EUROPEAN CENTRAL BANK

EUROSYSTEM

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OPINION OF THE EUROPEAN CENTRAL BANK

of 7 June 2017

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

(CON/2017/22)

Introduction and legal basis

On 22 November 2016 the European Commission adopted 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[1] (hereinafter the 'proposed directive'). The European Central Bank (ECB) considers that the proposed directive falls within its scope of competence, yet it has not been consulted on the proposed directive. It is therefore exercising its right as provided for in the second sentence of Article 127(4) of the Treaty on the Functioning of the European Union to submit an opinion to the appropriate Union institutions on matters in its fields of competence.

The ECB's competence to deliver an opinion is based on the second sentence of Article 127(4) of the Treaty 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 pursuant to Article 127(5) of the Treaty and the tasks conferred upon the ECB pursuant to Article 127(6) of the Treaty concerning policies relating to the prudential supervision of credit institutions. In addition, the proposed directive affects the ESCB's obligation pursuant to Article 127(1) of the Treaty to support the general economic policies in the Union, without prejudice to the ESCB's primary objective to maintain price stability. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1 General observations

1.1 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. The proposed directive constitutes an important step towards building a legally binding minimum common standard across the Union, in particular with regard to pre-liquidation procedures for businesses and corporate restructuring.

1 COM(2016) 723 final.

1.2 Although the proposal introduces a number of highly relevant minimum harmonisation measures for existing restructuring frameworks, it does not take a holistic approach towards harmonising insolvency laws across the Union, including both restructuring and liquidation, nor does it attempt to harmonise core aspects of insolvency law such as: (a) the conditions for opening insolvency proceedings; (b) a common definition of insolvency; (c) the ranking of insolvency claims; and (d) avoidance actions. While the ECB fully recognises the considerable legal and practical challenges that developing a holistic approach would involve, due to the far-reaching changes to commercial, civil and company law that would need to accompany such an endeavour, more ambitious action needs to be undertaken to lay a common ground for a substantive harmonisation of Member States' insolvency laws, thus ensuring a more comprehensive harmonisation in the long term[2] and contributing to a well-functioning Capital Markets Union.

1.3 Two overarching objectives of insolvency proceedings, including corporate and business reorganisation, are common to most legal systems: (a) the allocation of risk among participants in a market economy in a predictable, equitable and transparent manner, which includes correctly balancing the creditor-debtor relationship; and (b) protecting and maximising value for the benefit of all interested parties and the economy in general[3]. A failure to adequately balance the rights of debtors and creditors in insolvency procedures could lead to adverse and unintended consequences. A well-designed insolvency framework should contain incentives for all stakeholders and give due regard to macro-financial considerations. Furthermore, having predictable insolvency procedures fosters cross-border capital market transactions, whereas unpredictable procedures for insolvency proceedings, in particular in a cross-border context, constitute a significant obstacle to further capital market integration. Similarly, and in the context of the high levels of non-performing loans currently weighing down the balance sheets of European banks, predictability and transparency in these processes could contribute to fostering distressed debt markets across the Union, which, at present, are more domestically focused. At a minimum, 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.

1.4 Businesses rely heavily on contractual agreements which codify the notion of trust, reduce costs and uncertainty, and, at the same time, support new investment projects and business opportunities. In order to maximise value for the economy in general, an efficient restructuring framework for non-financial corporations and businesses needs to be embedded in an economic and legal environment that helps viable businesses to restructure their operations. Whilst a non-viable business should be swiftly liquidated to maximise the recovery value and reduce uncertainty for creditors and other stakeholders, viable enterprises, whose rehabilitated assets can be worth more than in a liquidation scenario, can potentially return to producing returns for shareholders and repayments to creditors while securing jobs. In such a situation, the rescue of a business should be

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2 See Diego Valiante, Harmonising Insolvency Laws in the Euro Area: rationale, stocktaking and challenges, Centre for European Policy Studies Special Report No 153, December 2016.

3 See International Monetary Fund (IMF), Orderly & Effective Insolvency Procedures: Key Issues, 1999, available on the IMF's website at www.imf.org.

achieved through both informal and formal procedures. The prospect of formal procedures is acknowledged to have clear implications for the costs and incentives to reach a restructuring agreement. This also implies that a more efficient solution for restructuring a going-concern business can enhance the debtor's continuation value and provide a proper balance vis-à-vis creditors, especially unsecured ones. The right to commence preventive restructuring, to define a restructuring plan, the opportunity for creditors to decide on the plan by a majority vote and the possibility to appoint a restructuring practitioner are all elements which can contribute to preserving the value of the business. Such an approach may also support and promote financial stability by creating the right incentives for debtors and creditors. Troubled debtors are encouraged to engage early and meaningfully with creditors, rather than relying on the possibility of forbearance, and viable enterprises may be distinguished from those that are unviable, benefiting also from sustainable restructuring. Similarly, despite the limits that a stay of enforcement actions would put on the immediate exercise of creditors' rights, creditors may nevertheless benefit from reduced costs of debt workout, earlier and easier access to collateral, and hence higher collateral values, the deepening of markets for distressed debt and the signalling effect that such a framework may have on debtor discipline.

