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# EBF POSITION PAPER On the Commission’s Proposal for a Directive on preventive restructuring frameworks and second chance of 22 November 2016 - [COM(2016) 723 final](http://ec.europa.eu/information_society/newsroom/image/document/2016-48/proposal_40046.pdf)

## General comments:

The EBF fully supports the Commission’s aim to develop the Capital Markets Union in order to diversify sources of funding for the European economy. Considering that the European economy is currently reliant in approximately 75% on banks’ lending, it is crucial to ensure that the flow of banks’ lending to the economy is not hampered and that the cost of the credit is not increased by unintended consequences stemming from the legislative proposal 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 ‘proposal’).

Some of the provisions in the current proposal may, however, have unintended effects. In particular, if the economic interest of secured creditors is affected, the cost of the future loans will increase. To put it differently, if the recovery ratios for banks decrease, the loss given default calculations of banks will have to be adjusted accordingly. This will put further pressure on the regulatory capital ratios of EU banks and will result in follow-on effects for new business.

Moreover, the decrease of recovery ratio for banks will aggravate the problem of high level of non-performing loans in a number of European jurisdictions, which the legislative proposal should be instead addressing.

EBF’s main concerns relate to the following issues:

1. Stay of individual enforcement actions.
2. Suspension of ipso facto and early termination clauses.
3. Cross-Class Cram-Down.
4. Valuation.

