

**STRENGTHENING
WORKERS' VOICES
IN CASES OF**

INSOLVENCIES

GUIDELINE AND RECOMMENDATIONS
“MORE DEMOCRACY AT WORK STILL NEEDED”



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Brussels, August 2019



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1. CONTEXT – THE NEW DIRECTIVE ON PREVENTIVE RESTRUCTURING

In January 2019 the European Council, the Parliament and the Commission approved the EU Preventive Restructuring Framework Directive, published in June 2019.¹ This is the EU's approach to install "preventive restructuring" as a compulsory instrument and to harmonise insolvency laws and measures in all Member States. These now have a timeframe of about two years to implement the Directive into national law.

The objective of this Directive is to contribute to the proper functioning of the internal market and to the removal of obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment. These obstacles result largely from differences between national laws and procedures concerning preventive restructuring and insolvency procedures.

The Directive aims to remove these obstacles and provides a legal framework supporting workers' interests by ensuring that viable enterprises and entrepreneurs "*which are in financial difficulties have access to effective national preventive restructuring frameworks that enable them to continue operating **without affecting workers' fundamental rights and freedoms***" (as mentioned in the very first beginning in the Directive and as part of recital number one in the text).

The directive's emphasis on not affecting workers' rights can be used as a first reference point and test bench for unions and their experts within all discussions and potential decisions at national level on how to transpose the directive into national law.

1.1 The main outcome of the Directive

In the future, it will be easier for companies in financial difficulties to set up preventive restructuring measures beyond the insolvency proceedings. For example, a moratorium (also referred to as "stay") can be declared for a period of four to twelve months. During this period there is protection against enforcement measures by creditors and no obligation to file for insolvency. Although the management must file an application with the insolvency court, they then have time to work out a restructuring plan with the creditors. In certain cases, the court may appoint a restructuring administrator for monitoring purposes. Restructuring will be also possible against the will of individual creditors or groups of creditors.

1.2 The ETUC position on the Directive: More democracy at work still needed

In general, the ETUC welcomes a European revision of the regulation on insolvency proceedings but European legislators have missed again an opportunity to improve European-wide workers' participation rights within restructuring and insolvency procedures.²

The idea that democracy cannot end at the workplace is a fundamental part of the European Social Model. In addition to social dialogue and collective bargaining workers and their representatives can wield important influence within their work places via different instruments of workers' participation.³ These instruments all serve to enhance democracy at work and range from information and consultation rights at work, to cross-border information and consultation in European multinationals, to the representation of the workforce in governance at top company level. The idea of

1 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1023> on 26 June 2019, the Directive (EU) 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks, debt relief and prohibitions of activities as well as on measures to improve the efficiency of restructuring, insolvency and debt relief proceedings was published in the Official Journal (L 172/18) and thus entered into force. Now the two-year implementation period begins.

2 See the ETUC position on the final trialogue text of the directive from 22.01.2019 <https://www.etuc.org/en/circular/vote-insolvency-directive-no-another-missed-chance>

3 See the ETUC resolution on strategy for more democracy at work <https://www.etuc.org/en/document/etuc-resolution-strategy-more-democracy-work-0>

democracy at work is not a concept for “sunny days” – even in times of crises this concept is of stronger importance than ever before.

Thus, it is essential to improve the protection of workers against the threat of insolvency and to strengthen their position in the case of insolvency, especially where the risk that companies are becoming unable to meet their responsibilities towards their workers is increasing.

During insolvency proceedings workers need to be protected:

- > with regard to the continuity of their employment contracts;
- > by insuring that the conditions of whether businesses can continue to operate during insolvencies are acceptable to them;
- > by respecting their outstanding claims.



Source: PCG 2019

The ETUC had asked the legislators to ensure that (1) the participation of workers representatives would be guaranteed; (2) workers’ information and consultation rights would be respected as well as; (3) workers would be considered preferential creditors in the course of the preventive restructuring and insolvency procedures.

So far, national legislation enacts the rules in different frameworks between countries. Countries with a low insolvency standard referring to workers’ rights are currently competing on lowest standards. The Directive leaves now wide scope to Member States, which could significantly weaken workers’ positions within a preventive restructuring framework. The final text of the Directive, at the same time, offers some good potential in terms of workers’ outstanding claims and wages and aims to guarantee full national labour law protection, but there are a lot of not legally binding “**may**”-clauses in the Directive – for example, Member States may (!) choose to introduce a right for creditors or workers’ representatives to initiate a restructuring procedure.

1.3 The objective of this guideline

The European Trade Union Movement firmly believes that a well-functioning European insolvency framework with a focus on preventive restructuring can contribute to the safeguard of employment and workers' interests, but the main intention of this directive certainly is to support economic growth and cross-border investment. Having this context and economic driven motivation in mind, it is important for the European Trade Union movement to analyse the possible impact the new EU directive has on European workers' rights as well as to clarify the scope and leeway for transposition into national law. Doing so, means to identify cornerstones and hazards for the national implementation on behalf of the workforce's interests. This Guideline identifies a lot of these already mentioned weak "may" clauses in the Directive and includes ideas and recommendations on transposition of the Directive on preventive restructuring into national law.

Such issues were discussed with this project entitled "Strengthening Workers' Voices in Cases of Insolvencies" in 2018/2019 driven by the ETUC and financed by the EU-Commission. As an outcome of this project the following guideline for trade unions and workers representatives was set up.

These recommendations should help monitor the transposition of the Directive on preventive restructuring into national law and develop recommendations on how to deal with financial crises and insolvencies from the workforce' perspective.

