Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (Text with EEA relevance)

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

of 20 June 2019

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee[(1)],

Having regard to the opinion of the Committee of the Regions[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) The objective of this Directive is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications. Without affecting workers' fundamental rights and freedoms, this Directive aims to remove such obstacles by ensuring that: viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance; and that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length.

(2) Restructuring should enable debtors in financial difficulties to continue business, in whole or in part, by changing the composition, conditions or structure of their assets

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and their liabilities or any other part of their capital structure — including by sales of assets or parts of the business or, where so provided under national law, the business as a whole — as well as by carrying out operational changes. Unless otherwise specifically provided for by national law, operational changes, such as the termination or amendment of contracts or the sale or other disposal of assets, should comply with the general requirements that are provided for under national law for such measures, in particular civil law and labour law rules. Any debt-to-equity swaps should also comply with safeguards provided for by national law. Preventive restructuring frameworks should, above all, enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises. Those frameworks should help to prevent job losses and the loss of know-how and skills, and maximise the total value to creditors — in comparison to what they would receive in the event of the liquidation of the enterprise's assets or in the event of the next-best-alternative scenario in the absence of a plan — as well as to owners and the economy as a whole.

(3) Preventive restructuring frameworks should also prevent the build-up of non-performing loans. The availability of effective preventive restructuring frameworks would ensure that action is taken before enterprises default on their loans, thereby helping to reduce the risk of loans becoming non-performing in cyclical downturns and mitigating the adverse impact on the financial sector. A significant percentage of businesses and jobs could be saved if preventive frameworks existed in all the Member States in which businesses' places of establishment, assets or creditors are situated. In restructuring frameworks the rights of all parties involved, including workers, should be protected in a balanced manner. At the same time, non-viable businesses with no prospect of survival should be liquidated as quickly as possible. Where a debtor in financial difficulties is not economically viable or cannot be readily restored to economic viability, restructuring efforts could result in the acceleration and accumulation of losses to the detriment of creditors, workers and other stakeholders, as well as the economy as a whole.

(4) There are differences between Member States as regards the range of the procedures available to debtors in financial difficulties in order to restructure their business. Some Member States have a limited range of procedures that allow the restructuring of businesses only at a relatively late stage, in the context of insolvency procedures. In other Member States, restructuring is possible at an earlier stage but the procedures available are not as effective as they could be, or they are very formal, in particular because they limit the use of out-of-court arrangements. Preventive solutions are a growing trend in insolvency law. The trend favours approaches that, unlike the traditional approach of liquidating a business in financial difficulties, have the aim of restoring it to a healthy state or, at least, saving those of its units which are still economically viable. That approach, among other benefits to the economy, often helps to maintain jobs or reduce job losses. Moreover, the degree of involvement of judicial or administrative authorities, or the persons appointed by them, varies from no involvement or minimal involvement in some Member States to full involvement in others. Similarly, national rules giving entrepreneurs a second chance, in particular

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by granting them discharge from the debts they have incurred in the course of their business, vary between Member States in respect of the length of the discharge period and the conditions for granting such a discharge.

(5) In many Member States, it takes more than three years for entrepreneurs who are insolvent but honest to be discharged from their debts and make a fresh start. Inefficient discharge of debt and disqualification frameworks result in entrepreneurs having to relocate to other jurisdictions in order to benefit from a fresh start in a reasonable period of time, at considerable additional cost to both their creditors and the entrepreneurs themselves. Long disqualification orders, which often accompany a procedure leading to discharge of debt, create obstacles to the freedom to take up and pursue a self-employed, entrepreneurial activity.

(6) The excessive length of procedures concerning restructuring, insolvency and discharge of debt in several Member States is an important factor triggering low recovery rates and deterring investors from carrying out business in jurisdictions where procedures risk taking too long and being unduly costly.

(7) Differences between Member States in relation to procedures concerning restructuring, insolvency and discharge of debt translate into additional costs for investors when assessing the risk of debtors getting into financial difficulties in one or more Member States, or of investing in viable businesses in financial difficulties, as well as additional costs of restructuring enterprises that have establishments, creditors or assets in other Member States. This is most notably the case with restructuring international groups of companies. Investors mention uncertainty about insolvency rules or the risk of lengthy or complex insolvency procedures in another Member State as being one of the main reasons for not investing or not entering into a business relationship with a counterpart outside the Member State where they are based. That uncertainty acts as a disincentive which obstructs the freedom of establishment of undertakings and the promotion of entrepreneurship and harms the proper functioning of the internal market. Micro, small and medium-sized enterprises (‘SMEs’) in particular do not, for the most part, have the resources needed to assess risks related to cross-border activities.

(8) The differences among Member States in procedures concerning restructuring, insolvency and discharge of debt lead to uneven conditions for access to credit and to uneven recovery rates in the Member States. A higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal market in general and for a working Capital Markets Union in particular, as well as for the resilience of European economies, including for the preservation and creation of jobs.

(9) The additional cost of risk-assessment and of cross-border enforcement of claims for creditors of over-indebted entrepreneurs who relocate to another Member State in order to obtain a discharge of debt in a much shorter period of time should also be reduced. The additional costs for entrepreneurs stemming from the need to relocate to another Member State in order to benefit from a discharge of debt should also be reduced. Furthermore, the obstacles stemming from long disqualification orders linked to an entrepreneur's insolvency or over-indebtedness inhibit entrepreneurship.

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(10) Any restructuring operation, in particular one of major size which generates a significant impact, should be based on a dialogue with the stakeholders. That dialogue should cover the choice of the measures envisaged in relation to the objectives of the restructuring operation, as well as alternative options, and there should be appropriate involvement of employees' representatives as provided for in Union and national law.

(11) The obstacles to the exercise of fundamental freedoms are not limited to purely cross-border situations. An increasingly interconnected internal market, in which goods, services, capital and workers circulate freely, and which has an ever-stronger digital dimension, means that very few enterprises are purely national if all relevant elements are considered, such as their client base, supply chain, scope of activities, investor and capital base. Even purely national insolvencies can have an impact on the functioning of the internal market through the so-called domino effect of insolvencies, whereby a debtor's insolvency may trigger further insolvencies in the supply chain.

(12) Regulation (EU) 2015/848 of the European Parliament and of the Council[(4)] deals with issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings as well as with the interconnection of insolvency registers. Its scope covers preventive procedures which promote the rescue of economically viable debtors as well as discharge procedures for entrepreneurs and other natural persons. However, that Regulation does not tackle the disparities between national laws regulating those procedures. Furthermore, an instrument limited only to cross-border insolvencies would not remove all obstacles to free movement, nor would it be feasible for investors to determine in advance the cross-border or domestic nature of the potential financial difficulties of the debtor in the future. There is therefore a need to go beyond matters of judicial cooperation and to establish substantive minimum standards for preventive restructuring procedures as well as for procedures leading to a discharge of debt for entrepreneurs.

(13) This Directive should be without prejudice to the scope of Regulation (EU) 2015/848. It aims to be fully compatible with, and complementary to, that Regulation, by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness. It does not change the approach taken in that Regulation of allowing Member States to maintain or introduce procedures which do not fulfil the condition of publicity for notification under Annex A to that Regulation. Although this Directive does not require that procedures within its scope fulfil all the conditions for notification under that Annex, it aims to facilitate the cross-border recognition of those procedures and the recognition and enforceability of judgments.

(14) The advantage of the application of Regulation (EU) 2015/848 is that it provides for safeguards against abusive relocation of the debtor's centre of main interests during cross-border insolvency proceedings. Certain restrictions should also apply to procedures not covered by that Regulation.

