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Harmonisation of Insolvency Law on the EU level
The Preventive Restructuring Framework

EIP Proposals
to enhance efficiency and fairness

Frankfurt am Main, 28 February 2017

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Background

The European Perspective

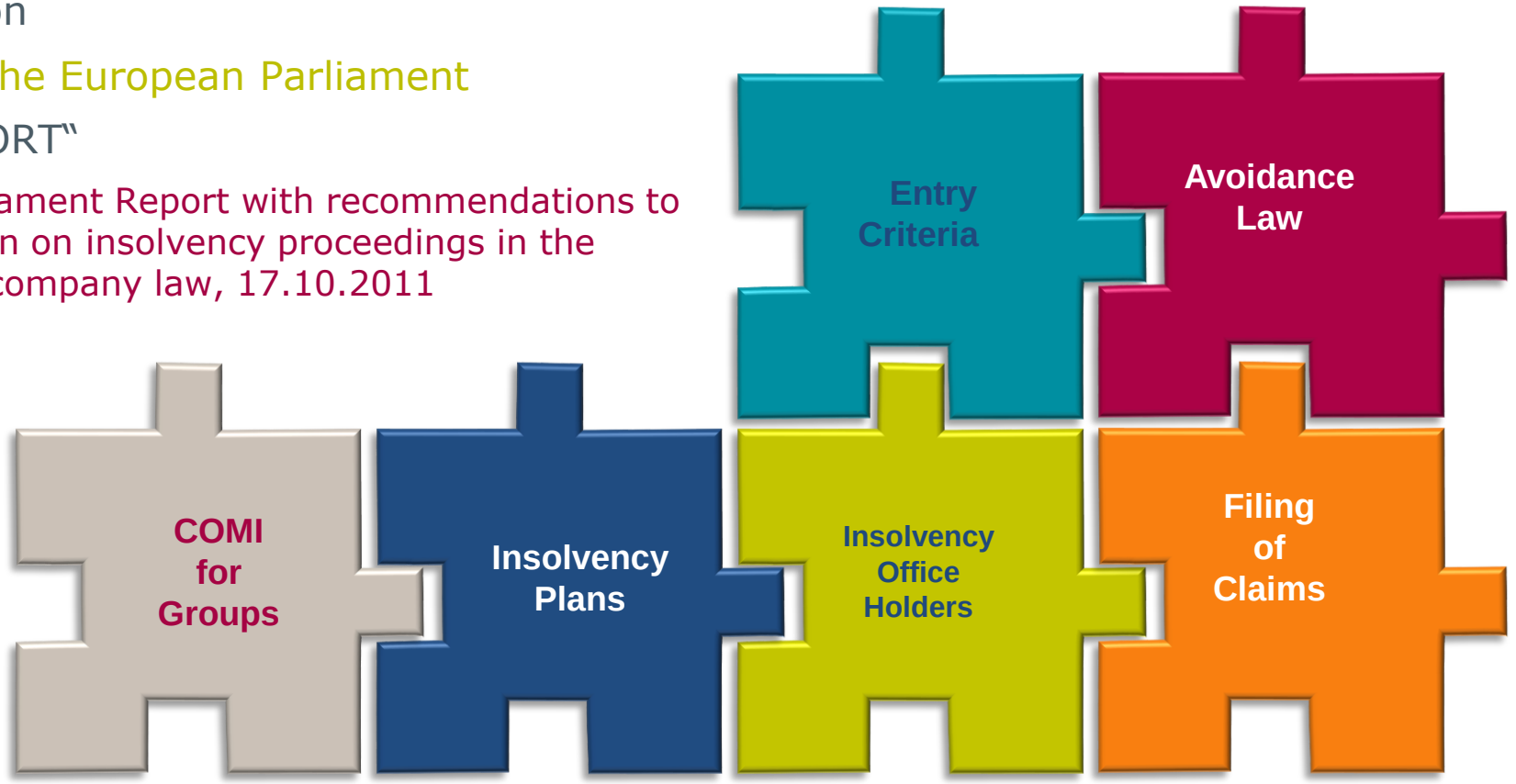
Background: European Agenda 2011

Harmonisation

Initiative of the European Parliament

„LEHNE REPORT"

European Parliament Report with recommendations to the Commission on insolvency proceedings in the context of EU company law, 17.10.2011



