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NOTE

from : the Presidency

to : Coreper/Council

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Subject : Proposal for a Regulation of the European Parliament and of the Council
amending Council Regulation (EC) No 1346/2000 on insolvency proceedings
[First reading]
- General approach

I. INTRODUCTION

1. By letter of 13 December 2012, the Commission transmitted to the Council a proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (the "proposed Insolvency Regulation"). The proposed Insolvency Regulation aims to modify Council Regulation (EC) No 1346/2000 on insolvency proceedings (the "current Insolvency Regulation").

2. In accordance with Articles 3 and 4a of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom¹ and Ireland² have notified their wish to take part in the adoption and application of the proposed Insolvency Regulation.
3. In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of the proposed Insolvency Regulation and will not be bound by it or subject to its application.
4. The European Economic and Social Committee adopted its opinion on the proposed Insolvency Regulation on 22 May 2013.
5. The proposed Insolvency Regulation aims at making cross-border insolvency proceedings more efficient and effective with a view to ensuring a smooth functioning of the internal market and its resilience in economic crises. This objective is in line with the European Union's current political priorities to promote economic recovery and sustainable growth, a higher investment rate and the preservation of employment, as set out under the Europe 2020 strategy, and to safeguard the development and the survival of businesses, as stated in the Small Business Act.
6. As part of the overall Justice for Growth Programme, the proposed Insolvency Regulation is an important element of the broad European Union response to the significant economic difficulties being experienced by many companies and citizens throughout the Union.

¹ See 6106/13 JUSTCIV 81 CODEC 811.

² See 8325/13 JUSTCIV 79 CODEC 777.

7. The Council (Justice and Home Affairs) held an initial policy debate on the proposed Insolvency Regulation on 6 and 7 June 2013 and, on that occasion, approved a set of general guidelines for future work¹.
8. On 5 and 6 December 2013, the Council (Justice and Home Affairs) held a second policy debate and approved a another set of general guidelines for future work².
9. The proposed Insolvency Regulation is subject to the ordinary legislative procedure. The European Parliament adopted its position at first reading on 5 February 2014³.
10. The Presidency has put the examination of the proposed Insolvency Regulation at the top of its agenda owing to the importance of efficient cross-border insolvency proceedings for the European economy and in response to the European Council's call for a swift examination.
11. On the basis of the general guidelines and key principles approved by the Council in June and December 2013, substantial progress has been made in the discussions in the Working Party on Civil Law Matters (Insolvency).
12. In the light of that substantial progress, the Presidency submitted to Coreper, on 20 May 2014, a package⁴ inviting it to examine it.
13. During the meeting of Coreper on 20 May 2014, it was decided to call a meeting of the JHA Counsellors in order to further examine some issues before resubmitting the compromise text to Coreper on 28 May.
14. JHA Counsellors met on 22 and 26 May 2014, and on 2 June 2014, and discussed outstanding issues.

¹ See 10050/13 JUSTCIV 134 EJUSTICE 51 CODEC 1201.

² See 17304/13 JUSTCIV 298 EJUSTICE 109 CODEC 2826.

³ See 5910/14 CODEC 241 JUSTCIV 19 PE 50.

⁴ See 9776/14 JUSTCIV 125 EJUSTICE 49 CODEC 1274

15. The Presidency is of the opinion that a general approach can be achieved on the text of the Articles as is presented in Addendum 1 to this note.
16. Broad agreement appears to be emerging on the provisions of the text of the proposed Insolvency Regulation, with the exception of certain remaining recitals and the Annexes which will be subject to further discussions.
17. Therefore, the Presidency submits to Coreper a compromise text set out in Addendum 1 to this note, inviting it to examine it with a view to subsequent submission to the Council (Justice and Home Affairs) on 5 and 6 June 2014 for the adoption of a general approach. The Presidency invites Coreper to address the following elements of the proposed compromise.

II. SPECIFIC ELEMENTS OF THE COMPROMISE

A. Scope of the proposed Insolvency Regulation and the modification of the Annexes

18. Article 1 (1) of the proposed Insolvency Regulation defines the scope, which is broader than the scope of the current Insolvency Regulation No 1346/2000 as it includes hybrid and pre-insolvency proceedings as well as debt discharge and other proceedings. In order to shed more light on this scope, the proceedings that are included in the scope of the proposed Insolvency Regulation are listed in the Annex A¹. It should be noted that only proceedings that are listed in the Annex will fall within the scope of the proposed Insolvency Regulation.
19. Discussion arose concerning the discretion that Member States can retain over amendments to the Annexes, with some Member States insisting on the importance of keeping a maximum degree of control over whether or not to add national proceedings to the Annexes, and some Member States wanting all Member States to have a complete overview of which national proceedings will and which will not be included in the Annexes.

