

Preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures

2016/0359(COD) - 07/06/2017 - European Central Bank: opinion, guideline, report

OPINION OF THE EUROPEAN CENTRAL BANK on a proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU.

The European Central Bank (ECB) is exercising its right to submit an opinion, since the proposed directive contains provisions falling within the ECB's fields of competence, including the task of the European System of Central Banks (ESCB) to contribute to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system and the tasks conferred upon the ECB pursuant to the Treaty concerning policies relating to the prudential supervision of credit institutions.

General observations: the ECB welcomes the key objective of the proposed directive to reduce the most significant barriers to the cross-border flow of capital stemming from differences in Member States' business and corporate restructuring frameworks.

It would, however, like to see more ambitious action undertaken to lay a common ground for a substantive harmonisation of Member States' insolvency laws. This would ensure a more comprehensive harmonisation in the long term and contributing to a well-functioning Capital Markets Union.

At a minimum, the ECB considers that the overarching objectives of insolvency proceedings within the Member States should be further harmonised, including a commonly agreed balance between the rights of creditors and debtors.

In addition to legislative reforms, a code of best practice or principles could be considered as a tool to orient national insolvency laws towards a more harmonised approach in the long term. Furthermore, the proposal offers a unique opportunity to put in place a pan-European regime, which builds on common underlying concepts and harmonised key elements regarding the definition of the triggers for the opening of reorganisation proceedings.

Lastly, the proposed directive does not apply to procedures related to debtors that are credit institutions, investment firms and collective investment undertakings, central counterparties and central securities depositories, insurance undertakings and reinsurance undertakings. Unintended consequences for these institutions may arise due to the impact on financial contracts with their commercial counterparties. The ECB feels that careful attention should be paid to any potentially unintended consequences.

In specific terms, the ECB suggests that:

- the proposed directive should be used as a vehicle for further harmonisation of the definition of insolvency proceedings, rather than giving rise to further conceptual fragmentation;
- the concept of likelihood of insolvency should be further elaborated with further guidance provided to national legislators regarding the scope and content of the concept. This could be provided through regulatory technical standards to be adopted by the Commission by means of delegated legislative powers;
- there is a need for a clear hierarchy between the proposed directive and other Union legal acts such as Directives [98/26/EC](#) and [2002/47/EC](#) and [Regulation \(EU\) No 648/2012](#) by providing expressly that the provisions of these legal acts prevail over the proposed directive;
- it should be clarified to what extent entities regulated by Directives [2009/110/EC](#) and [Directive \(EU\) 2015/2366](#) of the European Parliament and of the Council, namely payment institutions and electronic money institutions, may utilise the proposed directive's preventive restructuring framework;
- it should also be clarified to what extent the proposed directive, including the stay of enforcement actions, would operate without prejudice to the enforceability of close-out netting arrangements between credit and financial institutions, on the one hand, and corporate debtors, on the other hand.