Topics of the European Insolvency Regulation *2012* (2015)

Article 1

Scope

1. This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

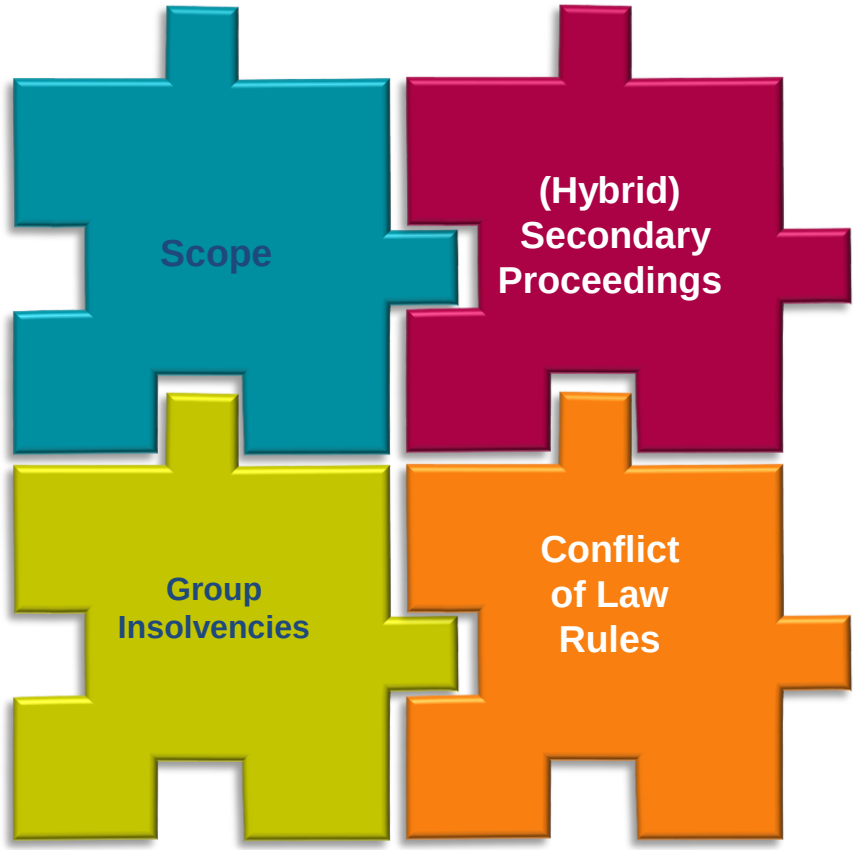
(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;

(b) the assets and affairs of a debtor are subject to control or supervision by a court; or

(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).

Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.

The proceedings referred to in this paragraph are listed in Annex A.



