Association
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DRAFT EUROPEAN BUSINESS CODE

Book 7

INSOLVENCY LAW

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Introduction

The text of the introduction is to be taken out of the code and integrated into a general presentation document for distribution.

A common insolvency law would make it possible to have a largely integrated market favouring the granting of credit by avoiding, in particular, the risks of forum shopping, which call into question the predictability and legal certainty of creditors. The drafters of Directive (EU) 2019-1023 of June 20, 2019, which has embarked on this path, have moreover emphasized in its Recitals the disadvantages of differences between national laws for the functioning of the internal market.

Moreover, we believe that the health crisis that has hit Europe calls for a common approach. This should lead to the establishment of the principles of a legislative framework offering new opportunities for recovery for those companies most severely affected by the Covid-19 pandemic, particularly small businesses.

Directive (EU) 2019-1023 of June 20, 2019, an exceptional opportunity. The harmonization of insolvency law is complicated by the fact that it is interwoven with other areas of law (securities law, labour law, criminal law, etc.). What's more, although French and German law are similar in various points, they differ significantly in other aspects. The Directive requires Member States to set up preventive procedures, with which French law is very familiar, and which can therefore inspire a unified law on this point. But it also requires the introduction of groups of creditors, a mechanism which German law has already put in place, and which therefore inspired the present draft. We might also mention the provisions of this European text relating to rebound.

The proposed harmonization directive of December 7, 2022: a complementary contribution

This harmonization is also one of the objectives of the proposal for a directive presented by the European Commission on December 7, 2022 "harmonizing certain aspects of insolvency law".

General principles

The proposed text first deals with a number of jurisdictional and procedural issues common to all mechanisms for preventing and dealing with companies in difficulty: eligible debtors, competent judicial authority, insolvency professionals, creditor representation and supervision of the procedure.

The text then goes on to deal separately with four different procedures: two preventive procedures on the one hand, and on the other, two classic procedures, a judicial recovery

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procedure and a judicial liquidation procedure, the latter two procedures alone being referred to as insolvency procedures.

An amicable prevention procedure, of a contractual nature, for which the recommendations of the Directive have been introduced. On this point, French law is little affected by the project.

To this preventive procedure a non-judicial option has been added. It was inspired by the reform of the German Insolvency Code, in which the debtor leads the procedure, being required only to notify its request to the competent court and to take the case to court only when applying for a stay of individual enforcement actions and the validation of a plan.
A judicial restructuring procedure, which, under the control of the judicial authority, aims to organize the recovery of a company that is not yet insolvent; this procedure is close in spirit to the French sauvegarde procedure, while implementing rules provided for under German law, which allows insolvency proceedings to be opened when the threat of a company´s insolvency is imminent. Provision is also made for the plan to be adopted by groups of creditors, as provided for in the 2019 directive. These provisions have been introduced into German and French law, which obviously inspired the project on this point.

This procedure is based on the general principles of insolvency proceedings, again with the establishment of groups of creditors. If recovery appears impossible, this procedure is immediately converted into liquidation, to avoid increasing liabilities to the detriment of creditors.

A judicial liquidation procedure if recovery of the insolvent company appears impossible; the rules for realizing assets or transferring the company are in line with French and German law. Claims are classified according to an order that appears broadly comparable between national laws, except on points (especially mortgage claims and preferential claims) where an option appears preferable.

Finally, simplified judicial liquidation for micro-businesses.

A draft text that can be applied flexibly, while respecting national laws

The draft contains harmonized standards on points where such harmonization appeared possible. It remains open on certain questions in the form of options, whenever the differences have revealed serious harmonization difficulties which seem insurmountable at this stage. This concerns general standards: the authors of the draft recommend dissociating these harmonized general standards from the rules of implementation, which should be left to the discretion of each national legislator, whether through an implementing decree or a specific introductory law. This option seems likely to facilitate the adoption of a common text.

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Certain matters have been deliberately left outside the scope of the Code, due to the complexity of the rules or their links with other provisions, such as criminal sanctions, group rules or private international law provisions. It is expressly provided that the legislator of each State may apply all or part of the provisions of the Code to natural persons who are not self-employed.

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INSOLVENCY LAW

Preliminary article.
This Book introduces four procedures for dealing with business difficulties:

One amicable non-judicial prevention procedure and three judicial procedures:

Judicial restructuring proceedings, judicial recovery proceedings and judicial liquidation proceedings.

These procedures also include a preventive mechanism without prior intervention by the judicial authorities, and a simplified liquidation procedure for micro-businesses.

Judicial restructuring, judicial recovery and judicial liquidation proceedings are considered insolvency proceedings within the meaning of Regulation (EU) 2015/848 of May 20, 2015.

In the present text, "debtor" is taken to mean both the company when it has a corporate form and the entrepreneur when it carries out its activity on an individual basis, as well as any person whom the provisions of national law consider to be a debtor.

TITLE 1 : COMMON RULES

CHAPTER 1 : GENERAL PROCEDURAL REQUIREMENTS

Article 7.1.1.1. Eligible debtors.

The procedures governed by the present text are applicable to natural persons and legal entities under private law exercising an independent commercial, industrial, craft, agricultural or liberal professional activity as defined in article 1.1.2 of the Code.

National law may provide for the application of some or all of the provisions of this text to natural persons who are not self-employed.

The above-mentioned persons are referred to in this text as the debtor.

Comment:
The draft text proposes to cover all types of activity: "commercial, industrial, craft, agricultural or liberal", even if in some countries they are not covered by the same provisions.

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The choice was made to limit the scope of the text to persons exercising a professional activity, and to leave it up to States to decide whether they wish to extend the application of the text to natural persons not exercising a self-employed professional activity.

Article 7.1.1.2. Territorial jurisdiction.

The judicial authority in whose jurisdiction the debtor has the center of its main interests is competent to hear proceedings governed by this text.

The center of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.
In the case of a company or legal person, the place of the registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to the jurisdiction of another court within the 3-month period prior to the request for the opening of insolvency proceedings.

In the case of an individual exercising an independent business or professional activity, the center of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. That presumption shall only apply if the individual's principal place of business has not been moved to the jurisdiction of another court within the 3-month period prior to the request for the opening of insolvency proceedings.

In the case of any other individual, the center of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to the jurisdiction of another court within the 3-month period prior to the request for the opening of insolvency proceedings.

National law may set up specialized courts, depending on the size or structure of the company.

This article shall be interpreted in accordance with the provisions of European law relating to the debtor's center of main interests.

Comment:
This article is a repeat of article 3.1 of Regulation (EU) No. 2015/848 of May 20, 2015, adapted in a domestic law context.

The last paragraph could apply to the head office of a group's parent company.

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Article 7.1.1.3. Verification of competence. Judicial review of the opening decision.

A judicial authority seized of a request to open insolvency proceedings shall of its own motion examine whether it has jurisdiction pursuant to article 7.1.1.2 and national rules of domestic jurisdiction.

The judgment opening proceedings governed by the present text specify the grounds on which the jurisdiction is based.

The opening decision may be appealed to the competent court of appeal, by the debtor, the creditors or an authority empowered by the provisions of national law.

Appeals must be lodged within two weeks, unless national law provides otherwise.

This article shall be interpreted in accordance with the provisions of European law relating to the debtor's center of main interests.

Comment:
Par. 1 and 2: This text is inspired by article 4. 1 of Regulation (EU) no. 2015 /848 of May 20, 2015, adapted in a domestic law context.

Paragraph 3: appeal procedures.

Par. 4: The commencement of the time limit will have to be set by the provisions of national law according to the publication of the opening decision and, where applicable, the parties' knowledge of the decision. The commencement of the time limit for a debtor present at the hearing may be different from the respective commencement of the time limit for a creditor, for example.

Article 7.1.1.4. Publication.

The decision to open one of the insolvency proceedings governed by this Book shall be entered in the register in which the debtor is registered and, where applicable, in the register kept by the competent national authorities. It shall also be entered in the register provided for by the provisions of European law relating to insolvency registers. The provisions of national law must allow for the interconnection provided for by the provisions of European law relating to the interconnection of insolvency registers.

The opening decision must be made available in electronic form.

It is also published in a legal gazette.

The costs of advertising and registration measures are considered as costs and expenses of the procedure.

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The preceding provisions do not apply to the amicable prevention procedure.

Comment:
This article is inspired by articles 25 and 30 of Regulation (EU) no. 2015 /848 of May 20, 2015.

Article 7.1.1.5. "No Bankruptcy on bankruptcy" principle.

Where insolvency proceedings have been opened in respect of a debtor, no further insolvency proceedings may be opened in respect of that debtor until such proceedings have been closed.

The opening of preventive proceedings precludes the opening of insolvency proceedings, unless the debtor becomes insolvent and national law requires the opening of insolvency proceedings.

CHAPTER 2 : BODIES

Article 7.1.2.1. Insolvency practitioner.

The organization, status, methods of appointment, powers, remuneration and liability of the insolvency practitioner are determined by the provisions of national law.

Article 7.1.2.2. Meeting of creditors.

Provisions of national law may provide for an assembly of creditors in insolvency proceedings within the meaning of the preliminary article.

In this case, they determine its powers, which may include:

review of the insolvency practitioner's actions, examination of the insolvency practitioner's report on the debtor's economic situation and the causes of its difficulties;

review of the insolvency practitioner's report on the audited statement of liabilities;
authorization of transfers proposed by the insolvency practitioner.

Where the provisions of the applicable national law do not provide for an assembly of creditors, these powers belong to the competent judicial authority.

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Article 7.1.2.3. Creditors' Committee.