## EBF position:

1. **Stay of individual enforcement actions (Article 6):**
2. **Length**:
   * It is currently envisaged (Article 6(4)) to grant the debtor up to 4 months a stay of individual enforcement actions of unsecured and secured creditors to safeguard ongoing negotiations in a preventative restructuring framework. However, a stay always affects the rights of creditors/banks to enforce their repayment claims or collateral.
   * Under the existing Capital Requirements Regulation (CRR) in particular, a bank has to consider a repayment claim as in default if the debtor is past due more than 90 days (Article 178 CRR). Hence, the common length of the stay period should not be longer than 60-90 days. It should also be very clear that an option of an extension of the stay period can only be granted in very limited and exceptional cases, only if a majority of creditors support the extension of the stay. This prevents the risk that the original and the extension period of stay become the normal case, which would increase the volume of non-performing loans on the balance sheet of EU banks. Moreover, the extension period should not be longer than three months and there should not be more than two extension periods, i.e. a total duration of nine months.
   * In addition, there should be a possibility of lifting the stay if the plan is not properly progressing and the agreement fails to be reached.
3. **Illiquidity before applying the stay**:
   * It should be very clear that a restructuring proceeding can only be initiated if the debtor is not illiquid according to the laws of Member States.
   * Otherwise there is the risk that debtors, including those with a non-viable business model, will circumvent normal collective insolvency proceedings via the restructuring proceeding and burn remaining cash up during a stay at the expense of their creditors, including banks.
   * If the debtor becomes illiquid during the restructuring proceeding, it should be left to the discretion of the Members States, as envisaged in the current text, whether or not the transition to a normal insolvency proceeding should be mandatory. However, creditors should also be able to ask for a lift of the stay if it appears that the debtor is not able to pay new obligations.
   * If the recovery ratios for banks decrease due to an inappropriate use of the “attractive” option of preventative insolvency proceedings, the loss given default calculations of banks would have to be adjusted accordingly with further pressure on the regulatory capital ratios of EU banks and follow-on effects for new businesses.
4. **Suspension of ipso facto and early termination clauses (Article 7):** 
   * It is a strong EBF position that netting arrangements and, in particular, early termination clauses in such netting arrangements, as well security arrangements should not be affected by the stay or at least be subject to special safeguards. In particular it is crucial to include safeguards and a limitation of the stay to no more than 48 hours in case of netting and security arrangements.
   * Netting and security arrangements are expressly protected by a number of EU legislative acts, specifically the ‘Settlement Finality directive’, the ‘Financial Collateral Arrangements directive’, and the ‘Bank Winding-up directive’. These acts demand the legal protection of these arrangements. Moreover, key legislative instruments for the regulation of the European financial markets, such as the CRR, the European Financial Market Infrastructure Regulation (EMIR) and the Bank Recovery and Resolution Directive (BRRD) not only require or pre-suppose the effectiveness and end enforceability of netting arrangements, they also see these arrangements as a key element to effectively mitigate counterparty risk from financial contracts. Precisely for this reason the BRRD requires special safeguards for netting arrangements and also limits the effects of stay and other resolution measures in relation to netting arrangements (as well as security arrangements).
   * The current proposal sets out a very general provision on stay without providing for any safeguards for netting and security arrangements. Such a general stay would have very serious consequences for all market participants relying on netting arrangements as well as security arrangements to monitor and mitigate their counterparty risk exposure, not least under the capital requirements regime. The general reference to the financial collateral directive in Art. 31 is insufficient to ensure an adequate level of protection of financial contracts, netting arrangements and security arrangements.
   * It is therefore of paramount importance to include express and adequate safeguards and exception in respect of financial contracts and netting as well as security arrangements. At the very least, safeguards and limitations in line with those foreseen under the BRRD should be included in order to avoid clearly unfair and imbalanced effects on the solvent counterparties. Such safeguard provisions would have to include, inter alia, clear time limits on the preliminary stay (48 hours), specific safeguards regarding the subsequent measures following such stay (such as a transfer of the portfolio or winding-up), including permitting a termination during the stay where key contractual obligations are no longer observed (in particular provision of collateral etc.). It is simply inconceivable that the restructuring framework is intended to grant significantly broader and far-reaching rights and impose significantly more onerous risks and burden on the solvent counterparties than the BRRD regime.
   * Moreover, Article 7 refers to the term of “executory contracts”, which is defined in Article 2(5). It is not clear where this term comes from and what it means in detail. We in particular do not fully understand which consequences a stay will have on revolving credit lines and revolving securities such as storage assignment and global assignment and on other banking-related issues.
   * It should be clarified in the text that, in case of any existing credit lines (revolving credit lines and revolving securities such as storage assignment and global assignment and other banking related issues), whether drawn down before commencement of restructuring proceedings or not, any new drawings should be subject to the agreement of a lender. This is crucial so as not to increase the potential indebtedness. It should be clarified that creditors should not be obliged to provide any additional funding to an entity that is under restructuring.
5. **Cross Class Cram Down (Article 11):**
   * Under the current wording of the draft directive, if one class of affected creditors which would receive any payment or other consideration if the normal ranking of liquidation were applied, voted in favour of the plan, the plan could be confirmed, even if this class represents a very small percentage of all the affected creditors which would receive any payment or other consideration if the normal ranking of liquidation were applied. EBF takes the view that the possibility of a cross class cram down of a class of creditors should be limited to situations where those classes of the affected creditors representing the *majority* in amount of the claims, which would receive any payment or other consideration if the normal ranking of liquidation were applied, voted in favour of the plan.
6. **Valuation (Article 13):** 
   * The envisaged valuation for affected shareholders takes as reference the going concern enterprise value while the “best interest of creditors test” as defined in Article 2(9) is based on a liquidation scenario. This reference will be highly unfair towards affected creditors as it ultimately bears the risk that the preventive insolvency proceeding will restructure the legal entity in favour of the shareholders, but at the expense of the creditors. As the proceedings can be initiated before the debtor becomes insolvent it can be expected that any proposed plan provides for a better recovery rate than the one expected in an insolvency proceeding and thus the criteria of the “best interest of creditors test” would nearly always be satisfied. The test does not ensure a fair comparison as it does not reflect the legal possibility of the creditor to an (early) pre-insolvency enforcement of his claims and collateral. It will not increase the acceptance of preventative insolvency proceedings among creditors. If the recovery ratios for banks decrease because of an inappropriate ‘best interest test’, the loss given default calculations of banks have to be adjusted accordingly with further pressure on the regulatory capital ratios of EU banks and follow-on effects for new businesses.
   * Therefore, we consider that the “the best interest of creditors test”, as defined in Article 2(9), which is currently based on liquidation, whether piecemeal or sale as a going concern, should be changed. The test should be based on the hypothetical recovery rate the creditor would expect if he proceeded to an enforcement of his claims at the earliest moment possible.
7. **Other issues:**
8. **Subject matter and scope (Article 1):**
   * It is currently envisaged (Art. 1, paragraph 2) that the Directive shall not apply to procedures (preventive restructuring, discharge) that concern debtors who are, among other things, natural persons who are not entrepreneurs. But then, under paragraph 3, Member States may extend the application of the discharge procedure to over-indebted natural persons who are not entrepreneurs.
   * The reasons for the over-indebtedness of an entrepreneur and that of a consumer or a natural person who are not entrepreneurs can be essentially different. Therefore, the remedies must also be different. For the discharge of natural persons who are not entrepreneurs the admission requirements should be different, eg. preventing the access to the discharge when the over-indebted person acted dishonestly or in bad faith and also when he acted with fault or negligence.
   * Moreover, it is important to specify that the legal framework proposed in the text is without prejudice to other existing procedures of different nature only based on a creditors’ contractual agreement that may exist in Member States.
9. **Distinction between viable and non-viable business (Article 8):**
   * The proposal lacks a clear description when a business is considered viable and when not. Therefore, it should be required that any restructuring proposal should as soon as possible be confirmed with an opinion of an independent third party stating whether the business is viable or not. In other words, the viability test should be a requirement for the opening of the proceedings. Any later time is too late. The assets of the debtor or the value of collateral dilute once the restructuring proceeding is opened. Moreover, Article 8(1)(g) of the proposal should be amended so that this opinion or reasoned statement is not delivered by the person responsible for the proposal of the restructuring plan but an independent third party.
10. **Protection for new financing and interim financing (Article 16)**
    * The EBF is of the position that, while the new financing should be encouraged, collateral positions of creditors existing prior to any new financing must be protected and in no way impacted by new or interim financing, unless mutually agreed with collateral holders.
11. **Appeals (Article 15):** 
    * Article 15(4)(b) may incentivise creditors, particularly lower ranking creditors, to use their nuisance value by voting against the plan. Furthermore, where it is considered fair to provide certain creditors a compensation in deviation of the priority ranking or a higher compensation than similarly situated creditors (e.g. compensation in full to small creditors), such compensation should be part of the plan proposal so that all classes can vote on such distribution.
    * Moreover, it is envisaged that in cases where minority creditors have suffered unjustifiable detriment under the plan, Member States can consider a monetary compensation for dissenting creditors payable by the debtor or the creditors who voted in favour of the plan. This concept has a deterrent effect on creditors who would otherwise support the plan. Such contribution of a creditor who – unlike an equity holder - does not participate in the economic success of the company lacks economic and legal justification.
    * Therefore we consider that Article 15(4)(b) should be deleted.
    * Furthermore, a second hearing system should not be imposed. The mere challenge regime has proved to be effective and agile in some Member States.
12. **Second chance for entrepreneurs**
    1. **Access to discharge (Article 19):**
    * The partial repayment of debt should be compulsory, so the Directive should envisage that Member States shall ensure that a full or partial discharge of debt is conditional on a partial repayment of debt by the entrepreneur.
    * A balance between the rights of the debtor to the potential benefits of a second chance and the rights of creditors must be achieved so as to ensure that there are benefits for all parties involved. Otherwise creditors could become more cautious, the access to financing could be restricted (higher interest rates, more security/guarantees required etc.) and the suppliers could also require further assurances. In this way the potential benefits of the discharge could be frustrated.
    * Furthermore, full debt discharge may result to be counterproductive, since it does not promote a responsible entrepreneurship model.
    1. **Discharge period (Article 20):**
    * Three-year discharge is in many cases – though not always - an unattainable goal, even in Members States with relatively well-established second chance regimes. It is likely that many Members States will make heavy use of the limitations allowed in the proposal. This may have a profound impact on creditors and may translate in increased charges of future loans. In case the three-year discharge period is upheld, the provisions restricting access to discharge must be upheld unchanged as well. This applies in particular to repeated access to discharge procedures (Art. 19(1)(c)). Otherwise second chance can be used in an inflationary manner.
    * Moreover, we believe that not only excessive, but also too short length of discharge procedures can trigger low recovery rate and deter banks from providing loans, as debtors may try to avoid the payment by moving their COMI to a more favourable jurisdiction.
    * In relation to Article 20(2), we consider that, on expiry of the discharge period, the discharge of debt and exemption benefit should be given by a judicial or administrative authority for the following reasons:
      1. In order to grant the existence of a third party act (judicial or administrative resolution) with a binding effect, which would permit creditors (and any other person) to know with certainty if the debtor´s debt has been exempted or not.
      2. In addition, judicial intervention is necessary in order to verify whether the repayment plan has been fulfilled or not. Without this judicial intervention, the debtor would be able to obtain (a few years after) an exemption benefit without a proper verification of its repayment plan compliance.
      3. Finally, a judicial decision is also necessary in order to solve or verify certain situations where creditors have the right to revoke a repayment plan due to the breach of the debtor´s undertakings or other circumstances (i.e. if debtor has substantially improved its economic situation by receiving an inheritance or by any other acts of disposal) or to reverse the discharge if it is subsequently proven that a debtor acted fraudulently to avail himself/herself of the discharge.
    1. **Limitation (Article 22):**
    * Under Art. 22, it is currently envisaged that Member States may maintain or introduce provisions restricting access to discharge or laying down longer periods for obtaining a full discharge or longer disqualification periods in certain well-defined circumstances and where such limitations are justified by a general interest, in particular where: (a) the over-indebted entrepreneur acted dishonestly or in bad faith towards the creditors when becoming indebted or during the collection of the debts; (b) the over-indebted entrepreneur does not adhere to a repayment plan or to any other legal obligation aimed at safeguarding the interests of creditors; (c) in case of abusive access to discharge procedures; (d) in case of repeated access to discharge procedures within a certain period of time.
    * These limitations should be compulsory, so the Directive should envisage that Member States shall ensure provisions restricting access to discharge or laying down longer periods for obtaining a full discharge or longer disqualification periods in certain well-defined circumstances and where such limitations are justified by a general interest, at least in the above cases.
    * With reference to the case referred to in point (d), for the same reasons as in point 1, it would be important to fix a limit to the repeated access to discharge procedures (eg. maximum twice). Furthermore, it would be important to fix a minimum time limit between the different requests for discharge.
    * The directive shall in no way prevent honest debtor to continue servicing their debt even after the discharge is granted.
13. **Change of COMI during restructuring proceedings**
    * The debtor should not be in a position to change its centre of main interest (COMI) during a restructuring proceeding. The acceptance of the preventive restructuring proceedings among creditors would be seriously damaged if debtors were in a position to misuse the proceedings to obtain time to shift their COMI to another jurisdiction.
14. **Definitions (several Articles):**
    * The concepts of “*likelihood of insolvency*”, “*absolute priority rule*”, “*restore the viability*” and “*strong likelihood that a restructuring plan will be adopted*” should be either further detailed or reconsidered.
    * The concept of “*strong likelihood that a restructuring plan will be adopted*” is very hard to assess and, as such, it is not operative in practical terms. This concept may be replaced by the indication of a certain majority of creditors. For instance, in Article 6(6), instead of this concept, it might be set out that, creditors representing more than 50% of the total aggregated value of credits support (either by means of a resolution taken in a general assembly for that purpose or simply by subscribing a letter or other document) the extension of the stay period.

