Comments of the German Trade Union Confederation (DGB) on the Commission Proposal for a DIRECTIVE on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU [2016/0359 (COD)] including amendments to Title II, Chapter 2 and 3 of the Proposals

Part I (Comments on the Proposal)

On 22 November 2016 the Commission (COM) has presented a European package of measures concerning enterprise insolvencies in the form of the Commission Proposal for a DIRECTIVE on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (Com 2016) 723 final. This proposal (DD) also concerns the interests of employees of companies in crisis respectively in danger of insolvency. In a certain way it constitutes a change of paradigms for the pre-insolvency stage, like it is marked in Germany by the Insolvency Act and especially the reform of insolvency law at the end of 2011 through the Act on Further Facilitation of Enterprise Restructuring: away from a creditor satisfaction procedure, towards a new discharge of debts procedure.

According to the COM one wants to help enterprises at an early restructuring in order to preserve jobs and the value of the enterprise. An essential purpose of the project in the framework of the Action Plan Capital Markets Union can be seen in the early rescue of banks by the envisaged rules: one wants to give credit institutions the chance to reduce their bad loans portfolios in order to be more stable in a comparison with other national economies (reduction of so-called “non-performing-loans”, i. e. credits whose repayments are in danger). In the trade unions’ and employees’ view this shows the ambiguity of the project: considerations about a plan to establish a pre-insolvency restructuring procedure in order to restructure enterprises and to save jobs are on the one hand in principle in the interest of unions, employee representatives and employees. Yet dangers and impairments coming with the plan must be thwarted resolutely from the start.

Out of this focus the following core points for a trade union position on the considerations about the establishment of a pre-insolvency restructuring procedure can be devised – in general, but also concretely regarding the Directive proposal:

Core points of the DGB and its affiliates on the fundamental considerations to establish a pre-insolvency restructuring procedure

- Restructuring with the aim of continuing operation of the enterprise and the plant saving as many jobs as possible is in the interest of employees and their unions.
- If the law provides a procedure preventing insolvencies, job losses and losses of wage claims of the employees, this is also welcome.
- However, such a procedure may not introduce nor foster negative impacts on legal positions of employees and their unions.
- The proposal provides that employee claims are part of restructuring plans. This makes it possible to compromise these claims by creditor vote and court decision. Even if all employees dissent, their rights can be restricted by a cross-class cram-down. This procedure is between creditors, not between the social partners. This is harmful to freedom of coalition as enshrined in the Basic Law (German Constitution) and the European Charter of Fundamental rights. Legal positions of employees may not be the subject of restructuring plans. Nor is it possible to compensate for this via more employee participation.
- The draft plans temporary stay of enforcement during restructurings. This even if there is only a probability of insolvency, not a real insolvency yet. An exception for employee claims is foreseen, which is good, but even their enforcement can be stopped if there is a kind of

compensation, like statutory insolvency insurance (see Art. 6 (3), recital 34). This is insufficient for employee protection since it might be more difficult to get these moneys than to enforce the wage claims against the employer.

- Art. 7(4) provides that creditors to whom the execution stay applies may not withhold performance or terminate contracts for debts that came into existence prior to the stay. In case something like a statutory insolvency insurance is created this could apply to employees as well! This is unacceptable under any circumstances! One may not force employees to maintain the employment relationship and to continue to work as this would infringe Art. 12 (1) Basic Law.
- The proposal contains new privileges and protections for new financiers and advisors (super-privileges in Arts. 16 and 17). In a subsequent insolvency, the creditors' securities and the payments they received are untouchable. For financial credits, even a superpriority can be provided, against all other creditors, including the employees. Thus, there is the serious danger that in case of a subsequent insolvency there are no monies left for upholding the enterprise or at least a social compensation plan. This would endanger or alloy employment, employment rights and rights of other stakeholders who were not part of the restructuring negotiations. **New privileges for big creditors, banks and other financial creditors are to be refused!** Quite the opposite: These creditors, who are mostly already privileged for example by guarantees or mortgages, should contribute more to the costs of insolvency procedures than nowadays. New privileges for advisors as provided in Art. 17 (2) (b) of the proposal are also to be refused, for the same reasons.
- The protection of wage payments, as provided in Art. 18 (2) (c) of the proposal is to be welcomed. Under Art. 15 (2) (b) TFEU there is an EU competence for such a rule. As a matter of principle, employee claims should not be subjected to revocatory actions. This has been a long time request by DGB and its affiliates to the German legislator. The priority rules existing in many European states must remain untouched and should be extended Europe-wide.
- In case a legally regulated restructuring alloys or endangers interests of employees, be it indirectly through endangering or reducing the employer's assets, judicial control and participation of a provisional creditor committee or an equivalent body with employee participation must be provided. It must be clarified that unions have a right to participate in these bodies. Anyway, it must be precluded that the progress achieved in Germany with the universally praised reform act "ESUG", which brought more participation of creditors and employees via creditor committees is undermined or even undone by European law.
- Abuse of the procedure to the detriment of employees and uninvolved creditors must be prevented, especially with regard to a – possibly – lurking subsequent insolvency.

