressees**

This Directive is addressed to the Member States.

Done at Brussels, 20 June 2019.

*For the European Parliament*  
*The President*  
A. TAJANI

*For the Council*  
*The President*  
G. CIAMBA

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*ANNEX I*

List of thematic categories of high-value datasets, as referred to in Article 13(1)

1. Geospatial
  2. Earth observation and environment
  3. Meteorological
  4. Statistics
  5. Companies and company ownership
  6. Mobility
-

## ANNEX II

## Part A

Repealed Directive with the amendment thereto  
(referred to in Article 19)

Directive 2003/98/EC of the European Parliament and of the Council (OJ L 345, 31.12.2003, p. 90).	
Directive 2013/37/EU of the European Parliament and of the Council (OJ L 175, 27.6.2013, p. 1).	

## Part B

Time-limits for transposition into national law and dates of application  
(referred to in Article 19)

Directive	Time-limit for transposition	Date of application
2003/98/EC	1 July 2005	1 July 2005
2013/37/EU	18 July 2015	18 July 2015

## ANNEX III

## CORRELATION TABLE

Directive 2003/98/EC	This Directive
Article 1(1)	Article 1(1), introductory wording Article 1(1)(a), (b) and (c)
Article 1(2), introductory wording	Article 1(2), introductory wording
Article 1(2)(a)	Article 1(2)(a)
—	Article 1(2)(b)
Article 1(2)(b)	Article 1(2)(c)
Article 1(2)(c)	Article 1(2)(d)
—	Article 1(2)(e)
Article 1(2)(ca)	Article 1(2)(f)
Article 1(2)(cb)	Article 1(2)(g)
Article 1(2)(cc)	Article 1(2)(h)
Article 1(2)(d)	Article 1(2)(i)
Article 1(2)(e)	Article 1(2)(l)
Article 1(2)(f)	Article 1(2)(j)
—	Article 1(2)(k)
Article 1(3)	Article 1(3)
Article 1(4)	Article 1(4)
Article 1(5)	Article 1(5)
—	Article 1(6) and (7)
Article 2, introductory wording	Article 2, introductory wording
Article 2(1)	Article 2(1)
Article 2(2)	Article 2(2)
—	Article 2(3) and (5)
Article 2(3)	Article 2(6)
—	Article 2(7) to (10)
Article 2(4)	Article 2(11)
Article 2(5)	Article 2(12)
Article 2(6)	Article 2(13)
Article 2(7)	Article 2(14)
Article 2(8)	Article 2(15)
Article 2(9)	Article 2(4)
—	Article 2(16) and (17)
Article 3	Article 3
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