**EBF Suggested Amendments:**

Amendment 1 – Adoption of the restructuring plan

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| **Preamble: Recital 25** | |
| 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 reflect the class formation criteria under national law. ***As a minimum***, secured ***and unsecured*** creditors should always be treated in separate ***classes***. National law may provide that secured claims may be divided into secured and unsecured claims based on collateral valuation. National law may also stipulate 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. National laws should in any case ensure that adequate treatment is given to matters of particular importance for class formation purposes, such as claims from connected parties, and should contain rules that deal with contingent claims and contested claims. The judicial or administrative authority should examine class formation when a restructuring plan is submitted for confirmation, but Member States could stipulate that such authorities may also examine class formation at an earlier stage should the proposer of the plan seek validation or guidance in advance. | 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 reflect the class formation criteria under national law. ***If affected by a restructuring plan,*** *s*ecured creditors should always be treated in ***a*** separate ***class***. National law may provide that secured claims may be divided into secured and unsecured claims based on collateral valuation. National law may also stipulate 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. National laws should in any case ensure that adequate treatment is given to matters of particular importance for class formation purposes, such as claims from connected parties, and should contain rules that deal with contingent claims and contested claims. The judicial or administrative authority should examine class formation when a restructuring plan is submitted for confirmation, but Member States could stipulate that such authorities may also examine class formation at an earlier stage should the proposer of the plan seek validation or guidance in advance. |
| **Justification** | |
| * The question of whether secured creditors should be affected by a restructuring plan without their consent is a delicate issue that is handled differently within the EU because of differences in the legal frameworks of Member States in the areas of contract law, property law and other areas of law that are not harmonized. * The ability to post collateral to creditors is vital in ensuring access to finance for businesses, and SMEs in particular. In jurisdictions where secured creditors, according to current national legislation, are not subject to cram downs in restructuring, a weakening of their legal position as envisioned by the Commission proposal would be detrimental to access to capital for businesses. In these Member States, this particular part of the Directive proposal would have an effect that goes against the objectives of the Capital Markets Union (CMU). * It is therefore submitted that the issue of the position of secured creditors in restructuring should be left at the discretion of Member States. | |

Amendment 2 – Adoption of the restructuring plan

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| **Preamble: Recital 26** | |
| Requisite majorities should be established by national law to ensure that a minority of affected parties in each class cannot obstruct the adoption of 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. | Requisite majorities should be established by national law to ensure that a minority of affected parties in each class cannot obstruct the adoption of restructuring plan which does not unfairly reduce their rights and interests. Without a majority rule binding dissenting 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. |
| **Justification** | |
| * The question of whether secured creditors should be affected by a restructuring plan without their consent is a delicate issue that is handled differently within the EU because of differences in the legal frameworks of Member States in the areas of contract law, property law and other areas of law that are not harmonised. * The ability to post collateral to creditors is vital in ensuring access to finance for businesses, and SMEs in particular. In jurisdictions where secured creditors, according to current national legislation, are not subject to cram downs in restructuring, a weakening of their legal position as envisioned by the Commission proposal would be detrimental to access to capital for businesses. In these Member States, this particular part of the Directive proposal would have an effect that goes against the objectives of the Capital Markets Union (CMU). * It is therefore submitted that the issue of the position of secured creditors in restructuring should be left at the discretion of Member States. | |

Amendment 3 – Subject matter and scope

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| **Article 1(3)** | |
| Member States may extend the application of the procedures referred to in point (b) of paragraph 1 to over indebted natural persons who are not entrepreneurs. | ***DELETE*** |
| **Justification** | |
| * The reasons for the over-indebtedness of an entrepreneur and of a consumer or a natural person who are not entrepreneurs can be essentially different so also the remedies must be different. For the discharge of natural persons who are not entrepreneurs the admission requirements should be different, e.g. preventing the access to the discharge when the over-indebted acted dishonestly or in bad faith and also when he acted with the fault or negligence. | |

Amendment 4 – Definitions

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| **Article 2(4)** | |
| 'stay of individual enforcement actions' means a temporary suspension of the right to enforce a claim by a creditor against a debtor, ordered by a judicial or administrative authority; | 'stay of individual enforcement actions' means a temporary suspension of the right to enforce a claim by a creditor ***or a group of creditors*** against a debtor ***or a group of debtors***, ordered by a judicial or administrative authority; |
| **Justification** | |
| * Situations where the stay of individual enforcement actions affects a group of creditors, or is requested by a group of debtors, should be contemplated in this definition. | |

Amendment 5 – Definition of ‘executory contracts’

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| **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; | 'executory contracts' means contracts***, excluding financial facilities such as undrawn credit facilities, revolving credit lines and offers for financing,*** 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; |
| **Justification** | |
| * Including undrawn lines of credits and offers for financing that have not been used at the time of the stay in the definition of ‘executory contracts’ would lead to the debtor incurring new debts at a time when insolvency is already likely and often imminent. In that case, the financier would not be afforded the same protections given to grantors of new and interim financing in Article 16, even though the credit would serve the same purpose. * This would make financial creditors very hesitant to extend lines of credits or offer financing if there was any doubts about the future solvency of the business, particularly if the business is an SME. * Incurring new debts during the stay based on credit lines or offers for financing granted before the restructuring procedure would also have a very negative impact on third parties, including natural persons, who have guaranteed the debtors credit line or pledged assets as security. | |