(15) It is necessary to lower the costs of restructuring for both debtors and creditors. Therefore, the differences between Member States which hamper the early restructuring of viable debtors in financial difficulties and the possibility of a discharge of debt for honest entrepreneurs should be reduced. Reducing such differences should

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bring greater transparency, legal certainty and predictability across the Union. It should maximise the returns to all types of creditors and investors and encourage cross-border investment. Greater coherence of restructuring and insolvency procedures should also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union.

(16) Removing the barriers to effective preventive restructuring of viable debtors in financial difficulties contributes to minimising job losses and losses of value for creditors in the supply chain, preserves know-how and skills and hence benefits the wider economy. Facilitating a discharge of debt for entrepreneurs would help to avoid their exclusion from the labour market and enable them to restart entrepreneurial activities, drawing lessons from past experience. Moreover, reducing the length of restructuring procedures would result in higher recovery rates for creditors as the passing of time would normally only result in a further loss of value of the debtor or the debtor's business. Finally, efficient preventive restructuring, insolvency and discharge procedures would enable a better assessment of the risks involved in lending and borrowing decisions and facilitate the adjustment for insolvent or over-indebted debtors, minimising the economic and social costs involved in their deleveraging process. This Directive should allow Member States flexibility to apply common principles while respecting national legal systems. Member States should be able to maintain or introduce in their national legal systems preventive restructuring frameworks other than those provided for by this Directive.

(17) Enterprises, and in particular SMEs, which represent 99 % of all businesses in the Union, should benefit from a more coherent approach at Union level. SMEs are more likely to be liquidated than restructured, since they have to bear costs that are disproportionately higher than those faced by larger enterprises. SMEs, especially when facing financial difficulties, often do not have the necessary resources to cope with high restructuring costs and to take advantage of the more efficient restructuring procedures available only in some Member States. In order to help such debtors restructure at low cost, comprehensive check-lists for restructuring plans, adapted to the needs and specificities of SMEs, should be developed at national level and made available online. In addition, early warning tools should be put in place to warn debtors of the urgent need to act, taking into account the limited resources of SMEs for hiring experts.

(18) When defining SMEs, Member States could give due consideration to Directive 2013/34/EU of the European Parliament and of the Council[(5)] or the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises[(6)].

(19) It is appropriate to exclude from the scope of this Directive debtors which are insurance and re-insurance undertakings as defined in points (1) and (4) of Article 13 of Directive 2009/138/EC of the European Parliament and of the Council[(7)], credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council[(8)], investment firms and collective investment undertakings as defined in points (2) and (7) of Article 4(1) of Regulation (EU) No 575/2013, central counterparties as defined in point (1) of Article 2 of Regulation

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(EU) No 648/2012 of the European Parliament and of the Council[9], central securities depositories as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council[10] and other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU of the European Parliament and of the Council[11]. Such debtors are subject to special arrangements and the national supervisory and resolution authorities have wide-ranging powers of intervention in relation to them. Member States should be able to exclude other financial entities providing financial services which are subject to comparable arrangements and powers of intervention.

(20) For similar considerations, it is also appropriate to exclude from the scope of this Directive public bodies under national law. Member States should also be able to limit the access to preventive restructuring frameworks to legal persons, since the financial difficulties of entrepreneurs may be efficiently addressed not only by means of preventive restructuring procedures but also by means of procedures which lead to a discharge of debt or by means of informal restructurings based on contractual agreements. Member States with different legal systems, where the same type of entity has a different legal status in those legal systems, should be able to apply one uniform regime to such entities. A preventive restructuring framework laid down pursuant to this Directive should not affect claims and entitlements against a debtor that arise from occupational pension systems if those claims and entitlements accrued during a period prior to the restructuring.

(21) Consumer over-indebtedness is a matter of great economic and social concern and is closely related to the reduction of debt overhang. Furthermore, it is often not possible to draw a clear distinction between the debts incurred by entrepreneurs in the course of their trade, business, craft or profession and those incurred outside those activities. Entrepreneurs would not effectively benefit from a second chance if they had to go through separate procedures, with different access conditions and discharge periods, to discharge their business debts and other debts incurred outside their business. For those reasons, although this Directive does not include binding rules on consumer over-indebtedness, it would be advisable for Member States to apply also to consumers, at the earliest opportunity, the provisions of this Directive concerning discharge of debt.

(22) The earlier a debtor can detect its financial difficulties and can take appropriate action, the higher the probability of avoiding an impending insolvency or, in the case of a business the viability of which is permanently impaired, the more orderly and efficient the liquidation process would be. Clear, up-to-date, concise and user-friendly information on the available preventive restructuring procedures as well as one or more early warning tools should therefore be put in place to incentivise debtors that start to experience financial difficulties to take early action. Early warning tools which take the form of alert mechanisms that indicate when the debtor has not made certain types of payments could be triggered by, for example, non-payment of taxes or social security contributions. Such tools could be developed either by Member States or by private entities, provided that the objective is met. Member States should make information about early warning tools available online, for example on a dedicated website or

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webpage. Member States should be able to adapt the early warning tools depending on the size of the enterprise and to lay down specific provisions on early warning tools for large-sized enterprises and groups that take into account their peculiarities. This Directive should not impose any liability on Member States for potential damage incurred through restructuring procedures which are triggered by such early warning tools.

(23) In an effort to increase the support of employees and their representatives, Member States should ensure that employees' representatives are given access to relevant and up-to-date information regarding the availability of early warning tools and it should also be possible for them to provide support to employees' representatives in assessing the economic situation of the debtor.

(24) A restructuring framework should be available to debtors, including legal entities and, where so provided under national law, natural persons and groups of companies, to enable them to address their financial difficulties at an early stage, when it appears likely that their insolvency can be prevented and the viability of the business can be ensured. A restructuring framework should be available before a debtor becomes insolvent under national law, namely before the debtor fulfils the conditions under national law for entering collective insolvency proceedings, which normally entail a total divestment of the debtor and the appointment of a liquidator. In order to avoid restructuring frameworks being misused, the financial difficulties of the debtor should indicate a likelihood of insolvency and the restructuring plan should be capable of preventing the insolvency of the debtor and ensuring the viability of the business.

(25) Member States should be able to determine whether claims that fall due or that come into existence after an application to open a preventive restructuring procedure has been submitted or after the procedure has been opened are included in the preventive restructuring measures or the stay of individual enforcement actions. Member States should be able to decide whether the stay of individual enforcement actions has an effect on the interest due on claims.

(26) Member States should be able to introduce a viability test as a condition for access to the preventive restructuring procedure provided for by this Directive. Such a test should be carried out without detriment to the debtor's assets, which could take the form of, among other things, the granting of an interim stay or the carrying out without undue delay of the test. However, the absence of detriment should not prevent Member States from requiring debtors to prove their viability at their own cost.

(27) The fact that Member States can limit access to a restructuring framework with regard to debtors that have been sentenced for serious breaches of accounting or book-keeping obligations should not prevent Member States from also limiting the access of debtors to preventive restructuring frameworks where their books and records are incomplete or deficient to a degree that makes it impossible to ascertain the business and financial situation of the debtors.

(28) Member States should be able to extend the scope of preventive restructuring frameworks provided for by this Directive to situations in which debtors face non-financial difficulties, provided that such difficulties give rise to a real and serious threat

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to a debtor's actual or future ability to pay its debts as they fall due. The time frame relevant for the determination of such threat may extend to a period of several months, or even longer, in order to account for cases in which the debtor is faced with non-financial difficulties threatening the status of its business as a going concern and, in the medium term, its liquidity. This may be the case, for example, where the debtor has lost a contract which is of key importance to it.