Unlike EU Regulations, EU Directives are not directly effective and binding, but must be implemented through national legal acts in order to be effective. It is up to each Member State to decide how to transpose the Directives. They therefore have a certain margin of manoeuvre in transposing the Directive. These are the essential point for the European Trade Union Movement:

No downgrading!

This means on the one hand that a downgrading of the existing legal situation and a reduction of standards (especially on behalf of the rights and the involvement of the workforce in the procedures) has strictly to be avoided. As mentioned before, this tool can be used to detect vulnerabilities in the directive that can affect workers' interests on national level.

Going beyond legal practice!

On the other hand, this guideline offers further ideas and conceptional suggestions to do more, setting up new routines – beyond the existing legal situation. Our request is to strive for the introduction of additional provisions beyond the minimum re-quirements established by the Directive. (See for example chapter 3.6 and 3.7 und the practical hints in chapter 4)

The following suggestions were put forward through a variety of platforms, including a questionnaire/survey circulated among the participants of the project, through workshops in Berlin, Amsterdam and Paris as well as through the working groups of the final conference in Brussels, where both legal experts and trade union members gave their input during the multiple discussions.

2. THE SPIRIT OF THE DIRECTIVE FOCUSES ON PREVENTIVE ACTION

A financial crisis or even a company insolvency procedure that has been initiated is associated with considerable cuts and uncertainties for the affected employees, the works councils and the unions who represent the workforce's interests. The jobs in the company are partially or even completely endangered, future prospects are unclear and (remuneration) claims of the employees against the company may not be able to be realised or can only be realised in part.

Almost every company in its history has experienced several crises, which in the worst case could lead to its closure or at least to strong adjustment or preventive restructuring measures. Crisis processes can be triggered by external or internal factors, but in most of the cases there is a combination of both. The causes of corporate crises are complex. Personal failure in the actions of corporate management is complemented by structural causes, e.g. obsolete products and means of production, inadequate investments, processes, procedures and communication structures in the company.

Corporate insolvencies arise from different stages of crises which as a singular impact do not yet pose a threat to a company's existence, even though these crises usually lead to considerable adjustment reactions and restructurings in companies:



Source: PCG 2019

Such measures have considerable and negative consequences for the employees: personnel reduction, cost reduction, location and product-related performance restrictions, intensification of performance in the work process.

Latent crises can turn into acute crises, the chain of failed restructurings or even omitted restructuring measures can threaten the very existence of the company and enlarge the danger of insolvency.

In order to strengthen the employee representatives' options for action, it is crucial to identify corporate crises as early as possible. This approach is necessary because crises that threaten the very existence of a company can be

avoided by identifying the causes and drivers of a crisis at an early stage and furthermore by taking corrective and preventive action as long as there is time and space for action.

2.1 Early warning systems - a useful tool to identify financial crisis

The approach of early warning systems on monitoring potential crisis is fully in line with the new directive. According to Art: 3 (3) "Member States shall ensure that debtors and employees' representatives have access to relevant and up-to-date information about the availability of early warning tools as well as the procedures and measures concerning restructuring and discharge of debt." This is a very strong and positive point which deserves being monitored intensively.

OUR RECOMMENDATION I

Setting up early warning tools and guaranteeing access to workers representatives

Within the transposition of the directive into national law it should be monitored that this urgent aspect is covered.

The introduction of early warning systems and procedures into national law or collective agreements and established practices is demanded here, the access to the tools for workforce should be guaranteed! Try to ensure that an early warning system is in place when implementing the Directive, with all kind of meaningful information as mentioned under Art. 3 (3). With reference, for example, to the situation in Germany with a strong co-determination approach: up to now, there is no legal basis for information rights that meets these strong requirements of the Directive. Here and in other countries there is an urgent need for action.

Ideas from experts on how to implement an early warning system into national law and at company-level are very welcome to stimulate the debate across the European Trade Union Movement. For example, there was a discussion on this topic within the European Economic Social Committee (EESC), one of the discussed tools was to introduce a legal obligation for accountants to inform the works council directly in case of an impending bad financial position. A network from Works Council, external experts and unionist can launch a learning process on identify early warning approaches and tools. The approach should be to develop/derive a system of different figures and Key Performance Indicators (KPI) on company level in order to be able to get a precise, accurate and complete picture of the economic situation of the company on the basis of the information provided in regular meetings (e.g. once a month). Entrepreneurs and employee representatives should have the same level of information so that they can talk to each other on equal terms or even negotiate. Topics could be, for example, the economic and financial situation of the company, the production and sales situation, economic and market development, competitive and industry situation, the production and investment program; restructuring plans, closure of companies, dislocation of parts of the company etc.⁴

2.2 Support for worker's representatives on the assessment of the economic situation

According to Article 3 (5): "Member States **may** provide support to employees' representatives for the assessment of the economic situation of the debtor."

