

# Table of Contents

|                             |      |
|-----------------------------|------|
| Preface .....               | V    |
| Selected Bibliography ..... | XV   |
| List of Authors.....        | XVII |

## Introduction (Paulus)

|  |   |
|--|---|
| A. General overview; structure.....                      | 1 |
| I. The goals of the Directive.....                       | 1 |
| II. Structure.....                                       | 3 |
| B. Historical development .....                          | 4 |
| C. Relationship to EU 2015/848; cross-border issues..... | 6 |
| D. Global positioning of the new instrument.....         | 7 |

|  |          |
|--|----------|
| <b>DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL.....</b> | <b>9</b> |
|--|----------|

## Title I General Provisions

|   |    |
|---|----|
| Article 1. Subject matter and scope ( <i>Dammann</i> ) .....  | 35 |
| A. Purpose .....  | 36 |
| B. Proceedings and measures falling within the scope of the Directive .....   | 37 |
| I. Preventive restructuring frameworks .....  | 37 |
| 1. The development of hybrid, preventive, semi-collective restructuring proceedings.....                                    | 37 |
| 2. The approach of the Directive.....   | 37 |
| 3. The exclusion of classical insolvency proceedings from the scope of the Directive.....                                   | 39 |
| 4. Judicial composition versus court-assisted contractual approach.....   | 41 |
| 5. Transposition by amending existing preventive insolvency proceedings.....  | 42 |
| 6. The two-step approach .....  | 43 |
| II. Proceedings leading to a discharge of debts .....   | 45 |
| III. Measures to increase the efficiency of procedures concerning the restructuring, insolvency and discharge of debt ..... | 45 |
| C. Group of companies .....   | 46 |
| D. Excluded classes of debtors .....  | 46 |
| E. Excluded categories of claims .....  | 48 |
| F. Possibility to limit preventive restructuring framework to financial restructuring?.....                                 | 49 |
| G. The size of the debtors .....  | 50 |
| H. The relationship between the Directive, the EIR 2015 and Brussels Ia.....  | 50 |
| I. Cross-border aspects of preventive restructurings .....  | 50 |
| II. The relationship between the Directive and the EIR 2015 .....   | 51 |
| III. The scope of the EIR 2015.....   | 51 |
| IV. The scope of the EIR 2015 in light of the Directive.....  | 52 |
| V. The consequence of the application of the EIR 2015 to restructuring frameworks.....                                      | 55 |
| VI. The advantage of the two-step model.....  | 56 |
| VII. The application of Brussels Ia.....  | 56 |
| VIII. The relationship between the Directive and the Transfer Directive.....  | 58 |
| Article 2. Definitions.....   | 59 |
| A. Purpose of the norm ( <i>Paulus</i> ) .....  | 60 |
| B. Definitions.....   | 61 |
| I. lit. 1: Restructuring ( <i>Dammann</i> ) .....   | 61 |
| II. lit. 2: Affected parties ( <i>Veder</i> ) .....   | 63 |

|  |    |
|--|----|
| III. lit. 3: Equity holder ( <i>Garcimartin</i> ).....                         | 64 |
| IV. lit. 4: Stay of individual enforcement actions ( <i>Richter</i> ).....     | 64 |
| V. lit. 5: Executory contract ( <i>Richter</i> ).....                          | 67 |
| VI. lit. 6: Best-interest-of-creditors test ( <i>Veder</i> ).....              | 68 |
| VII. lit. 7: New financing ( <i>Lynch Fannon</i> ).....                        | 69 |
| VIII. lit. 8: Interim financing ( <i>Lynch Fannon</i> ).....                   | 71 |
| IX. lit. 9: Entrepreneur ( <i>Paulus</i> ).....                                | 74 |
| X. lit. 10: Full discharge of debt ( <i>Paulus</i> ).....                      | 75 |
| XI. lit. 11: Repayment plan ( <i>Paulus</i> ).....                             | 75 |
| XII. lit. 12: Practitioner in the field of restructuring ( <i>Veder</i> )..... | 76 |
| C. Par. 2 ( <i>Paulus</i> ).....   | 76 |
| I. Insolvency.....   | 77 |
| II. Likelihood of insolvency.....  | 77 |
| III. Micro, small and medium-sized enterprises ('SMEs').....                   | 77 |
| Article 3. Early warning and access to information ( <i>Rammeskow</i> ).....   | 78 |
| A. Purpose of the norm.....  | 78 |
| B. Duty of Member States to establish early warning tools.....                 | 79 |
| C. Should early warning tools also apply to consumers etc.?.....               | 79 |
| D. Which early warning tools must be available?.....                           | 80 |
| I. Alert mechanisms.....   | 80 |
| II. Advisory services.....   | 81 |
| III. Directors' duties to act upon an early warning.....                       | 82 |
| E. Information to employee representatives on early warning tools.....         | 83 |
| F. Easy accessible online information about early warning tools.....           | 83 |
| G. Support to employees' representatives.....                                  | 83 |