1.5 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 adoption by all Member States of existing recognised international standards, such as the United Nations Commission on International Trade Law (UNCITRAL) Model law on cross-border insolvency[4], might also be conducive to a greater degree of harmonisation.

1.6 Furthermore, national laws differ substantially on the definition of the triggers for the opening of reorganisation proceedings[5]. This proposal offers a unique opportunity to put in place a pan-European regime, which builds on common underlying concepts and harmonised key elements.

1.7 Finally, although 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 and other financial institutions and entities listed in Article 1(1) of Directive 2014/59/EU of the European Parliament and of the Council[6], unintended consequences for these institutions may arise due to the impact on financial contracts with their commercial counterparties (see, for example, paragraph 2.4 on enforceability of close-out netting arrangements). Furthermore, the consequences and scope of the stay, such as whether the stay of individual enforcement actions also applies to assets of the debtor pledged as collateral for claims of the creditor, need to be carefully assessed also from the perspective of its possible impact on regulatory capital requirements, and in particular

4 Available on UNCITRAL's website at www.uncitral.org.

5 See Diego Valiante, Harmonising Insolvency Laws in the Euro Area, cited in footnote 2, pp. 11-12; and Gerard McCormack et al., Study on a new approach to business failure and insolvency, Comparative legal analysis of the Member States' relevant provisions and practices, Tender No JUST/2014/JCOO/PR/CIVI/0075, January 2016, Chapter 5.2.

6 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 (OJ L 173, 12.6.2014, p. 190).

from the perspective of risk mitigation techniques under Regulation (EU) No 575/2013 of the European Parliament and of the Council[7]. In this context, a more nuanced consideration of the legal relationship between the proposed directive and key provisions of Union legislation in the financial fields is warranted, including Regulation (EU) No 575/2013, Regulation (EU) No 648/2012 of the European Parliament and of the Council[8], Directive 98/26/EC of the European Parliament and of the Council[9], Directive 2002/47/EC of the European Parliament and of the Council[10] and Directive 2014/59/EU. To this end, careful attention should be paid to any potentially unintended consequences.

2 Specific observations

2.1 *Union law definition of insolvency proceedings*

The proposed directive adds to the existing fragmentation regarding the definition of relevant proceedings across Union legal acts[11], and departs from the approach of Regulation (EU) 2015/848, where all covered insolvency proceedings are listed in the annex. The proposed directive should be used as a vehicle for further harmonisation of this definition, rather than giving rise to further conceptual fragmentation.

2.2 *Likelihood of insolvency*

The proposed directive requires Member States to ensure that debtors in financial difficulty have access to an effective preventive restructuring framework that enables them to restructure their debts or business and restore their viability where there is a 'likelihood of insolvency'. This concept needs to be further elaborated in the proposed directive as it is crucial to the restructuring framework and should not be left to the complete discretion of Member States. In particular, further guidance should be provided to national legislators regarding the scope and content of the 'likelihood of insolvency' concept. As an alternative to including such guidance in the proposed directive, it could be provided via regulatory technical standards to be adopted by the Commission by means of delegated legislative powers.

2.3 *The need for a clear hierarchy between the proposed directive and other Union legal acts affecting the stability of financial markets and for assessment of its effect on further Union legal acts*

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7 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).

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

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

10 Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43).

11 See e.g., definitions of 'reorganisation measures', 'winding-up proceedings' and 'insolvency proceedings' in 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); Directive 2002/47/EC; and Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ L 125, 5.5.2001, p. 15) respectively.

Article 31 of the proposed directive provides that the proposed directive is without prejudice to Directives 98/26/EC and 2002/47/EC and Regulation (EU) No 648/2012. In addition, recital 43 states that the stability of financial markets relies heavily on financial collateral arrangements, in particular, when security collateral is provided in connection with participation in designated systems or in central bank operations and when margins are provided to central counterparties. Recital 43 notes further that since the value of financial instruments given as security may be very volatile, it is crucial to realise their value quickly before it goes down.

In the interests of providing a high degree of legal certainty and clear guidance to the Member States, it would be preferable to establish a clear hierarchy between the proposed directive and the Union legal acts specified, by providing expressly in Article 31 that the provisions of these legal acts prevail over the proposed directive.

