

## ETUC Position on Protecting Workers in the context of the Commission Proposal for a Directive on Preventive Restructuring, Second Chance, Insolvency and Discharge Procedures

Adopted at the Executive Committee Meeting of 14-15 December 2016

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### Main messages

- Wider EU reform of Insolvency Law is needed to address the increasing abuse of insolvency law.
- The focus of the Directive should be on the protection of workers in restructuring and insolvency situations but not on banks or to give preferential status to banks.
- The EU Commission should use the opportunity of this Directive to combat the increasing use of tactical insolvencies as a means to deny workers their rights and entitlements;
- The Directive should explicitly guarantee the workers' right to receive their wages (i.e. remuneration and other payments or awards arising from the employment relationship) in full and without delay;
- The Directive needs to ensure that workers' pension funds are fully safeguarded;
- Of particular concern are the proposals for 'cram-down of dissenting creditors' and 'cross class cram-down' this could have serious implications for workers' interests and insufficient safeguards have been provided;
- The ETUC rejects any direct or indirect interference with employees' ranking as preferential and secure creditors; of particular concern is the possible indirect impact of financial restructuring on the preferential status of the workers claims;
- The Directive needs to provide for improved protection for workers. In particular, workers' must have the right to be represented by their trade union, to be kept informed and consulted in a timely and proper manner by the company, restructuring agreements must be properly negotiated and agreed, and workers must to be able to protect their interests through the exercise of their right to collective action. Experience from the past highlights that of this all must be explicitly guaranteed in the Directive; along with
- Safeguarding Directive 98/59/EC on Collective Redundancies and Directive 2001/23 preserving terms and conditions of employment in case of transfer of undertaking during insolvency proceedings;
- Directors, entrepreneurs and insolvency practitioners must be held accountable and more dissuasive sanctions are needed to ensure compliance, especially in respect of workers' rights.

## 1. Context

In its Single Market Strategy communication of 2015, the Commission had announced a legislative initiative in the area of insolvency in order to provide a « regulatory environment that is able to accommodate failure without dissuading entrepreneurs from trying new ideas »<sup>1</sup>. A proposal for a Directive on preventive restructuring and second chance has been published on 22 November 2016<sup>2</sup>.

The rationale for such an initiative is an economic and financial one rather than the perspective of protecting jobs or workers. According to the Commission, costly and lengthy restructuring frameworks and insolvency proceedings lead to a high amount of accumulated private debt. The ECB, assesses the amount of what they refer to as 'non-performing exposures' to be €980bn. This creates a sub-optimal level of investment, along with difficulties in making a new start and overall loss of growth, jobs and competitiveness.

The Commission had in 2014 issued a soft law instrument, encouraging Member States to adopt a framework for preventive restructuring as well as discharge periods for « honest » bankrupt entrepreneurs which would allow them to have a second chance<sup>3</sup>. Dissatisfied by the implementation of this Recommendation, the Commission now intends to enact binding principles in the form of a Directive.

EU insolvency law is of great importance to the European trade union movement. Throughout Europe, and especially in times of crisis, workers are feeling the consequences of unfair insolvency rules that leave them dismissed without notice, prior consultation or payment of outstanding wages, redundancy or any other entitlements due to them. The ETUC is seriously concerned about the increasing use of « tactical insolvencies », deliberately used to evade responsibilities under labour and tax law. Without adequate protections, there is every danger that unscrupulous employers will also seek to use the restructuring rules to undermine collective agreements in particular.

The introduction of an EU framework on insolvency rules must therefore be welcome to the extent that it seeks to ensure that workers and their interests are properly protected. The proposed new rules will give a period during which the company can explore all opportunities to provide for its survival. During this period the company may stop creditors from forcing that company into insolvency and provide much needed breathing space for a restructuring plan to be put in place, helping to save jobs.

However, the proposed draft of the Directive presents a number of problems for workers. Our main concerns are four-fold. First, while we fully support that the law should attempt to save businesses and jobs, this needs to be the subject of full information, consultation and agreement with the workers and their representatives. Workers representatives are best placed to distinguish genuine economic difficulties from mere « tactical insolvencies » and their support for any new organisation arrangements is key. Secondly, it is highly problematic to treat workers' wages more or less the same as all other outstanding claims, all steps must be taken to ensure that workers receive their wages (and other payments or awards) in full and without delay. Workers must retain their preferential creditor status, despite assurances to the contrary, this status is currently jeopardised by the proposals for refinancing. Thirdly, cross-class cram downs have the potential to unfairly impact on workers and in particular the application of collective agreements. Lastly, the EU legislator has a special responsibility to ensure

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<sup>1</sup> COM (2015) 550

<sup>2</sup> COM (2016) 723 final. This proposal for a new Directive must not be confused with the on-going discussions in the European Parliament modifying an annex of Regulation 2015/848 on private international law rules applicable to insolvency proceedings ('the Zwiefka report'). The European Parliament report is very technical in nature and does not raise political questions.