## Title II Preventive Restructuring Frameworks

|  |     |
|--|-----|
| <b>Chapter 1. Availability of preventive restructuring frameworks</b> .....                | 85  |
| Article 4. Availability of preventive restructuring frameworks ( <i>Garcimartin</i> )..... | 85  |
| A. Purpose.....  | 86  |
| B. Structure.....  | 87  |
| C. Availability of preventive restructuring frameworks.....                                | 87  |
| I. Introduction.....   | 87  |
| II. Preventive restructuring frameworks.....   | 87  |
| III. The likelihood-of-insolvency test.....  | 89  |
| D. Suspicious debtors.....   | 91  |
| E. Viability test.....   | 92  |
| F. Number of times.....  | 93  |
| G. Procedural aspects.....   | 94  |
| I. General aspects.....  | 94  |
| II. Minimum intervention of judicial or administrative authorities.....                    | 95  |
| H. Initiative.....   | 96  |
| <b>Chapter 2. Facilitating negotiations on preventive restructuring plans</b> .....        | 97  |
| Article 5. Debtor in possession ( <i>Veder</i> ).....                                      | 97  |
| A. Purpose of the norm.....  | 97  |
| B. Debtor-in-possession.....   | 98  |
| C. Appointment of a practitioner in the field of restructuring.....                        | 100 |
| I. General remarks.....  | 100 |
| II. Discretion.....  | 101 |
| III. Mandatory appointment.....  | 101 |
| D. Practitioner in the field of restructuring.....   | 102 |
| Article 6. Stay of individual enforcement actions ( <i>Richter</i> ).....                  | 103 |
| A. General comments.....   | 105 |
| B. Specific parameters of the stay.....  | 105 |