To analyse the financial and economic situation is only one side of this approach. Additionally, it is important that a specialized expert can provide recommendations to the workforce, for example, in terms of the extent to which the company has a perspective within a preventive restructuring procedure. And such support, however, should not be limited to economic experts only; access to legal experts selected by works councils and/or trade unions should also be granted. In addition to this it is important that workers representatives can benefit from the EWC information and

⁴ The ETUI offers for examples different types of trainings on these issues for Works Councils on European level.

consultation rights in order to have a satisfactory overview of the economic and social situation of the whole group (for example to avoid artificial insolvencies based on the group internal financial operations).⁵

OUR RECOMMENDATION II

Support by legal and economic experts should be granted

The assessment of a company's situation being in a crisis is really complex and can normally not be evaluated by the workers' representatives on their own. From the national and European level we know that information and consultation processes can be improved by the use of advisors and experts.⁶ Here the directive offers the possibility of using expert knowledge (Art. 3 (5)). Be aware on that important leeway for action - this aspect should be covered within the national legislation. Experts should be involved at every stage of the process (pre and post insolvency). The works council or the trade union, according to the country specificities, should be able to call in experts of their choice. This can be lawyers and/or business experts. They can tackle knowledge deficits the work councils may have. Financing such advice for employee representatives should be done by the company, particularly in absence of dedicated national or sectoral fund. Courts have to decide on the necessity in case of disagreement. In Austria and in some federal states in Germany, for example, state-run chambers of labour can also be used here.

2.3 Items for a preventive restructuring

Which requirements on behalf of the workforce can be important for a sustainable concept on preventive company reorganization?

- It has to be checked whether a comprehensible and consistent restructuring concept is presented by the company management or an insolvency / restructuring practitioner.
- Conclude regulations and agreements that focus on the implementation process of preventive restructuring measures and keep the influence of the workers' representatives on information and consultation open.
- Try to set up intensive and regular monitoring and evaluation of the restructuring and reorganization process.
- If possible, actively involve and support the workforce in the change process (e.g. qualification of employees).
- Respond immediately to undesirable developments.
- Restructuring very often takes place over longer periods of time, so that restructuring collective agreements (including for example waiver from the workforce about the payment) with the employer must also be process-oriented. This means: the agreements should contain passages that enable employees to regularly monitor – possibly with the involvement of experts – this period and, in the event of non-compliance with commitments, to cancel the agreement. The conditions and consequences for the withdrawal from an agreement must be specified.

5 See recital no. 37 of the European Directive 2009/38/EC on EWC: For reasons of effectiveness, consistency and legal certainty, there is a need for linkage between the Directives and the levels of informing and consulting employees established by community and national law and/or practice. Priority must be given to negotiations on these procedures for linking information within each undertaking or group of undertakings. If there are no agreements on this subject and where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged, the process must be conducted at both national and European level in such a way that it respects the competences and areas of action of the employee representation bodies. Opinions expressed by the European Works Council should be without prejudice to the competence of the central management to carry out the necessary consultations in accordance with the schedules provided for in national legislation and/or practice. National legislation and/or practice may have to be adapted to ensure that the European Works Council can, where applicable, receive information earlier or at the same time as the national employee representation bodies, but must not reduce the general level of protection of employees.

6 See the paper from Jan Cremers and Pascale Lorber "Transposition of provisions of the Recast Directive on the functioning of the European Works Council (2015). <https://www.worker-participation.eu/European-Works-Councils/Recast-Directive>

OUR RECOMMENDATION III

Our recommendation III: For the ETUC and its affiliates it is a clear position that there shall be no preventive restructuring measures without appropriate workers' participation as stakeholders. Works councils should be actively given the opportunity to make alternative proposals to prevent crises. The insolvency practitioner should be obliged not only to analyse the financial side of the preventive restructuring, but also to draw up a comprehensive continuation concept.

3. MATCHING WORKERS' INTERESTS**3.1 Workers' claims have to be protected during preventive restructurings**

In Article 1(1a) on the subject matter and scope of the Directive "rules on preventive restructuring frameworks available for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor" are laid down.

In Article 1 (5a) it is written that "member states may provide that claims are excluded from, or are not affected by preventive restructuring frameworks, here especially "the existing and future claims of existing or former workers" are mentioned.

This is a very important point. This weak "may clauses" provides leeway for national debates and actions – setting the course and a spirit for the implementation.

OUR RECOMMENDATION IV***Non-affecting the rights of employees by preventive restructuring measures***

The Directive must be implemented in such a way that the rights of employees as a whole are not affected/affected by the preventive restructuring. Art. 1 (5a) of the Directive must be taken into account due to political reasons, not undermining the position of workers in the national social and economic system! Try to influence that member states have to ensure that employee requirements are completely excluded from the restructuring plan. They must be actively involved as stakeholders but not as creditors.

In close relation to the debate on how to secure workers claims it is worth reading Article 6. Here it is referred to as a stay of individual enforcement actions. "Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework"

With a notice of enforcement, creditors threaten their debtors that they want to enforce their claims within a specified period of time by coercion. The Directive offers now the possibility of a stay (moratorium) as contribution towards a preventive restructuring. And here again is leeway for action as "*member States may 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 achieve the objective set out in the first subparagraph*".

"By way of derogation from the first subparagraph, Member States may apply paragraph 2⁷ to workers' claims if, and to the extent that, Member States ensure that the payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection".

7 Article 6 (2): "Without prejudice to paragraphs 4 and 5, Member States shall ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims"

OUR RECOMMENDATION V***Employees must be enabled to enforce their claims even in insolvency***

Employee related claims, such as remuneration claims, must be excluded from a stay, from the prohibition of enforcement, i.e. in other words, employees must be enabled to enforce their claims even in insolvency!

3.2 If workers' claims are not excluded – being a preferred class of creditors

For the worst case that workers claims will not be excluded in the transposition of the Directive (compare our demand according to Article 1 (5a)) workers may have the same status as other creditors. Here Member States should provide workers with a preferred status as compares to other creditors due to their vulnerability.

OUR RECOMMENDATION VI***Workers should be a preferred class of creditors***

Actors like Trade Unions should insist workers be treated as a preferred group during preventive restructuring proceedings for the cases that their claims will not be excluded due to the legal framework! Employee claims deserve particular protection and must therefore be served first before all other claims.