Amendment 6 – Definitions

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| **Article 2(6)** | |
| 'class formation' means the grouping of affected creditors and equity holders in a restructuring plan in such a way as to reflect the rights and seniority of the affected claims and interests, taking into account possible pre-existing entitlements, liens or inter-creditor agreements, and their treatment under the restructuring plan; | 'class formation' means the grouping of affected creditors and equity holders in a restructuring plan in such a way as to reflect the rights and seniority of the affected claims and interests, taking into account possible pre-existing entitlements, liens or inter-creditor agreements, and their treatment under the restructuring plan; ***for the purposes of adopting a restructuring plan, creditors are divided into different “classes of creditors” as regulated by Member States, where as a minimum, secured and unsecured claims are treated in separate classes;*** |
| **Justification** | |
| * It is necessary to ensure that secured and unsecured creditors are treated in separate classes. | |

Amendment 7 – Definitions

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| **Article 2(9)** | |
| 'best interest of creditors test' means that no dissenting creditor would be worse off under the restructuring plan than they would be in the event of liquidation***, whether piecemeal or sale as a going concern;*** | 'best interest of creditors test' means that no dissenting creditor would be worse off under the restructuring plan than they would be in the event of liquidation ***or - in cases where a continuation of the debtor as a going concern is likely – a sale on the basis of a going concern value;*** |
| **Justification** | |
| * The envisaged valuation for affected stakeholders takes as reference the going concern enterprise value while the “best interest of creditors test” as defined in Article 2(9) is based on a liquidation scenario. This reference will be highly unfair towards affected creditors as it ultimately bears the risk that the preventive restructuring proceeding will restructure the legal entity in favour of the shareholders, but at the expense of the creditors. As the proceedings can be initiated before the debtor becomes insolvent it can be expected that any proposed plan provides for a better recovery rate than the one expected in an insolvency proceeding and thus the criteria of the “best interest of creditors test” would nearly always be satisfied. The test does not ensure a fair comparison as it does not reflect the legal possibility of the creditor to an (early) pre-insolvency enforcement of his claims and collateral. It will not increase the acceptance of preventative insolvency proceedings among creditors. If the recovery ratios for banks decrease because of an inappropriate best interest test, the loss given default calculations of banks have to be adjusted accordingly with further pressure on the regulatory capital ratios of EU banks and follow on effects for new business. * Therefore, we consider that the “the best interest of creditors test” as defined in Article 2(9), which is currently based on liquidation, whether piecemeal or sale as a going concern, should be changed. The test should be based on the hypothetical recovery rate the creditor would expect if he proceeded to an enforcement of his claims at the earliest moment possible. * If this change is accepted, Art. 13 (1) needs to be amended as suggested below (see Amendment 30). | |

Amendment 8 – Definitions

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| **Article 2(9) bis** | |
| ***NEW*** | ***‘Alternative value’ means for secured creditors the expected proceeds from a hypothetic enforcement of collateral at the earliest point of time where the legal preconditions for an enforcement are given;*** |
| **Justification** | |
| * Please see justification to the above-proposed amendment to Article 2(9) above. | |

Amendment 9 – Definitions

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| **Article 2(10)** | |
| 'absolute priority rule' means that ***a dissenting class of creditors must be satisfied in full before a more junior class may receive any distribution or keep any interest under the restructuring plan;*** | 'absolute priority rule' means that***:***  ***1. a dissenting class of secured creditors must receive under the plan the value of the collateral, valued on the basis of the enterprise as a going concern; and***  ***2. any other dissenting class of creditors must be satisfied in full before a more junior class may receive any distribution or keep any interest under the restructuring plan.***  ***Member States may impose other requirements with respect to preferential claims.*** |
| **Justification** | |
| * The absolute priority rule as currently drafted in the draft directive is too strict. A secured creditor will only be satisfied in full if and to the extent the value of the collateral is sufficient to cover the debt. If that is not the case, the remainder of the claim of the secured creditor is only paid as unsecured debt. * The application of the priority rule might - due to different rules in member states relating to preferred creditors - have different results with respect to preferred claims. Creditors might be preferred on all of the assets or only on specific assets. Therefore, it is suggested that a clause is inserted in order to allow Member Stated to set specific rules. | |

Amendment 10 – Availability of preventive restructuring frameworks

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| **Article 4(1)** | |
| Member States shall ensure that, where there is ***likelihood*** of insolvency, debtors in financial difficulty have access to an effective preventive restructuring framework that enables them to restructure their debts or business, restore their viability and avoid insolvency. | Member States shall ensure that, where there is ***a preponderance of*** ***probability*** of insolvency, debtors in financial difficulty have access to an effective preventive restructuring framework that enables them to restructure their debts or business, restore their viability and avoid insolvency. ***Member States shall ensure that the viability of the debtor is proven.*** |
| **Justification** | |
| * One of the objectives of the Directive is to ensure uniform procedures for preventive restructuring frameworks within the Union. This requires a harmonised approach to the conditions under which such procedures should be available. * The Commission proposal does not define the required certainty of the likelihood of insolvency, or how imminent the debtor’s insolvency must be. A more specific condition for entering into preventive restructuring would clarify this. | |

Amendment 11 – Availability of preventive restructuring frameworks

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| **Article 4(2)** | |
| Preventive restructuring frameworks may consist of one or more procedures or measures. | Preventive restructuring frameworks may consist of one or more procedures or measures. ***These are without prejudice to other existing procedures based on a creditors’ contractual agreement that may exist in Member States.*** |
| **Justification** | |
| * As stated in the explanatory memorandum “*the objective is not to interfere with what works well*”. As a result procedures of a contractual nature that exist in some Member States and that are efficient and effective must be let outside the scope of the Directive. The contractual agreement on which they are based does not match measures set out in the Directive such as majority rule, classes of creditors, a stay ordered by a court. | |

Amendment 12 – Availability of preventive restructuring frameworks

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| **Article 4(4)** | |
| Preventive restructuring frameworks shall be available on the application ***by*** debtors, or ***by*** creditors with the agreement of debtors. | Preventive restructuring frameworks shall be available on the application ***of*** debtors, or ***of*** creditors with the agreement ***or subsequent consent*** of debtors. |
| **Justification** | |
| * Many times, the creditors are better placed to assess whether the debtor is viable and they know the functioning and commercial relationships of the debtor. Moreover, in principle creditors want a viable debtor as much as the debtor itself. * An application filed by creditors should not be dismissed unless the debtor objects to an early restructuring procedure. This would strengthen the incentive for creditors to try to save viable businesses rather than file applications for ordinary insolvency procedures. | |

Amendment 13 – Debtor in possession

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| **Article 5(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 the business. | 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 the business***, without prejudice to specific legislation, such as Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements***. |
| **Justification** | |
| * It is important to ensure coherence between the different pieces of legislation. | |

