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NOTE

From:	Presidency
To:	Permanent Representatives Committee
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Subject:	Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU - Partial general approach

I. INTRODUCTION

By letter of 23 November 2016, the Commission transmitted a proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (the 'proposed Insolvency Directive') to the Council and the European Parliament.

This proposal is a key deliverable under the 'Capital Markets Union Plan' and the 'Single Market Strategy'. Its objective is to reduce the most significant barriers to the free flow of capital stemming from differences in Member States' restructuring and insolvency frameworks, and to ensure that viable companies and entrepreneurs in financial difficulty have access to effective preventive restructuring and second chance procedures, while protecting the legitimate interests of creditors.

According to the Commission's Explanatory Memorandum, the proposal seeks to balance the different interests at stake – those of debtors, creditors, employees and society at large – allowing Member States a degree of flexibility when implementing the Directive in national law.

In the context of the Commission's work on the Banking Union, the proposal also seeks to contribute to preventing the accumulation of non-performing loans.

The Bulgarian Presidency has included this file among its top legislative priorities.

Building on the results of the policy debates in the Council in June 2017 (9316/17) and December 2017 (15201/17), the Working Party on Civil Law Matters (Insolvency) continued its deliberations on the proposed Directive at an intensive pace.

During the deliberations, the Bulgarian Presidency focused on finding a good compromise on Title III (Discharge of debt and disqualifications), Title IV (Measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt) and Title V (Monitoring of procedures concerning restructuring, insolvency and discharge of debt).

In the light of the substantial progress made in the discussions of the Working Party on Civil Law Matters (Insolvency), the Presidency is of the opinion that a partial general approach can be achieved on the text of the Articles of Titles III, IV and V and a number of recitals of the proposed Directive. The definitions relating to those Titles, namely of 'entrepreneur' and 'full discharge of debt' are also included in the compromise text on those Titles.

The remaining Titles (I, II and VI) and remaining recitals will be subject to further discussions at a later stage.

The European Parliament is discussing this file in the JURI-Committee. The draft report will likely be voted in Committee in July 2018.

II. MAIN ELEMENTS OF THE COMPROMISE PACKAGE

A. Discharge of debt

(a) Access to discharge

Member States generally agreed from the outset of the negotiations with the principle that an honest entrepreneur who has become insolvent should be given a second chance by being discharged of his debts after a certain period. A number of Member States felt that, in order to be eligible for such a discharge, the entrepreneur should, however, first be declared insolvent. Those Member States did not want to be obliged to provide for the possibility for an entrepreneur to obtain a full discharge of debt already when he is over-indebted but not yet insolvent.

In the light of this, the compromise package requires Member States to provide for at least one procedure leading to the discharge of debts for an insolvent entrepreneur, while allowing Member States to interpret the concept of insolvency under national law. This national interpretation can then include the principle of over-indebtedness. On the other hand, Member States will also be allowed to require that the activity to which the debts are related has ceased.

(b) Discharge period

Member States had different views as to how long the period should last before a debtor is fully discharged of debt and at what point in time that period should start running. Whereas a large number of Member States agreed with the maximum period of three years proposed by the Commission, another group felt that this was too short.

In order to find a compromise between these opposing positions, the compromise text establishes a general rule that the discharge period should be a maximum of three years. However, the text provides broad possibilities for Member States to define situations in their national law where access to the discharge procedure is restricted, where the period can be prolonged or where the discharge can be revoked. Member States can also exclude certain types of debt under their national law.

(c) Start of the discharge period

The start of the discharge period proved to be an important element in the discussions, in view of the fact that Member States have a great variety of insolvency and restructuring procedures. Whereas the Commission had proposed a distinction between a procedure leading to a liquidation of the entrepreneur's assets and procedures including a repayment plan, a number of Member States indicated that they had procedures which included both a liquidation and a repayment plan.