The <u>three most important DGB positions</u> on the introduction of a pre-insolvency restructuring procedure highlighted

1. A pre-insolvency restructuring may not introduce nor foster new negative legal impacts on legal positions of employees and their unions and representatives. Comprising employee claims and rights in restructuring plans leading to a reduction of or an adverse effect on these legal positions, is to be refused strictly as it would be such an impact.
2. New privileges and protections for banks, other financial creditors and advisors are to be refused ditto.
3. If such procedures bring negative impacts or dangers for the interests of employees, e. g. through enforcement bans, revocatory action privileges for parties of the procedure or a bar on bankruptcy filing by creditors, a sufficient control by courts and the participation of an insolvency control body, for example a provisional creditor committee with employee representation which is in the position to exert financial and legal control in the insolvency procedure must be provided. The right of the cognisant trade union to participate in the employee representation of the control body must be made clear.

Part II (Amendments to Title II, Chapter 2 and 3 of the Proposals)

Chapter 2

Facilitating negotiations on preventive restructuring plans

Article 5

Debtor in possession

1. Member States shall ensure that debtors accessing preventive restructuring procedures remain totally or at least partially in control of their assets and the day-to-day operation of the business.
2. The appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall not be mandatory in every case.
3. Member States may require the appointment of a practitioner in the field of restructuring in the following cases:
   (a) where the debtor is granted a general stay of individual enforcement actions in accordance with Article 6;
   (b) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance with Article 11.
4. **Member States shall ensure that a creditors' committee shall be established. The committee shall include representatives of the main creditors and other stakeholders; it shall include a representative of the debtor' s employees, especially the representation by a responsible trade union. The members of the creditors' committee shall support and monitor the insolvency administrator's execution of his office. They shall demand information on the progress of business affairs, have the books and business documents inspected and the monetary transactions and the available cash verified.**

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Article 6

Stay of individual enforcement actions

1. Member States shall ensure that debtors who are negotiating a restructuring plan with their creditors may benefit from a stay of individual enforcement actions if and to the extent such a stay is necessary to support the negotiations of a restructuring plan.

2. Member States shall ensure that a stay of individual enforcement actions may be ordered in respect of all types of creditors, including secured and preferential creditors. The stay may be general, covering all creditors, or limited, covering one or more individual creditors, in accordance with national law.

3. Paragraph 2 shall not apply to workers' outstanding claims ~~except if and to the extent that Member States ensure by other means that the payment of such claims is guaranteed at a level of protection at least equivalent to that provided for under the relevant national law transposing Directive 2008/94/EC~~.

4. Member States shall limit the duration of the stay of individual enforcement actions to a maximum period of no more than four months.

5. Member States may nevertheless enable judicial or administrative authorities to extend the initial duration of the stay of individual enforcement actions or to grant a new stay of individual enforcement actions, upon request of the debtor or of creditors. Such extension or new period of stay of individual enforcement actions shall be granted only if there is evidence that:

   (a) relevant progress has been made in the negotiations on the restructuring plan; and

   (b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties.

6. Any further extensions shall be given only if the conditions referred to in points (a) and (b) of paragraph 5 are met and the circumstances of the case show a strong likelihood that a restructuring plan will be adopted.

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

8. Member States shall ensure that judicial or administrative authorities may lift the stay of individual enforcement actions, in whole or in part:

   (a) if it becomes apparent that a proportion of creditors who under national law could block the adoption of the restructuring plan does not support the continuation of the negotiations; or

   (b) at the request of the debtor or the practitioner in the field of restructuring.

9. Member States shall ensure that, where an individual creditor or a single class of creditors is or would be unfairly prejudiced by a stay of individual enforcement actions, the judicial or administrative authority may decide not grant the stay of individual enforcement actions or may lift a stay of individual enforcement actions already granted in respect of that creditor or class of creditors, at the request of the creditors concerned.

Article 7

Consequences of the stay of individual enforcement actions

1. Where the obligation of the debtor to file for insolvency under national law arises during the period of the stay of individual enforcement actions, that obligation shall be suspended for the duration of the stay.