|  |            |
|--|------------|
| I. The specific purpose of the stay (Article 6 par. 1 1 <sup>st</sup> subparagraph).....                         | 105        |
| II. Official discretion at the point of entry (Article 6 par. 1 2 <sup>nd</sup> subparagraph).....               | 106        |
| III. The claims subject – and not the subject – of the stay (Article 6 par. 2) .....                             | 107        |
| IV. The nature of the stay (Article 6 par. 3 1 <sup>st</sup> subparagraph).....                                  | 109        |
| V. The limited stay (Article 6 par. 3 2 <sup>nd</sup> subparagraph) .....  | 109        |
| VI. Claims which Member States may exempt from the stay (Article 6 par. 4).....                                  | 110        |
| 1. The two general pre-requirements .....  | 110        |
| 2. The two specific conditions .....   | 111        |
| a) Enforcement not likely to jeopardise the restructuring (Article 6 par. 4 lit. a) .....                        | 112        |
| b) Unfair prejudice (Article 6 par. 4 lit. b).....   | 114        |
| 3. The procedural context.....   | 115        |
| VII. Employees' claims (Article 6 par. 5).....   | 116        |
| VIII. The initial duration of the stay (Article 6 par. 6).....   | 117        |
| IX. Extensions and renewals (Article 6 par. 7) .....   | 117        |
| X. Limitations on the overall duration of the stay (Article 6 par. 8).....                                       | 119        |
| XI. Termination of the stay via official discretion (Article 6 par. 9) .....                                     | 120        |
| 1. A stay litigation standstill period.....  | 120        |
| 2. An opportunity to be heard.....   | 120        |
| 3. The grounds for lifting the stay .....  | 121        |
| C. The debtor's powers and duties during the stay .....  | 123        |
| Article 7. Consequences of the stay of individual enforcement actions ( <i>Richter</i> ) .....                   | 124        |
| A. General comments.....   | 126        |
| B. Specific rules related to the stay.....   | 126        |
| I. Commencement of formal insolvency proceedings .....   | 126        |
| 1. Suspension of the debtor's duty to file (Article 7 par. 1).....   | 126        |
| 2. Suspension of the creditors' right to file (Article 7 par. 2).....  | 127        |
| 3. Derogations from the safe-harbours (Article 7 par. 3) .....   | 128        |
| II. The debtor's contracts.....  | 130        |
| 1. Preservation of essential executory contracts (Article 7 par. 4 1 <sup>st</sup> subparagraph) .....           | 130        |
| a) What is the prohibition? .....  | 130        |
| b) When does the prohibition apply? .....  | 131        |
| c) What does the prohibition apply to? .....   | 132        |
| d) Against whom the prohibition applies.....   | 133        |
| e) For how long does the prohibition apply?.....   | 134        |
| 2. Safeguards awarded to the debtor's counterparties (Article 7 par. 4 2 <sup>nd</sup> subparagraph).....        | 134        |
| 3. Extension of the prohibition to non-essential contracts (Article 7 par. 4 3 <sup>rd</sup> subparagraph) ..... | 135        |
| 4. <i>Ipsa facto</i> clauses (Article 7 par. 5) .....  | 135        |
| 5. The ultimate fate of the debtor's contracts .....   | 137        |
| III. Netting arrangements (Article 7 par. 6) .....   | 138        |
| IV. Expiry of the stay (Article 7 par. 7).....   | 139        |
| V. Set-off.....  | 140        |
| <b>Chapter 3. Restructuring plans .....</b>  | <b>141</b> |
| Article 8. Content of restructuring plans ( <i>Veder</i> ) .....   | 141        |
| A. Purpose of the norm.....  | 142        |
| B. Minimum content of the plan .....   | 142        |
| I. Information regarding the (financial situation of the) debtor .....   | 142        |
| II. Affected parties.....  | 143        |
| III. Terms of the plan .....   | 144        |
| IV. Statement relating to the prospects of the restructuring .....   | 145        |
| C. Checklists .....  | 145        |
| D. Third-party releases .....  | 145        |
| Article 9. Adoption of restructuring plans ( <i>Dammann</i> ).....   | 146        |
| A. Introduction.....   | 148        |
| B. Preliminary remark: the concept of 'affected parties' .....   | 149        |

|  |     |
|--|-----|
| I. The legal framework.....  | 149 |
| II. The choice for the proposer of the plan to carve out unaffected parties .....                              | 151 |
| C. Submission of restructuring plans, Article 9 par. 1 .....   | 153 |
| I. The submission of the restructuring plan by the debtor.....   | 153 |
| II. The submission of the restructuring plan by the practitioner in the field of restructuring .....           | 154 |
| III. The submission of competing restructuring plans by creditors.....   | 154 |
| D. Voting rights, Article 9 par. 2 and 3.....  | 155 |
| E. Classes of creditors, Article 9 par. 4 and 5 .....  | 156 |
| I. The rationale of class formation.....   | 156 |
| II. Equity holders.....  | 157 |
| III. The constitution of additional classes .....  | 158 |
| IV. The question of mixing up secured and unsecured creditors within the same class.....                       | 160 |
| V. The option to create a separate class for workers' claims .....   | 161 |
| VI. The protection of vulnerable creditors .....   | 161 |
| VII. The single class option for SMEs .....  | 161 |
| VIII. The control of the formation of classes and voting rights by a judicial or administrative authority..... | 162 |
| F. Voting Majorities, Article 9 par. 6.....  | 164 |
| I. Rational of majority rules .....  | 164 |
| II. The flexible approach of the Directive.....  | 164 |
| III. Best practice .....   | 165 |
| IV. The calculation of the voting rights.....  | 165 |
| G. Agreement with the requisite majority, Article 9 par. 7.....  | 166 |
| Article 10. Confirmation of restructuring plans ( <i>Garcimartin</i> ) .....                                   | 167 |
| A. Purpose .....   | 168 |
| B. Need of confirmation .....  | 168 |
| C. Conditions .....  | 170 |
| I. Adoption of the plan.....   | 170 |
| II. Unfair discrimination test.....  | 171 |
| III. Notification of the plan .....  | 172 |
| IV. Best-interest-of-creditors test .....  | 172 |
| V. New financing.....  | 174 |
| VI. Burden of allegation .....   | 175 |
| D. Viability and Insolvency tests .....  | 175 |
| E. Procedure.....  | 175 |
| Article 11. Cross-class cram-down ( <i>Veder</i> ) .....   | 176 |
| A. Purpose of the norm .....   | 177 |
| B. Cross-class cram-down.....  | 177 |
| C. Request for confirmation by the debtor or with the debtor's agreement.....                                  | 180 |
| D. Conditions for confirmation of a non-consensual plan .....  | 183 |
| I. General confirmation conditions .....   | 183 |
| II. Minimum support test.....  | 183 |
| III. The fairness test.....  | 184 |
| 1. Relative priority rule.....   | 185 |
| 2. Absolute priority rule .....  | 187 |
| E. Practitioner in the field of restructuring .....  | 189 |
| Article 12. Equity holders ( <i>Garcimartin</i> ).....   | 189 |
| A. Purpose .....   | 190 |
| B. Structure.....  | 191 |
| C. Definition of equity holders .....  | 191 |
| D. Alternatives .....  | 192 |
| I. Introduction: legal background.....   | 192 |
| II. Equity holders as a class of affected parties.....   | 193 |
| III. Other means.....  | 195 |
| IV. SMEs .....   | 197 |
| V. Cross-border scenarios .....  | 198 |