(29) To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures. Where this Directive is implemented by means of more than one procedure within a restructuring framework, the debtor should have access to all rights and safeguards provided for by this Directive with the aim of achieving an effective restructuring. Except in the event of mandatory involvement of judicial or administrative authorities as provided for under this Directive, Member States should be able to limit the involvement of such authorities to situations in which it is necessary and proportionate, while taking into consideration, among other things, the aim of safeguarding the rights and interests of debtors and of affected parties, as well as the aim of reducing delays and the cost of the procedures. Where creditors or employees' representatives are allowed to initiate a restructuring procedure under national law and where the debtor is an SME, Member States should require the agreement of the debtor as a precondition for the initiation of the procedure, and should also be able to extend that requirement to debtors which are large enterprises.

(30) To avoid unnecessary costs, to reflect the early nature of preventive restructuring and to encourage debtors to apply for preventive restructuring at an early stage of their financial difficulties, they should, in principle, be left in control of their assets and the day-to-day operation of their business. The appointment of a practitioner in the field of restructuring, to supervise the activity of a debtor or to partially take over control of a debtor's daily operations, should not be mandatory in every case, but made on a case-by-case basis depending on the circumstances of the case or on the debtor's specific needs. Nevertheless, Member States should be able to determine that the appointment of a practitioner in the field of restructuring is always necessary in certain circumstances, such as where: the debtor benefits from a general stay of individual enforcement actions; the restructuring plan needs to be confirmed by means of a cross-class cram-down; the restructuring plan includes measures affecting the rights of workers; or the debtor or its management have acted in a criminal, fraudulent, or detrimental manner in business relations.

(31) For the purpose of assisting the parties with negotiating and drafting a restructuring plan, Member States should provide for the mandatory appointment of a practitioner in the field of restructuring where: a judicial or administrative authority grants the debtor a general stay of individual enforcement actions, provided that in such case a practitioner is needed to safeguard the interests of the parties; the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down; it was requested by the debtor; or it is requested by a majority of creditors provided that the creditors cover the costs and fees of the practitioner.

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(32) A debtor should be able to benefit from a temporary stay of individual enforcement actions, whether granted by a judicial or administrative authority or by operation of law, with the aim of supporting the negotiations on a restructuring plan, in order to be able to continue operating or at least to preserve the value of its estate during the negotiations. Where so provided by national law, it should also be possible for the stay to apply for the benefit of third-party security providers, including guarantors and collateral givers. However, Member States should be able to provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not fulfil the objective of supporting the negotiations. Grounds for refusal might include a lack of support by the required majorities of creditors or, where so provided under national law, the debtor's actual inability to pay debts as they fall due.

(33) In order to facilitate and accelerate the course of proceedings, Member States should be able to establish, on a rebuttable basis, presumptions for the presence of grounds for refusal of the stay, where, for example, the debtor shows conduct that is typical of a debtor that is unable to pay debts as they fall due — such as a substantial default vis-à-vis workers or tax or social security agencies — or where a financial crime has been committed by the debtor or the current management of an enterprise which gives reason to believe that a majority of creditors would not support the start of the negotiations.

(34) A stay of individual enforcement actions could be general, in that it affects all creditors, or it could apply only to some individual creditors or categories of creditors. Member States should be able to exclude certain claims or categories of claims from the scope of the stay, in well-defined circumstances, such as claims which are secured by assets the removal of which would not jeopardise the restructuring of the business or claims of creditors in respect of which a stay would cause unfair prejudice, such as by way of an uncompensated loss or depreciation of collateral.

(35) In order to provide for a fair balance between the rights of the debtor and those of creditors, a stay of individual enforcement actions should apply for a maximum period of up to four months. Complex restructurings may, however, require more time. Member States should be able to provide that, in such cases, extensions of the initial period of the stay can be granted by the judicial or administrative authority. Where a judicial or administrative authority does not take a decision on the extension of a stay before it lapses, the stay should cease to have effect upon expiry of the stay period. In the interest of legal certainty, the total period of the stay should be limited to 12 months. Member States should be able to provide for an indefinite stay where the debtor becomes insolvent under national law. Member States should be able to decide whether a short interim stay pending a judicial or administrative authority's decision on access to the preventive restructuring framework is subject to the time limits under this Directive.

(36) To ensure that creditors do not suffer unnecessary detriment, Member States should provide that judicial or administrative authorities can lift a stay of individual enforcement actions if it no longer fulfils the objective of supporting negotiations, for example if it becomes apparent that the required majority of creditors does not support the continuation of the negotiations. The stay should also be lifted if creditors are

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unfairly prejudiced by it, where Member States provide for such a possibility. Member States should be allowed to limit the possibility to lift the stay to situations where creditors have not had the opportunity to be heard before it came into force or before it was extended. Member States should also be allowed to provide for a minimum period during which the stay cannot be lifted. In establishing whether there is unfair prejudice to creditors, judicial or administrative authorities should be able to take into account whether the stay would preserve the overall value of the estate, and whether the debtor acts in bad faith or with the intention of causing prejudice or generally acts against the legitimate expectations of the general body of creditors.

(37) This Directive does not cover provisions on compensation or guarantees for creditors of which the collateral is likely to decrease in value during the stay. A single creditor or a class of creditors would be unfairly prejudiced by the stay if, for example, their claims would be made substantially worse-off as a result of the stay than if the stay did not apply, or if the creditor is put more at a disadvantage than other creditors in a similar position. Member States should be able to provide that, whenever unfair prejudice is established in respect of one or more creditors or one or more classes of creditors, the stay can be lifted in respect of those creditors or classes of creditors or in respect of all creditors. Member States should be able to decide who is entitled to request the lifting of the stay.

(38) A stay of individual enforcement actions should also result in the suspension of a debtor's obligation to file for, or the opening at a creditor's request of, an insolvency procedure which could end in liquidation of the debtor. Such insolvency procedures should, in addition to those limited by law to having as the only possible outcome the liquidation of the debtor, also include procedures that could lead to a restructuring of the debtor. The suspension of the opening of an insolvency procedure at the request of creditors should apply not only where Member States provide for a general stay of individual enforcement actions covering all creditors, but also where Member States provide for the option of a stay of individual enforcement actions covering only a limited number of creditors. Nevertheless, Member States should be able to provide that insolvency proceedings can be opened at the request of public authorities which are not acting in a creditor capacity, but in the general interest, such as a public prosecutor.

(39) This Directive should not prevent debtors from paying, in the ordinary course of business, claims of unaffected creditors, and claims of affected creditors that arise during the stay of individual enforcement actions. To ensure that creditors with claims that came into existence before the opening of a restructuring procedure or a stay of individual enforcement actions do not put pressure on the debtor to pay those claims, which otherwise would be reduced through the implementation of the restructuring plan, Member States should be able to provide for the suspension of the obligation on the debtor with respect to payment of those claims.

(40) When a debtor enters an insolvency procedure, some suppliers can have contractual rights, provided for in so-called ipso facto clauses, entitling them to terminate the supply contract solely on account of the insolvency, even if the debtor has duly met its obligations. Ipso facto clauses could also be triggered when a debtor applies

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for preventive restructuring measures. Where such clauses are invoked when the debtor is merely negotiating a restructuring plan or requesting a stay of individual enforcement actions or invoked in connection with any event connected with the stay, early termination can have a negative impact on the debtor's business and the successful rescue of the business. Therefore, in such cases, it is necessary to provide that creditors are not allowed to invoke ipso facto clauses which make reference to negotiations on a restructuring plan or a stay or any similar event connected to the stay.

(41) Early termination can endanger the ability of a business to continue operating during restructuring negotiations, especially when contracts for essential supplies such as gas, electricity, water, telecommunication and card payment services are concerned. Member States should provide that creditors to which a stay of individual enforcement actions applies, and whose claims came into existence prior to the stay and have not been paid by a debtor, are not allowed to withhold performance of, terminate, accelerate or, in any other way, modify essential executory contracts during the stay period, provided that the debtor complies with its obligations under such contracts which fall due during the stay. Executory contracts are, for example, lease and licence agreements, long-term supply contracts and franchise agreements.