<sup>3</sup> C(2014) 1500 final

more sustainable corporate behaviour throughout the Union, this requires more independent oversight, explicit duties and dissuasive sanctions on directors, entrepreneurs and insolvency practitioners to ensure against abuse.

## **2. ETUC DEMANDS**

### **2.1 Saving jobs**

Preventive restructuring plans can be welcome when they are agreed by the workers. Particular measures are needed to ensure that workers' have access to their trade union representatives and trade union representation throughout the procedure, including access to the early warning procedure envisioned by the Directive. Workers' representatives must be informed and consulted; they must have the right to introduce alternative plans in order to safeguard employment and have recourse to expertise for counterproposals. This is a key way to avoid abuses. Workers representatives often have the best understanding of their company's abilities and the likelihood of success of the new plan.

The proposals need to be amended to ensure that restructuring plans do not interfere with occupational pension funds or the rights of members (active, deferred and pensioners).

The proposed Directive treats financial restructuring and organisational restructuring as if they are the same. There are two problems with this approach. Firstly, the issue of organisational restructuring is a matter properly falling into the competence of the social partners and should be referred to the social partners in the first instance. Secondly, the proposal seems to provide that organisational restructuring will be achieved through a vote of creditors rather than through normal industrial relations. Such an approach is radical and far reaching; it will destroy many hard-won rights and will be strongly resisted by the ETUC. Organisational restructuring is a complex matter. It is covered by a substantial network of provisions safeguarding employees' rights some of which are established in EU Directives, others are set out in ILO Conventions and reinforced in industrial relations and collective bargaining law and practice at Member State level.

The ETUC underscores that grave violations of the fundamental right to collective bargaining and the right to strike will occur if workers are obliged by law to comply with a restructuring agreement especially when they have had no voice, no role to play and the changes are unilaterally imposed on them.

The ETUC therefore insists that the following points are included in the Directive:

- Where restructuring plans entail changes in the work organisation or to employment contracts and collective agreements, the proposed Directive must explicitly guarantee workers' rights to information, consultation and agreement throughout all stages of the procedure. It is not sufficient to simply state that the Directive is without prejudice to the EU acquis on information and consultation. The EU legislator must ensure that sustainable and inclusive procedures are put in place. This means in particular that a restructuring plan dealing with remuneration and conditions of employment cannot become legally binding in the absence of meaningful consultation and agreement of the workers. Employees' trade union representatives must be in a position to introduce alternative restructuring plans in order to safeguard employment and have recourse to expertise for counterproposals. Furthermore, the Directive must ensure that the early warning tools that are made available to the company are also made available to employees' representatives;

- The Directive needs to provide certainty about the need to respect normal industrial relations systems;
- The Directive must explicitly guarantee workers' right to protect their interests through collective bargaining and collective action, including strike action in accordance with Articles 27 and 28 of the Charter of Fundamental Rights;
- The Directive must ensure that information and consultation rights are reinforced and guaranteed in the process, this must include an obligation on the employer or controller of a significant asset to inform of any planned disposal which could have an impact on employment and/or affect ability of workers to recover their wages should the company become insolvent;
- The Directive must ensure that occupational pension funds are not interfered with;
- There must be a requirement for a full audit of workers' pay and conditions prior to the restructuring process;

## 2.2 Securing workers' claims

The ETUC will reject any interference with workers' ranking as preferential and secure creditors. It is worth recalling that the impact on workers is generally greater than on other business creditors. It is for that reason also, among others, that workers are rightly given preferential creditor status in debt recovery in liquidations. It is well settled and established that the rationale for this is the fact that they are almost totally financially dependent on the income from their employment and the fact that their position is relatively weak when attempting to secure payment from their employer enterprise or undertaking when it is insolvent. It is for those reasons also that they are given access to state social protection funds where insolvent employments have not paid such debts.