As soon as insolvency proceedings are opened, the judicial authority may set up a creditors' committee made up of representatives of preferential creditors, ordinary creditors, employees, the tax authorities, social security bodies and the public body for wage guarantee. This committee can be set up by the judicial authority as soon as the latter takes provisional measures prior to the opening of insolvency proceedings.

A creditors' committee may be set up if the operating costs do not appear proportionate to the value or size of the business, to the small number of creditors, or if the debtor is a micro-business.

Comment:
In some jurisdictions, including Germany, creditors are involved in the process as soon as provisional measures are put in place. We propose that such a supervisory body be set up on an optional basis. It would be up to each State to decide whether to set it up. However, the text takes care to refer to national law for the determination of the distribution of competences.

The possibility of appointing this supervisory body is reserved for insolvency proceedings, i.e. judicial recovery and judicial liquidation proceedings.

This body is consulted on the appointment of the insolvency practitioner. This provision is the result of a compromise between laws that leave it up to creditors to appoint the practitioner, and those that grant this power to the judge. The first solution seems a little extreme, and may give rise to fears of a loss of independence on the part of the practitioner. Moreover, the status of insolvency practitioners has not yet been harmonized.

Article 7.1.2.4. Role and powers of the creditors' committee.

The number of creditors is determined by national law and may not exceed 7.

The constitution of the creditors' committee may be challenged by any interested party before the competent judicial authority.

Any misconduct on the part of a committee member may result in dismissal.

The procedures and powers of the creditors' committee are determined by the provisions of national law.

National law also determines the division of powers between this body and the creditors' meeting.

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The body is consulted by the competent judicial authority on the appointment of the insolvency practitioner and on any act of transfer envisaged by the debtor or the insolvency practitioner, with the exception of acts of day-to-day management.

It may refer any difficulty to the judicial authorities.
The Creditors' Committee is empowered to request the appointment of an expert in matters concerning all creditors.

The operating costs of the creditors' committee are controlled by the judicial authority and constitute costs of the proceedings.

National law may provide for remuneration of outside counsel and experts with the authorization and under the supervision of the competent judicial authority.

Where provisions of national law confer decision-making powers on the creditors' committee, any interested party may challenge its decision before the competent judicial authority.

Article 7.1.2.5. Judicial authority.
The organization of the judiciary - in particular the composition of the courts - is determined by the provisions of national law. These ensure that the judicial authority has the necessary legal and economic competence.

Comment:
The judiciary's specific economic knowledge is essential for the smooth running of proceedings. Economic knowledge can be acquired through professional activities (as an entrepreneur or manager) or training activities.

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TITLE 2 : AMICABLE PREVENTION PROCEDURE

CHAPTER 1 : OBJECTIVES AND CONDITIONS FOR INITIATING THE PROCEDURE

Article 7.2.1.1. Objectives of the amicable prevention procedure.

The debtor may apply for amicable preventive proceedings if it is facing difficulties which could lead to insolvency within the meaning of article 7.3.1.3 Where the provisions of national law so permit, this procedure may also be opened if the debtor demonstrates that a recent difficulty has caused its insolvency.

It aims at the conclusion of an agreement with the creditors mentioned by the debtor for the restructuring of the company. It has no effect on creditors not named by the debtor.

Comment:
The choice of an amicable prevention procedure was made in view of the success of this type of procedure in countries where it exists. The procedure has several features. It can only be initiated at the request of the debtor, before insolvency, in the event of difficulties that could lead to insolvency. Even debtors in a state of insolvency can benefit from this procedure, provided they can demonstrate that their insolvency is the result of recent difficulties: if they delay too long, they risk getting assigned to a judicial recovery procedure.

The procedure is brief, and restrictions on creditors' rights are limited. Moreover, in the event of insolvency, the opening of the amicable prevention procedure does not prevent a creditor from filing for an insolvency procedure. It does not affect the rights of all creditors. The aim is to enable negotiations with the main creditors within a short period.

Finally, the procedure remains confidential, thus avoiding the aggravation of difficulties that would result from the opening of public collective proceedings. If the debtor wishes to reach an agreement, the quid pro quo for this confidentiality is the necessary transparency towards the creditors with whom he is negotiating. Otherwise, the agreement has no chance of success. Furthermore, the presence of a judge and a practitioner helps to avoid abuses.

Article 7.2.1.2. Initiation of the amicable prevention procedure.

Only the debtor, or one or more creditors jointly with the debtor, may request the opening of the amicable prevention procedure.

The judicial authority initiates the procedure on the basis of the accounting documents submitted by the debtor, a report from the auditor or a certified public accountant attesting to the financial situation, or any other authorized body or person. In particular, the application must include evidence that the debtor is not insolvent or, if insolvent, that this is the result of recent difficulties.

It appoints an insolvency practitioner whose name may be proposed by the debtor.

The provisions of European law relating to the preservation of employees' rights in the event of transfer of undertakings remain applicable.

Comment:
The amicable prevention procedure is voluntary and non-judicial. This means that only the debtor can request the opening of the procedure. If the company is not insolvent, forcing it to use such a procedure would be tantamount to interfering in the management of its business, or even putting pressure on it. As an option, however, the text provides for this request to be made jointly with one or more creditors. This possibility, which also

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exists in OHADA law, will no doubt encourage the judge to open proceedings more easily, in the presence of a joint request.

The debtor is given the opportunity to propose the name of an insolvency practitioner. The debtor has been able to contact an insolvency practitioner, has prepared the file with him and has established a relationship of trust with him. The rules adopted in implementation of Council Directive 2001/23/EC of March 12, 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses remain applicable.

Article 7.2.1.3. Remuneration of the insolvency practitioner.

At the time of his appointment, the insolvency practitioner determines, in agreement with the debtor, the conditions of its remuneration, according to the foreseeable duties involved in the accomplishment of his mission.

The designated practitioner must certify that he or she has not received any remuneration or payment from the debtor or any of the creditors mentioned in the application in the two years preceding the opening decision. He or she must also certify that he or she has no personal interest in the proceedings, and that he or she has no relationship of dependence, personal interest or conflict of interest with the debtor or any of the creditors mentioned in the application.

Comment:
Even without harmonizing the status of practitioners, remuneration must be regulated as part of an amicable prevention procedure. Entrepreneurs in difficulty must be aware of the costs involved. The terms of the practitioner's remuneration must be defined by agreement with the debtor. In addition, the appointed practitioner must be independent of the parties, both debtor and creditors. This is why it is stipulated that the practitioner must not have received any payment from the debtor or creditors in the two years preceding its appointment, and that he or she must not have any conflict of interest.

Article 7.2.1.4. Amicable prevention without referral to the judicial authority.

The debtor may freely make use of the provisions of this chapter without first referring the matter to the judicial authorities, subject to the following conditions:

- it must notify its decision to resort to an amicable prevention procedure to the competent judicial authority and to the supervisory body if one has been appointed;

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- it may only request the suspension of individual enforcement actions or the adoption of a plan in accordance with the applicable provisions of articles 7.2.2.2 and 7.2.4.1;

- the insolvent debtor remains obliged to request the opening of insolvency proceedings if the conditions mentioned in article 7.2.1.1 are met.

The debtor's decision, duly notified, has the same effects as a decision to open proceedings by the judicial authority, as regards the duration of the procedure, confidentiality, negotiation procedures, preparation of an assignment, priority of payment, execution of the agreement and the situation of the guarantors.

The decision referred to in paragraph 1 has no effect on individual enforcement actions, termination clauses, the enforceability of the agreement or the consequences of non-performance of the agreement.

CHAPTER 2 : DURATION AND EFFECTS OF THE AMICABLE PREVENTION PROCEDURE

Article 7.2.2.1. Duration of the amicable prevention procedure.

The duration of the procedure may not exceed three months, it is renewable once only by the judicial authority that opened it, at the request of the debtor and after obtaining the opinion of the insolvency practitioner.

The judicial authority may terminate the amicable prevention procedure at any time, if it appears impossible to reach an agreement. This decision is taken at the request of the debtor, a creditor or the insolvency practitioner.

The opening of insolvency proceedings automatically puts an end to the amicable prevention procedure.

Comment:
The duration of the procedure is an important issue, especially as the company may find itself in a state of insolvency, but also because its insolvency may occur despite the opening of the procedure. The duration of the procedure is therefore fairly short, limited to three months. It can be renewed for the same period, but in this case at the request of the debtor and, above all, after an opinion from the insolvency practitioner, which allows an assessment of the chances of success.

As the debtor may be in a state of insolvency at the time the proceedings are opened, or as such a state may arise during the proceedings, we deemed it necessary to provide that

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the opening of collective proceedings puts an end to the amicable avoidance procedure, in order to protect the interests of creditors.

Finally, the debtor must be able to request payment delays. These deadlines are likely to facilitate the conclusion of an agreement, which is generally more favourable to creditors than collective proceedings.

Article 7.2.2.2. Suspension of proceedings by one or more creditors.

For the purposes of negotiation, if an agreement appears possible, the competent judicial authority may, at the debtor's request, suspend or prohibit one or more individual legal proceedings or one or more individual enforcement proceedings by one or more creditors, which would be likely to compromise the debtor's continued operation. The decision is taken after consultation with the insolvency practitioner. Any creditor concerned is heard or duly summoned. This measure may be lifted or modified at the request of a creditor if it causes him or her excessive prejudice that could lead to insolvency.

The conditions, duration and termination of the suspension of proceedings are governed by articles 7.3.4.1 to 7.3.4.3. It does not apply to debts arising during the proceedings.

