Council of the European Union

Brussels, 18 October 2017
(OR. en)

13087/17

Interinstitutional File:
2017/0189 (COD)

JUSTCIV 236
EJUSTICE 123
CODEC 1562

NOTE

From:	General Secretariat of the Council
To:	Working Party on Civil Law Matters (General Questions)
No. Cion doc.:	11667/17 + ADD 1
Subject:	Proposal for a Regulation of the European Parliament and of the Council replacing Annex A to Regulation (EU) 2015/848 on insolvency proceedings - Compilation of requests for amendments from BE, BG, HR, LV, PT

Delegations will find in the Annex of this document a compilation of requests from BE, BG, HR, LV and PT to amend Annexes A & B to Regulation (EU) 2015/848 on insolvency proceedings following changes to their national legislation, submitted in context of the negotiations on the Commission proposal for a Regulation of the European Parliament and of the Council replacing Annex A to Regulation (EU) 2015/848 on insolvency proceedings.

BE

Following the new Act of 11 August 2017, which incorporated Book XX on 'business insolvency' into the Belgian Economic Law Code (ELC) and was published in the *Moniteur belge/Belgisch Staatsblad* of 11 September 2017, a number of amendments will need to be made to the abovementioned Annexes. The new Act incorporated the specific definitions in Book XX and the implementing provisions for Book XX into Book I of the ELC.

It should be noted that this new Act, which will repeal the Act of 8 August 1997 on insolvency and the Act of 31 January 2009 on the continuity of enterprises, will not enter into force until 1 May 2018.

These amendments are:

– In Annex A, entitled 'Insolvency proceedings referred to in point 4 of Article 2', the last indent referring to 'De voorlopige ontneming van beheer, bepaald in artikel 8 van de faillissementswet/Le dessaisissement provisoire, visé à l'article 8 de la loi sur les faillites' should be replaced by 'De voorlopige ontneming van beheer, bepaald in artikel XX.32 van het Wetboek van economisch recht/Le dessaisissement provisoire, visé à l'article XX.32 du Code de droit économique'.

– In Annex B, entitled 'Insolvency practitioners referred to in point (5) of Article 2', the second indent referring to 'De gedelegeerd rechter/Le juge-délégué' should be removed.

  As the Regulation contains provisions for having a debtor in possession, it thereby removes the requirement to appoint an insolvency practitioner in all cases.

At the time of the entry into force of Article XX.208 of the Economic Law Code, the role of the deputy of the presiding judge will change to entail cross-border cooperation duties.

BG

In the end of 2016 the Republic of Bulgaria has adopted a new legislation on restructuring of merchants which is part of our Commercial Act. The new provisions are envisaged starting from Article 761 and the following articles.

The main objective of that procedure is to avoid opening of insolvency proceedings by an agreement reached between the merchant and its creditors on the settlement of the merchant's payables, allowing the merchant's business to continue.

The grounds for initiating of restructuring proceedings are laid down in Article 762.

Competent to administrate this proceeding is the Bulgarian court, more specifically the district court of the registered office of the merchant.

From the scope of the procedure are excluded the public-enterprise merchant, exercising a State monopoly or created by a special law, as well as banks and insurers.

The main advantages of this procedure, creating the balance between the interests of the debtor and those of its creditors are as follows:

As of the initiation of the restructuring proceedings, the merchant may not make any payments on any payables, arising prior to the date of the application on initiation of the proceedings and remaining outstanding on their respective due dates, with the exception of transfers of amounts to settle public receivables such as value-added tax, excise, taxes or mandatory social security contributions on behalf of a worker, employee or other person, from whose remuneration the respective public receivable is being withheld (see Article 776) After initiation of the restructuring proceedings, no enforcement proceedings against the merchant and no enforcement action under the procedure of the Registered Pledges Act against any property of the merchant shall be admissible. The period of the stay is 4 months.

In the process of restructuring the court is authorized to appoint a restructuring practitioner.

In view of the above and on behalf of the Republic of Bulgaria, please be notified for the recent changes in our national legislation reflecting the Insolvency Regulation as follows:

- In Annex A in relation with Art. 2, point 4, please add a new proceeding: MERCHANT RESTRUCTURING PROCEEDINGS (ПРОИЗВОДСТВО ПО СТАБИЛИЗАЦИЯ НА ТЪРГОВЕЦА)
- In Annex B in relation with Art. 2, point 5, please add a new figure: RESTRUCTURING PRACTITIONER (ДОВЕРЕНО ЛИЦЕ).