The Directive must unequivocally clarify that workers' wages and other entitlements have preferential status, above all others, in both restructuring and insolvency situations. Of particular concern is the indirect impact on the new financing agreements on assets that would otherwise have been used to secure the outstanding wages of the workers should the company become insolvent. It is worth recalling that as co-legislators, the European Parliament and the Council have already entrusted the Commission with the task of identifying « further measures in order to improve the preferential rights of employees at European level <sup>4</sup>».

The proposal foresees that during a restructuring plan, company's debts can be suspended for a period – a stay on enforcement, without the workers being aware of it. This includes workers' wages and other entitlements. The provisions in the proposed Directive, relating to the stay of enforcement must therefore be amended with a view to ensure that workers continue to receive their financial entitlements in full and without delay. The Directive should provide that Member States may put in place appropriate schemes to assist the employer to meet these obligations rather than providing ways to justify reducing wages. Without adequate safeguards, the application of a 'stay on enforcement' is likely to mean workers will lose out on wages, notice entitlements, accrued holidays, bonuses, pension and other entitlements or awards made in respect of the employment relationship. A mere reference to Directive 2008/94/EC does not provide sufficient guarantees that outstanding claims are to be guaranteed in full and without delay. Indeed, the Directive seems to enable Member States to change the workers' wages and other interests as part of the Restructuring Agreement.

The Directive needs to ensure that the structural protection for workers on national level through judicial control or administrative control cannot be circumvented. In addition 'creditor bodies' involving worker representatives need to be recognised within the Directive and their role protected.

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<sup>4</sup> Recital 22 of Regulation 2015/848

The Directive allows that redundancy may be part of the restructuring plan. It is desirable to provide clarity about the right of workers to have notice and the application of the Directive on Collective Redundancies (Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies).

The Directive must ensure that workers are treated in a separate class of their own. This should be mandatory.

Of particular concern are the proposals for 'cram-down of dissenting creditors' and 'cross class cram-down' this could have serious implications for workers' interests and insufficient safeguards have been provided

### **2.3 Ensuring more sustainable corporate behaviour**

The ETUC is concerned that the rules around « second chance » are so lax that they would further encourage unsustainable corporate behaviour. It is highly questionable whether controllers of a company that becomes insolvent by reason of their own acts or omissions should be relieved of their failure and debts and immediately re-establish themselves carrying on the same business and still availing themselves of the privilege of limited liability. There should be no second chance for those companies seeking to circumvent employment law, engage in unfair competition or operate in a socially irresponsible manner for example by starting up and maintaining a nonviable enterprise.

The second chance proposals raise concerns about hasty, unnecessary and tactical closures of companies. « Tactical insolvencies » refer to the practice of the engineered closure of a company, often leaving employees high and dry with unpaid wages nor any notice of their dismissal. In some cases, there is a restart of the same business, after having disposed of staff and long-established terms and conditions of employment. The practice of engineered insolvency can take an elaborated form such as the pre-pack situation where companies are broken up and a secret receiver prepares restart after bankruptcy. A number of such scandals have emerged in recent years, causing grave injustice to thousands of workers and costing a high price to national social security systems (for instance Clerys a large retail store costing 460 jobs in Ireland (2015), Air Alitalia with loss of 1 100 jobs in Italy (2014-2015), the childcare company ESTRO in Netherlands costing 1000 jobs and lower terms and conditions of employment for the remaining 2500 employees (2014)).

The ETUC therefore demands urgent action on the following

- Supervision of directors' duties and liability must improve. Tests should be used to determine to which extent a director has acted in bad faith and irresponsibly. When disqualification orders for directors are issued in one Member State they should always be automatically prevented from managing businesses or undertakings in other Member States;
- Directors' duties should be defined, including having due regard to the interests of workers, other creditors and stakeholders in any restructuring or insolvency procedure. Failure to comply with directors' duties should be taken into account in determining the period and conditions of any discharge;
- Directors should be prevented from reducing the company's assets below the level necessary to discharge accrued liabilities to workers;
- Minimum standards rather than voluntary codes for Insolvency Practitioners should be established, including training and qualifications, licensing and registration, liability and a mandatory (not voluntary as suggested) code of practice;

- Particular measures to address abuse of insolvency should be included.
- Finally, the proposals will require Member States to collect data on the number of restructuring agreements and the content. The ETUC recommends the collection of the following fields of data: job losses, transfer of part or whole of the business, part redundancy, impact of restructuring agreements on workers and breaches of Directors obligations.

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