(42) This Directive lays down minimum standards for the content of a restructuring plan. However, Member States should be able to require additional explanations in the restructuring plan, concerning for example the criteria according to which creditors have been grouped, which may be relevant in cases where a debt is only partially secured. Member States should not be obliged to require an expert opinion regarding the value of assets which need to be indicated in the plan.

(43) Creditors affected by a restructuring plan, including workers, and, where allowed under national law, equity-holders, should have a right to vote on the adoption of a restructuring plan. Member States should be able to provide for limited exceptions to this rule. Parties unaffected by the restructuring plan should have no voting rights in relation to the plan, nor should their support be required for the approval of any plan. The concept of ‘affected parties’ should only include workers in their capacity as creditors. Therefore, if Member States decide to exempt the claims of workers from the preventive restructuring framework, workers should not be considered as affected parties. The vote on the adoption of a restructuring plan could take the form of a formal voting process or of a consultation and agreement with the required majority of affected parties. However, where the vote takes the form of an agreement with the requisite majority, affected parties which were not involved in the agreement could nevertheless be offered the opportunity to join the restructuring plan.

(44) To ensure that rights which are substantially similar are treated equitably and that restructuring plans can be adopted without unfairly prejudicing the rights of affected parties, affected parties should be treated in separate classes which correspond to the class formation criteria under national law. ‘Class formation’ means the grouping of affected parties for the purposes of adopting a plan in such a way as to reflect their rights and the seniority of their claims and interests. As a minimum, secured and unsecured creditors should always be treated in separate classes. Member States should, however,

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be able to require that more than two classes of creditors are formed, including different classes of unsecured or secured creditors and classes of creditors with subordinated claims. Member States should also be able to treat types of creditors that lack a sufficient commonality of interest, such as tax or social security authorities, in separate classes. It should be possible for Member States to provide that secured claims can be divided into secured and unsecured parts based on collateral valuation. It should also be possible for Member States to lay down specific rules supporting class formation where non-diversified or otherwise especially vulnerable creditors, such as workers or small suppliers, would benefit from such class formation.

(45) Member States should be able to provide that debtors that are SMEs, can, on account of their relatively simple capital structure, be exempted from the obligation to treat affected parties in separate classes. In cases where SMEs have opted to create only one voting class and that class votes against the plan, it should be possible for debtors to submit another plan, in line with the general principles of this Directive.

(46) Member States should in any case ensure that adequate treatment is given in their national law to matters of particular importance for class formation purposes, such as claims from connected parties, and that their national law contains rules that deal with contingent claims and contested claims. Member States should be allowed to regulate how contested claims are to be handled for the purposes of allocating voting rights. The judicial or administrative authority should examine class formation, including the selection of creditors affected by the plan, when a restructuring plan is submitted for confirmation. However, Member States should be able to provide that such authority can also examine class formation at an earlier stage should the proposer of the plan seek validation or guidance in advance.

(47) Requisite majorities should be established by national law to ensure that a minority of affected parties in each class cannot obstruct the adoption of a restructuring plan which does not unfairly reduce their rights and interests. Without a majority rule binding dissenting secured creditors, early restructuring would not be possible in many cases, for example where a financial restructuring is needed but the business is otherwise viable. To ensure that parties have a say on the adoption of restructuring plans proportionate to the stakes they have in the business, the required majority should be based on the amount of the creditors' claims or equity holders' interests in any given class. Member States should, in addition, be able to require a majority in the number of affected parties in each class. Member States should be able to lay down rules in relation to affected parties with a right to vote which do not exercise that right in a correct manner or are not represented, such as rules allowing those affected parties to be taken into account for a participation threshold or for the calculation of a majority. Member States should also be able to provide for a participation threshold for the vote.

(48) Confirmation of a restructuring plan by a judicial or administrative authority is necessary to ensure that the reduction of the rights of creditors or interests of equity holders is proportionate to the benefits of the restructuring and that they have access to an effective remedy. Confirmation is particularly necessary where: there are dissenting affected parties; the restructuring plan contains provisions on new financing; or the

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plan involves a loss of more than 25 % of the work force. Member States should, however, be able to provide that confirmation by a judicial or administrative authority is necessary also in other cases. A confirmation of a plan which involves the loss of more than 25 % of the work force should only be necessary where national law allows preventive restructuring frameworks to provide for measures that have a direct effect on employment contracts.

(49) Member States should ensure that a judicial or administrative authority is able to reject a plan where it has been established that it reduces the rights of dissenting creditors or equity holders either to a level below what they could reasonably expect to receive in the event of the liquidation of the debtor's business, whether by piecemeal liquidation or by a sale as a going concern, depending on the particular circumstances of each debtor, or to a level below what they could reasonably expect in the event of the next-best-alternative scenario where the restructuring plan is not confirmed. However, where the plan is confirmed through a cross-class cram-down, reference should be made to the protection mechanism used in such scenario. Where Member States opt to carry out a valuation of the debtor as a going concern, the going-concern value should take into account the debtor's business in the longer term, as opposed to the liquidation value. The going-concern value is, as a rule, higher than the liquidation value because it is based on the assumption that the business continues its activity with the minimum of disruption, has the confidence of financial creditors, shareholders and clients, continues to generate revenues, and limits the impact on workers.

(50) While compliance with the best-interests-of-creditors test should be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground in order to avoid a valuation being made in every case, Member States should be able to provide that other conditions for confirmation can be examined *ex officio*. Member States should be able to add other conditions which need to be complied with in order to confirm a restructuring plan, such as whether equity holders are adequately protected. Judicial or administrative authorities should be able to refuse to confirm restructuring plans which have no reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business. However, Member States should not be required to ensure that such assessment is made *ex officio*.

(51) Notification to all affected parties should be one of the conditions for confirmation of a restructuring plan. Member States should be able to define the form of the notification, to identify the time when it is to be made, as well as to lay down provisions for the treatment of unknown claims as regards notification. They should also be able to provide that non-affected parties have to be informed about the restructuring plan.

(52) Satisfying the ‘best-interest-of-creditors’ test should be considered to mean that no dissenting creditor is worse off under a restructuring plan than it would be either in the case of liquidation, whether piecemeal liquidation or sale of the business as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not to be confirmed. Member States should be able to choose one of those thresholds when implementing the best-interest-of-creditors test in national law. That test should be applied in any case where a plan needs to be confirmed in order to be

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binding for dissenting creditors or, as the case may be, dissenting classes of creditors. As a consequence of the best-interest-of-creditors test, where public institutional creditors have a privileged status under national law, Member States could provide that the plan cannot impose a full or partial cancellation of the claims of those creditors.

(53) While a restructuring plan should always be adopted if the required majority in each affected class supports the plan, it should still be possible for a restructuring plan which is not supported by the required majority in each affected class to be confirmed by a judicial or administrative authority, upon the proposal of a debtor or with the debtor's agreement. In the case of a legal person, Member States should be able to decide if, for the purpose of adopting or confirming a restructuring plan, the debtor is to be understood as the legal person's management board or a certain majority of shareholders or equity holders. For the plan to be confirmed in the case of a cross-class cram-down, it should be supported by a majority of voting classes of affected parties. At least one of those classes should be a secured creditor class or senior to the ordinary unsecured creditors class.

(54) It should be possible that, where a majority of voting classes does not support the restructuring plan, the plan can nevertheless be confirmed if it is supported by at least one affected or impaired class of creditors which, upon a valuation of the debtor as a going concern, receive payment or keep any interest, or, where so provided under national law, can reasonably be presumed to receive payment or keep any interest, if the normal ranking of liquidation priorities is applied under national law. In such a case, Member States should be able to increase the number of classes which are required to approve the plan, without necessarily requiring that all those classes should, upon a valuation of the debtor as a going concern, receive payment or keep any interest under national law. However, Member States should not require the consent of all classes. Accordingly, where there are only two classes of creditors, the consent of at least one class should be deemed to be sufficient, if the other conditions for the application of a cross-class cram-down are met. The impairment of creditors should be understood to mean that there is a reduction in the value of their claims.