HR (3/1/2017)

Hereby we provide you the supplementary information with regard to the pre-insolvency proceeding (predstečajni postupak) and the consumer insolvency proceeding (postupak stečaja potrošača), as follows:

1) Under which category of Article 1(1) of the REIR these proceedings fall: we can confirm that both pre-insolvency proceeding and the consumer insolvency proceeding fall under the subparagraph (b) of Article 1(1) of the REIR given that both proceedings are subject to control or supervision by a court.

2) On the public nature of the proceedings, we inform as follows:

The proposal to initiate a pre-insolvency proceeding shall be submitted by the debtor or creditor, if the debtor agrees with that proposal. If the court determines that the conditions for the opening of the pre-insolvency proceeding have been fulfilled, it shall render a decision on the initiation of the pre-insolvency proceeding which will be published on the e-Bulletin Board of the courts (e-Bulletin Board).

The decision on the initiation of the pre-insolvency proceeding shall include a summon for the creditors to report their claims to the Financial Agency within 15 days from the date of publication of the decision, and to dispute the reported claims that they consider to be non-existent within eight days from the date of publication of the statement of the debtor and trustee (if appointed) on the reported claims.

The initiation of the pre-insolvency proceeding shall be recorded in the Court Register or Crafts Register in which the debtor is registered, as well as in the public registers in which the debtor is registered as the holder of a right. Since the Court Register is public and everyone, without proving legal interest, has access to the data in the court registry, all creditors may get the information on the initiation of the pre-insolvency proceeding.

The consumer's insolvency proceeding shall be initiated upon the request of the consumer. Before rendering the decision on the initiation of the consumer's insolvency proceeding, the court shall schedule a preliminary hearing where the plan on the fulfillment of obligations shall be discussed and voted. The summon for a preliminary hearing shall be published (along with a list of properties and obligations as well as the plan on the fulfillment of obligations) on the e-Bulletin board of the courts (e-Bulletin Board).

In the summon it shall be pointed out that everyone can have an insight in the list of properties and obligations as well as the plan on the fulfillment of obligations at the competent court. The period of time between the publication of the summon for the preliminary hearing and the preliminary hearing cannot be shorter than 60 days. In the summon for the preliminary hearing the court shall invite the creditors to give their opinions on the plan on the fulfillment of obligations within 30 days from the publication of the summon.

If the court determines the existence of grounds for insolvency and if the plan on the fulfillment of obligations is not accepted at the preliminary hearing, it shall render a decision on the initiation of the consumer's insolvency proceeding. The decision will be published on the e-Bulletin board on the same day of its adoption. The decision shall contain a summon for the creditors to report their claims or their rights within 60 days from the date of the publication of the decision, as well a summon for the debtor's of the consumer to fulfill their obligations without delay. It shall also contain the summon for the examination hearing and report hearing.

3) On the collective nature of the proceedings, we inform as follows:

In accordance with the provisions of the Insolvency Act all the persons having a specific claim towards a debtor are his creditors. The Act distinguishes four categories of creditors: the insolvency creditors, creditors with the right to separate recovery, secured creditors and creditors of the insolvency estate.

The insolvency creditors are creditors who, at the time of the initiation of the insolvency proceeding, have claims on the debtors assets which can be settled only in the insolvency proceeding regardless of the type of claim.

The creditors with the right to separate recovery are persons who, on the basis of any real or personal right, can prove that an object does not belong to the insolvency estate, while the secured creditors have the right to separately settle his claim from certain objects and rights that are part of the insolvency estate.

Finally, the creditors of the insolvency estate are the creditors who have a claim deriving from the costs of the insolvency proceeding and other obligations.

The creditors shall file their claims to the Financial Agency on a prescribed application form. If the creditor has not filed the claims but they are nevertheless stated in the proposal for the initiation of the pre-insolvency proceeding, these claims will be considered to be the filed claims.

In relation to the consumer's insolvency proceeding we emphasize that the Consumer's Insolvency Act does not expressly state the categories of creditors who are entitled to participate in the consumer's insolvency proceeding, but refers to the relevant provisions of the Insolvency Act in that part.

Along with the proposal for the initiation of the consumer's insolvency proceeding, the consumer shall submit a list of assets and obligations in which s/he shall specify all his/her monetary and non-monetary obligations, as well as the secured rights and the rights to separate recovery with a clear indication of all creditors. Furthermore, the creditors whose claims are not included in the list of assets and obligations, nor they are taken into consideration while drafting the plan on the fulfillment of obligations, can request the settlement of these claims only if they have submitted a request for the amendment of the list of assets and obligations within 30 days from the date of the publication of the summon for a preliminary hearing. In the summon for the preliminary hearing the court shall warn about the legal consequences that will occur if the deadline for the submission of the request for the amendment of the list will be missed.

