Dear Madam or Sir,

The EUF is the industry body and voice for the European factoring industry. The EUF's members consist of 14 national factoring and commercial finance associations (representing 15 EU-member states, namely [in alphabetic order] Austria, Belgium, the Czech Republic, Denmark, France, Germany, Greece, Ireland, Italy, the Netherlands, Poland, Portugal, Spain, Sweden and the UK) and the international factoring association FCI
In 2016, the factoring industry in the EU provided over €201 billion of working capital financing to nealry 180,000 businesses. According to the results published in the EUF White Paper "Factoring and Commercial Finance" (January 2016, cf. http://euf.eu.com/what-is-euf/whitepaper-factoring-and-commercial-finance.html), mostly SMEs and principally businesses in the manufacturing, services and distribution sectors used factoring, a financing solution with low Loss Given Default (LGD). The amount of working capital provided by the European factoring industry has to be seen in relation to the total factoring turnover, which in 2016 was over € 1.5 trillion. If you consider that the total GDP of Europe amounted to nearly € 15 trillion, this figure represents a significant portion of the real economy within the EU. Our members account for 97% of the total European factoring market, and comprise of both regulated and non-regulated factoring companies. Over half of the factored volume conducted within the EU is generated by factoring companies that are banks or part of consolidated banking groups, but there is also a significant number of independent factoring companies.

Leaseurope brings together 45 member associations representing the leasing, long term and/or short term automotive rental industries in the 33 European countries in which they are present. The scope of products covered by Leaseurope members' ranges from hire purchase and finance leases to operating leases of all asset categories (automotive, equipment and real estate). It also includes the short term rental of cars, vans and trucks.
In 2016, the **leasing firms** represented through Leaseurope's membership **helped European businesses invest in assets worth more than 273.2 billion EUR.** Leasing is used by more European SMEs (around 40% of all European SMEs make use of leasing, which is more than any other individual form of long-term lending). than any individual category of traditional bank lending taken altogether and is also extremely popular amongst larger corporates. It is also extremely useful to support the public sector (e.g. leasing to schools, hospitals, etc.).

Based on the research findings of an Oxford Economics report released in 2015[1], it is shown that, relative to bank loans, which experienced significant constraints during the most recent economic crisis, leasing remained a reliable and robust form of SME finance. Oxford Economics estimates that, at the EU level, leasing was responsible for financing around €104 billion of SME investment in fixed assets in 2013 and was forecasted to account for circa €121 billion in 2014.

It is against this background that the **EUF and Leaseurope wish to comment on the EU Commission's proposal for a „Directive on preventive restructuring frameworks,**

[1] Oxford Economics, The Use of Leasing Amongst European SMEs, 2015;

second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 32012/30/EU" (cf. document COM2016 723 (final), dated 22/11/2016).

The **EUF and Leaseurope support the general idea** of the aforementioned draft directive to facilitate and **foster restructuring processes** for companies in distress as this is a commendable aim. Indeed, the general idea behind this draft directive has already caused several national legislators within the EU to adopt or at least discuss new and amending laws over the last years to promote reorganisation and restructuring in order to avoid the liquidation of insolvent companies (e.g. in Germany in 2012 and currently in the Netherlands).

However, we also wish to point out that **certain specificities relating to factoring** and leasing as a form of financing for especially SMEs **need to be taken into consideration** in the context of insolvency rules and therefore also when drafting the aforementioned directive.

Leasing, Factoring and Commercial Finance companies work with client businesses to provide finance to enable them to trade. These Factors offer businesses (the Sellers/factoring clients) the funding they need to meet day-to-day business expenses, including payments to suppliers, salaries, rent and rates. This funding is known as "working capital". The amount of funding that a factor can provide is contingent on the volume of sales the Seller generates; it may be sufficient to meet the needs of the Seller on its own or may be complementary to that raised from traditional sources. **Factoring and Commercial Finance is based on the idea of selling / assigning a business's unpaid receivables to the Factor for a payment equivalent to the value of the invoices less a fee for offering the service and a charge for the period the invoice is financed**.
Leasing companies usually find themselves on the side of creditors in insolvency proceedings, which is why the protection of creditor's interest is crucial to lessors. This means that instead of having to wait e.g. 30 or 60 days, or even longer for payment from their customers (the Buyers/debtors), the Seller can have access to their funds usually within 24 hours. The Factor will then collect the invoice payment from the Buyer and recover their advance. The Factor can also offer additional services to the Seller, such as assessments of the creditworthiness of the Buyers that the Seller is selling to, Sales Ledger Management and Collection services as well as Credit Cover, a type of buyer default protection which can give the Seller greater confidence in selling in volume to its buyers, also in a cross border context. Which version of the factoring offer is used depends on the detailed circumstances of the Seller, its Buyers and the local market. Regardless of the specific form factoring takes, it will always be a Secured and a Monitored form of financing. Secured because the Receivables are assigned to the Factor and payments from the buyers have to be made directly to the Factor, even in the case of the seller's insolvency. Monitored, because the Factor will permanently follow up on the details of the receivables portfolio it is financing.

Based on these premises, we are of the opinion that it **makes both commercial as well as legal sense to leave factored, but also other trade receivables outside the scope of the proposed regime for restructuring plans**. On the one hand, there are sound economic reasons to do so: including trade creditors in the restructuring process might lead to the disruption of the business. Moreover, as **factoring companies** acquire receivables in the course of their financing activities, they **are the owners of these receivables** - and owners of an asset should always be treated differently from other creditors who merely have a claim. **Ownership is a right which can generally be invoked *erga omnes***, while claims are mainly *inter partes*. Therefore, a differentiation of creditors and other persons with regard to possible rights of segregation/separation should be kept in mind when drafting the aforementioned directive.