3.3 Preventive restructuring – Implementation out of the workforce's request

Article 4 refers on the availability of preventive restructuring frameworks – and here paragraph 8 is worth monitoring as “Member States **may** also provide that preventive restructuring frameworks provided for under this Directive are available at the request of creditors and **employees' representatives**, subject to the agreement of the debtor. Member States may limit that requirement to obtain the debtor's agreement to cases where debtors are SMEs.”

OUR RECOMMENDATION VII***Providing leeway for workers representatives to initiate a preventive restructuring process***

Member States must ensure during transposition into national law that employee representatives can also initiate a preventive restructuring process in any kind of company regardless of size.

3.4 The (mandatory) appointment of the practitioner

According to that Article 5 “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 their business” In addition to that it is written under Article 5 (2) that “where necessary, the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall be decided on a case-by-case basis, except in certain circumstances where Member States **may** require the mandatory appointment of such a practitioner in every case”.

OUR RECOMMENDATION VIII***Provide workers representatives consultations right towards the (preventive) restructuring practitioner***

Try to have an influence on the implementation into the national law that employees and their representative should be given specific information and consultation rights vis-à-vis the preventive restructuring practitioner neither if it is a mandatory appointment (as the directive gives leeway to decide on) or if it should be a case by case approach within the transposition into national law.

Strategies and positions vis-à-vis an internal self-administration of pre-insolvency restructurings fulfilled by the existing management vis-à-vis an external third-party administration should be clarified by each individual case, done by the employee representatives with the support of the trade unions and their economic experts. Should self-administration be given a chance in a specific case or should external administration be given preference?

Empirical knowledge indicates that Works councils can make a significant contribution to the continuation of a company out of an insolvency by contributing production or service knowledge towards the practitioner. Very often the workforce is able to identify and name problems in processes at workstations, organisation and management - pointing out possible economic solutions and alternatives, and possibly getting involved in the search for an investor.

3.5 Workers' rights shall not be affected by preventive restructuring

According to article 13: *"Members [sic. Member] States shall ensure that individual and collective workers' rights, under Union and national labour law, [...], are not affected by the preventive restructuring framework"*.

However, where wages and jobs are at stake, workers representatives should provide more than an opinion, not being just in a "back to the wall" negotiation. As Article 13 (2) points out: Where the restructuring plan includes measures leading to changes in the work organisation or in contractual relations with workers, those measures shall be approved by those workers, if national law or collective agreements provide for such approval in such cases.

Article 13 of the Directive points out that the individual and collective rights of employees are not affected by the preventive restructuring framework; the explicit naming and use of article 13 could be used to derive an increase/extension possibility for rights of workers representatives in relation to the status quo in the Member States. Otherwise the named standard in the Directive would only have declaratory significance, i.e. the requirement would be a special right for the preventive restructuring procedure⁸.

OUR RECOMMENDATION IX

Employees should be granted an explicit right of participation in a preventive restructuring process if they want to

Only a few strong participation rights can be derived directly from the Directive in total. Thus, for the implementation it is important to have not only a strong voting position on restructuring plans, employees should be granted an explicit right of participation in a preventive restructuring process

Workers are, as creditors, being placed on the same footing as banks or any other equity holders.⁹ Affiliates should try to use the opportunity of the transposition not just to maintain the existing rights and instruments, but to introduce new ones. Voting rights on organizational changes should be ensured (Article 13.2).

3.6 Setting up the creditors' committee including workers representatives

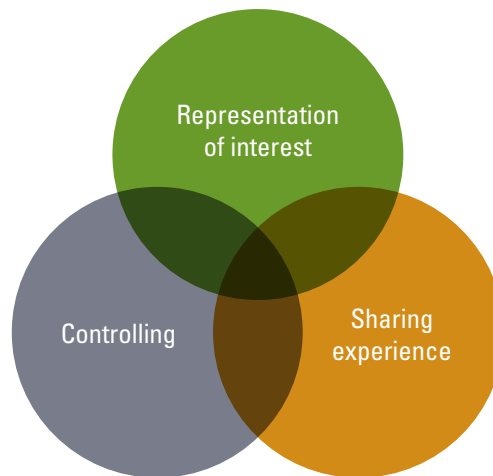
A number of good ideas emerged from the country workshops as part of the "Strengthening workers' voices in case of insolvencies" project, which are not reflected in the directive and its interpretations, but deserve to be discussed and implemented at national-level, for example the obligation for workers' representatives to take part in a creditors' committee.

Be aware of that no preventive insolvency measures should be decided without employees and/or unions being represented in the committees according to national rules!

⁸ According to a lawyer at the executive board of German IG Metall in the labour law department, also responsible for insolvency law."

⁹ This is a concern that the Committee on Employment and Social Affairs of the European Parliament originally had addressed.

Tasks of the workers' representatives in the creditor' committee



Source: Wellensiek for IGBCE Trade Union Workshop 2016

It should be voted by the workforce which actor¹⁰ has to represent the workers' interests within the creditors' committee as stakeholder. In the legal systems in which the institution of the creditors' committee is known, the establishment of a (provisional) creditors' committee should also be demanded for a preventive restructuring procedure. In any case, the early information and participation of employee representatives, i.e. instruments comparable to creditors' committees, should be demanded in all EU Member States.

The mentioned voting approach includes cases when practitioners can be chosen by a creditors' committee from a list or a pool of pre-approved experts provided by a judicial or administrative authority.¹¹ In choosing the practitioner 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, especially on behalf of the workers' claims. Being part of the committee at a very early stage, the workers reps can contribute to choose the most suitable and experienced practitioner.