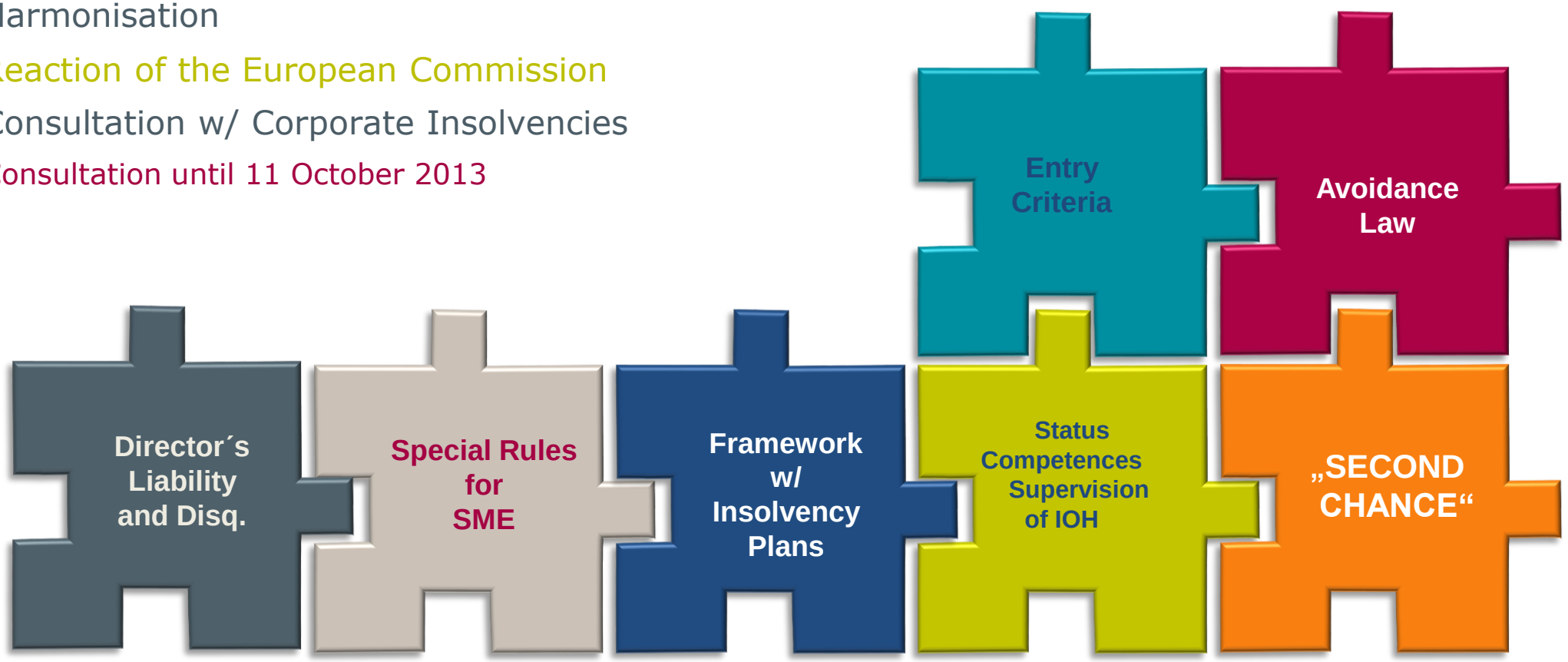
Background:
Commission´s Communication 2012/13

Harmonisation

Reaction of the European Commission

Consultation w/ Corporate Insolvencies

Consultation until 11 October 2013



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Background:
„New Approach“ /„Second Chance“ 2014

Recommendation of the European Commission on a new approach to business failure and insolvency

C(2014) 1500 final, 12.3.2014

Objective and subject matter

to encourage Member States to put in place a framework that enables the efficient restructuring of viable enterprises in financial difficulty

to give honest entrepreneurs a second chance

to lower the costs of assessing the risks of investing in another Member State

to increase recovery rates for creditors

to remove the difficulties in restructuring cross-border groups of companies.

Minimum Standards

on preventive restructuring frameworks

on discharge of debts of bankrupt entrepreneurs.

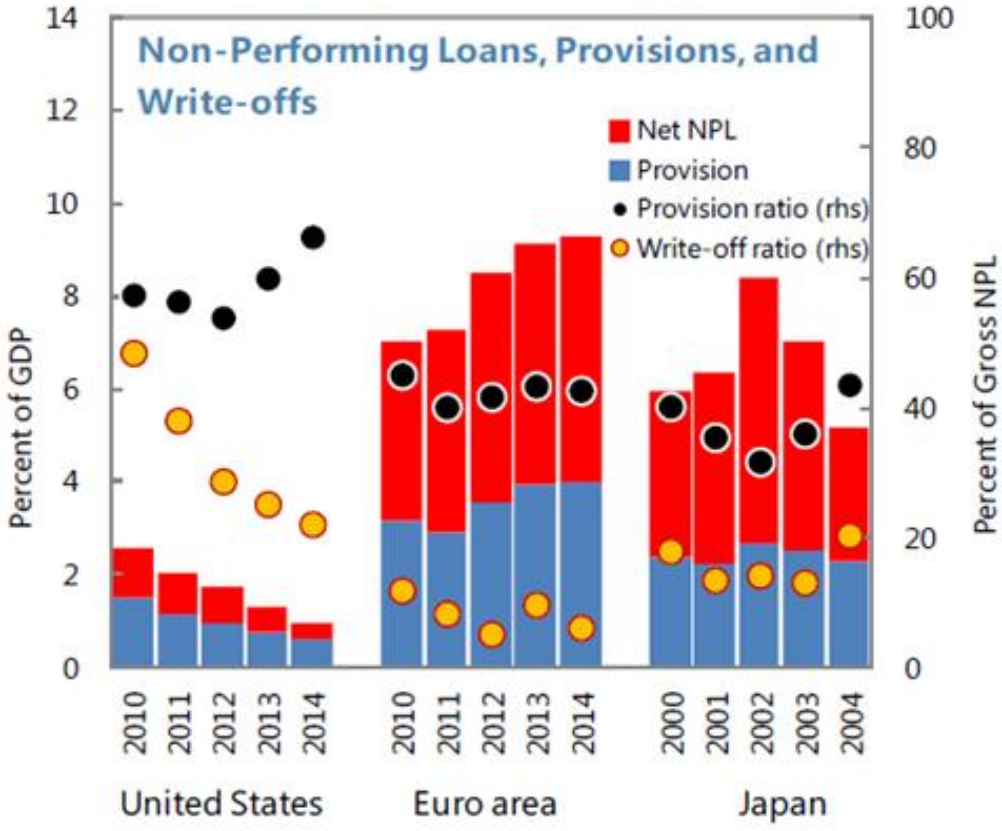
Background:
Capital Markets Action Plan 2015