Amendment 14 – Stay of individual enforcement actions

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| **Article 6(1)** | |
| Member States shall ensure that debtors who are negotiating a restructuring plan with their creditors may benefit from a stay of individual enforcement ***actions if and to the extent such a stay is necessary to support the negotiations of a restructuring plan***. | Member States shall ensure that debtors who are negotiating a restructuring plan with their creditors may benefit from a stay of individual enforcement actions***.*** ***Member States shall set the particular conditions to be met by the debtor in order to justify that the stay is necessary to support the negotiations of a restructuring plan. Such conditions, however, should not allow illiquid debtors to benefit from the stay.*** |
| **Justification** | |
| * It is not clear who would do this assessment. If this competence is finally given to courts, this would entail important delays in the process. We believe that providing Member States with the possibility to establish ex ante conditions would be more efficient and reduce uncertainty. | |

Amendment 15 – Stay of individual enforcement actions

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| **Article 6(2)** | |
| Member States shall ensure that a stay of individual enforcement actions may be ordered ***in respect of all types of creditors, including secured and preferential creditors***. The stay may be general, covering all creditors, or limited, covering one or more individual creditors, in accordance with national law. | Member States ***may*** ***establish that*** a stay of individual enforcement actions ***can*** be ordered ***in respect of all types of creditors, including public, secured and preferential creditors***. The stay may be general, covering all creditors, or limited, covering one or more individual creditors, in accordance with national law. ***Member States may exclude secured creditors from the stay.*** |
| **Justification** | |
| * The question of whether secured creditors should be affected by a restructuring plan and a stay of individual enforcement actions without their consent is a delicate issue that is handled differently within the EU because of differences in the legal frameworks of Member States in the areas of contract law, property law and other areas of law that are not harmonised. * The ability to post collateral to creditors is vital in ensuring access to finance for businesses, and SMEs in particular. In jurisdictions where secured creditors, according to current national legislation, are not subject to cram downs in restructuring, a weakening of their legal position as envisioned by the Commission proposal would be detrimental to access to capital for businesses. In these Member States, this particular part of the Directive proposal would have an effect that goes against the objectives of the Capital Markets Union (CMU). * It is therefore submitted that the issue of the position of secured creditors in restructuring should be left at the discretion of Member States. | |

Amendment 16 – Stay of individual enforcement actions

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| **Article 6(4)** | |
| Member States shall limit the duration of the stay of individual enforcement actions to a maximum period of no more than ***four*** months. | Member States shall limit the duration of the stay of individual enforcement actions to a maximum period of no more than ***three*** months ***[and, in the case of financial contracts and netting arrangements no more than 48 hours]***. |
| **Justification** | |
| * Under the existing Capital Requirements Regulation (CRR) in particular, a bank has to consider a repayment claim as in default if the debtor is past due more than 90 days (Article 178 CRR). Hence, the length of the stay period should not be longer than 60-90 days. It should also be very clear that an option of an extension of the stay period can only be granted in very limited exceptional cases, only if and when an independent third party has issued an opinion stating that the business is viable. Otherwise there is the risk that the original and the extension period of stay become the normal case which would increase the volume of nonperforming loans on the balance sheet of EU banks. Moreover, no extension period should be longer than three months and there should not be more than two extension periods, i.e. a total duration of nine months. * Moreover, regarding financial contracts and netting arrangements, in no event should the rights to impose a stay be broader than those provided under the BRRD. This should be clarified accordingly. As to the need to provide for adequate protection for financial contracts and netting arrangements and a limitation of the length of the stay to a maximum of 48 hours. The reference in Art. 31 to the financial collateral directive is too general to ensure an adequate level of protection. | |

Amendment 17 – Stay of individual enforcement actions

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| **Article 6(5)** | |
| Member States may nevertheless enable judicial or administrative authorities to extend the initial duration of the stay of individual enforcement actions or to grant a new stay of individual enforcement actions, upon request of the debtor or of creditors. Such extension or new period of stay of individual enforcement actions shall be granted only if there is evidence that:  (a) relevant progress has been made in the negotiations on the restructuring plan; and  (b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties. | Member States may nevertheless enable judicial or administrative authorities to extend the initial duration of the stay of individual enforcement actions or to grant a new stay of individual enforcement actions, upon request of the debtor or of creditors. Such extension or new period of stay of individual enforcement actions shall be granted only if there is evidence that:  (a) relevant progress has been made in the negotiations on the restructuring plan; and  (b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties.  ***Member States shall set the particular conditions that the debtor would have to comply with in order to extend the stay or grant a new period of stay.*** |
| **Justification** | |
| * If an extension of the period of stay is allowed, the conditions should be set by Member States in order to limit the intervention of courts. | |

Amendment 18 – Stay of individual enforcement actions

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| **Article 6(7)** | |
| The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed ***twelve*** months. | The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed ***nine*** months. ***A stay exceeding three months shall require the consent of secured creditors who are affected by the plan.*** |
| **Justification** | |
| * Under the existing Capital Requirements Regulation (CRR) in particular, a bank has to consider a repayment claim as in default if the debtor is past due more than 90 days (Article 178 CRR). Hence, the length of the stay period should not be longer than 60-90 days. It should also be very clear that an option of an extension of the stay period can only be granted in very limited exceptional cases, only if and when an independent third party has issued an opinion stating that the business is viable. Otherwise there is the risk that the original and the extension period of stay become the normal case which would increase the volume of nonperforming loans on the balance sheet of EU banks. Moreover, no extension period should be longer than three months and there should not be more than two extension periods, i.e. a total duration of nine months. * Experience shows that the likelihood that the assets of the debtor erode and collateral loses value increases rapidly throughout the stay. The chance of a satisfactory recovery rate in cases where the restructuring fails decreases exponentially with time. Therefore, a stay exceeding more than three months should require the consent of secured creditors who are affected by the plan. | |

Amendment 19 – Stay of individual enforcement actions

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| **Article 6(8)(c)** | |
| ***NEW*** | ***(c) at the request of a creditor if (i) its security interest or other interest in property is not adequately protected, or (ii) the property is not necessary for an effective restructuring.*** |
| **Justification** | |
| * It should be possible for creditors to request a lift of the stay, and such lift of stay should be granted, if a creditor’s security interest or other interest in property is not adequately protected or if the plan is not properly progressing and the agreement fails to be reached (Article 6.5(b)). The security position of a secured creditor should not be affected as a result of the stay. This concept is also embedded in US bankruptcy law. Also, if a creditor has a security interest or other interest in property that is not necessary for an effective restructuring, the stay should be lifted with respect to such creditor and property. | |