|   |            |
|---|------------|
| Article 13. Workers ( <i>Lynch Fannon</i> ).....  | 198        |
| A. Purpose .....  | 199        |
| B. Emergence of Article 13 in the legislative development of the Directive.....                                       | 201        |
| C. Purpose .....  | 201        |
| D. Interface with other EU employment legislation .....   | 202        |
| I. Information and consultation .....   | 202        |
| II. Additional Directives which interface with restructuring .....  | 204        |
| III. Guarantee of payments of wages, salaries and pension .....   | 205        |
| IV. Acquired Rights Directive .....   | 206        |
| V. New consultation rights.....   | 208        |
| E. Alternative restructuring proposals, frameworks and approaches.....  | 208        |
| Article 14. Valuation by the judicial or administrative authority ( <i>Dammann</i> ).....                             | 209        |
| A. Purpose .....  | 209        |
| B. The valuation of the business as a going concern .....   | 210        |
| C. The liquidation value of the business .....  | 211        |
| D. Judicial valuation only where the plan is challenged .....   | 212        |
| E. The procedure to lodge a challenge .....   | 212        |
| F. The appointment of experts.....  | 213        |
| G. Best practice for the transposition of Article 14 of the Directive.....  | 214        |
| Article 15. Effects of restructuring plans ( <i>Richter</i> ).....  | 214        |
| A. The effects of restructuring plans .....   | 214        |
| I. Binding effects on affected parties (Article 15 par. 1).....   | 214        |
| II. Creditors not involved in the adoption of the plan, par. 2.....   | 215        |
| Article 16. Appeals ( <i>Paulus</i> ).....  | 216        |
| A. Purpose .....  | 216        |
| B. Appeal .....   | 217        |
| I. Possibility to appeal, par. 1.....   | 217        |
| 1. Judicial authority .....   | 217        |
| 2. Administrative authority.....  | 218        |
| II. Procedural steps, par. 2 and 3.....   | 218        |
| III. Decision, par. 4.....  | 219        |
| <b>Chapter 4. Protection for new financing, interim financing and other restructuring related transactions .....</b>  | <b>220</b> |
| Article 17. Protection for new financing and interim financing ( <i>Lynch Fannon</i> ).....                           | 220        |
| A. Introduction.....  | 221        |
| B. History.....   | 222        |
| C. Purpose .....  | 224        |
| D. Protection for new and interim financing .....   | 224        |
| I. The applicability of measures which might render new and interim financing ‘void, voidable or unenforceable’ ..... | 224        |
| II. Where liability might be incurred in relation to new and interim financing.....                                   | 226        |
| III. Interim financing granted after the debtor is unable to pay its debts as they fall due .....                     | 227        |
| E. Priority for new and interim financing .....   | 228        |
| F. Conclusion.....  | 228        |
| Article 18. Protection for other restructuring related transactions ( <i>Lynch Fannon</i> ) .....                     | 229        |
| A. Purpose and background .....   | 230        |
| B. The scope of Article 18: introduction .....  | 231        |
| C. The scope of the Article: specific provisions.....   | 232        |
| I. Transactions which are “reasonable and immediately necessary”.....   | 232        |
| II. Specifically enumerated protected transactions .....  | 232        |
| III. Timing of Transactions during the negotiation phase.....   | 233        |
| IV. Transactions entered into during the implementation phase.....  | 234        |
| D. Implementation of Article 18 – The role of the judiciary and or administrative authority ...                       | 234        |