In the legal systems in which the institution of the creditors' committee is known, the establishment of a (provisional) creditors' committee should also be demanded in the preventive restructuring procedure. In any case, the early information and participation of employee representatives, i.e. instruments comparable to creditors' committees, should be demanded in all Member States.

OUR RECOMMENDATION X

Go beyond the legal framework of the directive

The participation of workers' representatives is strictly necessary and should be implemented into national law as it is a very strong issue affecting the workers' perspective within (pre-) insolvency measures.

Creditors' committee:

For a long time one of the ETUC demands is to put in place a creditors' committee with the participation of workers' representatives, to monitor the operation of the business and the success of measures implemented for (preventive) restructuring.

¹⁰ Could be members of the Works Council assisted by an external expert and an unionist

¹¹ See the "Whereas Note" 40 on the Directive

Training:

Experiences from countries like Germany indicate that an appropriate training should be provided in order to equip employee representatives with necessary basic knowledge. Such skills are required when one is in need of navigating through all phases of an (pre-) insolvency procedure. Training and information sessions on the background of insolvency should be organised for trade unions full-time staff, voluntary multipliers and works councils to improve know-how. One member of the Works Council may be selected on voluntary basis and get trained to become a specialist on that topic. Some trade union manuals and brochures are already available.¹²

Employee representatives should know what the rights of workers in all phases of (also pre- and after) insolvency. If workers may lose their jobs due to insolvency, they should know about their rights based on Directive 80/987/EC.¹³

3.7 Possible content of trainings for workers' representatives

Within the context of such a training it should be discussed how workers' representatives can have an influence on the decision process and choose a workforce-orientated and experienced practitioner. In cooperation with national experts and unionist recommendations, a common check list for criteria for a "good practitioner from the point of the WC' view" could be developed based on the proposal on chapter 2.4. Such a training content has to be in line with the legal national framework and procedures. First, it would be important to know the rights of workers' representatives. Second, the transfer of knowledge about successful models in other restructuring projects might be helpful for workers' representatives, especially wherever wages and jobs are at stake. The provision of such a training to works councils and workers is very necessary, especially during financial crises or when they are faced with the threat of insolvency.

3.8 Stay of individual enforcement actions

According to Article 6 (2), "*Without prejudice to paragraphs 4 and 5, Member States shall ensure that a stay of individual enforcement actions may cover all types of claims, including secured claims and preferential claims*". In Article 6 (5) it is specified this regulation shall not apply to workers' claims. "*By way of derogation from the first subparagraph, Member States may apply paragraph 2 to workers' claims if, and to the extent that, Member States ensure that the payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection*"

Members states may already have included measures to secure workers interests when there is for example a remuneration guarantee system in place, having a same level of protection.

OUR RECOMMENDATION XI

Remuneration should be granted

A remuneration guarantee system is a very strong issue, providing a little bit more security for the employees in time of crisis. For example under the German law, in the case of the insolvency of their employer, employees receive money (payments) what is known as payment in cases of insolvency "Insolvenzgeld" to compensate for their loss of earnings. This money is paid by the Federal Employment Agency and financed by employers through the payment of a levy. German "Insolvenzgeld" is paid for a maximum period of three months. All components of remuneration are not always covered this type of funds or similar ones. But the question of similarity on levels of protection should be detailed / listed in each Member state legislation.

12 See the IG Metall paper "Bankruptcy, the employer in insolvency: What does that mean for employees?" https://netkey40.igmetall.de/homepages/virtueller-gewerkschaftssekretaer/hochgeladenedateien/materialien/pdfs/1_4_11a.pdf

13 Council Directive 80/987/EEC of 20 October 1980 relating to the protection of employees in the event of the insolvency of their employer

3.9 Securing workers claims when interim financing should be necessary

Within the Directive there are some regulations on the protection of new financing, interim financing and other restructuring related transactions (Art. 17 and 18). This is a good approach in general as fresh money and a higher liquidity rate can of course be necessary to set up a preventive restructuring framework and to keep business running. But this approach included in the directive needs to be monitored.

OUR RECOMMENDATION XII

Any priority protection of interim financing within preventive restructuring measures may not lead to a worse position of claims of the employees if afterwards an insolvency cannot be avoided

Rules on stronger protection of interim financing may not lead to a worse position for employees. Privileges for banks and financial creditors should only be implemented restrictively. A European-wide forum shopping and race to the bottom by some lower national standards has to be prevented.

Attention: There is a risk that there is “nothing left” for other creditors and employees when a preventive restructuring was not successful and the subsequent insolvency cannot be avoided. There occurs a danger that otherwise privileged creditors have previously secured their claims by legal opportunities (excessive power for new creditors) that are offered in some countries. Thus, their claims are secured in spite of the workers claims that may not be challenged.

3.10 Adoption of restructuring plans – the vote of employees and their representatives

“Member States shall ensure that affected parties have a right to vote on the adoption of a restructuring plan. Parties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan” according to Article 9 (2).

OUR RECOMMENDATION XIII

Employees as affected party must have a right to vote on the adoption of a restructuring plan

Having voting rights is a very important point on the concept of democracy at the workplace. Thus, it is important that there are not only information and consultation rights for the workforce but always substantial voting rights for this group as stakeholders and further possibilities to wield influence at any time and in that case concerning the further proceeding on a preventive restructuring.