Amendment 20 – Stay of individual enforcement actions

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| **Article 6(9)** | |
| Member States shall ensure that, where an individual creditor or a single class of creditors is or would be unfairly prejudiced by a stay of individual enforcement actions, the judicial or administrative authority may decide not grant the stay of individual enforcement actions or may lift a stay of individual enforcement actions already granted in respect of that creditor or class of creditors, at the request of the creditors concerned. | *Member States shall ensure that, where an individual creditor or a single class of creditors is or would be unfairly prejudiced by a stay of individual enforcement actions*, ***or if no relevant progress has been made in the negotiations of the restructuring plan due to the debtor’s uncooperative behaviour,*** *the judicial or administrative authority may decide not grant the stay of individual enforcement actions or may lift a stay of individual enforcement actions already granted in respect of that creditor or class of creditors, at the request of the creditors concerned.* |
| **Justification** | |
| * There should be possibility to lift the stay in case the negotiations of the restructuring do not progress well and have no chance of success due to uncooperative behaviour of the debtor. Otherwise, the interests of the creditors could be disproportionally harmed. | |

Amendment 21 – Consequences of the stay of individual enforcement actions

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| **Article 7(4)** | |
| Member States shall ensure that, during the stay period, creditors to which the stay applies may not withhold performance or terminate, accelerate or in any other way modify executory contracts to the detriment of the debtor for debts that came into existence prior to the stay. ***Member States may limit the application of this provision to essential contracts which are necessary for the continuation of the day-to-day operation of the business.*** | ***Without prejudice to specific legislation, such as Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements,*** Member States shall ensure that, during the stay period, ***unsecured*** creditors to which the stay applies may not withhold performance or terminate, accelerate or in any other way modify executory ***and essential*** contracts ***which are necessary for the continuation of the day-to-day operation of the business*** to the detriment of the debtor for debts that came into existence prior to the stay, provided that the debtor complies with its obligations under such contracts. |
| **Justification** | |
| * It is important to ensure coherence between the different pieces of legislation. * If the reasons for the withholding or the early termination are prior to the granting of the stay (such as failure to pay dues), then creditors should keep their right over the contracts. In some MS, secured creditors are entitled to early terminate and even to file for enforcement during the stay, although this file remains “freezed” until the stay comes to an end. If finally liquidation proceedings are opened, those secured creditors are in a better position in the liquidation plan than if they had not filed for enforcement (it´s a procedural issue, but of the utmost importance). | |

Amendment 22 – Consequences of the stay of individual enforcement actions

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| **Article 7(5)** | |
| Member States shall ensure that creditors may not 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 the debtor's entry into restructuring negotiations, a requested for a stay of individual enforcement actions, the ordering of the stay as such or any similar event connected to the stay. | ***(DELETE)*** |
| **Justification** | |
| * Ipso facto and early termination clauses are very common safeguards for contractual parties, not just in commercial contracts between private entities, but also in contracts for public procurements with governments and regional public authorities. The invalidation of such clauses during preventive restructuring procedures would violate the principle of freedom of contract and could shift the contractual balance of many long-term contracts concluded before the entering into force of this Directive. * Due to the potential wide-ranging consequences, Article 7(5) of the Commission proposal should be deleted. | |

Alternative:

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| **Article 7(5)** | |
| Member States shall ensure that creditors may not 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 the debtor's entry into restructuring negotiations, a requested for a stay of individual enforcement actions, the ordering of the stay as such or any similar event connected to the stay. | ***Without prejudice to specific legislation, such as Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements,*** Member States shall ensure that creditors may not 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 the debtor's entry into restructuring negotiations, a requested for a stay of individual enforcement actions, the ordering of the stay as such or any similar event connected to the stay. |
| **Justification** | |
| * It is important to ensure coherence between the different pieces of legislation. * Ipso facto and early termination clauses are very common safeguards for contractual parties, not just in commercial contracts between private entities, but also in contracts for public procurements with governments and regional public authorities. The invalidation of such clauses during preventive restructuring procedures would violate the principle of freedom of contract and could shift the contractual balance of many long-term contracts concluded before the entering into force of this Directive. | |

Amendment 23 – Consequences of the stay of individual enforcement actions

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| **Article 7.7** | |
| Member States shall ***not*** require debtors to file for insolvency procedures if the stay period expires without an agreement on a restructuring plan being reached, unless the other conditions for filing laid down by national law are fulfilled. | Member States shall require debtors to file for insolvency procedures if the stay period expires without an agreement on a restructuring plan being reached, **unless the debtor declares to the relevant judicial or administrative authority that he is no longer in the conditions for filing laid down by national law**. |
| **Justification** | |
| * The burden of proof should be reversed: automatic filing unless the debtor declares and proves he is no longer under the conditions for filing. | |

Amendment 24 – Content of restructuring plans

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| **Article 8(1)(b)** | |
| a valuation of the present value of the debtor or the debtor's business as well as ***a*** reasoned statement on the causes and the extent of the financial difficulties of the debtor; | a valuation of the present value of the debtor or the debtor's business as well as ***an expected liquidation valuation of the debtor or the debtor's business*** and a reasoned statement on the causes and the extent of the financial difficulties of the debtor; |
| **Justification** | |
| * There should also be a liquidation valuation. After all, it is necessary to know whether the going-concern value is higher than the liquidation value. In addition, it is necessary to know the liquidation value for the best interest of creditors test. | |

Amendment 25 – Content of restructuring plans

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| **Article 8(1)(g)** | |
| an opinion or reasoned statement by the person responsible for proposing the restructuring plan which explains why the business is viable, how implementing the proposed plan is likely to result in the debtor avoiding insolvency and restore its long-term viability, and states any anticipated necessary pre-conditions for its success. | an opinion or reasoned statement by the person responsible for proposing the restructuring plan***, to be determined by each Member State,*** which explains why the business is viable, how implementing the proposed plan is likely to result in the debtor avoiding insolvency and restore its long-term viability, and states any anticipated necessary pre-conditions for its success. |
| **Justification** | |
| * In some Member States involving a third party is costly and ineffective. | |

Amendment 26 – Adoption of restructuring plans

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| **Article 9(2)** | |
| Member States shall ensure that affected parties are treated in separate classes which reflect the class formation criteria. Classes shall be formed in such a way that each class comprises claims or interests with rights that are sufficiently similar to justify considering the members of the class a homogenous group with commonality of interest. ***As a minimum***, 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 are treated in a separate class of their own. | Member States shall ensure that affected parties are treated in separate classes which reflect the class formation criteria. Classes shall be formed in such a way that each class comprises claims or interests with rights that are sufficiently similar to justify considering the members of the class a homogenous group with commonality of interest. ***If affected by a restructuring plan***, secured claims shall be treated in ***a separate class*** for the purposes of adopting a restructuring plan. Member States may also provide that workers are treated in a separate class of their own. |
| **Justification** | |
| * The question of whether secured creditors should be affected by a restructuring plan without their consent is a delicate issue that is handled differently within the EU because of differences in the legal frameworks of Member States in the areas of contract law, property law and other areas of law that are not harmonised. * The ability to post collateral to creditors is vital in ensuring access to finance for businesses, and SMEs in particular. In jurisdictions where secured creditors, according to current national legislation, are not subject to cram downs in restructuring, a weakening of their legal position as envisioned by the Commission proposal would be detrimental to access to capital for businesses. In these Member States, this particular part of the Directive proposal would have an effect that goes against the objectives of the Capital Markets Union (CMU). * It is therefore submitted that the issue of the position of secured creditors in restructuring should be left at the discretion of Member States. | |