|   |     |
|---|-----|
| E. Protection from actions or measures which render the transactions void, voidable or unenforceable.....     | 235 |
| I. Other transactions or commitments which are relevant .....   | 236 |
| II. Practical Issues.....   | 237 |
| <b>Chapter 5. Duties of directors</b> .....   | 238 |
| Article 19. Duties of directors where there is a likelihood of insolvency ( <i>Corno</i> ).....               | 238 |
| A. Purpose of Article 19 and of the implementing Member States' rules .....                                   | 238 |
| B. Ambit of application .....   | 239 |
| C. Duties of directors as one of the minimum standards for preventive restructuring procedure .....           | 240 |
| D. The long way to Article 19 .....   | 242 |
| E. Issues to be imposed on directors by Member States as a minimum .....                                      | 243 |
| I. Interests of creditors, equity holders and other stakeholders.....   | 243 |
| 1. Need to have regard to interests of stakeholders .....   | 243 |
| 2. The possible extension to rights of stakeholders .....   | 244 |
| 3. Interests of creditors .....   | 244 |
| 4. Interests of equity holders .....  | 245 |
| 5. Interest of other stakeholders. Directors' interests .....   | 246 |
| II. Need to take steps to minimize losses and avoid insolvency .....  | 246 |
| III. Need to avoid deliberate or grossly negligent conduct that threatens the viability of the business ..... | 247 |

### Title III Discharge of Debt and Disqualifications

|  |     |
|--|-----|
| Article 20. Access to discharge ( <i>Paulus</i> ).....   | 249 |
| A. Purpose .....   | 249 |
| B. Access to full discharge, par. 1 .....  | 250 |
| C. Proportionality, par. 2 .....   | 251 |
| D. Fresh start, par. 3.....  | 252 |
| Article 21. Discharge period ( <i>Paulus</i> ) .....   | 252 |
| A. Purpose .....   | 253 |
| B. Start of discharge period, par. 1.....  | 253 |
| C. End of discharge period, par. 2 .....   | 254 |
| D. Permissible side effect, par. 3.....  | 255 |
| Article 22. Disqualification period ( <i>Rammeskow</i> ).....  | 255 |
| A. Purpose of the norm.....  | 255 |
| B. Article 22 concerns entrepreneurs .....   | 256 |
| C. Which kinds of disqualifications must cease according to Article 22.....                                | 257 |
| D. Disqualifications concerning specially supervised activities .....                                      | 258 |
| E. When must a disqualification cease.....   | 258 |
| F. No requirement for additional procedures to cease a disqualification .....                              | 259 |
| Article 23. Derogations ( <i>Rammeskow</i> ).....  | 259 |
| A. Purpose of the norm.....  | 261 |
| B. Entrepreneurs that have acted dishonestly or in bad faith.....  | 261 |
| C. Derogations in other well-defined circumstances.....  | 262 |
| I. Violation of obligations under the repayment plan etc. ....   | 262 |
| II. Failure to comply with information or cooperation duties .....   | 263 |
| III. Abusive applications for discharge .....  | 263 |
| IV. Limitation of further applications for discharge.....  | 263 |
| V. The cost of the procedure leading to the discharge of debt is not covered .....                         | 263 |
| VI. Safeguarding the balance between the rights of the debtor and the rights of one or more creditors..... | 264 |
| D. Longer discharge period.....  | 264 |
| I. Longer discharge period in order to preserve the entrepreneur's business.....                           | 264 |
| II. Longer discharge period where the entrepreneur's main residence is not realised.....                   | 265 |

