



GLOSSARY

Cross-Border Insolvency Proceedings in the European Union

"Inter-professional judicial cooperation for the effective application of the European Directive on Insolvency"

Introduction

The first part of this glossary reproduces the terms for which the Directive of 20 June 2019 provides a definition.

These definitions are binding on the Member States and for the courts in their interpretation of the rules, subject to any necessary adaptations to the law of each State.

The second part of the glossary proposes definitions for the terms not explicitly defined in the Directive, but which are part of the concepts used. These definitions are naturally not binding for the Member States or the courts.

They can serve as a guide to a good understanding of the rules and principles used.

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I. Terms defined by the Directive (Article 2)

Affected parties: creditors, including, where applicable under national law, workers, or classes of creditors and, where applicable, under national law, equity holders, whose claims or interests, respectively, are directly affected by a restructuring plan

Best-interest-of-creditors test: a test that is satisfied if no dissenting creditor would be worse off under a restructuring plan than such a creditor would be if the normal ranking of liquidation priorities under national law were applied, either in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not confirmed

Entrepreneur: a natural person exercising a trade, business, craft or profession

Equity holder: a person that has an ownership interest in a debtor or a debtor's business, including a shareholder, in so far as that person is not a creditor. **NB:** a shareholder can be considered as a creditor for their contribution to the current account of the debtor company

Executory contract: a contract between a debtor and one or more creditors under which the parties still have obligations to perform at the time the stay of individual enforcement actions is granted or applied

Full discharge of debt means that enforcement against entrepreneurs of their outstanding dischargeable debts is precluded or that outstanding dischargeable debts as such are cancelled, as part of a procedure which could include a realisation of assets or a repayment plan or both

Remark: this is a measure recommended to the Member States by the Directive to facilitate the recovery of an insolvent entrepreneur. It leads to a total or partial cancellation of the entrepreneur's debts after an insolvency procedure. The Directive provides for a maximum period of three years counting from the opening of the procedure for the debtor to be automatically fully discharged from their debts. Exceptions are provided for in certain specific cases, with a non-limitative list, such as a substantial violation of the obligations under a plan, or a failure to comply with information obligations as well as for certain types of debts such as those arising from the debtor's tortious liability or maintenance obligations. Member States may provide for other cases of disqualification.

Interim financing: any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business

New financing: any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan and that is included in that restructuring plan;

Practitioner in the field of restructuring: any person or body appointed by a judicial or administrative authority to carry out, in particular, one or more of the following tasks:

- a) assisting the debtor or the creditors in drafting or negotiating a restructuring plan
- b) supervising the activity of the debtor during the negotiations on a restructuring plan, and reporting to a judicial or administrative authority
- c) taking partial control over the assets or affairs of the debtor during negotiations

Remark: the "insolvency practitioner" is also used.

Repayment plan: a programme of payments of specified amounts on specified dates by an insolvent entrepreneur to creditors, or a periodic transfer to creditors of a certain part of entrepreneur's disposable income during the discharge period;

Restructuring: measures aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements

Stay of individual enforcement actions: a temporary suspension, granted by a judicial or administrative authority or applied by operation of law, of the right of a creditor to enforce a claim against a debtor and, where so provided for by national law, against a third-party security provider, in the context of a judicial, administrative or other procedure, or of the right to seize or realise out of court the assets or business of the debtor

II. Terms not defined by the Directive

Absolute priority rule: principle of classification of the creditors according to rank. It is possible to derogate from the rule to meet the objective the plan if it has not caused unfair prejudice to the rights of the affected parties; in practice the creditors in a dissenting class must be paid in full if a more junior class would receive any distribution under the plan.

Affected parties' right to vote: decision of the affected parties formed into classes to vote on the draft restructuring plan or plans, in accordance with the rules laid down by the national rules. This majority may not be higher than 75% of the amount of claims in each class or, where applicable, of the number of affected parties in each class (Art. 9-6). The affected parties are informed of the voting conditions.

Check-list: document containing all the items required and the conditions of a draft restructuring plan with a view to putting it to the vote of the affected parties and submitting it to the judicial authority for confirmation. This check-list must be easily available, especially for SMEs. It is written in the official language or languages of the Member State (Art. 8- 2).

Confirmation of a plan: decision of the judicial authority rendering enforceable a plan adopted by the affected parties with the majority required by law or a plan that has not been adopted by these rules but which meets the conditions required to make it binding on the creditors that did not approve it (Art. 10).

Cross-class cram-down: a plan approved by the required majority of voting classes of affected parties becomes enforceable on all of them and in particular the dissenting creditors. If a plan is not approved by the means and the majority required, it may be approved by a judicial authority and enforced on all the creditors, if it has been approved by at least one class of secured or preferential creditors and one other class of affected parties and if the dissenting creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class (Art. 11).

Debtor in financial difficulties: debtor who is not insolvent, but is encountering cash flow difficulties, supply problems, a significant loss of turnover, a reduction in the share capital. The preventive restructuring mechanisms are suited to this situation. The appearance of financial difficulties requires the debtor or the company director to take protective measures to safeguard the interests of the shareholders and creditors, such as the implementation of a preventive restructuring procedure

Debtor in possession: debtor subject to a preventive procedure or insolvency procedure who maintains their powers under the supervision of a practitioner in the field of restructuring or an insolvency practitioner and a judicial authority. The debtor continues operating their business with the aim of proposing a plan to the creditors. The management powers retained by the debtor may be restricted in the event of mismanagement.