Amendment 27 – Adoption of restructuring plans

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| **Article 9(4)** | |
| A restructuring plan shall be deemed to be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each and every class. Member States shall lay down the required majorities for the adoption of a restructuring plan, which shall be in any case not higher than 75% in the amount of claims or interests in each class. | A restructuring plan shall be deemed to be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each and every class. Member States shall lay down the required majorities for the adoption of a restructuring plan, which shall be in any case not higher than 75% **(or 80% for secured creditors)** in the amount of claims or interests in each class. |
| **Justification** | |
| * For the class of secured creditors the respective majority may require a higher threshold. | |

Amendment 28 – Adoption of restructuring plans

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| **Article 9(7)NEW** | |
| ***NEW*** | ***Member States where credits of State entities cannot be partially or totally affected by the restructuring plans must ensure that such credits form a separate class, which shall be treated separately, and that such State entities do not have voting rights for approval of the restructuring plan.*** |
| **Justification** | |
| * Considering that in some Member States the credits of State entities cannot be affected by restructuring plans, those credits should form a separate class, which must be treated separately. Moreover, such State entities should not have voting rights in relation the restructuring plan. * This solution would avoid deadlock situations in contexts where the remaining creditors and a viable debtor agree in a certain restructuring plan. | |

Amendment 29 – Cross-class cram-down

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| **Article 11(1)(b)** | |
| has been approved by ***at least one class of affected creditors other than an equity-holder class and any other class which, upon a valuation of the enterprise, would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied;*** | has been approved by ***those classes of the affected creditors representing the majority in amount of the claims, which would receive any payment or other consideration if the normal ranking of liquidation were applied, voted in favour of the plan.*** |
| **Justification** | |
| * The fact that the majority of in the money creditors supports the plan, is an important indication that there is a sufficient basis for the reorganisation. | |

Amendment 30 – Valuation by the judicial or administrative authority

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| **Article 13(1)** | |
| A liquidation value shall be determined by the judicial or administrative authority where a restructuring plan is challenged on the grounds of an alleged breach of the best interest of creditors test. | A***n alternative***value shall be determined by the judicial or administrative authority where a restructuring plan is challenged on the grounds of an alleged breach of the best interest of creditors test***.*** |
| **Justification** | |
| * Please see justification to the above-proposed amendment to Article 2(9). | |

Amendment 31 – Valuation by the judicial or administrative authority

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| **Article 13(2)** | |
| An enterprise value shall be determined by the judicial or administrative authority on the basis of the value of the enterprise as a going concern ***in the following cases:***  ***(a) where a cross-class cram-down application is necessary for the adoption of the restructuring plan;***  ***(b) where a restructuring plan is challenged on the grounds of an alleged breach of the absolute priority rule.*** | An enterprise value shall be determined by the judicial or administrative authority on the basis of the value of the enterprise as a going concern ***where a restructuring plan is challenged in the rest of cases.*** |
| **Justification** | |
| * Not all of the judicial / administrative authorities have the capabilities and resources to do evaluations. Our proposal is to conduct enterprise valuations (directly done by the judicial/ administrative authority or by a third party pointed by the judicial /administrative authority) only when an appeal over the judicial/administrative confirmation occurs. Please note that both valuations (liquidation value and enterprise value) might be merged into a single generic valuation, so paragraph 1. and 2. in cl. 13 might be merged into only one paragraph. | |

Amendment 32 – Effects of restructuring plans

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| **Article 14(3) NEW** | |
| ***NEW*** | ***3. Member States may exclude secured creditors from the effects of restructuring plans.*** |
| **Justification** | |
| * The question of whether secured creditors should be affected by a restructuring plan without their consent is a delicate issue that is handled differently within the EU because of differences in the legal frameworks of Member States in the areas of contract law, property law and other areas of law that are not harmonised. * The ability to post collateral to creditors is vital in ensuring access to finance for businesses, and SMEs in particular. In jurisdictions where secured creditors, according to current national legislation, are not subject to cram downs in restructuring, a weakening of their legal position as envisioned by the Commission proposal would be detrimental to access to capital for businesses. In these Member States, this particular part of the Directive proposal would have an effect that goes against the objectives of the Capital Markets Union (CMU). * It is therefore submitted that the issue of the position of secured creditors in restructuring should be left at the discretion of Member States. | |

Amendment 33 – Appeals

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| **Article 15(1 and 2)** | |
| 1. Member States shall ensure that a decision on the confirmation of a restructuring plan taken by a judicial authority may be appealed before a higher judicial authority and that a decision on the confirmation of a restructuring plan taken by an administrative authority may be appealed before a judicial authority.  2. ***A***ppeals shall be resolved in an expedited manner. | 1. Member States shall ensure that a decision on the confirmation of a restructuring plan taken by a judicial authority may be ***challenged or*** appealed before ***the same or*** a higher judicial authority and that a decision on the confirmation of a restructuring plan taken by an administrative authority may be appealed before a judicial authority.  2. ***Challenges and*** ***a***ppeals shall be resolved in an expedited manner. |
| **Justification** | |
| * Necessary additions to respect procedures and practices existing in various MS. | |

Amendment 34 – Appeals

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| **Article 15(4)(b)** | |
| confirm the plan and grant monetary compensation to the dissenting creditors, payable by the debtor or by the creditors who voted in favour of the plan. | ***DELETE*** |
| **Justification** | |
| * Article 15.4(b) may incentivize creditors, particularly lower ranking creditors, to use their nuisance value by voting against the plan. Furthermore, where it is considered fair to provide certain creditors a compensation in deviation of the priority ranking or a higher compensation than similarly situated creditors, e.g. compensation in full to small creditors, such should be part of the plan proposal so that all classes can vote on such distribution. * Moreover, it is envisaged that in cases where minority creditors have suffered unjustifiable detriment under the plan, Member States can consider a monetary compensation for dissenting creditors payable by the debtor or the creditors who voted in favour of the plan. This concept has a deterrent effect on creditors who would otherwise support the plan. Such contribution of a creditor who – unlike an equity holder - does not participate in the economic success of the company lacks economic and legal justification. * Therefore we consider that Article 15.4(b) should be deleted. | |