In addition, it is worthwhile noting that in some Member States leasing companies already have a right to separation in regard to their owned asset. In those Members States, customers can often only get relevant financing because the asset is suitable and the lessor owns it as a security. If the right to separation is not considered in the proposal, many leasing financing contracts will be denied in the future.

Unfortunately, it is **unclear to what extent the draft directive is to enable debtors and/or a majority of creditors and/or courts to amend executory contracts** such as e.g. factoring contracts. Allowing such (imposed) alterations would be contrary to general principles of private law such as the continuity of contracts in insolvency (let alone in pre-insolvency) and *pacta sunt servanda;* alterations of e.g. pre-insolvency factoring contracts should be made consensually but not imposed by the decision of a court or of a majority of other creditors.
A similar argument can be made against recitals 22 and art. 7 (5) of the draft directive which limits e.g. the right of creditors to terminate an executory contract because restructuring negotiations have begun - this also goes against general principles of civil law.
Should factors and other creditors be included in pre-insolvency/restructuring plans, the result may well be e.g. a compulsory haircut on outstanding claims or even alterations of the overarching executory/factoring agreement, e.g. by changing payment terms or possibly even going as far as the factor having to accept a debt-equity-swap if this is decided by a majority of creditors or by a court.
These are **serious infringements on factors' and other creditors' basic rights such as the right to freedom of contract** and therefore, such measures and consequences need to be **carefully deliberated and balanced with e.g. creditors' objection rights**. In general, it is important that not only the interests of all creditors are taken into consideration during a restructuring process, but that the affected creditors also have the rights and means to ensure that their interests are heard and considered, e.g. by being able to raise a complaint or appeal before a court.
We therefore **strongly advocate that the directive contain such rights of complaint and appeal**, which should (in contrast to what is foreseen in recitals 32 and art. 15 of the aforementioned draft directive) **in certain cases also have a suspensive effect** on the implementation of the restructuring plan in order to avoid irreversible detriments to the affected creditors.
Regarding the stay of proceedings as foreseen in provision Article 6 of the Directive, the Directive leaves much uncertainty as to the conditions for such a stay and also the possible duration of the stay of four (and possibly even twelve months) seems excessive, as affected creditors are confronted with disproportionate consequences resulting from the restriction of their right. For Lessors this could particularly be true due to unclear conditions regarding the stay as the leasing contract cannot be terminated and will prevent lessors of asserting any right to their owned object.

Regarding the optional stay of individual enforcement actions as foreseen in the draft directive, we wishes to point out that the **scope of such a stay should be further clarified**, and that the foreseen provision in art. 7 (4) that creditors may not withhold performance or terminate, accelerate or modify executory contracts to the detriment of the debtor for debts that came into existence prior to the stay needs to take into account that **creditors often need to be able to take risk or loss reducing measures** – in fact, some creditors are even **legally required to do so**, especially creditors in the financial sector. According to the draft directive, Member States can **limit the application of this provision art. 7 (4) to essential contracts which are necessary for the continuation of the day-to-day operation of the business** – it is our opinion that such a limit should always be connected to such effects of a stay and that **affected creditors should accordingly have the right to request lifting of the stay**, especially if the court's decision on what is necessary for the day-to-day operation of the business is ill-founded or if the creditors' assets are not necessary for an effective restructuring.

The **criteria for class formation** proposed by **art. 9** of the draft directive seem to leave flexibility for the plan proposer. The criteria, as they are drafted now, contain two open ends ("sufficiently similar rights" and "commonality of interests") and are therefore flexible. Such **flexible criteria for class formation are important** as the mere fact that certain claims have the same (unsecured or secured) ranking does not justify allocating these claims in one class: E.g. the interests of banks providing unsecured bank loans and of a factor providing finance against purchased receivables do not necessarily align. We advocate that **other facts should explicitly be taken into account as criteria for class formation**, e.g. such as the proposed treatment under the plan, the fact that the factor as creditor may have specific knowledge and the similarities/differences between the forms of finance provided by creditors.

In the case of a **cross-class cram-down (art. 11 of the aforementioned draft directive)**, the EUF and Leaseurope can understand the reasons for proposing such a rule, but wishes to point out that it is a **very far-reaching proposal**. Hence, the requirements for such a cram-down should be **refined to reflect that a larger number of creditors' classes are in favour of the restructuring plan and that only a "blocking minority" is obstructing the restructuring process out of reasons which (objectively) cannot be considered as legitimate** - in other words, the cross-class cram-down should be an *ultima ratio* for cases where a single or a very minor number of creditors are obstructing the restructuring process for no good reason.

Finally, **art. 20** of the draft directive foresees a **3 year-discharge period for entrepreneurs**, which (at least for some EU Member States) is both revolutionary and very short and is also shorter than the applicable discharge period to consumers. Therefore, the we advocate that **at the very least, this discharge period** (if not the whole concept of discharge for entrepreneurs) **should only be included as an optional instrument for the EU Member States**, also because there is a clear difference in quality between an entrepreneur's and a consumer's decisions and because such a discharge period has nothing to do with the laudable idea of supporting the restructuring process of companies which find themselves in a crisis.

Please do not hesitate to contact us should you have any queries regarding the aforementioned viewpoints or require more information on the factoring industry in Europe.

With kind regards

Erik Timmermans, Chairman EUF

Leon Dhaene, Director General Leaseurope