Article 7.2.2.3. Confidentiality.

Neither the decision to open the prevention procedure nor the agreement reached with the creditors are subject of a public notice. Any person with knowledge of the amicable prevention procedure is obliged to maintain confidentiality. The provisions relating to information due from listed companies remain applicable.

Comment:
The issue of the confidentiality of the procedure is essential, as has been emphasized. This does not affect creditors' rights, since they remain free to participate in the agreement. For listed companies, the rule does not prevent the supervisory authorities from being informed of the existence of the procedure. It will then be up to the supervisory authority to decide whether or not to inform the market. Limited exceptions may be made to allow employee representatives to be informed.

Article 7.2.2.4. Clauses to the contrary.

Any clause which provides for the resolution or termination of a current contract, or which modifies the conditions of continuation of a current contract by reducing the rights or increasing the obligations of the debtor, solely as a result of the opening or application for the opening of an amicable prevention procedure or a measure suspending proceedings in this context, is deemed unwritten.

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This provision does not apply to financial contracts, which are governed by the provisions of European law relating to this type of contract.

Comment:
Practice shows that when this type of procedure is widely used, some partners include clauses in their contracts stipulating that the debtor's rights or obligations will be increased in the event of recourse to the procedure. Such clauses enable certain partners to gain preferential treatment over others, and can even go so far as to turn the debtor company away from this procedure.

CHAPTER 3 : THE AGREEMENT

Article 7.2.3.1. Agreement.

The insolvency practitioner encourages an agreement between the debtor and the creditors mentioned in the application for commencement of insolvency proceedings.

In particular, the agreement may provide for the restructuring of debts or discharge of due and payable debts, any security in rem and personal guarantees likely to ensure performance, the suspension or reduction of interest on amounts due, assignment of priority ranking or of securities, or a change in capital. The transfer of all or part of the debtor's assets or shares, or of all or part of the debtor's business, may also be considered at the debtor's request.

Comment:
The aim of the amicable prevention procedure is to reach an agreement with the debtor's creditors, named by the latter. No effort is imposed on the creditors, and only those named by the debtor are called in for negotiations. This makes it possible to reach an agreement with certain creditors, such as financial creditors, or to exclude others, such as suppliers, so that essential contractual relationships can continue.

Article 7.2.3.2. Sale of the business or all or part of the assets.

The agreement may provide for the sale of all or part of the debtor's assets or shares, or all or part of the debtor's business, subject to approval by the competent judicial authority, independently of the sale implemented as part of a restructuring or recovery plan.

Comment:
We propose to provide for the possibility of selling all or part of the business or all or part of the assets in the amicable prevention procedure. This form of pre-negotiated sale

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makes it possible to envisage a sale at a time when the company is not yet in an excessively deteriorated situation. On the one hand, the chances of the buyer maintaining the business are therefore likely to be better, and on the other, the purchase price will be higher.

Article 7.2.3.3. Payment of claims arising during the proceedings and payment privilege.

The agreement provides for preferential payment in the event of subsequent insolvency proceedings of claims arising from contributions made to the debtor during the proceedings or under the agreement.

Only new contributions of cash, goods or services, to the exclusion of all prior claims, are eligible for this priority. Contributions made by the debtor's shareholders or associates as part of a capital increase or current account advance are not eligible for priority payment. Debts arising from transactions and contracts entered into or pursued during the proceedings must be paid by priority.

The judicial authority ensures that the conditions for preferential payment are met. In this case, the preferential position is published in a register, notwithstanding article 7.1.1.4.

Comment:
This article provides for a preferential position sometimes referred to as a new money privilege, which is provided for in Directive (EU) 2019/1023 of June 20, 2019. Its purpose is to provide the company with new capital. We also propose to extend this privilege to debts arising from transactions entered into or continued during the proceedings, on the grounds that this strengthens the attractiveness of the proceedings. This privilege is a recommendation of the UNCITRAL Insolvency Law Guide, as it is of Directive (EU) 2019/1023 of June 20, 2019.

Article 7.2.3.4. Enforceability of the agreement.

The agreement can only be enforced by the competent judicial authority if:

- it follows on from a referral to a competent judicial authority and
- it is presented by the debtor with the opinion of the insolvency practitioner and
- it does not excessively prejudice the interests of non-signatory creditors, including creditors whose claims arose after the agreement was signed.

In this case, the procedure and agreement remain subject to the confidentiality provisions of article7.2.2.3.

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Comment:
The agreement must not prejudice the rights of other creditors. For example, in addition to the new money privilege, it is conceivable that the debtor could grant new security interests to some of his creditors, which could take precedence over other pre-existing security interests. The text avoids such practices, which is an advantage over an out-of-court settlement. The intervention of a judge also prevents this type of abuse.

Article 7.2.3.5. Execution of the agreement.

The agreement can be executed under the supervision of the insolvency practitioner.

Any party to the agreement may refer the matter to the competent judicial authority in the event of difficulties in performance of the agreement. The latter may order the termination of the agreement if it finds that the commitments resulting from the agreement have not been fulfilled. The decision is taken after consultation of the insolvency practitioner. Termination of the agreement puts an end to all deferrals of the claims, and creditors regain all their claims or securities, less any sums received.

Comment:
We propose that the agreement "may" be executed under the supervision of the insolvency practitioner. We discussed whether this supervision should be compulsory or optional. Making it compulsory could entail additional costs, which would be questionable for medium-sized and small businesses. Creditors could, however, demand it during negotiations if they so wished.

Article 7.2.3.6. Status of guarantors.

Persons who have granted a personal guarantee or assigned or transferred an asset as security in rem may avail themselves of the agreement.

Comment:
This provision has two advantages. On the one hand, it avoids inviting the guarantors to the negotiation who otherwise would have to be invited if their rights could be affected by the agreement. Secondly, once again, it makes the amicable preventive procedure more attractive to debtors, and in particular to directors who granted a guarantee or security. Lastly, it does not affect the rights of creditors, since it is sufficient for those benefiting from such guarantees and securities and wishing to put them into effect to make no effort in the agreement.

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CHAPTER 4 : ADOPTION OF A RESTRUCTURING PLAN

Article 7.2.4.1. Recourse to a vote and lifting of confidentiality.

If the agreement cannot be reached before the expiry of the period provided for in article 7.2.2.1**,** but it appears that a plan could be adopted in accordance with the procedures relating to the adoption of the restructuring plan, the debtor and the insolvency practitioner may apply to the judicial authority for these procedures to be opened. In this case, the procedure is continued for a period of three months, and the decision granting the request is subject to legal publication. The confidentiality of the amicable prevention procedure is terminated.

The judicial authority may make its decision subject to any additional guarantees designed to safeguard the rights of creditors.

Comment:
The amicable prevention procedure involves obtaining the agreement of creditors on a moratorium or deferment of payment, for example. Certain minority creditors may bring this agreement to failure, leading to the termination of the procedure, the opening of collective proceedings and, where applicable, the vote on a plan by the creditors. The opening of insolvency proceedings may worsen the company's situation and increase the cost of restructuring.

It is therefore proposed that the preventive procedure be continued with a view to carrying out this vote, leaving it up to the States to decide whether to apply the rules laid down for voting in the context of a restructuring plan in collective proceedings, or whether to adapt them, for example with a different majority of votes. In this case, the plan is voted on the basis of the content of the draft agreement.

In this case, the procedure is no longer confidential, and the minority creditors can have deferments of payment or debt remissions imposed by a majority vote. We propose a short deadline of three months.

Article 7.2.4.2. Opinion of the creditors.

The judicial authority notifies the creditors named in the application to initiate the amicable prevention procedure of the restructuring plan and at the same time instructs the creditors to submit an opinion on the restructuring plan within a strict one-month period.

If a creditor's opinion is not received within this period, the creditor is deemed to have approved the restructuring plan.

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TITLE 3 : LEGAL PROCEEDINGS

CHAPTER 1 : PROCEDURES AND GENERAL OPENING CONDITIONS

Article 7.3.1.1. Objectives of legal proceedings.

A judicial restructuring procedure is instituted in the event of financial difficulties, and a judicial recovery procedure in the event of insolvency.

A judicial restructuring procedure is a way of dealing with a debtor's difficulties before it becomes insolvent.

A judicial recovery procedure is used to deal with the difficulties of an already insolvent debtor whose recovery is deemed possible.

The aim of these two procedures is to enable the debtor to retain management of the business, continue trading, pay off its debts and maintain employment, by implementing a restructuring or recovery plan that takes account of creditors' interests.

Such a restructuring or recovery plan may be preceded by a non-judicial negotiation phase and may involve a partial sale of the company.

Moreover, a judicial liquidation procedure is set up in the event of insolvency, when the debtor's recovery is impossible. This procedure aims at paying creditors and putting an end to the business.

Comment:
Such a descriptive text would appear to be useful for certain countries that are unfamiliar with these procedures. The same approach has been adopted for the amicable avoidance procedure. It should be remembered that judicial recovery and judicial liquidation proceedings are insolvency proceedings (see preliminary article).

Article 7.3.1.2. Opening conditions.

Judicial restructuring proceedings are initiated at the request of a debtor who demonstrates that it is not insolvent and that it is facing difficulties which could lead to insolvency within the meaning of article 7.3.1.3.

Judicial recovery proceedings are opened at the request of an insolvent debtor, if it can demonstrate its ability to continue trading and present a recovery plan.

Judicial liquidation proceedings are initiated at the request of the debtor who demonstrates the manifest impossibility of recovery.