|   |     |
|---|-----|
| E. Exclusion of certain categories of debt from the discharge .....                                     | 266 |
| F. Longer disqualification periods for certain professions.....   | 267 |
| I. Professions with specific rules on ethics, reputation or expertise .....                             | 267 |
| II. Professions dealing with the management of the property of others.....                              | 268 |
| III. Par. 5 apply despite a discharge .....   | 268 |
| IV. Par. 5 merely concerns the disqualification period.....   | 268 |
| G. Disqualifications ordered by other authorities .....   | 268 |
| Article 24. Consolidation of proceedings regarding professional and personal debts ( <i>Richter</i> ).. | 269 |
| A. General comments.....  | 270 |
| B. Specific rules related to consolidation of proceedings .....   | 271 |
| I. Inseparable debts (Article 24 par. 1) .....  | 271 |
| II. Separable debts (Article 24 par. 2).....  | 271 |

#### Title IV

#### Measures to increase the efficiency of the procedures concerning restructuring, insolvency and discharge of debt

|   |     |
|---|-----|
| Article 25. Judicial and administrative authorities ( <i>Corno</i> ) .....  | 273 |
| A. Purpose of Title IV .....  | 273 |
| B. Scope of Article 25 .....  | 274 |
| I. Content and reasons of its text.....   | 274 |
| II. Measures regarding judicial and administrative authorities, when dealing with procedures concerning restructuring, insolvency and discharge of debt (Article 25 par. 1, lit. a) ..... | 275 |
| III. Measures regarding procedures concerning restructuring, insolvency and discharge of debt (Article 25 par. 1, lit. b).....  | 276 |
| C. Limits to the application of measures set by Article 25 .....  | 277 |
| D. Ambit of application of the measures set by Article 25 .....   | 277 |
| I. Measures set by Article 25, par. 1, lit. a.....  | 277 |
| II. Measures set by Article 25, par. 1, lit. b .....  | 278 |
| Article 26. Practitioners in procedures concerning restructuring, insolvency and discharge of debt ( <i>Veder</i> ) .....   | 278 |
| A. Purpose of the norm .....  | 279 |
| B. Training and expertise.....  | 280 |
| C. Eligibility.....   | 281 |
| D. Appointment, removal and resignation.....  | 281 |
| E. Objections.....  | 282 |
| F. Best Practices .....   | 282 |
| Article 27. Supervision and remuneration of practitioners ( <i>Veder</i> ).....   | 283 |
| A. Purpose of the norm .....  | 283 |
| B. Supervision.....   | 283 |
| C. Codes of conduct .....   | 284 |
| D. Remuneration .....   | 285 |
| Article 28. Use of electronic means of communication ( <i>Paulus</i> ) .....  | 285 |

#### Title V

#### Monitoring of Procedures Concerning Restructuring, Insolvency and Discharge of Debt

|  |     |
|--|-----|
| Article 29. Data collection ( <i>Richter</i> ) .....                     | 287 |
| A. General comments.....   | 288 |
| B. The data to be collected .....  | 289 |
| I. A dataset of restructurings and insolvencies (Article 29 par. 1)..... | 289 |
| II. Repeat filers (Article 29 par. 2).....                               | 289 |
| III. Further data to be collected voluntarily (Article 29 par. 3) .....  | 290 |
| IV. Breakdowns of the data collected (Article 29 par. 4) .....           | 290 |
| V. Working with samples (Article 29 par. 5).....                         | 291 |

|   |     |
|---|-----|
| VI. Reporting periods, the communication form and presentation of the national data<br>(Article 29 par. 6 to 8) ..... | 291 |
| Article 30. Committee procedure ( <i>Paulus</i> ) .....   | 291 |

Title VI

Final Provisions

|   |     |
|---|-----|
| Article 31. Relationship with other acts and international instruments ( <i>Paulus</i> )..... | 293 |
| Article 32. Amendment of Directive (EU) 2017/1132 ( <i>Paulus</i> ).....                      | 294 |
| Article 33. Review clause ( <i>Paulus</i> ) .....   | 294 |
| Article 34. Transposition ( <i>Paulus</i> ) .....   | 295 |
| Article 35. Entry into force.....   | 296 |
| Article 36. ....  | 297 |