If the court determines that the conditions for the initiation of the consumer's insolvency proceeding are fulfilled, the provisions of the Insolvency Act shall be appropriately applied on the insolvency creditors, creditors with the right to separate recovery, secured creditors, creditors of the insolvency estate as well as the provisions on the settlement of the insolvency creditors.

The Consumer's Insolvency Act also ensures that the decision on the exemption of the consumer's remaining obligations does not affect the following creditor's claims:

1. legal obligations for the maintenance of children, parents and other persons s/he is legally obliged to maintain;

2. the restitution of pecuniary gain acquired by a criminal offence or misdemeanor;

3. compensation of damages caused by a criminal offence or misdemeanor;

4. compensation of damages for death or serious bodily injury.

If the creditors accept the restructuring plan, the court shall render a decision on the acceptance of a restructuring plan and will confirm the pre-insolvency agreement, unless one of the requirement for contesting the agreement is fulfilled. The confirmed pre-insolvency agreement has legal effect towards those creditors who did not participate in the proceeding, as well as those creditors who participated in the proceeding whose contested claims will be confirmed afterwards.

In relation to the above mentioned, we point out that the Insolvency Act enables the participation of all creditors in a collective proceeding, in both pre-insolvency proceeding and consumer's insolvency proceeding. The possibility of participation of all creditors in these proceedings aimed at rescuing the debtor is broader than it is prescribed in Recital 14 of the REIR which prescribes that the proceedings which do not include all the creditors of a debtor should be proceedings aimed at rescuing the debtor.

HR (20/9/2017)

On 6 April 2017 the new Act on Extraordinary Administration Procedure in Companies of Systemic Importance for the Republic of Croatia (Official Gazette 32/2017, hereinafter: Extraordinary Administration Act) entered into force in the Republic of Croatia. This Act sets out a new pre-insolvency regime for companies having systemic importance for Croatia's economy. The new regime falls under the jurisdiction of the Commercial Court in Zagreb. The proceedings are administered by the court-appointed Extraordinary Commissioner (*izvanredni povjerenik*), who is proposed by the Croatian Government. The final settlement rests with the Creditors' Council and the Court.

The purpose of the proceedings is to regulate the legal status of a debtor of systemic importance in the event of its imminent insolvency as well as to provide the opportunity to restructure the debtor's business in order to prevent this insolvency spreading on to the rest of the economy. The proceedings are thus deemed urgent. A debtor is considered of systemic importance if it, independently or as a part of a corporate group, employed more than 5,000 employees on average over the course of the year preceding the year of the extraordinary administration's opening, and held at least HRK 7.5 billion (approximately one billion euros) in debt on the day of opening of these proceedings. Credit and financial institutions, as regulated by the Regulation (EU) 2013/575, are excluded.

According to the Recital (9) of the Regulation 2015/848 it applies to insolvency proceedings which meet the conditions set out in it, irrespective of whether a debtor is a natural person or a legal person, a trader or an individual.

According to the Recital (10) of the Regulation 2015/848 the scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency.

Recitals (12) and (13) make it clear that the Regulation should apply to proceedings the opening of which is subject to publicity in order to allow creditors to become aware of the proceedings and to lodge their claims, and in order to give creditors the opportunity to challenge the jurisdiction of the court which has opened the proceedings.

The extraordinary administration proceedings are formally opened by the decision rendered by the Commercial Court in Zagreb, are subject to court review, and are duly published at the e-bulletin board of the courts (e-Bulletin Board), which is available at the Internet portal: e-oglasna.pravosudje.hr. All decisions of the Court in these proceedings are publicly available at the mentioned portal.

Furthermore, the initiation of the extraordinary administration is recorded with the Court Register, as well as with all public registers where the debtor is registered as the holder of any registered rights or privileges. Since the Court Register is public and everyone has access to the data of the court registry, all creditors may get the information on the initiation of these proceedings.

With regard to the collective nature of insolvency proceedings, Recital (14) of the Regulation 2015/848 defines that the proceedings should include all or a significant part of the creditors to whom a debtor owes all or a substantial proportion of the debtor's outstanding debts, provided that the claims of those creditors who are not involved in such proceedings remain unaffected.