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A debtor in a state of insolvency is obliged to apply for the opening of judicial recovery or judicial liquidation proceedings within a period determined by the provisions of national law from the date of his insolvency.

Judicial recovery and judicial liquidation proceedings may also be initiated at the request of a creditor or a judicial authority specially empowered by the provisions of national law. The applicant shall provide the competent authority with any evidence likely to characterize the state of insolvency, and to demonstrate, where applicable, that recovery is manifestly impossible.

If the application is for the opening of judicial restructuring or judicial recovery proceedings, the debtor must produce an attestation from an auditor or certified public accountant establishing its ability to continue trading under a plan. Under national law, companies below certain thresholds may be exempted from this requirement.

Comment:
Unlike judicial recovery and judicial liquidation, judicial restructuring proceedings can only be initiated at the request of the debtor. The debtor is not yet insolvent, and it seems out of the question to require him to resort to insolvency proceedings. It is also proposed that the auditor's or expert's certificate should not be required, particularly for smaller companies which sometimes have neither.

Lastly, it is proposed that the opening of insolvency proceedings should be subject to a time limit, the maximum duration of which is to be set by national law. Exceeding this time limit may give rise to sanctions but does not prevent the opening of proceedings.

Article 7.3.1.3. Insolvency criterion.

Insolvency is characterized by the debtor's inability to pay debts that are due, chargeable and not in dispute. It must be established by the applicant.

Provisions of national law may lay down additional criteria for the opening of insolvency proceedings.

Comment:
The requirement that debts be due and chargeable takes into account the possibility of granting the debtor a deferment of payment: in this case, a debt that is due is not necessarily chargeable. As for the absence of dispute condition, we need to take into account the fact that a debtor may dispute the amount of a debt or its chargeability for relevant reasons and without bad faith.

The balance sheet test (or over-indebtedness) is provided for in certain insolvency laws. The same applies to imminent insolvency. This option could facilitate agreement among

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legislators on this point. Both criteria are expressly recommended by UNCITRAL (Legislative Guide on Insolvency Law).

CHAPTER 2 : PROVISIONAL MEASURES; COMMENCEMENT AND CONVERSION OF PROCEEDINGS

Article 7.3.2.1. Provisional measures.

This article shall apply in the event of an application for the opening of insolvency proceedings.

As soon as the application for insolvency proceedings has been filed, the judicial authority may, either at the request of the debtor or ex officio, take any measures t deems necessary to protect the debtor's assets and avoid any action prejudicial to its restructuring or to the interests of creditors. The decision ordering such measures may be appealed by the debtor.

The judicial authority may in particular:

1. appoint a provisional insolvency administrator whose mission it defines; in any event, he is empowered to request any measure to preserve and protect the debtor's assets for the period between the application to open insolvency proceedings and the decision to open them;

2. prohibit the debtor from performing any acts of transfer, or order that they may only be performed with the authorization of the provisional insolvency administrator. The debtor is authorized to carry out all acts of day-to-day management essential to the continuation of its business;

3. prohibit or suspend enforcement proceedings against the debtor;

4. order that the assets covered by an exclusive real right may not be realized or repossessed by the creditor, and that such assets may be assigned to the continuation of the debtor's business if they are deemed indispensable.

These measures do not apply if:

The debtor's insolvency is not proven, or if the debtor produces a certificate from an auditor or certified public accountant establishing its ability to continue trading under the plan.

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Comment:
The possibility for the court to take provisional measures that apply between the time of referral to it and the time of its decision is an important issue, since both the debtor and certain creditors may, during this period, harm the collective interest of other creditors.

Article 7.3.2.2. Opening of the procedure.

The judicial authority decides on the opening of the procedure within a short period of time.

If the debtor is not in a state of insolvency, the judicial authority opens a judicial restructuring procedure if the conditions are met.

Where the debtor is insolvent, the judicial authority will open judicial recovery proceedings if the debtor provides a draft plan or the certificate referred to in the last paragraph of article 7.3.1.2 or if the adoption of a plan does not appear manifestly impossible. If this is not the case, the judicial authority initiates judicial liquidation proceedings.

In the judgment opening the judicial restructuring proceedings, the judicial authority appoints an insolvency practitioner if:

- the judicial authority deems it necessary to preserve the interests of the parties;
- if groups of creditors are formed, or
- if requested by the debtor or the majority of creditors, provided that, in the latter case, the cost of the practitioner is borne by the creditors.

In the judgment opening the judicial recovery procedure or judicial liquidation procedure, the competent judicial authority appoints an insolvency practitioner.

Comment:
In particular, this text provides for the procedures for appointing an insolvency practitioner, in accordance with article 5 of Directive (EU) 2019-1023 of June 20, 2019

Article 7.3.2.3. Conversion of procedures.

At any time during the insolvency proceedings, the judicial authority may, at the request of any interested party, convert the proceedings if the legal conditions are met.

The same rule applies to judicial restructuring proceedings if it appears that the debtor was in a state of insolvency at the time of the judgment opening the proceedings.

Draft

Insolvent debtors who have benefited from a restructuring or recovery plan which they have been unable to implement are placed under judicial liquidation.

In the event of conversion, the appointed insolvency practitioner remains in office; the judicial authority may appoint another insolvency practitioner at any time.

Comment:
One of the objectives is to avoid aggravating the situation if the chosen procedure is not appropriate.

With regard to the possibility of converting to judicial restructuring proceedings, the court seized of the matter must be able to open such proceedings quickly. Insolvency is not always easy to establish. Therefore, even if there is a doubt as to the absence of insolvency, the procedure can be opened without risk, since it can be converted if this doubt proves to be well-founded.

CHAPTER 3 : BUSINESS MANAGEMENT (JUDICIAL RESTRUCTURING AND RECOVERY PROCEDURES).

Article 7.3.3.1. Administration of the debtor's assets and realization of assets.

During judicial restructuring proceedings, the debtor or manager retains its powers over the company's assets and management, with the exception of powers transferred to the insolvency practitioner. The same applies during judicial recovery proceedings, unless the court decides otherwise. In any event, the debtor or the manager continues to exercise valid acts of day-to-day management.

In both judicial restructuring and judicial recovery proceedings, the appointed practitioner has a supervisory role. If there is evidence to suggest that the debtor's management is likely to cause prejudice to creditors, the practitioner may be entrusted with a co-management mission in the case of judicial recovery.

Creditors are informed of the powers of the debtor or manager and of the insolvency practitioner by the legal publication and by the individual notice sent to them by the insolvency practitioner within a short time of his appointment.

The insolvency practitioner may authorize the debtor or manager to enter into any act going beyond the day-to-day management of the company and its assets. Provisions of national law may stipulate that judicial authorization is required for the most important acts, in particular acts of transfer or the transfer of a production unit.

Draft

The provisions of national law shall define the penalty for acts performed in violation of the rules defined in this article.

Comment:

In both judicial restructuring and judicial recovery, the debtor is not, in principle, divested of all his rights. However, two distinctions are proposed. In judicial recovery, the judicial authority could override this principle, whereas in judicial restructuring proceedings, the insolvency practitioner would have a simple supervisory role, as the debtor is not in a state of insolvency. Moreover, this provision could encourage the debtor to resort to this procedure without waiting to become insolvent. Once insolvent, the debtor is obliged to apply for insolvency proceedings, which justifies entrusting the practitioner with a co-management mission or, exceptionally, a representation mission.

In the event of a breach of these rules, the legislator could opt for sanctions such as nullity, unenforceability or invalidity of the acts performed.

Article 7.3.3.2. Changes in the distribution of powers.

At any time, the judicial authority may, on its own initiative or at the request of the creditors' committee, modify the powers of the debtor or the manager and the insolvency practitioner.

Article 7.3.3.3. Acts performed in violation of powers.

At the request of the insolvency practitioner or any other interested party, the judicial authority shall declare null and void any act performed by the debtor or a manager in breach of its powers or those entrusted to the insolvency practitioner. The third party having benefited from such an act is required to return the goods or reimburse the payments received.

CHAPTER 4: STOPPING OR SUSPENDING INDIVIDUAL LAWSUITS

Article 7.3.4.1. Stay of individual enforcement actions.

The judgment opening insolvency proceedings suspends or prohibits any legal action by prior creditors, including secured and preferential claims. It also suspends or prohibits any enforcement proceedings by such creditors.

This provision does not apply to claims and restitutions within the meaning of article 7.3.11.1 and to obligations arising from a contract within the meaning of article 7.3.5.1 which the debtor or the insolvency practitioner has decided to perform or which has been concluded after the opening of judicial recovery or judicial liquidation proceedings.

Draft

Comment:
The above rules reproduce article 6 of Directive (EU) 2019-1023 of June 20, 2019 with a few adjustments. In particular, it is specified that the rule applies to all lawsuits, including those involving creditors benefiting from guarantees or liens.

Article 7.3.4.2. Special provisions applicable in the context of a judicial restructuring procedure.

The opening of the judicial restructuring procedure results in the suspension of proceedings under the conditions set out in article 7.3.4.1 However, this suspension does not apply to wage claims. In addition, the judicial authority may exclude certain claims or categories of claims from the scope of the individual stay of proceedings where they are unlikely to jeopardize the restructuring of the company, or where the stay is likely to cause excessive damage to the creditors concerned.

The procedure is limited to a period of not more than four months. At the request of the debtor, a creditor or, where applicable, the insolvency practitioner, the judicial authority may extend its duration or grant a further stay of individual proceedings. The extension or renewal of the suspension of individual proceedings is ordered only if justified, in particular in the following cases:

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

b) it does not unfairly prejudice the rights or interests of any affected parties.