(55) In the case of a cross-class cram-down, Member States should ensure that dissenting classes of affected creditors are not unfairly prejudiced under the proposed plan and Member States should provide sufficient protection for such dissenting classes. Member States should be able to protect a dissenting class of affected creditors by ensuring that it is treated at least as favourably as any other class of the same rank and more favourably than any more junior class. Alternatively, Member States could protect a dissenting class of affected creditors by ensuring that such dissenting class is paid in full if a more junior class receives any distribution or keeps any interest under the restructuring plan (the ‘absolute priority rule’). Member States should have discretion in implementing the concept of ‘payment in full’, including in relation to the timing of the payment, as long as the principal of the claim and, in the case of secured creditors, the value of the collateral are protected. Member States should also be able to decide on the choice of the equivalent means by which the original claim could be satisfied in full.

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(56) Member States should be able to derogate from the absolute priority rule, for example where it is considered fair that equity holders keep certain interests under the plan despite a more senior class being obliged to accept a reduction of its claims, or that essential suppliers covered by the provision on the stay of individual enforcement actions are paid before more senior classes of creditors. Member States should be able to choose which of the above-mentioned protection mechanisms they put in place.

(57) While shareholders' or other equity holders' legitimate interests should be protected, Member States should ensure that they cannot unreasonably prevent the adoption of restructuring plans that would bring the debtor back to viability. Member States should be able to use different means to achieve that goal, for example by not giving equity holders the right to vote on a restructuring plan and by not making the adoption of a restructuring plan conditional on the agreement of equity holders that, upon a valuation of the enterprise, would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied. However, where equity holders have the right to vote on a restructuring plan, a judicial or administrative authority should be able to confirm the plan by applying the rules on cross-class cram down notwithstanding the dissent of one or more classes of equity holders. Member States that exclude equity holders from voting should not be required to apply the absolute priority rule in the relationship between creditors and equity holders. Another possible means of ensuring that equity holders do not unreasonably prevent the adoption of restructuring plans would be to ensure that restructuring measures that directly affect equity holders' rights, and that need to be approved by a general meeting of shareholders under company law, are not subject to unreasonably high majority requirements and that equity holders have no competence in terms of restructuring measures that do not directly affect their rights.

(58) Several classes of equity holders can be needed where different classes of shareholdings with different rights exist. Equity holders of SMEs that are not mere investors, but are the owners of the enterprise and contribute to the enterprise in other ways, such as managerial expertise, might not have an incentive to restructure under such conditions. For this reason, the cross-class cram-down should remain optional for debtors that are SMEs.

(59) The restructuring plan should, for the purposes of its implementation, make it possible for equity holders of SMEs to provide non-monetary restructuring assistance by drawing on, for example, their experience, reputation or business contacts.

(60) Throughout the preventive restructuring procedures, workers should enjoy full labour law protection. In particular, this Directive should be without prejudice to workers' rights guaranteed by Council Directives 98/59/EC[(12)] and 2001/23/EC[(13)], and Directives 2002/14/EC[(14)], 2008/94/EC[(15)] and 2009/38/EC[(16)] of the European Parliament and of the Council. The obligations concerning information and consultation of employees under national law transposing those Directives remain fully intact. This includes obligations to inform and consult employees' representatives on the decision to have recourse to a preventive restructuring framework in accordance with Directive 2002/14/EC.

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(61) Employees and their representatives should be provided with information regarding the proposed restructuring plan in so far as provided for in Union law, in order to allow them to undertake an in-depth assessment of the various scenarios. Furthermore, employees and their representatives should be involved to the extent necessary to fulfil the consultation requirements laid down in Union law. Given the need to ensure an appropriate level of protection of workers, Member States should be required to exempt workers' outstanding claims from any stay of individual enforcement actions, irrespective of the question of whether those claims arise before or after the stay is granted. A stay of enforcement of workers' outstanding claims should be allowed only for the amounts and for the period for which the payment of such claims is effectively guaranteed at a similar level by other means under national law. Where national law provides for limitations on the liability of guarantee institutions, either in terms of the length of the guarantee or the amount paid to workers, workers should be able to enforce any shortfall in their claims against the employer even during the stay period. Alternatively, Member States should be able to exclude workers' claims from the scope of the preventive restructuring frameworks and provide for their protection under national law.

(62) Where a restructuring plan entails the transfer of a part of an undertaking or business, workers' rights arising from a contract of employment or from an employment relationship, in particular the right to wages, should be safeguarded in accordance with Articles 3 and 4 of Directive 2001/23/EC, without prejudice to the specific rules applying in the event of insolvency proceedings under Article 5 of that Directive and in particular the possibilities provided for in Article 5(2) of that Directive. This Directive should be without prejudice to the rights to information and consultation, which are guaranteed by Directive 2002/14/EC, including on decisions likely to lead to substantial changes in work organisation or in contractual relations with a view to reaching an agreement on such decisions. Furthermore, under this Directive, workers whose claims are affected by a restructuring plan should have the right to vote on the plan. For the purposes of voting on the restructuring plan, Member States should be able to decide to place workers in a class separate from other classes of creditors.

(63) Judicial or administrative authorities should only decide on the valuation of a business — either in liquidation or in the next-best-alternative scenario, if the restructuring plan was not confirmed — if a dissenting affected party challenges the restructuring plan. This should not prevent Member States from carrying out valuations in another context under national law. However, it should be possible that such a decision also consists of an approval of a valuation by an expert or of a valuation submitted by the debtor or another party at an earlier stage of the process. Where the decision to carry out a valuation is taken, Member States should be able to provide for special rules, separate from general civil procedural law, for a valuation in restructuring cases, with a view to ensuring that it is carried out in an expedited manner. Nothing in this Directive should affect the rules on burden of proof under national law in the case of a valuation.

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(64) The binding effects of a restructuring plan should be limited to the affected parties that were involved in the adoption of the plan. Member States should be able to determine what it means for a creditor to be involved, including in the case of unknown creditors or creditors of future claims. For example, Member States should be able to decide how to deal with creditors that have been notified correctly but that did not participate in the procedures.

(65) Interested affected parties should be able to appeal a decision on the confirmation of a restructuring plan issued by an administrative authority. Member States should also be able to introduce the option of appealing a decision on the confirmation of a restructuring plan issued by a judicial authority. However, in order to ensure the effectiveness of the plan, to reduce uncertainty and to avoid unjustifiable delays, appeals should, as a rule, not have suspensive effects and therefore not preclude the implementation of a restructuring plan. Member States should be able to determine and limit the grounds for appeal. Where the decision on the confirmation of the plan is appealed, Member States should be able to allow the judicial authority to issue a preliminary or summary decision that protects the execution and implementation of the plan against the consequences of the pending appeal being upheld. Where an appeal is upheld, judicial or administrative authorities should be able to consider, as an alternative to setting aside the plan, an amendment of the plan, where Member States provide for such a possibility, as well as a confirmation of the plan without amendments. It should be possible for any amendments to the plan to be proposed or voted on by the parties, on their own initiative or at the request of the judicial authority. Member States could also provide for compensation for monetary losses for the party whose appeal was upheld. National law should be able to deal with a potential new stay or extension of the stay in event of the judicial authority deciding that the appeal has suspensive effect.