The new Croatia’s extraordinary administration proceedings involve all creditors having valid claims against the debtor at the time of opening of such proceedings. These creditors can be grouped for the purposes of efficient proceedings, within the Creditors’ Council. Categories of creditors remain as within the meaning of regular insolvency proceedings.

Since the extraordinary administration proceedings are subject to the Court control, we respectfully submit that they should fall under the subparagraph (b) of point (1) of the Article 1 of the Regulation 2015/848.

Point (5) of the Article 2 of the Regulations 2015/848 defines 'insolvency practitioners' to be listed in Annex B. The new Extraordinary Administration Act introduces such practitioner in a form of an Extraordinary Commissioner (*izvanredni povjerenik*) with powers to administer the stipulated proceedings.

According to Article 54 of the Regulation 2015/848, as soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the insolvency practitioner appointed by that court shall immediately inform the known foreign creditors, using the standard notice form bearing the heading 'Notice of insolvency proceedings'. The draft standard forms, as presented by the European Commission, should contain the information on the 'type of insolvency proceedings opened against the debtor', in other words it should refer to the appropriate national proceedings listed in the Annex A of the Regulation 2015/848. Where applicable, it should also contain the information on any relevant subtype of such proceedings opened in accordance with national law.

Taking account of the above-described substantial reform of the national insolvency legislation and the fact that in the Republic of Croatia, alongside with the insolvency proceedings and the amendments to the Annex A connected to the pre-insolvency and consumers' insolvency proceedings, as already requested with the letter of 3 January 2017, the extraordinary administration proceedings have been introduced, which meet the conditions set out in the Regulation 2015/848, the Republic of Croatia requested the European Commission to combine this request with the request of 3 January 2017, and to initiate legislative procedure with an aim to amend the Annex A in relation to the Republic of Croatia, in a way that it reads as follows:

"HRVATSKA

- Stečajni postupak,
- Predstečajni postupak,
- Postupak stečaja potrošača,
- Postupak izvanredne uprave u trgovačkim društvima od sistemskog značaja za Republiku Hrvatsku."

Also, the Republic of Croatia requested the European Commission to combine this request with the request of 3 January 2017, and to initiate the legislative procedure with an aim to amend the Annex B in relation to the Republic of Croatia, in a way that it reads as follows:

"HRVATSKA

- Stečajni upravitelj,
- Privremeni stečajni upravitelj,
- Stečajni povjerenik,
- Povjerenik,
- Izvanredni povjerenik."

LV

Amendments required in Annex B to Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings

In Annex B to Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (hereafter 'the Regulation'), which concerns the insolvency practitioners referred to in point 5 of Article 2 of the Regulation, it is stated that in Latvia this corresponds to one person – the 'maksātnespējas procesa administrators' (administrator of insolvency proceedings). That person also performed the duties laid down in the Latvian Insolvency Law in the case of legal protection proceedings.

On 22 December 2016, the Latvian Parliament (Saeima) approved some amendments to the Insolvency Law. These amendments provide, inter alia, for a 'tiesiskās aizsardzības procesa uzraugošā persona' (supervisor of legal protection proceedings) to be appointed for legal protection proceedings initiated after 1 July 2017, rather than an administrator of insolvency proceedings. The amendments set out different requirements and restrictions for these supervisors, but the rules on their appointment and their duties in legal protection proceedings remain the same as the Insolvency Law rules applicable to administrators of insolvency proceedings in legal protection proceedings initiated up to 30 June 2017.

Therefore, in view of these amendments to the national legislation, the item 'Tiesiskās aizsardzības procesa uzraugošā persona' should be added to Annex B to the Regulation, to ensure that it reflects the new situation.

PT

Context

Since May 2012, when the *Processo Especial de Revitalização* ('PER', Special Procedure for Recovery)[3] came into force, some have expressed their views on the need to adapt the procedure to companies, aiming to, among others, limit its use and mitigate dilatory strategies.

The experience gained in the first five years of this procedure has indeed confirmed the need to introduce adaptations to refocus 'PER' towards companies. Hence, the amendments recently introduced to Articles, 1 and 17A to 17I to the *Insolvency and Corporate Recovery Code* ('CIRE'). Accordingly, and aiming at ensuring that debtors who are not companies have a chance to stay in the market by providing a recovery plan before insolvency, a different procedure has been created, thought-out to give answers to the specific needs of such debtors.