2. A general stay covering all creditors shall prevent the opening of insolvency procedures at the request of one or more creditors, except one of workers' according to Article 6 paragraph 3.

3. Member States may derogate from paragraph 1 where the debtor becomes illiquid and therefore unable to pay his debts as they fall due during the stay period. In that case, Member States shall ensure that restructuring procedures are not automatically terminated and that, upon examining the prospects for achieving an agreement on a successful restructuring plan within the period of the stay, a judicial or administrative authority may decide to defer the opening of insolvency procedure and keep in place the benefit of the stay of individual enforcement actions.

4. Member States shall ensure that, during the stay period, creditors to which the stay applies may not withhold performance or terminate, accelerate or in any other way modify executory contracts to the detriment of the debtor for debts that came into existence prior to the stay. Member States may limit the application of this provision to essential contracts which are necessary for the continuation of the day-to-day operation of the business.

5. Member States shall ensure that creditors may not withhold performance or terminate, accelerate or in any other way modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of the debtor's entry into restructuring negotiations, a requested for a stay of individual enforcement actions, the ordering of the stay as such or any similar event connected to the stay.

6. Member States shall ensure that nothing prevents the debtor from paying in the ordinary course of business claims of or owed to unaffected creditors and the claims of affected creditors that arise after the stay is granted and which continue to arise throughout the period of the stay.

7. Member States shall not require debtors to file for insolvency procedures if the stay period expires without an agreement on a restructuring plan being reached, unless the other conditions for filing laid down by national law are fulfilled.

Chapter 3

Restructuring plans

Article 8

Content of restructuring plans

1. Member States shall require restructuring plans submitted for confirmation by a judicial or administrative authority to contain at least the following information:

   (a) the identity of the debtor or the debtor's business for which the restructuring plan is proposed;

   (b) a valuation of the present value of the debtor or the debtor's business as well as a reasoned statement on the causes and the extent of the financial difficulties of the debtor;

   (c) the identity of the affected parties, whether named individually or described by reference to one or more categories of debt, as well as their claims or interests covered by the restructuring plan;

   (d) the classes into which the affected parties have been grouped for the purposes of adopting the plan, together with a rationale for doing so and information about the respective values of creditors and members in each class;

   (e) the identity of non-affected parties, whether named individually or described by reference to one or more categories of debt, together with a statement of the reasons why it is not proposed to affect them;

   (f) the terms of the plan, including, but not limited to:

      (i) its proposed duration;

      (ii) any proposal by which debts are rescheduled or waived or converted into other forms of obligation;

      (iii) any new financing anticipated as part of the restructuring plan;

   (g) an opinion or reasoned statement by the person responsible for proposing the restructuring plan which explains why the business is viable, how implementing the proposed plan is likely to result in the debtor avoiding insolvency and restore its long-term viability, and states any anticipated necessary pre-conditions for its success.

2. **Workers' claims or other rights shall not be affected by restructuring plans.**

~~2~~3. Member States shall make a model for restructuring plans available online. That model shall contain at least the information required under national law and shall provide general but practical information on how the model is to be used. The model shall be made available in the official language or languages of the Member State. Member States shall endeavour to make the model available in other languages, in particular in

languages used in international business. It shall be designed in such a way that it can be adapted to the needs and circumstances of every case.

~~3~~4. The parties may choose whether or not to use the model restructuring plan.

To be continued:

- ***Amendment to Article 11:*** *Cross-class cram-down*
  Even if all employees dissent, their rights can be restricted by a cross-class cram-down. This procedure is between creditors, not between the social partners. This is harmful to freedom of coalition as enshrined in the Basic Law (German Constitution) and the European Charter of Fundamental rights. Legal positions of employees may not be the subject of restructuring plans. Nor is it possible to compensate for this via more employee participation.

- ***Amendment to Article 15 and 16:*** Protection *for new financing, interim financing and other restructuring related transactions / Protection for other restructuring related transactions:*
  New privileges for big creditors, banks and other financial creditors are to be refused!

- ***Completely missing / to be included by an amendment:***
  If such procedures bring negative impacts or dangers for the interests of employees, e. g. through enforcement bans, revocatory action privileges for parties of the procedure or a bar on bankruptcy filing by creditors, a sufficient control by courts and the participation of an insolvency control body, for example a provisional creditor committee with employee representation which is in the position to exert financial and legal control in the insolvency procedure must be provided. The right of the cognisant trade union to participate in the employee representation of the control body must be made clear.