3.11 Confirmation on restructuring plans by governmental authorities

According to Article 10 (1c), *Member States shall ensure that restructuring plans involving the loss of more than 25% of the workforce – when permissible under national law – are binding only if they have been confirmed by a judicial or administrative authority.*

The effect of Art. 10 (1c) can hardly be predicted. In principle, dismissals can only be made in accordance with the existing labour law. Therefore, the requirement of confirmation on the restructuring plan will be at its best an extra thin layer of protection for workers – the existing labour law of the Member States will still apply.

OUR RECOMMENDATION XIV

Confirmation of (preventive) restructuring action by a judicial or administrative authority when impact on the workforce is foreseen

Any (preventive) restructuring having an impact on the workforce should be confirmed by a judicial or administrative authority, furthermore this article provides again a strong argument that having

voting rights is a very important point on the concept of democracy at the workplace. It indicates that it is for the workforce as "first priority creditors" substantial to have voting rights on the impact and proceedings on (preventive) restructuring, to influence administrative or judicial decisions.

3.12 Avoiding abuse and tactical insolvencies

During the Country workshops, carried out within the framework of this project, it was recommended that workers and their representatives have the right to denounce abuses like tactical insolvencies (i.e. insolvency proceedings are abused in order to dispose of employee claims in a targeted and economically more advantageous way). This is a central and difficult issue, particularly in view of the directive.

As a rule, it is not possible to deny a creditor who is entitled to a claim and who can substantiate a reason for opening insolvency proceedings the legal interest in opening insolvency proceedings due to the state enforcement monopoly. If the application is made solely for the purpose of removing a competitor from the competition or "cheaply" getting rid of employees, it could be an abuse of rights. Workers should be able to exercise whistleblowing rights in this case. If the insolvency petition was obviously filed for tactical reasons, employee representatives should have the right to report it to the insolvency court.

OUR RECOMMENDATION XV

Denounce abuse

Workers' representatives should also have the right to effectively denounce and challenge tactical insolvencies by the owner or management. To cover this, it will be helpful that a mandatory appointment of an external practitioner will be implemented into national legislation (see Article 5). The owner and manager should be supervised by the insolvency court and the creditors' committee.

Abuse and tactical insolvencies can be avoided by several legal proposals, which include: (1) making restructuring via bankruptcy less attractive, for instance by applying the strong rules of business transfers; (2) involving workers and their representatives in the insolvency procedure; lay down strict requirements for filing a bankruptcy petition and for a restart.

The risk of abuse is closely linked to judicial control and the establishment of clear entry requirements. The lower the entry requirement, the more susceptible it is to abuse. It is questionable whether a subsequent control by the court can really compensate this.

3.13 Possibility of legal remedies

Article 16 offers the possibility to appeal: "*Member States shall ensure that any appeal provided for under national law against a decision to confirm or reject a restructuring plan taken by a judicial authority is brought before a higher judicial authority. Member States shall ensure that an appeal against a decision to confirm or reject a restructuring plan taken by an administrative authority is brought before a judicial authority.*"

OUR RECOMMENDATION XVI

Right to appeal

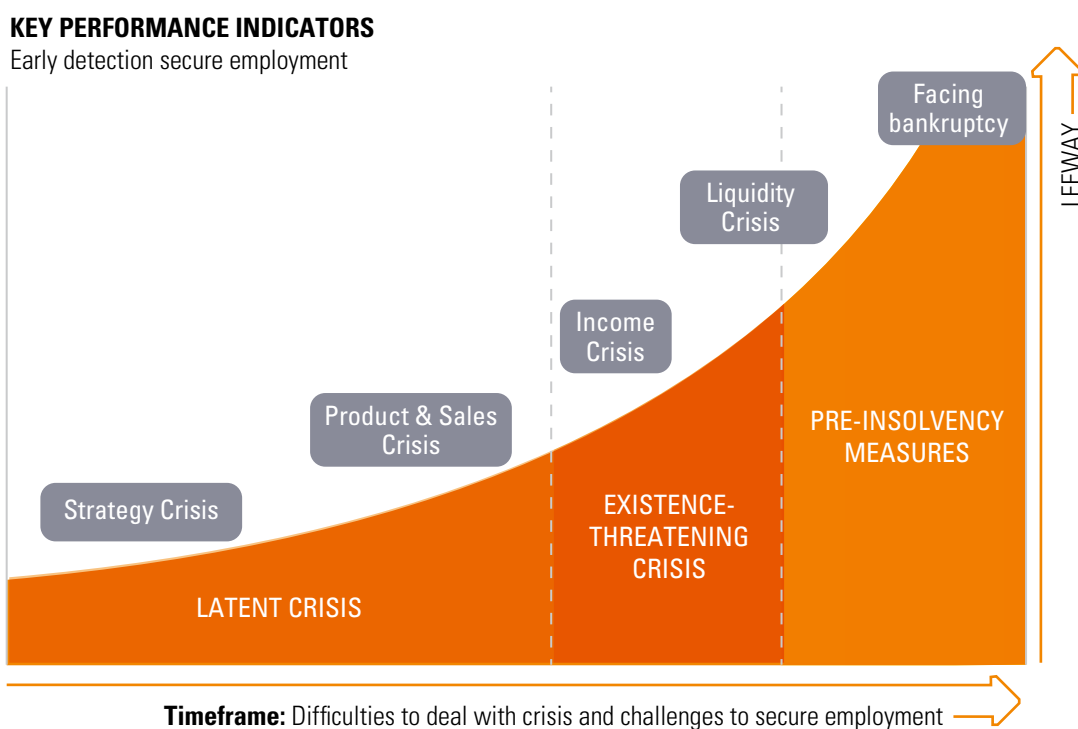
Works councils have to be involved in any preventive restructuring procedure!!
And in addition to that they should be entitled to appeal.