The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed 12 months.

These provisions do not derogate from the application of the provisions of European law relating to prudential requirements for credit institutions and investment firms.

Comment:
The above rules reproduce article 6 of Directive (EU) 2019-1023 of June 20, 2019. It should be noted, however, that it is proposed not to apply the suspension of proceedings to wage claims. As the company is not insolvent, there is no reason a priori why it should not be able to pay wages.

But above all, it is stipulated that this suspension is de jure. In fact, the judicial restructuring procedure is a preventive collective procedure sometimes unknown in certain countries. It is therefore to be feared that the suspension of proceedings will rarely be granted, hence the idea of making it compulsory. Creditors' rights are preserved,

Draft

since the suspension is limited in time and is not necessarily general. A reservation is made to take account of Regulation (EU) 575/2013 of the European Parliament and of the Council of June 26, 2013 on prudential requirements for credit institutions and investment firms.

Article 7.3.4.3. Special provisions applicable in the event of judicial recovery or judicial liquidation.

In the event of judicial recovery or judicial liquidation, the stay of individual enforcement actions as defined in article 7.3.4.1 is general, but national law may provide for exceptions.

It applies throughout the entire procedure.

CHAPTER 5 : CURRENT CONTRACTS

Article 7.3.5.1. Continuation or termination of a contract.

Contracts to which the debtor is a party and which have not been performed by any contracting party or which have only been partially performed are continued ipso jure under the supervision of the insolvency practitioner, without the other contracting party being able to raise the defense of unperformed contract.

In the context of judicial restructuring or judicial recovery proceedings, the debtor may terminate a bilateral contract that has not been performed or has only been partially performed, if it is not useful for the continuation of the business or if its performance constitutes an imminent risk to the business, and the termination does not unreasonably prejudice the interests of the co-contractor.

In the context of judicial restructuring proceedings, the contract may only be terminated with the authorization of the judicial authorities.

In insolvency proceedings, the insolvency practitioner may terminate the contract without the debtor's consent.

The current contract is terminated ipso jure after the other party has served formal notice on the insolvency practitioner to decide whether or not to continue the contract, without any response within a reasonable period set by the other party; this period may not be less than fifteen days or more than one month.

Any clause contrary to the provisions of this article is deemed unwritten.

Draft

The provisions of this article do not apply to employment contracts, leases or farm leases on property leased to the debtor.

Article 7.3.5.2. Claims arising from the performance of contracts.

Claims arising from the performance of contracts are paid on the due date. Failing this, they benefit from a payment lien ranking pari passu with the legal costs arising from the proceedings.

Insolvency practitioners who require a contract to be continued must check that they will be able to pay the resulting claims. If they fail to do so, they may incur liability, unless they can demonstrate that they could not have known, at the time of their decision to pursue a contract, that the debtor would be unable to pay the resulting claim.

The set-off of a claim of the contracting party against a claim of the debtor arising from the contract is excluded. The assignment of a debtor's claim to a third party prior to any decision on the continuation of the contract from which it arises is null and void.

Comment:
The insolvency practitioner's responsibility to monitor available funds reflects his general duty of care towards the interests of creditors.

The article aims at preserving and increasing the debtor's assets in the event of performance of the contract. The exclusion of set-off ensures that the debtor obtains the full value of the counter performance.

The rule concerning the nullity of an assignment made prior to any decision on the continuation of the contract ensures that the debtor, who performs the contract, benefits from the counter performance.

Article 7.3.5.3 Compensation for early termination of a contract.

Claims for compensation resulting from the termination of a contract under the terms of article 7.3.5.1 is subject to the rules applicable to claims arising prior to the proceedings.

Article 7.3.5.4. Divisible services.

If the services owed are divisible and the other party has already partially performed its obligation at the time of the opening of the procedure, it is considered to have a prior claim for an amount corresponding to its partial performance. This situation does not prevent continued performance of the contract for the remainder of the service under the conditions set out in article 7.3.5.1.

Draft

Article 7.3.5.5. Reservation of title.

If, prior to the opening of insolvency proceedings, the debtor has sold a movable asset with retention of title and handed it over to the buyer, the latter may demand performance of the sales contract. This right also applies if the debtor has entered into other obligations towards the buyer and has not performed them, or has only partially performed them.

Article 7.3.5.6. Provisional security or priority notice.

Provisions of national law may provide that if a provisional security interest or a priority notice has been published or entered in the land registry to secure a creditor's right or ranking in real estate or in a debtor's right, the creditor may demand acquisition of the secured right or ranking.

This provision also applies to security interests or priority notices registered in the register of ships, the register of ships under construction or the register of mortgages on aircraft.

Article 7.3.5.7. Employment contracts.

Employment contracts are continued ipso jure.

The transfer and termination of an employment contract are subject to the provisions of article 7.3.8.5.

Article 7.3.5.8. Lease contracts.

Leases and farm leases on real estate or premises occupied by the debtor are continued ipso jure.

After the application to initiate the procedure, the contracting partner may not terminate a lease or tenancy agreement entered into by the debtor as tenant or farmer:

for non-payment or late payment of rent or lease payments due for a period preceding the application for opening;

because of the debtor's financial situation.

The co-contractor can only assert the rights it invokes for the period prior to the opening of the proceedings in its capacity as an insolvency creditor.

Where the debtor is a lessor of real estate or premises, the assignment of a claim by the debtor to a third party prior to any decision on the continuation of the contract and relating to claims arising after that date is null and void.

Draft

The insolvency practitioner may terminate a lease or tenancy agreement for real estate or premises entered into by the debtor as tenant or farmer; unless a shorter period has been agreed, the notice period is three months.

Article 7.3.5.9. Financial contracts.

Provisions of national law may lay down special provisions derogating from the above rules for financial contracts whose regime is determined by the provisions of European law relating to this type of contract.

Article 7.3.5.10. License agreements.

License agreements are continued by operation of law.

Provisions of national law may provide that the debtor or insolvency practitioner may terminate a license agreement pursuant to article 7.3.5.1.

Comment:
Termination of the right to use a license can have extremely negative consequences for the licensee. The right to use a license is often the basis for having a complete infrastructure, such as a production plant, to manufacture licensed products. This is why we favour a continuation of the license agreement.

CHAPTER 6 : ASSET SEARCH

Article 7.3.6.1. Access to information.

The judicial authority may, at the request of the designated insolvency practitioner, access information relating to bank accounts held by the debtor in another Member State in order to identify and locate assets belonging to the debtor, including the assets and sums concerned by an avoidance action.

Article 7.3.6.2. Holders of access rights.

National legislation must specify the persons authorized to search for assets and the measures required to ensure data security.

Article 7.3.6.3. Access registration.

Searches of centralized bank account registers must be recorded by the competent judicial authority.

Draft

Article 7.3.6.4. Actual beneficiaries.

The insolvency practitioner has a right of access to the information referred to in article 30 of the Directive 2015 / 849 dealing with the register of beneficial owners.

The insolvency practitioner must justify the legitimate interest by designating the debtor's assets for which a search is being carried out.

Article 7.3.6.5. Insolvency practitioner's right of access.

Insolvency practitioners have direct and rapid access to national registers of assets located in the territory of the judicial authority that appointed them.

Article 7.3.6.6. Right of access for foreign practitioners.

Identical conditions of access must be granted to insolvency practitioners appointed in another Member State.

Comment:
These provisions transpose the guidelines of the proposed Insolvency Directive of December 7, 2022.

CHAPTER 7 : INVALIDITY IN THE SUSPECT PERIOD (RECOVERY AND LIQUIDATION PROCEEDINGS).

Article 7.3.7.1. Avoidance actions.

When insolvency proceedings have been opened, legal acts performed prior to the opening of the proceedings may be nullified under the following conditions.

Article 7.3.7.2. Avoidable acts.

The payment, creation or realization of a guarantee and any other act, including an act of execution, carried out for the benefit of a creditor to the detriment of the collective interests of the creditors are voidable.

An omission producing legal effects is equivalent to an act.

Article 7.3.7.3 Request for nullification.

The application for nullification is filed by the insolvency practitioner even in cases where the debtor or manager has retained its powers over the assets and management of the company.

Draft

The provisions of national law determine whether the insolvency practitioner must first consult the creditors' committee or seek its authorization, and the legal consequences of failure to do so.

Article 7.3.7.4. General grounds for nullification.

The suspect period begins twelve months before the application to open insolvency proceedings. It ends on the date of the decision to open proceedings. Where several persons have applied to open insolvency proceedings against the same debtor, the first application determines the reference date for calculating the suspect period.

Acts performed during this period are voidable:

- if the debtor was insolvent at the date of the act, and

- if, at the date of the act, the creditor knew, or should have known, that the debtor was insolvent or that an application to open insolvency proceedings had been filed.

A debtor may not nullify a service rendered in the ordinary course of business for which a consideration of equivalent value immediately enters the debtor's assets.

A party closely related with the debtor is presumed to have knowledge of the debtor's insolvency.

The provisions of national law determine the date on which an act is deemed to have been performed.

Article 7.3.7.5. Harmful intent.

Legal acts by which the debtor has intentionally caused harm to its creditors are voidable:

1. if they were carried out within a period of three years prior to the request to initiate proceedings, and

2. if, at the time or date of the act, the third-party beneficiary knew, or should have known, the debtor's intention.

A party closely associated with the debtor is presumed to have knowledge of the debtor's insolvency.

Provisions of national law may extend the rules relating to the nullification of acts prior to the opening of insolvency proceedings to acts concluded prior thereto which only produce their effects after the opening of insolvency proceedings.