(66) The success of a restructuring plan often depends on whether financial assistance is extended to the debtor to support, firstly, the operation of the business during restructuring negotiations and, secondly, the implementation of the restructuring plan after its confirmation. Financial assistance should be understood in a broad sense, including the provision of money or third-party guarantees and the supply of stock, inventory, raw materials and utilities, for example through granting the debtor a longer repayment period. Interim financing and new financing should therefore be exempt from avoidance actions which seek to declare such financing void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures.

(67) National insolvency laws providing for avoidance actions of interim and new financing or providing that new lenders may incur civil, administrative or criminal sanctions for extending credit to debtors in financial difficulties could jeopardise the availability of financing necessary for the successful negotiation and implementation of a restructuring plan. This Directive should be without prejudice to other grounds for declaring new or interim financing void, voidable or unenforceable, or for triggering civil, criminal or administrative liability for providers of such financing, as laid down in national law. Such other grounds could include, among other things, fraud, bad faith, a certain type

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of relationship between the parties which could be associated with a conflict of interest, such as in the case of transactions between related parties or between shareholders and the company, and transactions where a party received value or collateral without being entitled to it at the time of the transaction or in the manner performed.

(68) When interim financing is extended, the parties do not know whether the restructuring plan will be eventually confirmed or not. Therefore, Member States should not be required to limit the protection of interim finance to cases where the plan is adopted by creditors or confirmed by a judicial or administrative authority. To avoid potential abuses, only financing that is reasonably and immediately necessary for the continued operation or survival of the debtor's business or the preservation or enhancement of the value of that business pending the confirmation of that plan should be protected. Furthermore, this Directive should not prevent Member States from introducing an *ex ante* control mechanism for interim financing. Member States should be able to limit the protection for new financing to cases where the plan is confirmed by a judicial or administrative authority and for interim financing to cases where it is subject to *ex ante* control. An *ex ante* control mechanism for interim financing or other transactions could be exercised by a practitioner in the field of restructuring, by a creditor's committee or by a judicial or administrative authority. Protection from avoidance actions and protection from personal liability are minimum guarantees that should be granted to interim financing and new financing. However, encouraging new lenders to take the enhanced risk of investing in a viable debtor in financial difficulties could require further incentives such as, for example, giving such financing priority at least over unsecured claims in subsequent insolvency procedures.

(69) In order to promote a culture that encourages early preventive restructuring, it is desirable that transactions which are reasonable and immediately necessary for the negotiation or implementation of a restructuring plan also be given protection from avoidance actions in subsequent insolvency procedures. Judicial or administrative authorities should be able, when determining the reasonableness and immediate necessity of costs and fees, for instance, to consider projections and estimates submitted to affected parties, a creditor's committee, a practitioner in the field of restructuring or the judicial or administrative authority itself. To this end, Member States should also be able to require debtors to provide and update relevant estimates. Such protection should enhance certainty in respect of transactions with businesses that are known to be in financial difficulties and remove the fear of creditors and investors that all such transactions could be declared void in the event that the restructuring fails. Member States should be able to provide for a point in time prior to the opening of a preventive restructuring procedure and to the granting of the stay of individual enforcement actions, from which fees and costs of negotiating, adopting, confirming or seeking professional advice for the restructuring plan start to benefit from protection against avoidance actions. In the case of other payments and disbursements and the protection of the payment of workers' wages, such a starting point could also be the granting of the stay or the opening of the preventive restructuring procedure.

(70) To further promote preventive restructuring, it is important to ensure that directors are not dissuaded from exercising reasonable business judgment or taking reasonable

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commercial risks, particularly where to do so would improve the chances of a restructuring of potentially viable businesses. Where the company experiences financial difficulties, directors should take steps to minimise losses and to avoid insolvency, such as: seeking professional advice, including on restructuring and insolvency, for instance by making use of early warning tools where applicable; protecting the assets of the company so as to maximise value and avoid loss of key assets; considering the structure and functions of the business to examine viability and reduce expenditure; refraining from committing the company to the types of transaction that might be subject to avoidance unless there is an appropriate business justification; continuing to trade in circumstances where it is appropriate to do so in order to maximise going-concern value; holding negotiations with creditors and entering preventive restructuring procedures.

(71) Where the debtor is close to insolvency, it is also important to protect the legitimate interests of creditors from management decisions that may have an impact on the constitution of the debtor's estate, in particular where those decisions could have the effect of further diminishing the value of the estate available for restructuring efforts or for distribution to creditors. It is therefore necessary to ensure that, in such circumstances, directors avoid any deliberate or grossly negligent actions that result in personal gain at the expense of stakeholders, and avoid agreeing to transactions at below market value, or taking actions leading to unfair preference being given to one or more stakeholders. Member States should be able to implement the corresponding provisions of this Directive by ensuring that judicial or administrative authorities, when assessing whether a director is to be held liable for breaches of duty of care, take the rules on duties of directors laid down in this Directive into account. This Directive is not intended to establish any hierarchy among the different parties whose interests need to be given due regard. However, Member States should be able to decide on establishing such a hierarchy. This Directive should be without prejudice to Member States' national rules on the decision-making processes in a company.

(72) Entrepreneurs exercising a trade, business, craft or independent, self-employed profession can run the risk of becoming insolvent. The differences between the Member States in terms of opportunities for a fresh start could incentivise over-indebted or insolvent entrepreneurs to relocate to a Member State other than the Member State where they are established, in order to benefit from shorter discharge periods or more attractive conditions for discharge, leading to additional legal uncertainty and costs for the creditors when recovering their claims. Furthermore, the effects of insolvency, in particular the social stigma, the legal consequences, such as disqualifying entrepreneurs from taking up and pursuing entrepreneurial activity, and the continual inability to pay off debts, constitute important disincentives for entrepreneurs seeking to set up a business or have a second chance, even if evidence shows that entrepreneurs who have become insolvent have more chances of being successful the next time.

(73) Steps should therefore be taken to reduce the negative effects of over-indebtedness or insolvency on entrepreneurs, in particular by allowing for a full discharge of debt after a certain period of time and by limiting the length of disqualification orders issued in connection with a debtor's over-indebtedness or insolvency. The concept of ‘insolvency’ should be defined by national law and it could take the form of over-

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indebtedness. The concept of 'entrepreneur' within the meaning of this Directive should have no bearing on the position of managers or directors of a company, which should be treated in accordance with national law. Member States should be able to decide how to obtain access to discharge, including the possibility of requiring the debtor to request discharge.

(74) Member States should be able to provide for the possibility to adjust the repayment obligations of insolvent entrepreneurs when there is a significant change in their financial situation, regardless of whether it improves or deteriorates. This Directive should not require that a repayment plan be supported by a majority of creditors. Member States should be able to provide that entrepreneurs are not prevented from starting a new activity in the same or different field during the implementation of the repayment plan.

(75) A discharge of debt should be available in procedures that include a repayment plan, a realisation of assets, or a combination of both. In implementing those rules, Member States should be able to choose freely among those options. If more than one procedure leading to discharge of debt is available under national law, Member States should ensure that at least one of those procedures gives insolvent entrepreneurs the opportunity of having a full discharge of debt within a period that does not exceed three years. In the case of procedures which combine a realisation of assets and a repayment plan, the discharge period should start, at the latest, from the date the repayment plan is confirmed by a court or starts being implemented, for example from the first instalment under the plan, but it could also start earlier, such as when a decision to open the procedure is taken.

(76) In procedures that do not include a repayment plan, the discharge period should start, at the latest, from the date when a decision to open the procedure is taken by a judicial or administrative authority, or the date of the establishment of the insolvency estate. For the purposes of calculating the duration of the discharge period under this Directive, Member States should be able to provide that the concept of 'opening of procedure' does not include preliminary measures, such as preservation measures or the appointment of a preliminary insolvency practitioner, unless such measures allow for the realisation of assets, including the disposal and the distribution of assets to creditors. The establishment of the insolvency estate should not necessarily entail a formal decision or confirmation by a judicial or administrative authority, where such decision is not required under national law, and could consist in the submission of the inventory of assets and liabilities.