4 INCORPORATION OF WORKERS' REPRESENTATIVES – RECOMMENDATIONS

How is it possible to incorporate the Works Councils and the workforce into a (preventive) restructuring concept?

4.1 On-going observation of the financial situation at company level

Workers representatives should always try to observe the economic and financial situation and prospective development of the company or group. If possible, they should try to react to the most typical course of a company's crisis by getting in touch with the management. In order to strengthen the employee representatives' options for action, it is crucial that signs of company crises are identified as early as possible. Training for workers representatives on financial and economic issues as well on corporate strategy can be a suitable step to get acquainted with this complex matter.¹⁴



Source: PCG training material on financial analysis on behalf of the ETUI (2017)

The workers' representatives in the company should follow the task of ensuring clarity and transparency on the financial situation of the company/group. This matches the interests of the employees, working in a financially sound company with a sustainable future. Work Councils and/or Trade Unions (and their experts) are recommended to work closely together to define the depth of the information and to analyse the impact of trends and figures.

On the other hand – see diagram – more resources, i.e. money and time, are available at an early stage of the crisis to avert existentially threatening crises and to mobilize improvement potentials that simply need money and time to have an effect.

¹⁴ See as well the recommendations for German workers representatives in cases of insolvencies: "Notfallkoffer Insolvenz" by Rolf Plake (2015) for the Hans-Böckler-Stiftung

4.2 Setting up an early warning system

A first systematic assessment of the economic and financial situation can be done by a checklist which one can develop in general¹⁵ and adapted on company level. This can be a strong and useful instrument for the works council trying to identify crisis at an early stage and to consult about the preventive restructuring measures with the management side. Such a tool can be useful especially when the Works Councils do not have external economic experts on their side as it is the case in France or in Germany with the internal economic committee.

4.3 Analysing different types of data

What data should be analysed? The economic and financial situation and market data are essential fundamentals that can be used to identify a company crisis and to take steps for action. A distinction must be made between them:

Quantitative data in the sense of business management data that provide information on the development of the company's economic situation: Revenues, gross profit, contribution margin, costs and expenses and the company's result. The figures, data and facts result from the monthly reporting (e.g. monthly financial statements / profit and loss account, economic evaluation and quarterly results).

Qualitative data which result from assessments of operational processes or which can be identified by observation of operational processes.

The increasingly filling stock of finished material, lack of primary material, poorer quality, customer complaints or the faltering payment of supplier invoices - the perception of these processes in the company is important starting points for questions and discussions between the works council and the company management. In the end, it depends on the analytical combination of both aspects in order to be able to assess the crisis scenarios with the members of the workers committee.

4.4 Setting up a dialogue on the financial situation with the management

The economic and financial situation of the company should be the subject of regular discussions between the worker's representatives and the employer – e.g. through so-called monthly meetings.

4.5 Cooperation with experts

Strengthening the workforce's interests should be an important objective by using existing tools on information and consultation to prevent an insolvency and to achieve (at least partial) job security. This objective can only be achieved through intensive cooperation between the works council, employees, the trade union and external expertise - before entering into consultations with the management.

Further practical ideas:

- Discuss the situation and procedure in your committee with the expert and monitor on as continuously as possible.
- Submit workforce related questions towards management
- In the committee, answer yourself questions to your own assessment, discuss them and evaluate the result.
- Discuss all issues with the relevant trade union secretary.
- Evaluating the findings and define an internal communication strategy to ensure the involvement of the workforce.

Such an approach is closely linked to information and consultation rights and negotiations on necessary steps trying to implement a preventive measure – e.g. by developing a restructuring plan.

15 See chapter 2.1

EXAMPLE ILLUSTRATION**WORKERS MAKE THE DIFFERENCE I****The Insolvency of Chocolaterie de Bourgogne**

When the company Chocolaterie de Bourgogne enters into receivership, this procedure comes too late, the factory is practically at a standstill, a large part of the staff is partially unemployed, and stocks are close to zero. Shareholders have wasted precious time by focusing for many years on legal and financial engineering and not on the construction of an industrial and commercial plan.

At this stage, it is not clear that the company is able to ensure the payment of wages for the first month of the proceedings and, even if the Court will authorise new liabilities, it is therefore urgent to find a buyer in only a few weeks.

In this context, employee representatives appoint an expert in accounting analysis to assist them and are heard at each stage by the competent Court. Behind the scenes of the judiciary, they inform workers of developments and ensure that the social climate does not deteriorate in order to maintain activity. They look for and meet candidate buyers in the absence of both management and the receiver, they analyse the projects and their impact on employment with their expert. They will then be able to partially support the takeover project finally adopted by the judges and ensure that as many jobs as possible are taken over. The employee representative body will also negotiate in advance an agreement on economic redundancies and measures to support a part of the staff in finding a new job. The Chocolaterie de Bourgogne did not close and has started a progressive economic recovery.

4.6 Identifying a reasonable insolvency / preventive restructuring practitioner

The orientation and professional experience of the practitioner is a key factor in accelerating the continuation and restructuring options of a company in financial crisis. In proceedings with a third-party management, the practitioner has a strong role both in the opening and in the proceedings themselves with far-reaching competencies.

They step into the role and responsibility of the management, even if they often cooperate with the “old” management for this purpose. As a rule, they do not have industry-specific knowledge and customer relations or the technical knowledge required for the operational management of a company. They are specialists in the restructuring process and are required to foster good communication, cooperation and compromise between companies, business parties and company creditors.