In addition, it should be clarified to what extent entities regulated by Directive 2009/110/EC of the European Parliament and of the Council[12] and Directive (EU) 2015/2366 of the European Parliament and of the Council[13], namely payment institutions and electronic money institutions, may utilise the proposed directive's preventive restructuring framework. These entities are required to safeguard funds received from electronic money holders or from payment service users, respectively, by keeping such funds separate from the relevant institution's funds used for other business activities[14]. This separation of funds is particularly relevant in the event of insolvency proceedings relating to such institutions. Neither payment institutions nor electronic money institutions are expressly exempt from the scope of the proposed directive. Consequently, the potential effect of the stay of enforcement actions on payment institutions and electronic money institutions subject to the proposed directive should be assessed and clarified, potentially by including an additional recital or expanding the list of exempted Union legal acts in Article 31 of the proposed directive.

2.4 *Enforceability of close-out netting arrangements*

It should 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. It is understood that preventive restructuring procedures, within the meaning of the proposed directive, would fall within the definition of reorganisation measures provided in Directive 2002/47/EC requiring Member States to ensure that a close-out netting provision in a financial collateral arrangement may take effect in accordance with its terms, notwithstanding the commencement or continuation of reorganisation measures[15]. Many national laws contain a

12 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).

13 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).

14 See Article 7 of Directive 2009/110/EC and Article 10 of Directive (EU) 2015/2366.

15 See Article 2(1)(k) and Article 7 of Directive 2002/47/EC regarding the regulatory recognition of contractual netting.

broader recognition of the enforceability of close-out netting provisions beyond the context of financial collateral arrangements, notwithstanding the opening of reorganisation proceedings. On the other hand, Member States may exclude from the scope of Directive 2002/47/EC financial collateral arrangements where one of the parties is an ordinary corporate debtor[16]. This would make the enforcement of close-out netting arrangements with such ordinary corporate debtors as counterparties problematic[17]. It might also have practical implications for credit and financial institutions as regards their ability to meet the conditions for contractual netting arrangements to be recognised as an eligible form of credit risk mitigation and risk reduction under Regulation (EU) No 575/2013[18]. The introduction of a preventive restructuring framework at the Union level requires that this issue be given careful consideration.

Where the ECB recommends that the proposed directive should be amended, specific drafting proposals are set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on the ECB's website.

Done at Frankfurt am Main, 7 June 2017.

[signed]

The President of the ECB

Mario DRAGHI

16 Namely, where the debtor does not fall under any of the categories set out in Article 1(2)(a) to (d) of Directive 2002/47/EC.

17 See Article 1(3) of Directive 2002/47/EC regarding the possibility of Member States to exclude financial collateral arrangements for certain counterparties.

18 See Articles 206 and 296 of Regulation (EU) No 575/2013.

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Technical working document

produced in connection with ECB Opinion CON/2017/22[1]

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

Drafting proposals

Text proposed by the Commission	**Amendments proposed by the ECB**
Amendment 1 Point (5) of Article 2	
'(5) "Executory contracts" means contracts between the debtor and one or more creditors under which both sides still have obligations to perform at the moment the stay of individual enforcement actions is ordered;'	'(5) "Executory contracts" means contracts between the debtor and one or more creditors under which ~~both~~ **at least one** sides still ha~~s~~ve obligations to perform at the moment the stay of individual enforcement actions is ordered;
Explanation *The proposed directive's definition of 'executory contracts' in point (5) of Article 2 could be more precise. The condition that both sides of the contract still have obligations to perform might not cover loans where, once the loan has been granted by the lender, only the borrower has outstanding obligations, i.e., to pay interest and repay principal, or options, where the buyer has paid all the premiums. It would be more accurate to conceive of executory contracts as contracts between a debtor and one or more creditors under which at least one party still has material obligations to perform at the moment the stay of individual enforcement is ordered.*	
Amendment 2 Article 31(1)	
'1. This Directive shall be without prejudice to the following acts: (a) Directive 98/26/EC of the European Parliament and of the Council on settlement finality in payment	'1. **The provisions of the following acts shall prevail over** ~~T~~**t**his Directive ~~shall be without prejudice to the following acts~~: (a) Directive 98/26/EC of the European Parliament

1 This technical working document is produced in English only and communicated to the Union institutions after adoption of the opinion. It is also published in the Legal framework section of the ECB's website alongside the opinion itself.

Text proposed by the Commission	Amendments proposed by the ECB
and securities settlement systems[80]; (b) Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements[81]; and (c) Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories[82].'	and of the Council on settlement finality in payment and securities settlement systems[80]; (b) Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements[81]; and (c) Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories[82].'
Explanation *In the interests of providing a high degree of legal certainty and clear guidance to the Member States, it would be preferable to establish a clear hierarchy between the proposed directive and the Union legal acts specified, by providing expressly in Article 31 that the provisions of these legal acts prevail over the proposed directive.*	