The compromise text aims to provide for a level-playing field between all types of procedure: it envisages options for Member States who have procedures which include a repayment plan, a realisation of assets or a combination of those, and it allows Member States to choose freely among these alternatives when they implement the provisions.

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

(a) Judicial and administrative authorities

Member States indicated from the outset of the negotiations that the Directive should comply with the principle of procedural autonomy for the Member States. The organisation of the judiciary is an important element of this procedural autonomy. On the other hand, there is a clear economic need for insolvency procedures to be dealt with efficiently and by suitably trained judges who have the necessary expertise.

In view of the political sensitivity of the organisation of the judiciary of a Member State, the compromise text limits itself to a principle-based approach, requiring that members of judicial and administrative authorities dealing with insolvency, restructuring and discharge of debt-procedures are suitably trained and have the necessary expertise. It also requires that the procedure should be dealt with in an efficient manner. However, it leaves a broad margin of interpretation for Member States as to how to implement these provisions.

(b) Practitioners in the field of restructuring, insolvency and discharge of debt

During the negotiations, Member States indicated nearly unanimously that the requirements for appointment, selection, supervision and remuneration of practitioners in the field of restructuring, insolvency and discharge of debt were too descriptive in the proposal by the Commission. As with the provisions for the efficiency of the judicial and administrative authorities, Member States requested a more principle-based approach.

The compromise text has therefore streamlined the provisions, introducing a number of general principles which Member States have to follow in their national legal systems regarding the appointment, selection, supervision and remuneration of practitioners. These provisions include requirements regarding the training and expertise of practitioners, as well as regarding the eligibility criteria for appointing a practitioner in a specific case. The text also requires Member States to supervise their practitioners and to establish effective measures for the accountability of practitioners failing in their duties. Member States are, however, allowed a broad margin of interpretation as to how they comply with these provisions.

(c) Use of electronic means of communication

Although all Member States generally agree to the principle that it should be possible for parties to a procedure to undertake certain steps of the procedure digitally, a large number of them warned that the introduction of a well-functioning electronic system would take a long period of time and would have a significant impact on national budgets. While steps are underway to digitalise the procedures in a number of countries, a large group of Member States requested a longer implementation period for this provision and that the number of procedural actions concerned be limited to those which can be implemented within a reasonable time and which relate specifically to procedures concerning restructuring, insolvency and discharge of debt.

While the compromise text still requires Member States to make it possible to undertake certain procedural steps by digital means, it limits the provision to procedural actions which can reasonably be achieved within a certain time frame. The implementation period for this provision has also been extended from 3 to 5 years in general and to 7 years for the lodging of contestations and appeals.

C. Monitoring of procedures concerning restructuring, insolvency and discharge of debt

Although Member States agreed to the principle that reliable and comparable data were useful to monitor the effectiveness of national insolvency and restructuring procedures and to flag areas in which action would be needed, most Member States indicated that the data requested in the proposal by the Commission were too descriptive, would be very difficult to aggregate and would not be comparable. Member States therefore agreed that it was necessary for the provision to be limited to a set of core data which allowed the Commission to extrapolate relevant information.

The compromise text therefore streamlines the provision and limits the amount of data to be provided by Member States to what they consider achievable.

III. CONCLUSION

As a conclusion, broad agreement appears to be emerging on the text of the Articles and related recitals of the future Directive. Therefore, the Presidency wishes to submit to Coreper a draft partial general approach as presented in Addendum 1 to this note.

The elements of this compromise text are to be seen as a package that aims at establishing a well-balanced regime taking into account the interests of the debtor and the creditors alike. Although the compromise text harmonises some very important principles, it leaves sufficient flexibility for Member States to choose their approach of implementing these principles.

Bearing in mind the importance of keeping this balance, Coreper is invited:

(a) to approve the compromise package presented by the Presidency as set out in Addendum 1 to this note, and

(b) to decide to submit the compromise text to the Council (Justice and Home Affairs) on 4 and 5 June 2018 for a partial general approach.