Action Plan on Building a Capital Markets Union, COM(2015) 468 final, 30.9.2015

The Commission, working with Member States, will map and work to resolve unjustified national barriers to the free movement of capital, stemming, amongst other things, from insufficient implementation or lack of convergence in interpretation of the single rulebook and from national law that are preventing a well-functioning Capital Markets Union and publish a report by the end of 2016.

Convergence of insolvency and restructuring proceedings would facilitate greater legal certainty for cross-border investors and encourage the timely restructuring of viable companies in financial distress. Consultation respondents broadly agreed that both the inefficiency and divergence of insolvency laws make it harder for investors to assess credit risk, particularly in crossborder investments.

The Commission will propose a legislative initiative on business insolvency, including early restructuring and second chance, drawing on the experience of the Recommendation. The initiative will seek to address the most important barriers to the free flow of capital, building on national regimes that work well.



Sources: ECB; National central banks; IMF, Financial Soundness Indicators; and IMF staff calculations.
Notes: NPL = nonperforming loan; net NPL = gross NPL plus provisions; provision ratio = provisions as a percentage of gross NPL; write-off ratio = write-offs as a percentage of gross NPL.

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At a glance

The Preventive Restructuring Framework

The Preventive Restructuring Framework „DD RestFrame"
NO pre-insolvency proceedings

Negotiations between Debtor and Creditors about its restructuring

- generally out of court
- Debtor raimains in possession („**DiP**")

Preparation and presentation of the **Restructuring Plan**
- Restructuring participation by and/or haircut for Creditors
- (optional) Involvement of Shareholders
- Bridge and new financing

Voting on the Plan

- Classes of Creditors
- Qualified Majority (≤75%), by amounts, no headcount

Out of Court

***Option*: Assisted by Stay**, if necessary
- for the continuation of the business and to preserve the restructuring option
- No unfair impairment of indiviual creditors or groups of creditors
- Duration: Upto 4 months, prolongation to max. 12 months (optional)

Effects of the Stay
- Suspensioon of enforcement actions
- no withholding of performance, and/or termination of contracts and/or accelaration
- Suspension of requirement to file for insolvency

***(optional) Appointment of* „Restructuring Practitioner "**
- in case of a a general stay
- in case of cross-class cram-down
- other cases?

Confirmation of the plan, ***If***
- In case of new financing
- Plan adopted not unanoumosly, but by majority

Applicable Test:
- Fair proceedings
- *best interest of creditors test absolute priority rule*)
- new financing: no unfair prejudice
- Ability to avoid insolvency and to retain rentability

In Court

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EIP Proposals

to enhance efficiency and fairness

About EIP

- independent, self funding **Association of European Insolvency Practitioners' Organizations**
- Today EIP counts 11 national insolvency practitioners organizations as members, i.e. more than 5000 individuals , representing fairly our practice in the various states of the EU, including
  - Denmark
  - Estonia
  - Germany
  - France
  - Lithuania
  - Poland
  - Spain
  - Slovenia
  - Sweden
- The creation of the EIP in 2016 was motivated by the clear belief of the various members ín the importance of improving insolvency proceedings and their efficiency
- EIP has the primary goal to represent and promote the activity of Insolvency Office Holders organizations and their interest within the EU
- EIP helps to enhance the professionalism of European Insolvency Practitioners ("IP") by suggesting and monitoring standards and best practice guidelines - thus EIP is defining and supporting the profession of European IPs