(77) Where the procedural path leading to a discharge of debt entails the realisation of an entrepreneur's assets, Member States should not be prevented from providing that the request for discharge is treated separately from the realisation of assets, provided that such request constitutes an integral part of the procedural path leading to the discharge under this Directive. Member States should be able to decide on the rules on the burden of proof in order for the discharge to operate, which means that it should be possible for entrepreneurs to be required by law to prove compliance with their obligations.

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(78) A full discharge of debt or the ending of disqualifications after a period no longer than three years is not appropriate in all circumstances, therefore derogations from this rule which are duly justified by reasons laid down in national law might need to be introduced. For instance, such derogations should be introduced in cases where the debtor is dishonest or has acted in bad faith. Where entrepreneurs do not benefit from a presumption of honesty and good faith under national law, the burden of proof concerning their honesty and good faith should not make it unnecessarily difficult or onerous for them to enter the procedure.

(79) In establishing whether an entrepreneur was dishonest, judicial or administrative authorities might take into account circumstances such as: the nature and extent of the debt; the time when the debt was incurred; the efforts of the entrepreneur to pay the debt and comply with legal obligations, including public licensing requirements and the need for proper bookkeeping; actions on the entrepreneur's part to frustrate recourse by creditors; the fulfilment of duties in the likelihood of insolvency, which are incumbent on entrepreneurs who are directors of a company; and compliance with Union and national competition and labour law. It should also be possible to introduce derogations where the entrepreneur has not complied with certain legal obligations, including obligations to maximise returns to creditors, which could take the form of a general obligation to generate income or assets. It should furthermore be possible to introduce specific derogations where it is necessary to guarantee the balance between the rights of the debtor and the rights of one or more creditors, such as where the creditor is a natural person who needs more protection than the debtor.

(80) A derogation could also be justified where the costs of the procedure leading to a discharge of debt, including the fees of judicial and administrative authorities and of practitioners, are not covered. Member States should be able to provide that the benefits of that discharge can be revoked where, for example, the financial situation of the debtor improves significantly due to unexpected circumstances, such as winning a lottery, or coming in the possession of an inheritance or a donation. Member States should not be prevented from providing additional derogations in well-defined circumstances and when duly justified.

(81) Where there is a duly justified reason under national law, it could be appropriate to limit the possibility of discharge for certain categories of debt. It should be possible for Member States to exclude secured debts from eligibility for discharge only up to the value of the collateral as determined by national law, while the rest of the debt should be treated as unsecured debt. Member States should be able to exclude further categories of debt when duly justified.

(82) Member States should be able to provide that judicial or administrative authorities can verify, either *ex officio* or at the request of a person with a legitimate interest, whether entrepreneurs have fulfilled the conditions for obtaining a full discharge of debt.

(83) If an entrepreneur's permit or licence to carry on a certain craft, business, trade or profession has been denied or revoked as a result of a disqualification order, this Directive should not prevent Member States from requiring the entrepreneur to submit an application for a new permit or licence after the disqualification has expired.

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Where a Member State authority adopts a decision concerning a specifically supervised activity, it should be possible to also take into account, even after the expiry of the disqualification period, the fact that the insolvent entrepreneur has obtained a discharge of debt in accordance with this Directive.

(84) Personal and professional debts that cannot be reasonably separated, for example where an asset is used in the course of the professional activity of the entrepreneur as well as outside that activity, should be treated in a single procedure. Where Member States provide that such debts are subject to different insolvency procedures, coordination of those procedures is needed. This Directive should be without prejudice to Member States being able to choose to treat all the debts of an entrepreneur in a single procedure. Member States in which entrepreneurs are allowed to continue their business on their own account during insolvency proceedings should not be prevented from providing that such entrepreneurs can be made subject to new insolvency proceedings, where such continued business becomes insolvent.

(85) It is necessary to maintain and enhance the transparency and predictability of the procedures in delivering outcomes that are favourable to the preservation of businesses and to allowing entrepreneurs to have a second chance or that permit the efficient liquidation of non-viable enterprises. It is also necessary to reduce the excessive length of insolvency procedures in many Member States, which results in legal uncertainty for creditors and investors and low recovery rates. Finally, given the enhanced cooperation mechanisms between courts and practitioners in cross-border cases, set up under Regulation (EU) 2015/848, the professionalism of all actors involved needs to be brought to comparable high levels across the Union. To achieve those objectives, Member States should ensure that members of the judicial and administrative authorities dealing with procedures concerning preventive restructuring, insolvency and discharge of debt are suitably trained and have the necessary expertise for their responsibilities. Such training and expertise could be acquired also during the exercise of the duties as a member of a judicial or administrative authority or, prior to appointment to such duties, during the exercise of other relevant duties.

(86) Such training and expertise should enable decisions with a potentially significant economic and social impact to be taken in an efficient manner, and should not be understood to mean that members of a judicial authority have to deal exclusively with matters concerning restructuring, insolvency and discharge of debt. Member States should ensure that procedures concerning restructuring, insolvency and discharge of debt can be carried out in an efficient and expeditious manner. The creation of specialised courts or chambers, or the appointment of specialised judges in accordance with national law, as well as concentrating jurisdiction in a limited number of judicial or administrative authorities would be efficient ways of achieving the objectives of legal certainty and effectiveness of procedures. Member States should not be obliged to require that procedures concerning restructuring, insolvency and discharge of debt be prioritised over other procedures.

(87) Member States should also ensure that practitioners in the field of restructuring, insolvency, and discharge of debt that are appointed by judicial or administrative

authorities ('practitioners') are: suitably trained; appointed in a transparent manner with due regard to the need to ensure efficient procedures; supervised when carrying out their tasks; and perform their tasks with integrity. It is important that practitioners adhere to standards for such tasks, such as obtaining insurance for professional liability. Suitable training, qualifications and expertise for practitioners could also be acquired while practising their profession. Member States should not be obliged to provide the necessary training themselves, but this could be provided by, for example, professional associations or other bodies. Insolvency practitioners as defined in Regulation (EU) 2015/848 should be included in the scope of this Directive.

(88) This Directive should not prevent Member States from providing that practitioners are chosen by a debtor, by creditors or by a creditors' committee from a list or a pool that is pre-approved by a judicial or administrative authority. In choosing a practitioner, the debtor, the creditors or the creditors' committee could be granted a margin of appreciation as to the practitioner's expertise and experience in general and the demands of the particular case. Debtors who are natural persons could be exempted from such a duty altogether. In cases with cross-border elements, the appointment of the practitioner should take into account, among other things, the practitioner's ability to comply with the obligations, under Regulation (EU) 2015/848, to communicate and cooperate with insolvency practitioners and judicial and administrative authorities from other Member States, as well as their human and administrative resources to deal with potentially complex cases. Member States should not be prevented from providing for a practitioner to be selected by other methods, such as random selection by a software programme, provided that it is ensured that in using those methods due consideration is given to the practitioner's experience and expertise. Member States should be able to decide on the means for objecting to the selection or appointment of a practitioner or for requesting the replacement of the practitioner, for example through a creditors' committee.

(89) Practitioners should be subject to oversight and regulatory mechanisms which should include effective measures regarding the accountability of practitioners who have failed in their duties, such as: a reduction in a practitioner's fee; the exclusion from the list or pool of practitioners who can be appointed in insolvency cases; and, where appropriate, disciplinary, administrative or criminal sanctions. Such oversight and regulatory mechanisms should be without prejudice to provisions under national law on civil liability for damages for breach of contractual or non-contractual obligations. Member States should not be required to set up specific authorities or bodies. Member States should ensure that information about the authorities or bodies exercising oversight over practitioners is publicly available. For instance, a mere reference to the judicial or administrative authority should be sufficient as information. It should be possible, in principle, to attain such standards without the need to create new professions or qualifications under national law. Member States should be able to extend the provisions on the training and supervision of practitioners to other practitioners not covered by this Directive. Member States should not be obliged to provide that disputes over remuneration of practitioners are to be prioritised over other procedures.