Amendment 35 – Access to discharge

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| **Article 19(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 is notably proportionate to his or her disposable income over the discharge period***. | Member States ***ensure that a full or partial discharge of debt is conditional on a partial repayment of debt by the entrepreneur***. |
| **Justification** | |
| * The partial repayment of debt should be compulsory, so the Directive should envisage that Member States shall ensure that a full discharge of debt is conditional on a partial repayment of debt by the entrepreneur. * A balance between the rights of the debtor to the potential benefits of a second chance and the rights of creditors must be achieved so as to ensure that there are benefits for all parties involved. Otherwise creditors could become more cautious, the access to financing could be restricted (higher interest rates, more security/guarantees required, etc.) and the suppliers could also require further assurances. In this way the potential benefits of the discharge could be frustrated. * Furthermore, full debt discharge may result to be counterproductive, since it does not promote a responsible entrepreneurship model. | |

Amendment 36 – Discharge period

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| **Article 20(1)(a)** | |
| The period of time after which over-indebted entrepreneurs may be fully discharged from their debts shall be no ***longer than*** three years starting from:   1. the date on which the judicial or administrative authority decided on the application to open such a procedure, in the case of a procedure ending with the liquidation of an over-indebted entrepreneur' s assets; or | The period of time after which over-indebted entrepreneurs may be fully discharged from their debts shall be ***at least*** threeyears starting from:   1. the date on which the judicial or administrative authority decided on the application to open such a procedure, in the case of a procedure ending with the liquidation of an over-indebted entrepreneur' s assets, ***as described in clause 19.2 above***; or |
| **Justification** | |
| * Three-year discharge is in many cases – though not always - an unattainable goal, even in Member States with relatively well-established second chance regimes. It is likely that many Member States will make heavy use of the limitations allowed in the proposal. This may have a profound impact on creditors and may translate in increased charged of future loans. * Moreover, we believe that not only excessive, but also too short length of discharge procedures can trigger low recovery rate and deter banks from providing loans, as debtors may try to avoid the payment by moving their COMI to a more favourable jurisdiction. Thus it is necessary to stipulate not only the maximum, but also the minimum period of discharge. * The fact of having gone through liquidation does not exempt the creditor from the mandatory minimum repayment. | |

Amendment 37 – Discharge period

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| **Article 20(2)** | |
| Member States shall ensure that on expiry of the discharge period, over-indebted entrepreneurs are discharged of their debts ***without the need to re-apply to a judicial or administrative authority***. | Member States shall ensure that on expiry of the discharge period, over-indebted entrepreneurs are discharged of their debts. |
| **Justification** | |
| * An act from a judge stating the end of the discharge period would be desirable. | |

Amendment 38 – Disqualification period

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| **Article 21** | |
| Member States shall ensure that, where an over-indebted entrepreneur obtains a discharge of debts in accordance with this Directive, any disqualifications from taking up or pursuing a trade, business, craft or profession which is connected with the entrepreneur's over-indebtedness shall cease to have effect at the latest at the end of the discharge period***, without the need to re-apply to a judicial or administrative authority***. | Member States shall ensure that, where an over-indebted entrepreneur obtains a discharge of debts in accordance with this Directive, any disqualifications from taking up or pursuing a trade, business, craft or profession which is connected with the entrepreneur's over-indebtedness shall cease to have effect at the latest at the end of the discharge period. |
| **Justification** | |
| * An act from a judge stating the end of the discharge period would be desirable. | |

Amendment 39- Limitation

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| **Article 22(1)** | |
| By way of derogation from Articles 19, 20 and 21, Member States may maintain or introduce provisions restricting access to discharge or laying down longer periods for obtaining a full discharge or longer disqualification periods in certain well-defined circumstances and where such limitations are justified by a general interest, in particular where:  (a) the over-indebted entrepreneur acted dishonestly or in bad faith towards the creditors when becoming indebted or during the collection of the debts;  (b) the over-indebted entrepreneur does not adhere to a repayment plan or to any other legal obligation aimed at safeguarding the interests of creditors;  (c) in case of abusive access to discharge procedures;  (d) in case of repeated access to discharge procedures within a certain period of time. | By way of derogation from Articles 19, 20 and 21, Member States may maintain or introduce provisions restricting access to discharge or laying down longer periods for obtaining a full discharge or longer disqualification periods in certain well-defined circumstances and where such limitations are justified by a general interest, in particular where:  (a) the over-indebted entrepreneur acted dishonestly or in bad faith towards the creditors when becoming indebted or during the collection of the debts;  (b) the over-indebted entrepreneur does not adhere to a repayment plan or to any other legal obligation aimed at safeguarding the interests of creditors;  (c) in case of abusive access to discharge procedures;  (d) in case of repeated access to discharge procedures within a certain period of time.  ***Member States fix the limit to maximum twice the possibility to access to discharge procedures and prevent the access to the entrepreneur already discharged from his debts in the five years preceding the granting of the discharge.*** |
| **Justification** | |
| * The limitations provided by article 22, paragraph 1 should be compulsory, so the Directive should envisage that Member States maintain or introduce provisions restricting access to discharge or laying down longer periods for obtaining a full discharge or longer disqualification periods in certain well-defined circumstances and where such limitations are justified by a general interest. * A balance between the rights of the debtor to the potential benefits of a second chance and the rights of creditors must be achieved so as to ensure that there are benefits for all parties involved. Otherwise creditors could become more cautious, the access to financing could be restricted (higher interest rates, more security/guarantees required, etc.) and the suppliers could also require further assurances. In this way the potential benefits of the discharge could be frustrated. * Full debt discharge may result to be counterproductive, since it does not promote a responsible entrepreneurship model. * For the same reasons, with reference to the case referred to in point (d), it would be important to fix a limit to the repeated access to discharge procedures (eg. most twice), especially if the partial repayment of debt is not compulsory. Furthermore, it would be important to fix a minimum time limit between the different requests for discharge. | |

Amendment 40 – Prohibition to shift COMI during the stay

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| **Article 28 bis** | |
| ***New*** | ***For the purpose of determining the COMI as defined in Regulation EU 2015/848 of the European Parliament and the Council on insolvency proceedings (recast) any shift of the debtor’s center of main interest shall not be permissible during the*** ***restructuring proceeding.*** |
| **Justification** | |
| * The debtor should not be in a position to change its centre of main interest during a restructuring proceeding. The acceptance of the preventive restructuring proceedings among creditors would be seriously damaged if debtors were in a position to misuse the proceedings to obtain time to shift their COMI to another jurisdiction. | |

Amendment 41 – Relationship with other acts

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| **Article 31(1)** | |
| This Directive shall be without prejudice to the following acts: | This Directive shall be without prejudice to the following acts***, which shall prevail over this Directive***: |
| **Justification** | |
| * The current proposal sets out a very general provision on stay without providing for any safeguards for netting and security arrangements. Such a general stay would have very serious consequences for all market participants relying on netting arrangements as well as security arrangements to monitor and mitigate their counterparty risk exposure, not least under the capital requirements regime. The general reference to the financial collateral directive in this article is insufficient to ensure an adequate level of protection of financial contracts, netting arrangements and security arrangements. * Moreover, this amendment should be considered together with our suggested amendments to Articles 6(4), 7(4) and 7(5). | |