Early warning tools: information tools made available to companies so that they can alert their directors of foreseeable financial difficulties or a risk of insolvency. These early warning tools include the provision of advice services by public or private organisations, the information provided by the statutory auditor, the tax authorities or the social security organisations. The Directive advises Member States to facilitate access to these tools for SMEs (Art. 1).

Insolvency: situation of a debtor who is no longer able to meet their obligations. The definition is left to the appreciation of national lawmakers. The term generally covers a debtor's inability to honour their debts when they fall due and sometimes a situation of over indebtedness, characterised by the liabilities being greater than the assets. Insolvency is accompanied by a loss of trust from the banks and suppliers. Being insolvent forces the debtor to take steps such as asking for the opening of an insolvency procedure.

Likelihood of insolvency: a fragile financial situation of a debtor, characterised by a risk of insolvency in the near future, if the debtor does not take steps quickly to correct the situation: reduction of the financial expenses and personnel costs, reconstitution of the share capital or undertaking a preventive procedure constitute such steps.

Remark: this is a measure recommended to the Member States by the Directive to facilitate the recovery of an insolvent entrepreneur. It leads to a total or partial cancellation of the entrepreneur's debts after insolvency procedure. The Directive provides for a maximum period of three years counting from the opening of the procedure for the debtor to be automatically fully discharged from their debts. Exceptions are provided for in certain specific cases, with a non-limitative list such as a substantial violation of the obligations under a plan, or a failure to comply with information obligations as well as for certain types of debts such as those arising from the debtor's tortious liability or maintenance obligations. Member States may provide for other cases of disqualification.

Micro, small and medium-sized enterprise: small companies that require specially adapted measures. The Directive leaves it up to each Member State to define these terms. For MSMEs, the States are not obliged to treat affected parties in separate classes. This type of enterprise is determined by size, according to the law of each State: turnover or number of employees. These enterprises are operated as commercial companies or, more often, by individual entrepreneurs. A recommendation was adopted on this subject by the European Commission (Rec. N° 2003/300/EC of the EC of 6 May 2003). The definition and criteria differ according to the law for the application of particular insolvency arrangements or, for example, for the application of the rules on employee representation or for the application of simplified accounting rules.

Preventive restructuring frameworks: mechanisms or procedures allowing a debtor in difficulties to restore their business to a healthy state by negotiating with its creditors. A temporary stay of individual enforcement actions can be ordered within this framework, with the aim of facilitating an agreement. These mechanisms and procedures are intended to avoid or address the debtor's insolvency

Protection for financing: guarantee granted to a creditor to ensure that the financing they provide to the debtor is not voidable or unenforceable and benefits from a priority rank in the event of the subsequent insolvency of the debtor, and to avoid them incurring civil, administrative or criminal liability.

Restructuring plan: a set of measures proposed by the debtor or, in some cases, by a creditor with a view to re-organising a company experiencing difficulties. Such a re-organisation will involve the restructuring of its debts, spreading debts, the modification of the share capital with, where appropriate, the conversion of claims into shares, the disposal of certain assets or a branch of the business, and redundancies. The plan may also include the sale of the company as a whole or shares in the debtor company. The plan must provide for the financial commitments made by the directors or by guarantors to ensure its effective implementation. A practitioner in the field of restructuring or an insolvency practitioner will be appointed by the judicial authority to implement it.

Unfair prejudice or unfairly prejudice the interests of creditors: one of the planned conditions that can lead to a restructuring plan being challenged or rejected, when new financing is needed to implement the plan (Art.. 10). The judicial authority must ensure that this new liability does not cause any unfair prejudice or unfairly prejudice the interests of creditors. The appreciation of this prejudice is a matter for the judicial authority at the time of confirming the plan.

Valuation of the debtor/valuation of the enterprise: calculation of the value of the enterprise in difficulties. If a restructuring plan is rejected by the affected parties, the judicial authority can confirm the plan under certain conditions. A valuation of the enterprise as a going concern can assess whether the creditors opposed to the restructuring plan would be deprived of any payment if the normal ranking of the creditors in the liquidation procedure were applied. This valuation can be determined by an expert if it is challenged and finally approved by the judicial authority (Art. 14).

A distinction is therefore made between its going-concern value and its liquidation value.

The going-concern value of an enterprise is determined by valuing assets taking into account its future performances in terms of financial flows, minus liabilities including off-balance sheet liabilities.

The liquidation value of an enterprise is determined taking into account the different intangible and tangible assets of an enterprise in difficulties as part of the liquidation procedure (foreseeable value of these assets in liquidation) minus the costs inherent to the liquidation as well as the estimated total liabilities, including the liabilities generated by the discontinuation of the business.

Workers: employees of an enterprise in difficulties or already insolvent whose interests and rights may be jeopardised by the opening of a preventive procedure or insolvency procedure. A restructuring plan must not affect their claims, which must be paid as if there were no restructuring plan. A plan may nevertheless lead to a modification of the number of employees, in order to restore the profitability of the business, which will need to be examined by the judicial authority. The Directive prescribes this examination if the plan involves the loss of more than 25% of the labour force (Art. 10). Thus, the staff representatives must be informed whenever a plan would have an impact on employment (Art. 13).



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