(90) To further reduce the length of procedures, to facilitate better participation of creditors in procedures concerning restructuring, insolvency and discharge of debt and to ensure

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similar conditions among creditors irrespective of where they are located in the Union, Member States should put in place provisions enabling debtors, creditors, practitioners and judicial and administrative authorities to use electronic means of communication. Therefore, it should be possible that procedural steps such as the filing of claims by creditors, the notification of creditors, or the lodging of challenges and appeals, can be carried out by electronic means of communication. Member States should be able to provide that notifications of a creditor can only be performed electronically if the creditor concerned has previously consented to electronic communication.

(91) Parties to procedures concerning restructuring, insolvency and discharge of debt should not be obliged to use electronic means of communication if such use is not mandatory under national law, without prejudice to Member States being able to establish a mandatory system of electronic filing and service of documents in procedures concerning restructuring, insolvency and discharge of debt. Member States should be able to choose the means of electronic communications. Examples of such means could include a purpose-built system for the electronic transmission of such documents or the use of email, without preventing Member States from being able to put in place features to ensure the security of electronic transmissions, such as electronic signature, or trust services, such as electronic registered delivery services, in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council[(17)].

(92) It is important to gather reliable and comparable data on the performance of procedures concerning restructuring, insolvency and discharge of debt in order to monitor the implementation and application of this Directive. Therefore, Member States should collect and aggregate data that are sufficiently granular to enable an accurate assessment of how the Directive is working in practice and should communicate those data to the Commission. The communication form for the transmission of such data to the Commission should be established by the Commission assisted by a Committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council[(18)]. The form should provide a shortlist of the main outcomes of procedures that are common to all Member States. For example, in the case of a restructuring procedure, those main outcomes could be the following: the plan being confirmed by a court; the plan not being confirmed by a court; the restructuring procedures being converted to liquidation procedures or closed because of the opening of liquidation procedures before the plan was confirmed by a court. Member States should not be required to provide a break-down by types of outcome in respect of the procedures which end before any relevant measures are taken, but could instead provide a common number for all procedures which are declared inadmissible, rejected or withdrawn before being opened.

(93) The communication form should provide a list of options which could be taken into account by the Member States when determining the size of a debtor, by reference to one or more of the elements of the definition of SMEs and large enterprises common to all Member States. The list should include the option of determining the size of a debtor based on the number of workers only. The form should: define the elements of average cost and average recovery rates for which Member States should be able to collect data voluntarily; provide guidance on elements which could be taken into account when

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Member States make use of a sampling technique, for example on sample sizes to ensure representativeness in terms of geographical distribution, size of debtors and industry; and include the opportunity for Member States to provide any additional information available, for example on the total amount of assets and liabilities of debtors.

(94) The stability of financial markets relies heavily on financial collateral arrangements, in particular, when collateral security is provided in connection with the participation in designated systems or in central bank operations and when margins are provided to central counterparties. As the value of financial instruments given as collateral security may be very volatile, it is crucial to realise their value quickly before it goes down. Therefore, the provisions of Directives 98/26/EC[(19)] and 2002/47/EC[(20)] of the European Parliament and of the Council and Regulation (EU) No 648/2012 should apply notwithstanding the provisions of this Directive. Member States should be allowed to exempt netting arrangements, including close-out netting, from the effects of the stay of individual enforcement actions even in circumstances where they are not covered by Directives 98/26/EC, 2002/47/EC and Regulation (EU) No 648/2012, if such arrangements are enforceable under the laws of the relevant Member State even if insolvency proceedings are opened.
This could be the case for a significant number of master agreements widely used in the financial, energy and commodity markets, both by non-financial and financial counterparties. Such arrangements reduce systemic risks especially in derivatives markets. Such arrangements might therefore be exempt from restrictions that insolvency laws impose on executory contracts. Accordingly, Member States should also be allowed to exempt from the effects of the stay of individual enforcement actions statutory netting arrangements, including close-out netting arrangements, which operate upon the opening of insolvency procedures. The amount resulting from the operation of netting arrangements, including close-out netting arrangements should, however, be subject to the stay of individual enforcement actions.

(95) Member States that are parties to the Convention on international interests in mobile equipment, signed at Cape Town on 16 November 2001, and its Protocols should be able to continue to comply with their existing international obligations. The provisions of this Directive regarding preventive restructuring frameworks should apply with the derogations necessary to ensure an application of those provisions without prejudice to the application of that Convention and its Protocols.

(96) The effectiveness of the process of adoption and implementation of the restructuring plan should not be jeopardised by company law. Therefore, Member States should be able to derogate from the requirements laid down in Directive (EU) 2017/1132 of the European Parliament and of the Council[(21)] concerning the obligations to convene a general meeting and to offer on a pre-emptive basis shares to existing shareholders, to the extent and for the period necessary to ensure that shareholders do not frustrate restructuring efforts by abusing their rights under that Directive. For example, Member States might need to derogate from the obligation to convene a general meeting of shareholders or from the normal time periods, for cases where urgent action is to be taken by the management to safeguard the assets of the company, for instance through requesting a stay of individual enforcement actions and when there is a serious and

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sudden loss of subscribed capital and a likelihood of insolvency. Derogations from company law might also be required when the restructuring plan provides for the emission of new shares which could be offered with priority to creditors as debt-to-equity swaps, or for the reduction of the amount of subscribed capital in the event of a transfer of parts of the undertaking. Such derogations should be limited in time to the extent that Member States consider such derogations necessary for the establishment of a preventive restructuring framework. Member States should not be obliged to derogate from company law, wholly or partially, for an indefinite or for a limited period of time, if they ensure that their company law requirements do not jeopardise the effectiveness of the restructuring process or if Member States have other, equally effective tools in place to ensure that shareholders do not unreasonably prevent the adoption or implementation of a restructuring plan which would restore the viability of the business. In this context, Member States should attach particular importance to the effectiveness of provisions relating to a stay of individual enforcement actions and confirmation of the restructuring plan which should not be unduly impaired by calls for, or the results of, general meetings of shareholders. Directive (EU) 2017/1132 should therefore be amended accordingly. Member States should enjoy a margin of appreciation in assessing which derogations are needed in the context of national company law in order to effectively implement this Directive, and should also be able to provide for similar exemptions from Directive (EU) 2017/1132 in the case of insolvency proceedings not covered by this Directive but which allow for restructuring measures to be taken.

(97) In respect of the establishment of, and subsequent changes to, the data communication form, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011.

(98) A study should be carried out by the Commission in order to evaluate the necessity of submitting legislative proposals to deal with the insolvency of persons not exercising a trade, business, craft or profession, who, as consumers, in good faith, are temporarily or permanently unable to pay debts as they fall due. Such study should investigate whether access to basic goods and services needs to be safeguarded for those persons to ensure that they benefit from decent living conditions.

(99) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents[(22)], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

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

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set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(101) On 7 June 2017, the European Central Bank delivered an opinion[(23)],

HAVE ADOPTED THIS DIRECTIVE:

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(**1**) OJ C 209, 30.6.2017, p. 21.

(**2**) OJ C 342, 12.10.2017, p. 43.

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

(**4**) 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).

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

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

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

(**8**) 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).

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

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

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

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

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

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

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

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

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

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

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

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

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

(**22**) OJ C 369, 17.12.2011, p. 14.

(**23**) OJ C 236, 21.7.2017, p. 2.