Draft

Article 7.3.7.6. Parties closely associated with the debtor.

A party closely associated with the debtor is any person who had preferential access to information on the debtor's financial affairs at the time the legal act was concluded or carried out, or in the three months preceding this act.

Article 7.3.7.7. Gratuitous acts and undervalued transactions.

Gratuitous acts effectuated by the debtor less than three years prior to the request to open the procedure may be nullified, except in the case of a customary gift of low value.

Paragraph 1 also applies to acts effectuated by the debtor for which the consideration is insignificant.

Article 7.3.7.8. Repayment of a partner loan.

Legal acts providing a partner with a payment or security during the suspect period for the repayment of a loan are voidable. The partner cannot claim that it did not know, or could not have known, that the debtor was insolvent or that an application to open insolvency proceedings had been filed.

Provisions of national law determine the conditions under which such acts may be nullified if they were carried out or took place before the suspect period.

Article 7.3.7.9. Exception to voidability in the case of immediate counter performance.

In the absence of harmful intent aforementioned in article 7.3.7.5, the provisions on actions for nullity do not affect legal acts performed in the presence of equivalent and immediate counter performance for the benefit of the debtor's assets.

Article 7.3.7.10. Exceptions to the voidability of a bill of exchange or payment by cheque or promissory bill.

The provisions on avoidance actions do not affect the validity of the payment of a bill of exchange if the law governing bills of exchange would have prevented the beneficiary from asserting its claims against other debtors (endorsers or drawers) if it had refused the debtor's payment.

However, the insolvency practitioner may bring an action against the drawer of the bill of exchange or, in the case of a draw on account, against the principal if it is established that it knew, or should have known, that the debtor was insolvent or that an application for the opening of insolvency proceedings had been made.

Paragraphs 1 and 2 apply mutatis mutandis to debtor's cheques and promissory bills.

Draft

Settlement instructions and payment transactions carried out in accordance with the provisions of European law relating to the finality of settlement in the payment and securities settlement system and to financial collateral arrangements are not affected by these provisions.

Comment:
The text reserves the application of Directive 98/26/EC of the European Parliament and of the Council of May 19, 1998 and Directive 2002/47/EC of the European Parliament and of the Council of June 6, 2002**.**

Article 7.3.7.11. Exceptions to nullification in the event of new financing.

The provisions on avoidance actions do not affect the validity of a repayment of new financing benefiting from the lien provided for in article 7.2.3.3 or of a financial contribution granted as part of a restructuring plan.

Comment:
The additional mention of financial contributions takes into account the application of articles 17 and 18 of Directive (EU) 2019/1023 of June 20, 2019.

Article 7.3.7.12. Legal consequences: general rule.

The party concerned may not invoke against the debtor or the insolvency proceedings an act which has been declared null and void.

It is obliged to return what it has received or, if restitution proves impossible, to pay an equivalent amount. The beneficiary of a gratuitous act or undervalued transaction, who did not know that the debtor was insolvent, is exempt from this obligation if it has not benefited from an enrichment.

The limitation period for claims against the opposing third party arising from the voidable legal act is three years from the opening of the insolvency proceedings.

Article 7.3.7.13. Legal consequences: Rights of the opponent.

A third party who has benefited from an act that has been declared null and void may assert its claim against the debtor as a creditor if this claim predates the opening of the insolvency proceedings, except in the case of fraud.

The insolvency practitioner is obliged to return the consideration in kind if it is still in the debtor's assets, or in value if it is not. Insofar as the debtor's assets have not been enriched by the consideration, the third party is considered a creditor in this respect.

Draft

Article 7.3.7.14. Legal consequences: Third-party liability.

The nullification of an act may be asserted against any heir or universal successor of the beneficiary of the act.

It may also be invoked against any individual successor of the beneficiary of the nullified act if this successor acquired the property for an obviously inadequate counter-performance or if he knew or should have known the reasons for the nullification of the act.

Article 7.3.7.15. Legal consequences: compensation.

(1) A set-off which takes place prior to the opening of insolvency proceedings is not affected by the opening of the proceedings. If, at the time of the opening of insolvency proceedings, a creditor has the right to invoke a set-off, this right is not affected by the opening of the proceedings either.

(2) However, the rules on the nullification of acts apply mutatis mutandis to set-off. Where a legal or judicial set-off or the possibility of invoking a set-off results from a legal act which has been annulled, the set-off shall not be admitted and shall be deemed ipso jure to be inoperative.

(3) The above rules shall not preclude actions under national civil and commercial law for compensation for damage suffered by creditors as a result of a legal act which may be annulled.

Comment:
When the conditions for nullification are met, compensation is ineffective without the need for the practitioner to request nullification.

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CHAPTER 8 : RESTRUCTURING OR RECOVERY PLANS (JUDICIAL RESTRUCTURING AND RECOVERY PROCEEDINGS).

Article 7.3.8.1. Author of the draft plan.

In judicial restructuring or judicial recovery proceedings, the debtor may present a draft plan for restructuring the business, continuing its activity or selling all or part of it to a third party who undertakes to continue the business.

In judicial restructuring proceedings, a creditor may only submit a competing plan proposal if the debtor has not made one within six months of the opening judgment.

In judicial recovery proceedings, the debtor, with the assistance of the insolvency practitioner, or any creditor, may also submit a competing plan proposal. In this case, the debtor's proposal is decided upon first.

Upon request, the insolvency practitioner provides any interested party with useful necessary essential information about the business or assets that may be sold as part of a restructuring plan involving the sale of shares or a plan involving the sale of assets.

Comment:
Procedures vary from one country to another; the project is limited to proposing general rules.

It may seem questionable to admit takeover bids in judicial restructuring proceedings. However, on the one hand, the plan proposed by the debtor will have priority. On the other hand, if this plan is not adopted, it would be useful to have takeover bids in place quickly, in order to consider a sale. A period of 6 months is proposed**.**

Article 7.3.8.2. Constitution of classes or groups of affected parties.

The insolvency practitioner, with the assistance of the debtor and, where appropriate, a creditor who proposes a plan, brings together creditors and equity holders in groups in companies exceeding thresholds set by the provisions of national law.

If the company in difficulty has sales figures and a number of employees in excess of these thresholds, the creation of classes or groups of affected parties is mandatory.

If the company in difficulty has sales figures and a number of employees below these thresholds, the creation of groups of affected parties is optional. Groups are created at the request of the debtor, the insolvency practitioner or one or more creditors representing at least 30% of the declared financial claims.

Article 7.3.8.3. Consultation of affected creditors in the absence of groups.

If groups of affected parties are not established, the insolvency practitioner consults creditors and equity holders on the proposed restructuring plan. The judicial authority or, if the provisions of national law so provide, the creditors' meeting, decides on the draft plan in this case in the light of the received opinions and applies the principles established by article 7.3.8.8, in the light of a report by the insolvency practitioner analyzing the economic, financial and social situation of the company on the one hand and the proposals and offers on the other, as well as the guarantees presented.

The absence of a response to the consultation and the absence of a vote at the creditors' meeting constitute consent.

Draft

The decision of the judicial authority or the creditors' meeting replaces the vote of the groups of affected parties.

The decision may be appealed by opposing creditors.

These provisions also apply where insolvency proceedings are opened against a sole trader or a natural person who does not carry out an independent business activity.

Article 7.3.8.4. Group composition.

The creditors affected by a plan are grouped into groups, comprising at least one group of preferred creditors, one group of secured creditors and one group of non-preferred creditors.

Public creditors and social welfare authorities may constitute a group of affected parties.

Disputes relating to the constitution of groups are submitted to the judicial authority, which makes a ruling before the vote.

Article 7.3.8.5. Employees.

The employee representative body is informed of the proposals and offers received by the insolvency practitioner. It presents its observations on the provisions contained in the said proposals and offers with regard to the employees' employment contracts.

Wage claims are not affected by the plan.

Article 7.3.8.6. Vote on the plan.

The insolvency practitioner collects the creditors' votes for each group. Votes are expressed orally or by written or electronic mail on the basis of the proposals and offers received. Parties not affected by the plan do not take part in the vote.

The insolvency practitioner draws up a table of votes, including votes which, by virtue of the absence of a response to the consultation or the absence of a vote in the meeting of creditors, constitute consent within the meaning of article 7.3.8.3.

A group is considered to be in favor of proposals and bids when they receive a two-thirds favorable vote in terms of the amount of claims.

Comment:
The question of the majority required to pass the plan is a complex one. Requiring a high majority may make it difficult to adopt the plan, but too low a majority risks multiplying the recourse of opposing creditors, since by definition there will be more of them. We

Draft

have opted for a fairly high qualified majority. This option may be replaced by a different mechanism.

Article 7.3.8.7. Debt-to-equity swap.

The draft plan may allow creditors to convert their claims into shares or rights in the debtor company. Conversion against the will of the creditors concerned is excluded, except for holders of company shares or rights. In particular, the draft plan may provide for a reduction or increase in capital, contributions in kind, the exclusion of preferential subscription rights or the payment of compensation to ousted shareholders.

Where the shares or corporate rights held by the partners of the debtor company are also the subject of the plan, the decisions of these partners and any other declarations of intent by the participants in the insolvency plan are deemed to have been made in the prescribed form. Notices of meeting, publicity and other measures prescribed by company law and intended to prepare the decisions of the holders of company shares are deemed to have been taken in the prescribed form.

Comment:
Debt-for-equity swaps are an effective restructuring measure in many legal systems.

The second sentence of the first paragraph aims to protect freedom of association, which includes the right not to be forced to associate.