Re Stay (I)

- EIP is deeming the (stay or) **moratorium** as a very helpful tool and which EIP is generally welcoming.
- EIP after having consulted internally but as well hearing the positions of other stakeholders such as banks and trade unions sees the risk that a moratorium to be granted to easily, for too long and too extensively may have an adverse effect. Under such circumstances It might jeopardize its underlying idea and not help to create a safe harbor for successful negotiations but even create mistrust.
- EIP is therefore highlighting that beside the necessity of **limited confidentiality** there must be sufficient **transparency and safeguards** for all parties affected by the moratorium.
- Insofar, EIP is recommending that the Member States (hereinafter abbreviated as "**MS**") may take care for provisions that should avoid the misuse of the moratorium.
- Furthermore, and in order to avoid the creation of NPL the moratorium should be limited to **three months**.

Re Stay (III)

In the opinion of EIP the MS shall entrust skilled and independent professionals ("**IP**") to **supervise during the moratorium** the situation of the debtor and the status of the restructuring negotiations in order to take care for an early warning if the moratorium is only used for delaying or even deepening the crisis but not likely to be successful and/or the debtor is already illiquid. In such case the IP shall inform the restructuring court accordingly.

Insofar EIP is proposing:

- MS shall take care that **moratorium** is only **to be granted** in case it is (i) backed by vast majority of creditors and/or (ii) the business is viable (apart from the debts) and a relevant part of the creditors is backing the restructuring.

- The **moratorium** shall only have **effect** with respect to creditors that shall be affected by the plan, but not to third parties.

Re Stay (IV)

- The European Commission is correctly assessing that **third parties** should be encouraged not to stop their collaboration with or delivery to the debtor while in restructuring.
- EIP, after having consulted internally but as well hearing the positions of other stakeholders such as banks and trade unions is of the opinion that this should however not be enforced against the will of such parties by (automatic) effect of such a moratorium. This only may lead to even stricter termination clauses and will prevent the free market and mutual trust. EIP is therefore preferring to grant not only the debtor but those trusting in the success of the restructuring a certain **safe harbor**.
- Third parties should therefore be protected when continuing their trade with a debtor in restructuring under the DD RestFrame
  - » If the debtor is supervised and
  - » If payments and transactions are made under congruent conditions as already agreed and/or generally agreed under normal business conditions and
  - » If the negotiations are still promising to be successful.
- Under such circumstances the debtor shall be deemed to be solvent and/or the **avoidance action** aimed against such transactions and payments should be **limited** to cases of fraud and bad intent.

Re Restructuring Plan (I)

- According to the experience of EIP members and regarding the negotiation related to and the drafting of the **restructuring plan** an early involvement of a professional and the competent court would enable early engagement, support and transparency and could therefore lead to more successful restructurings.

- In order to make sure that the process is fair and transparent it is an requisite that the **claims granting votes** for the adoption of the restructuring plan have been revised independently. An independent examination of the claims regarded as acceptable by the debtor and a confirmation of the voting groups proposed by the debtor should be undertaken prior to the voting. Otherwise these two important factors might be used by the debtor for too "creative design" of their plan proposal or be challenged after the proceedings in lengthy lawsuits.

Re Restructuring Plan (II)

- With respect to the **cram-down** it is not understandable and fair if one group can overrule a majority of other groups. Although it makes sense to make a distinction between equityholders and creditors here, a relevant majority of groups should be needed for a cram-down.

- With respect to the various points where an **valuation** is needed we recommend to stay with one comparison value. This should always be the **going concern value** to be applied in the various test. The reason is that these proceedings take place at an early stage prior to material insolvency and grant safe harbors for various parties (exemption from claw back, exemption from directors liability etc.). This can only be fair if the entity is not already ripe for liquidation. And if the is not yet in a stage of liquidation, the liquidation value cannot be used.

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Re. Restructuring Practitioners within the Framework of early Restructuring (I)

- The points shown above are just a few examples highlighting the benefit and need for an **independent supervision** of the RestFrame, insofar EIP is missing a clear description that the professional taking this position must be skilled, integer and independent.

