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From:	Presidency
To:	Coreper/Council
No. Cion doc.:	14875/16
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 - Policy debate

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**I. INTRODUCTION**

1. 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.
2. The proposed Insolvency Directive is subject to the ordinary legislative procedure.
3. The European Economic and Social Committee adopted its opinion on the proposed Directive on 29 March 2017.

4. 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 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 towards preventing the accumulation of non-performing loans.
5. The objectives of the proposal received, in principle, broad support from ministers on 27 January 2017 during the informal Justice and Home Affairs meeting. Discussions during this meeting highlighted the importance of striking a fair balance between the interests of debtors and creditors and to allow a degree of flexibility so as not to interfere with national systems that work efficiently. Discussions within the Working Party on Civil Law Matters (Insolvency) have shown a general endorsement of the objectives of the proposal. However, delegations have also stressed the complexity of the proposed Directive due to its interconnection with other areas of national law, and the ensuing need to leave Member States enough flexibility to adapt the EU measures to the local economic situation and legal structures.
6. The Presidency is of the view that the proposed Insolvency Directive can significantly contribute to cross-border investment, help strengthen Europe's economy and create jobs by providing breathing space for companies and entrepreneurs in difficulty and helping them get back on their feet. The Presidency therefore thinks that due consideration needs to be given to this proposal in the Council.
7. Good progress has been made in the Working Party and, following a first thorough examination of Articles 1 to 9, the Presidency has identified a number of aspects which require a certain degree of political guidance.

8. The aspects identified below should not be construed as signifying that these are the only issues which have arisen during the Working Party meetings. However, these aspects have been identified as already requiring a certain degree of political guidance for future work at the expert level. Therefore, the Working Party will continue to work on all other aspects of the proposed Insolvency Directive.

## II. PRINCIPLES

### *A. Role of the national courts in preventive restructuring frameworks*

9. In order to facilitate availability and accessibility of preventive restructuring frameworks for debtors, the proposed Directive introduces a provision to limit the involvement of judicial or administrative authorities to where it is necessary to safeguard the rights of affected parties. The aim of this provision, according to the Commission, is to promote efficiency and reduce delays and costs, in particular for small and medium-sized enterprises, while at the same time recognising the role of judicial control when the rights of affected parties are at risk. Moreover, it seems that the proposal allows Member States a degree of flexibility in implementing this provision within their national insolvency framework.
10. However, based on some Member States' experiences, the intervention of a judicial or administrative authority does not always mean that a procedure is rendered less efficient. An important aspect emphasised by many delegations is that the role of the judicial or administrative authority is to guarantee impartiality, safeguard the balance between the debtors and their creditors, as well as among the creditors themselves, and finally to safeguard the general interest. Given that this limitation on the role of the court is introduced as an obligation, this provision may touch upon the procedural autonomy of Member States without specific clarification as to when a Member State can allow a court to intervene in the procedure. It should therefore be recognised that a right of access to the courts in certain circumstances may be guaranteed under the legal order of a Member State.

11. In order to achieve the aim of promoting efficiency and reducing delays and costs, while at the same time respecting the procedural autonomy of Member States, this general principle could be reformulated so as to allow those Member States which want to limit the role of the courts or that of the relevant administrative authority in the procedure to do so, without making it an obligation, thus allowing sufficient flexibility to Member States.
12. *The Presidency therefore invites the Council to confirm the approach of continuing to work on the premise that the general principle of limiting the role of the courts or administrative authority in preventive restructuring frameworks should allow more flexibility for Member States than currently foreseen in the proposal.*

### ***B. Debtor in possession***

13. A key objective of the Proposal is to strike an appropriate balance between the rights of the debtors and the creditors. Therefore, safeguards should be provided wherever the proposed measures would have a potentially negative impact on parties' rights. This is particularly important for providing legal certainty for investors in a cross-border context.
14. The proposed Insolvency Directive introduces a principle that debtors should remain totally or at least partially in control of their business when they start a preventive restructuring procedure, known as the 'debtor in possession' principle. Delegations have broadly welcomed this principle in the Working Party.
15. The proposed Insolvency Directive also requires Member States to assess whether a restructuring practitioner should be appointed or involved on a case-by-case basis, depending on the circumstances of the case or on the debtor's specific needs, therefore prohibiting Member States from making the appointment or involvement of a practitioner mandatory in every case. However, certain cases will require a degree of supervision where it is necessary to safeguard the legitimate interests of the creditor. The appointment or the involvement of a restructuring practitioner provides such a safeguard in these cases.

16. The proposed Insolvency Directive currently contains an exhaustive list of cases where Member States may require the mandatory appointment or involvement of a restructuring practitioner. However, discussions in the Working Party showed that an exhaustive list may not provide Member States with the appropriate flexibility to ensure the right balance between the interests of the debtor and of the creditors. An option which would provide this flexibility could be to make the list non-exhaustive.
17. *The Presidency invites the Council to confirm the approach of working on the premise that the debtor should remain, at least partially, in possession of his business and his assets during preventive restructuring procedures.*
18. *Finally, the Presidency invites the Council to agree that the proposed Insolvency Directive should allow Member States appropriate flexibility with regard to the mandatory appointment or involvement of a restructuring practitioner, for instance by making the list of cases requiring appointment non-exhaustive.*

### **III. CONCLUSION**

19. The Presidency invites the Coreper/Council (Justice and Home Affairs) to have a policy debate with a view to endorsing the principles set out in Part II of this note as general guidance for the future work on the proposed Directive.