Article 7.3.8.8. Plan approval.

The plan adopted by a majority of groups is validated by the judicial authority.

The judicial authority validates the plan once it has been adopted by a two-thirds majority of the claims affected in each group.

Plan approval must be withheld if:

- it is established that the opposing affected parties are disadvantaged by the plan in consideration of the payments they would receive in the event of judicial liquidation procedure;

- affected parties sharing a sufficient community of interest within the same group do not benefit from equal treatment;

- it is established that the plan does not respect the rule of absolute priority, unless the disadvantaged group voted for the plan.

Approval of a plan makes it enforceable against all parties.

Draft

Comment:
The draft code opts for the absolute priority rule adopted by German and French law.

Article 7.3.8.9. Cross-class cram-down.

I. In the event that the required majorities have not been reached, the agreement of a group of affected voting parties is deemed to have been obtained,

1. when it is likely that the treatment reserved by the plan for members of this group will not be more unfavorable than the treatment they would receive in the absence of the plan;

2. when the members of this group will participate equitably in the distribution of economic value under the plan, and

3. when at least one of the groups of affected parties entitled to vote, other than a group of equity holders or any other group which, after determining the value of the debtor as a going concern, would not be entitled to any payment or to retain any interest, has approved the plan with the required majorities.

II. In a group of affected parties, participation is equitable within the meaning of paragraph 1, point 2, if in accordance with the provisions of the plan,

1. no other affected party receives an economic value greater than the full amount of its claim;

2. neither an affected party, who in the absence of a plan would be paid in a lower rank than the other creditors of the group, nor the debtor, nor any partner of the debtor company, benefits from any economic value, and that

3. no affected party who, in the absence of a plan, would have had to be paid as an equal-ranking creditor at the same time as other group creditors, is treated more favorably than the latter.

III. In a group of associates, participation is equitable within the meaning of paragraph 1, number 2, if in accordance with the provisions of the plan:

1. no other creditor enjoys an economic value greater than the full amount of its claim;

2. no shareholder who, in the absence of a plan, would have been treated on an equal footing with other shareholders, receives more favorable treatment than other shareholders.

Draft

Article 7.3.8.10. Implementation of the plan.

The judicial authority appoints the insolvency practitioner to draw up the acts necessary to implement the plan and supervise their execution.

It reports any difficulties to the judicial authorities.

The judicial authority terminates the plan if the debtor fails to meet its obligations or becomes insolvent again.

While the plan is being implemented, the debtor may request an amicable prevention procedure.

Implementation of the plan releases the debtor from debts not taken into account in the plan.

Article 7.3.8.11. Adoption of a plan for the settlement of liabilities in the absence of groups of affected parties.

If the groups of affected parties are not constituted, the plan is adopted by the court on the basis of the insolvency practitioner's report and the opinions of the creditors. The court takes into account the criterion of the best interests of the creditors. A creditor may appeal if it considers that its situation is more unfavorable as a result of the plan than it would have been in the absence of the plan, or if it is not treated equitably in relation to other creditors.

Article 7.3.8.12. Liquidation plan.

National law may provide for a liquidation plan if recovery proves impossible.

Article 7.3.8.13. Pre-negotiated transfer.

If a plan organizing the sale of the business is conceivable, it can be prepared in a confidential amicable pre-negotiation phase, under the guidance of an insolvency practitioner.

The insolvency practitioner is appointed as monitor by the judicial authority.

In this case, the insolvency practitioner prepares the sale in accordance with the debtor.

Article 7.3.8.14. Terms and conditions of pre-negotiated sale.

Insolvency practitioners ensure compliance with competition rules and market standards.

They are responsible for ensuring the transparency of the process and compliance with the criterion of the best interests of creditors.

Draft

During this phase, the debtor or manager is not divested.

At the request of the debtor or the monitor, legal proceedings and enforcement measures may be suspended until the negotiation phase has been completed.

The liquidation phase is opened by the competent judicial authority.
On the basis of a report from the monitor and the proposed transfer, the judicial authority may declare that the transfer is in line with the market price, or decide that it should take place by public auction.

The monitor is appointed as liquidator. It proceeds with the transfer in accordance with the decision of the judicial authority.

The auction procedure must be completed within one month.

In this case, if the initial offer is not accepted, the person submitting the offer must be reimbursed for the costs incurred, under the supervision of the judicial authority.

The transfer of all or part of the business to a party closely linked to the debtor can only be authorized by the competent judicial authority and if all interested parties have been informed and given sufficient time to submit an offer.

In any event, the transfer must respect the criterion of the best interests of creditors.

Any interested party may contest the amicable transfer.

The other liquidation provisions apply to the pre-negotiated sale.

Comment:
These provisions transpose the guidelines of the proposed Insolvency Directive of December 7, 2022.

Draft

CHAPTER 9 : ESTABLISHING LIABILITIES (RECOVERY AND LIQUIDATION PROCEEDINGS)

Article 7.3.9.1 Information for creditors.

Creditors are informed by:

- publication in a legal gazette;

- an entry in the Trade and Companies Register or the Companies Register;
- an entry in the register provided for under the provisions of European law relating to insolvency registers, and
- an individual notice.

As soon as insolvency proceedings are opened, the appointed insolvency practitioner informs known creditors without delay.

Comment:
The above text is inspired by the provisions of article 54 of Regulation (EU) no. 2015/848 of May 20, 2015. From January 1, 2023, a dematerialized national business register will replace the national trade and company register, the trade register and the agricultural assets register in France (Ord. n° 2021-1189 of Sept. 15, 2021).

Article 7.3.9.2. Recipients of information.

Creditors are informed by means of an individual notice, setting out in particular the time limits to be observed, the penalties provided for in respect of these time limits, the body or authority empowered to receive the lodgment of claims and any other prescribed measures. The note also indicates whether creditors whose claims are preferential or secured in rem need to file their claims. The note indicates that the creditor may use the standard claims form provided by the provisions of European law. Claims may be filed electronically.

Where the insolvency proceedings concern a natural person who is not engaged in a liberal profession or any other self-employed activity, the standard form referred to in this article may not be required.

Comment:
The above text is a repetition of article 54 of Regulation (EU) No. 2015-848 of May 20, 2015 It refers to its provisions for the use of a standardized form.

Article 7.3.9.3. Verification of financial claims.

The verification of claims is carried out by the insolvency practitioner, who makes a decision on the claims declared, subject to appeal to the judicial authority. It reports on the verification to the competent judicial authority and, where applicable, to the creditors' meeting, in accordance with the applicable legal rules.

The verification of claims applies to all claims declared in judicial restructuring or judicial recovery proceedings. In the case of judicial liquidation, it only applies to claims that have been declared and are likely to be paid in view of the estimated assets.

Draft

Comment:
Consideration was given to reproducing the provisions of article 55 of Regulation (EU) No. 2015-848 of May 20, 2015 on the information of creditors and the lodging of claims. The choice was made for a simplified version to facilitate its adaptation by each legislator. If a consensus is reached on a pure and simple integration of these provisions, it will suffice to replace articles 7.3.9.2 and 7.3.9.3 with the corresponding texts of the regulation.

Article 7.3.9.4. Consequences of a late declaration.

National law must specify the penalties for failing to declare a financial claim in due time.

Comment:
The adoption of a uniform provision on this point appeared difficult because of the penalties attached to non-compliance with the rules governing the filing of claims: separate verification procedure at the creditor's expense or unenforceability of undeclared claims.

CHAPTER 10 : JUDICIAL LIQUIDATION PROCEDURE

Article 7.3.10.1. General provisions.

The common rules and the provisions of the present code relating to the suspension of proceedings, the establishment of liabilities, the nullity of the suspect period, claims and liabilities are applicable to judicial liquidation proceedings.

Article 7.3.10.2 Management of the company during the judicial liquidation procedure.

During judicial liquidation proceedings, the insolvency practitioner administers the debtor's assets and business. The appointed insolvency practitioner has sole powers of administration and transfer, subject to the debtor's or the manager's own and personal rights.

It puts an end to the debtor's activity as soon as possible, unless authorized by the judicial authority for a period necessary for the realization of the assets under the best market conditions.

The insolvency practitioner may authorize the debtor or manager to enter into any act that goes beyond the day-to-day management of the business and its assets.

If the debtor is in a position to submit a plan, the judicial authority may authorize the insolvency practitioner to implement the procedures laid down for restructuring and recovery plans.

Draft

In insolvency proceedings, the insolvency practitioner can terminate the contract without the debtor's consent.

Compensation resulting from the termination of a contract is considered to be a claim arising prior to the opening of insolvency proceedings.

Article 7.3.10.3. Simplified judicial liquidation.
If the procedure concerns a micro-business, the above rules apply, subject to the following provisions:

Simplified judicial liquidation proceedings are opened by the competent judicial authority, which appoints an insolvency practitioner, at the request of the debtor or a creditor.

If the debtor does not have sufficient assets, the judicial authority nonetheless opens the procedure if it is in the interest of the creditors, or if liability actions or avoidance actions are to be brought and the costs of a practitioner and the procedure can be financed.

In this procedure, exchanges can be carried out electronically.

A standard form das to be drawn up for simplified settlement requests.

The debtor in judicial liquidation may continue its business under the supervision of the insolvency practitioner or the competent judicial authority.

The realization of the assets is carried out on an electronic auction platform by the insolvency practitioner, who carries out the announcements, preparatory acts and informs the creditors.