Therefore, the works council should seek close cooperation with the practitioner (and vice versa). A “decent” insolvency administrator is characterised by

- › Transparency about the strategy, attempt and direction of business continuation.
- › Readiness for a continuous dialogue Openness throughout the process / basis for confidential cooperation.
- › Partnership-based cooperation “at eye to eye level” with the workers reps. committees and the Union.
- › Time and content presence in the process.
- › What experience and networks does the insolvency administrator have?
- › Reachability, distance and control towards management.
- › In the case of staff reductions: job-transition for employees¹⁶ should be a standard in line with national regulations.
- › Developing fair social plan conditions.
- › In the case of restructuring: focus on sustainability of the business concept and on employment.

16 Such services would be that an employee made redundant due to restructuring or insolvency would make a successful transition to another meaningful and rewarding job. This is entitled as ‘job transition’.

4.7 Workforce can provide their own expertise towards the practitioner

The experience, knowledge and commitment of the workforce are important factors in defining the necessary restructuring strategy and in developing and implementing a sustainable restructuring concept. Decent insolvency administrators make use of these factors and seek close cooperation with employee representatives, not least in order to maintain production and operational processes as smoothly and efficiently as possible. Employees and works councils can make important contributions concerning the identification of major errors and their causes within the company. A decent restructuring expert is measured by whether they take these aspects seriously, take hints and information from the Works Council or the workforce and use their input for the business continuation objective.

On this basis, a viable concept which has a realistic chance of being implemented can be developed. Deriving alternative concepts by the workforce to secure jobs and protect the business shall be taken into consideration in the process in such a time and in such a fashion that they stand a good chance in the decisions making processes. Therefore the information and consultation rights must be used extensively by the Works Councils and the workforce. This provides employee representatives with the necessary information. Secondly, there must be a permanent and fruitful exchange between workers' representatives, Trade Unions, management and the experts / practitioners.

4.8 The role of the Supervisory Board

A further important employee representatives' objective should be to use their influence in Supervisory Boards too. Supported by experts, they can try to submit proposals that, on the one hand, are constructive in terms of overcoming the crisis but, on the other hand, also promote employee protection.

EXAMPLE ILLUSTRATION

WORKERS MAKE THE DIFFERENCE II

The Insolvency of the Group Praktiker Bau- und Heimwerker GmbH

Various causes led the Praktiker Group into the crisis and ultimately into insolvency.¹⁷ The works council of Praktiker had many opportunities to exert influence in the procedure.

The employee representatives on the Supervisory Board were provided with early information on the seriousness of the situation and contributed to the simultaneous information of the Group Works Council and the economic committees.

The works council had the opportunity to create transparency for all co-determination bodies inside the Group. The participation of employee representatives in the provisional creditors' committee made it possible to be assertive for employee interests. The proposal and selection of the provisional insolvency practitioner by the vote of the works council was in line with the German law on insolvency and as well as subject to co-determination. The regular, trustful and direct communication of the workers reps. with the insolvency practitioner can be described as positive factor dealing with the whole procedure of the insolvency from the employees' perspective. The insolvency practitioner gave green light to establish direct contact with potential investors in order to convince them of a takeover. Thus, the works council was enabled in this difficult situation to make full use of the possibilities offered by the legal framework in Germany.

¹⁷ The case is described on detail in the final Report of the project "STRENGTHENING WORKERS' VOICES IN CASES OF INSOLVENCIES" for the ETUC final conference in Brussels, 29-30 APRIL 2019

4.9 Alternatives – Continuation of business activities by an employee-buy-out

What could be worthwhile within the discussion about setting up alternative concepts for business continuation is the approach that employees may occur as investors on the company. The cooperatives of workers in France have proved to be a successful solution in a number of cases.

A buyout is a complex affair. In a buyout the workers' representatives have to consider many things with which works councils are often unfamiliar. But that doesn't mean they can't acquire it. And they can organize help by lawyers and economic experts to support works councils and the workforce. With every buyout, there must be a viable concept that offers prospect of success. To achieve this, works councils must examine the company. Workers representatives have to orient themselves on the hard figures, otherwise such a buyout can quickly backfire.

There already exist some good and successful examples across Europe about which experts from Trade Unions can inform Works Councils.

5. MAIN CONCLUSIONS AND SUMMARY

The most important aspects on the future status of employees in preventive restructuring proceedings, restructuring proceedings and insolvencies can be summarized as follows:

- Workers' representatives should be involved at an early stage via their statutory information and consultation rights. They should also have the right to initiate a preventive restructuring process in the company when they deemed it necessary to protect their claims. But at the same time they should have the right to appeal to the court.
- Employee claims should not be included in the moratorium (stay) or in the restructuring plan.
- Every workers' representatives body affected by preventive restructuring or insolvency should seek close cooperation with the practitioner and offer a solid basis for exchange and cooperation.
- In addition to satisfaction of creditors' claims, company and job retention should also be anchored as procedural objectives in the national legislation.
- Any kind of restrictions on labour law in the event of insolvency must be avoided.
- Remuneration payments have to be secured. It is necessary to protect them against insolvencies.
- In case of insolvency, financial solutions to implement social plans and potential job transfers should be highly prioritised.
- The workers' representatives should have facilitated access to external experts to reinforce their position into consultations, negotiations and proceedings. This access should also apply to the preparation of alternative proposals to company management plans. The cost shall be on the company or on a dedicated sectoral fund for small companies.

NOTES

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