This procedure, referred to as *Processo Especial para Acordo de Pagamento* ('PEAP') is set out in Articles 1 and 222A to 222I of the *Insolvency and Corporate Recovery Code* and it is largely based on the original 'PER', although excluding companies from its scope. It is, therefore, a pre-insolvency procedure, which aims at avoiding stigmatising proceedings that hinder a second change for those who face economic difficulties or imminent insolvency, thus meeting the European goals as regards these issues, meant to safeguard trading and the economic fabric.

[3] Currently listed in Annex A.

General presentation

In specific terms and briefly describing the procedure we can say the following. 'PEAP' is a special procedure of an urgent nature that can be used by any debtor that, although not a company, proves to be in a difficult economic situation (according to Article 222B of 'CIRE', a debtor is in a difficult economic situation if he faces a serious difficulty to meet his obligations in a timely manner, namely because he lacks liquidity or is unable to obtain credit) or imminent insolvency.

The 'PEAP' procedure begins with a written statement by the debtor and one or more of his creditors whereby they express their desire to open negotiations respecting payment arrangements or through the presentation of an extrajudicial payment arrangement signed by the debtor and by creditors that represent at least the majority of the votes.

This declaration or this payment arrangement is notified by the debtor to the competent court to issue the insolvency declaration of the debtor and shall be accompanied by a list of all creditors and a list of all enforcement actions pending against the debtor. Once the declaration or the payment arrangement has been received, the court promptly appoints a provisional 'judicial administrator' (a practitioner in the field of restructuring, insolvency and second chance).

As soon as the debtor is notified of the nomination decision, he shall, in turn, notify all creditors who have not signed the declaration that gave rise to the negotiations by registered letter, inviting them to participate in the negotiations and informing them that the relevant documentation is available for consultation at the court registry. In cases where the debtor has submitted an extrajudicial payment arrangement, the court registry notifies all non-participating creditors listed by the debtor.

Starting from the date on which the nomination decision is published on the 'CITIUS' web page[4], any creditor has 20 days to claim his credits. A list of claims will then be submitted to the court registry and published on 'CITIUS' and can be contested within five working days.

[4] https://www.citius.mj.pt

Once the declaration is submitted and the practitioner's nomination is decided, enforcement actions against the debtor can no longer be submitted and the provision of essential public services cannot be suspended. Similarly, pending insolvency proceedings are stayed, provided that no final judgment declaring the debtor's insolvency has been given (proceedings are dismissed once the payment arrangement is approved and validated by the court). Pending enforcement actions are also stayed (proceedings are dismissed once the payment arrangement is approved and validated by the court unless the arrangement provides otherwise) and so are the limitation and prescription periods the debtor can invoke.

Following the submission of the declaration, the debtor is prevented from taking any *especially relevant* actions unless that operation has been authorised beforehand by the practitioner.

After the deadline for contesting claims, the parties to the declaration have two months to complete negotiations. This period may be extended only once – for another month – by previous and written agreement between the practitioner and the debtor.

Negotiations between the debtor and the creditors are governed by the rules agreed by the intervening parties or, in the absence of an agreement, by the rules defined by the practitioner.

If an agreement is reached and the payment agreement meets the unanimous approval of all creditors, it shall be signed by all and referred to the court, for validation or refusal by the judge, accompanied by the documents that demonstrate its approval, certified by the practitioner. If validated by the court, the agreement enters into force immediately.

If negotiations come to an end with an agreement having been reached without the intervention of all creditors, the debtor shall refer it to the court, for validation or refusal by the judge, and a notice is immediately published on the 'CITIUS' web page. Starting from the date on which the notice of the agreement is published, any interested person may request the plan's refusal within ten days.

A payment agreement is deemed approved if:

(i) It is voted by creditors whose claims represent, at least, a third of all claims with voting rights included in the list of claims, is approved by two-thirds of all issued votes and more than half of the issued votes represent non-subordinated debt, with abstentions not being taken into account.

(ii) It is favourably voted by creditors whose claims represent more than half of all listed claims with voting rights and more than half of those votes represent non-subordinated debt, with abstentions not being taken into account.

Where the debtor or a majority of creditors come to the conclusion that an agreement cannot be reached or where the two-month time limit is exceeded, the negotiating proceedings are terminated. In the absence of agreement, the debtor ceases to enjoy the protection afforded by the procedure if he is not already insolvent. In such a case, the termination of the proceeding entails the debtor's insolvency.

Security arrangements agreed with the debtor during the 'PEAP' to provide him with the required financial resources to develop his activity are preserved even if, after the proceedings and within two years, the debtor becomes insolvent. In addition, creditors who have financed the debtor's activity with a view to ensuring the fulfilment of the payment arrangement, are given priority over workers' claims.