Comment:
The chosen option favours the appointment of an insolvency practitioner, contrary to the guidelines of the proposed Insolvency Directive of December 7, 2022. The appointment of a practitioner is deemed necessary to ensure that the interests of all stakeholders are respected. It also seems necessary to give Member States the option of opening proceedings without assets, if a contribution is requested from the claimant creditor, if a fee is charged to insolvency practitioners, or if public funds are used.

Article 7.3.10.4. Realization of goods.

During judicial liquidation proceedings, the insolvency practitioner realizes the debtor's assets and rights in the interest of creditors.

Draft

The insolvency practitioner reports regularly to the judicial authority that appointed him or her on the realization of the debtor's assets and rights.

The insolvency practitioner realizes the debtor's real estate assets in accordance with the provisions governing seizure and forced sale of real estate, subject to the use of electronic platform sales provided for in the case of simplified judicial liquidation.

The debtor's real estate assets and rights are consequently sold at public auction, unless it appears that a private sale is preferable.

The debtor's movable property and rights are sold by a private sale, particularly if a sale by public auction would entail excessive costs or delays.

The sale of assets and the transfer of real and personal property rights are carried out by the insolvency practitioner under the supervision of the judicial authority or, if provided for under national law, a creditors' committee.

Costs relating to publication and sales operations are considered to be procedural costs.

At any time during the proceedings, the insolvency practitioner may, with the authorization of the judicial authority, sell the business as a whole or shares in the debtor company.

The insolvency practitioner pays the claims from the proceeds of the realization of assets, taking into account any privileges and securities.

The insolvency practitioner terminates contracts, dismisses employees and returns assets subject to a security interest or right of ownership.

Creditors holding security interests and rights in rem entitling to the possession of an asset may exercise their rights against the insolvency practitioner prior to the presentation of a plan for the transfer of the business or the realization of the assets.

Article 7.3.10.5. Classification of claims in a judicial liquidation procedure.

In the context of judicial liquidation proceedings, verified and accepted claims are paid after the following claims have been paid:

- procedural costs;
- administrative expenses
- claims benefiting from the privilege provided for in article 7.2.3.3;
- claims arising during judicial restructuring or insolvency proceedings;

Draft

- legally privileged claims;
- unsecured claims.

Comment:
The project proposes a general classification that reflects most national systems, and also complies with the recommendations of the UNCITRAL Legislative Guide on Insolvency Law, without taking sides on the classifications provided by each national law.

Article 7.3.10.6 Security interests.

Subject to the provisions relating to claims and restitutions and the rules relating to claims subsequent to the opening of insolvency proceedings, the rights of creditors holding a security in a debtor's asset are taken into account when the asset is realized by the insolvency practitioner.

Provisions of national law must define in a clear and predictable way the priority rules applicable to the proceeds of payment for the realization of the asset.

Comment:
This wording is intended to meet the concerns expressed by the parliamentary group on security law. If adopted, a similar provision should be introduced for restructuring and recovery plans.

Article 7.3.10.7 Closure of the judicial liquidation proceedings.

Closing of the procedure is governed by article 7.3.12.1 and its effects by article 7.3.12.2.

CHAPTER 11 : CLAIMS AND RESTITUTIONS

Article 7.3.11.1. Claims and restitutions.

The opening of judicial restructuring proceedings or insolvency proceedings does not prevent the supplier of an asset with a right of ownership over it under a rental, leasing or retention-of-title sale contract from claiming its return. He must request restitution from the insolvency practitioner or the debtor in possession within the time limit set for declaring his claims. He is liable for any damage resulting from a late request.

The claim is possible if:
- the asset exists in kind and can be returned without causing damage to another asset of the debtor;
- the asset is still in the hands of the debtor;

Draft

- the property has not been paid for in full prior to the opening of insolvency proceedings.

The claiming creditor applies to the insolvency practitioner or the debtor in possession.

An appeal may be lodged with the competent judicial authority against the decision on the request.

CHAPTER 12 : CLOSURE OF THE PROCEDURE (RESTRUCTURING, RECOVERY AND LIQUIDATION PROCEDURES)

Article 7.3.12.1. Declaration of closing.

The competent judicial authority shall close the proceedings when it has approved a restructuring or recovery plan or when the debtor's rights and assets have been realized and the insolvency practitioner has distributed the proceeds of the assets or in accordance with any other condition laid down by the provisions of national law.

The legal entity ceases to exist as a result of the closure of the judicial liquidation proceedings, unless all creditors have been paid.

If after the closure of the proceedings it appears that assets or claims have not been realized, the judicial authority may, at the request of the insolvency practitioner or any interested party, appoint the said practitioner or a practitioner of his choice to proceed with their realization and the distribution of the proceeds thereof. The costs and remuneration of the appointed practitioner are deducted from the proceeds of the realization. The same rule applies if it appears that actions in the interest of creditors have not been taken. However, in this case, the appointment of the practitioner presupposes that the claimants agree to bear the costs of the action. Once the practitioner has been remunerated, they are reimbursed for these costs in priority to the results of the action.

Comment:
Once the procedure is closed, the question arises as to the legal future of the legal entity. A priori, all its assets have been sold, and not all creditors have been paid off. It is therefore an empty shell, and is destined to come to an end, which is expressly provided for in the text, to avoid, for example, having to resort to an amicable liquidation or any other formality. If, however, the realization of assets has enabled all creditors to be paid, there is no reason to dissolve the legal entity. It can survive, at least to distribute the liquidation surplus among its members.

Draft

In addition, it may happen that after the proceedings have been closed, it appears that certain assets have not been realized or certain actions brought, a situation to which the last paragraph above provides a response.

Article 7.3.12.2 Specific effects of the closure of a judicial liquidation procedure.

Without prejudice to the application of article 7.3.13.3, the natural person is discharged from its debts by the closure of the judicial liquidation proceedings, unless it has already been subject of a judicial liquidation proceedings closed for insufficient assets in the five years preceding the opening of the present judicial liquidation proceedings.

Subject to this reservation, all of its debts are cancelled with the exception of:

- non-business debts (exception not applicable to consumers);
- debts resulting from crime, fraud or tax evasion;
- debts owed to a natural person who, as guarantor, has paid a professional debt owed by the debtor.
- debts incurred subsequent to the opening of insolvency or restructuring proceedings;
- legal fees;
- remuneration of insolvency practitioners;
- debts related to a new business;
- undeclared debts, the existence of which the debtor has not indicated.

In any event, the debtor may propose a payment schedule for debts that have not been written off. Legal and contractual interest on these debts ceases to accrue from the close of the judicial liquidation proceedings. The judicial authority decides on the payment schedule in the light of the statements of the creditors, who may grant a debt relief or on whom such debt relief may be imposed, depending on the debtor's ability to pay.

Cancellation of the debts takes place at the latest at the end of a period of three years from the opening of the judicial liquidation proceedings, unless the debtor is subject to a professional sanction provided for in article 7.3.13.3 for a longer period. In this case, debt cancellation may be deferred until the end of this measure.

The cancellation or payment of debts in accordance with the above conditions terminates any ban on self-employment imposed on the debtor in connection with his or her indebtedness, unless the ban has been imposed by a business supervisory authority or by a criminal court.

Any creditor who can demonstrate a personal interest may appeal against the decision to write off debts.

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Comment:
The principle of the "new start " of the individual debtor is affirmed by Directive (EU) 2019-1023 of June 20, 2019. Some countries have already adopted such provisions, while others have not. This mechanism is part of a requirement for fairness, since the manager of a one-person company cannot be made responsible for the company's debts (except for those he has guaranteed, or in the event of fault). It is also intended to encourage the debtor, by giving him a second chance, to resume business activity. Finally, leaving the debtor to pay all his debts sometimes leads him to resort to manoeuvres such as using a false name or working in the black market. We therefore recommend that all of the debtor's debts be written off, with certain exceptions. There is also a provision for the judicial authority to postpone debt repayment if it imposes a management ban. Finally, a debtor who has already undergone a similar procedure less than five years previously would not be eligible for debt relief.

CHAPTER 13 : RESPONSIBILITIES

Article 7.3.13.1. Responsibilities in the case of a risk of insolvency.

Where there is a risk of insolvency or a threat to the company's ability to continue as a going concern, all managers and entrepreneurs must take the measures at their disposal to avoid insolvency.

These measures include the obligation to:

- avoid any decision likely to increase the company's liabilities and debts
- seek advice from an accredited professional or a government-approved assistance service
- request an amicable prevention procedure.

Article 7.3.13.2 Responsibilities in the event of insolvency.

In the event of insolvency, all managers and entrepreneurs must take steps to avoid any damage to creditors, the company and its employees.

These measures include the obligation to:

- apply for the opening of judicial recovery or judicial liquidation proceedings within the period determined by the provisions of national law from the time when the manager ascertained or should have ascertained the insolvency situation, unless it

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has applied within this period for the opening of amicable preventive proceedings and unless national law waives the obligation for natural persons to do so,

- notify the company's creditors,
- not to transfer the company's assets in any way,
- not to benefit one creditor, several creditors or close relations, to the detriment of all other creditors,
- inform the designated insolvency practitioner of all matters relating to the management of the business and the treatment of debts,
- pay only those debts related to the needs of the business and those consistent with the activity of a prudent and informed person.

Article 7.3.13.3 Consequences of a breach of obligations.

If judicial recovery or judicial liquidation proceedings have been opened against a legal entity, any director may be held liable on its assets for any loss suffered by creditors as a result of one or more breaches of the above obligations, depending on the loss suffered by creditors.

Under the same conditions, it may be banned from managing a commercial, craft or industrial business for a specified period. Any sole trader may be subject to the ban provided for in the previous point in the event of failure to comply with the obligations set out above.

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