- The mixed role of the **Restructuring Professional in the RestFrame** (**"RP"**; be it as restructuring advisor, expert or mediator, is heavily based on the various different concepts serving as roots for the DD RestFrame, which are e.g. the so "independent advisor "in the UK (which is chosen by consent of the major creditors only- *sic!*), the French concept of Mediators in the conciliation procedures and German IP not only administering the case but serving as an expert for the court.

Re. Restructuring Practitioners within the Framework of early Restructuring (II)

- EIP asks the European Commission to be aware that at least such IP which are regularly appointed by courts or the majority of creditors in case of an filing for insolvency already meeting all requirements under the RestFrame, they are

  - » independent
  - » supervised by courts or other competent bodies or self-regulated organizations
  - » have the experience to serve as intermediate and mediator bringing together the various stakeholder
  - » have the knowledge and skills to supervise proceeding and to detect abuse to the detriment of the general body of creditors or third party and
  - » have the knowledge and skills to serve as experts for the court.

- With regard to Art. 5 subpara 3 DD RestFrame it should be made clear that the two **cases, where RP can be appointed** are not conclusive. Thus MS can foresee a role for the IP in other situations not mentioned in Art. 5 subpara 3 DD RestFrame so far as far as they want to avoid abuse and take care for better transparency.

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Re. Practitioners in the field of Restructuring, Insolvency and Second Chance

- Art 25 provides for all **Practitioners in the field of Restructuring, Insolvency and Second Chance**, may they act in restructuring, pre-insolvency, rescue or liquidation proceedings **("IP")** to be trained in impartiality and independence. EIP suggests that training only is not sufficient and that Member States shall provide for IP to perform their job in an impartial way and that they shall be independent from all influence by and conflicts with stakeholders in the proceedings.
- With regard to the rules in relation to IP the EIP is welcoming the concept that a **code of conduct** should be introduced for this profession. EIP is seeing the differences of and in the MS.
- Therefore, the details should be left for the MS and the national bodies and organization. On the EU level EIP is sharing the view that such code of conduct should be guide by three pillars:
  - » **Independence**
  - » **Fairness of Proceedings**
  - » **Transparency**
- In order to protect the affected parties MS shall take care that only such IP shall be appointed in restructuring and insolvency cases that have in addition to the principles already laid out in the DD PreIP as well sufficient **insurance cover** granted by a reputable insurer.

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Education

Born in 1972 in Heilbronn am Neckar

Studied Law at Ruprecht Karls University in Heidelberg and at Friedrich Schiller University in Jena

During his legal clerkship, Mr. Fritz worked for Deutsche Bank and for the German federal state of Brandenburg State Chancellery and its InvestitionsBank

Admitted to the Leipzig Bar in 1999 and in 2005 to the Bar Frankfurt am Main

Partner since 2009

Experience

Mr Fritz deals with complex and international company insolvencies with the focus on continuation and recovery from insolvency. He is an experienced M+A counsel for cases involving medium-sized up to large international companies and groups. Mr. Fritz acts as a legal advisor for debtors, managers, companies, corporate groups and banks.

In addition Mr. Fritz is an expert in the field of insolvency preference law as well as in corporate law.

Since 2004 Mr. Fritz acts regularly as court-appointed insolvency administrator and insolvency expert.

He regularely advises creditors, adminstrators or manager in insolvency law related disputes, in particular in litigation cases based on preferences and violation of managerial duties.

References

Philipp Holzmann (UK, NL)
Georg von Opel Group (Ger)
EganaGoldpfeil Europe (Ger)
Salamander Group (Ger, F, PL, It, At, Hun)
Woolworth Deutschland (Ger, UK)
Wilhelm Karmann Group (Ger, US, Mex, PL)
Schlecker (Ger, Esp, It)
Max Bahr (Ger)
Praktiker International
(Ger, Hun, Gr, Ukr, Bulg, Rom)

International Commitment

Daniel F. Fritz was currently engaged as private expert for the European Commission with respect to the reform of the European Insolvency Regulation and the "New Approach on Insolvency".

He regularly gives lectures both in Germany and abroad on insolvency law as well as on European Union insolvency law and has been editor or co-author of several publications with respect to (international) insolvency law.

He has contributed as co-author to the note on the "Harmonization of Insolvency Law at EU Level," upon the request of the DG internal policies of the European Parliament. Additionally, he was invited to speak at a hearing of the Committee on Legal Affairs of the European Parliament with regard to the harmonisation of insolvency land preference aw at EU level.