¹ Annex A will be revised by a separate act that will be adopted by the Council (Justice and Home Affairs) on 5 and 6 June 2014.

20. In order to ensure the best involvement of the Member States in discussing the content of the Annexes in full respect of the provisions of the Treaty, the Presidency proposes that the Annexes should be revised using the ordinary legislative procedure. In order to avoid a possible hiatus between the entry into force of the proposed Insolvency Regulation and the newly revised Annexes, it would be appropriate to ensure that both the proposed Insolvency Regulation and the revised Annexes enter into force at the same moment.

B. Termination of employment contracts

21. Article 10 of the current Insolvency Regulation sets out that the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment. The proposed Insolvency Regulation does not amend that principle.

22. Where main proceedings have been opened in a Member State and when the debtor has an establishment in another Member State, Article 3(2) of the current Insolvency Regulation grants jurisdiction to open secondary insolvency proceedings to the courts of that other Member State, with effects restricted to the assets located in that other Member State. Hence, the judge of the Member State of the establishment has jurisdiction for the termination or amendment of employment contracts.

23. Some Member States have underlined the sensitivity of the termination or modification of employment contracts, and have requested a specific rule, granting jurisdiction to the Member State where secondary proceedings would have been opened to deal with the specific issues of termination or modification of employment contracts. The Presidency therefore suggests taking on board this principle in a new Article 10a.

C. Registers

24. The proposed Insolvency Regulation includes a requirement for Member States to establish insolvency registers that contain certain information on the debtor and the insolvency practitioner, as well as information relating to the insolvency proceedings. These national insolvency registers are to be interconnected and accessible via the European e-Justice portal.
25. In its guidelines adopted in December 2013, the Council (Justice and Home Affairs) confirmed the approach of establishing, at national level, insolvency registers that would be interconnected and accessible via the e-Justice portal, in full conformity with European legislation on data protection. To this end, the Council invited the Working Party on Civil Law Matters (Insolvency) to further reflect on adequate safeguards for accessing information relating to individuals not exercising a professional activity, without placing an excessive burden on the requesting person.
26. In order to grant sufficient protection to the information relating to individuals not exercising an independent business or professional activity, the Working Party examined different approaches for safeguards that would, on the one hand, guarantee that only legitimate requests for information were allowed, and, on the other hand, not place an excessive burden on creditors who need information on the insolvency proceedings involving a debtor.
27. However, it appeared that this question, specifically linked to consumers insolvency proceedings, could not be satisfactorily solved by the addition of safeguards, as some Member States stated that there were serious difficulties with that principle, one Member State citing a difficulty of a Constitutional nature.

28. The Presidency proposes, as a compromise, that the following paragraph 3 be added to Article 20a of the Insolvency Regulation, based on the following principles:

"Member States are not obliged to include the information referred to in paragraph 1 concerning individuals not exercising an independent business or professional activity in the insolvency registers, nor to make such information publicly available through the system of interconnection of these registers, provided that foreign known creditors are informed, pursuant to Article 40 of the elements referred to under point 1 of paragraph 1a.

Where a Member State makes use of the possibility referred to in paragraph 3, subparagraph 1, the insolvency proceedings shall not affect the claims of the foreign creditors who have not received the information referred to in the first subparagraph."

D. Synthetic proceedings (Articles 28a, 29 and 29a of the proposed Insolvency Regulation)

29. The Commission proposal allows the insolvency practitioner in the main proceedings to propose an undertaking to local creditors according to which they will be treated, in the main proceedings, as if secondary proceedings had been opened. If they are satisfied with the undertaking, local creditors would not request the opening of secondary proceedings.
30. In order to ensure the success of such mechanism, an adequate balance between the flexibility of the undertaking and the interests of local creditors has to be struck. Several mechanisms have been proposed and discussed in order to guarantee the protection of local creditors.
31. The Presidency proposes, as a compromise, that:
- (i) the undertaking be approved by a qualified majority of the known local creditors. These qualified majority requirements and voting rules will be those that are applied for the adoption of restructuring plans under the law of the Member State where secondary proceedings could have been opened;

(ii) in order to ensure the efficiency of the undertaking, the right to request the opening of secondary proceedings be maintained, but within a time limit within 30 days of having received the notice of approval of the undertaking;

(iii) the court, seised of a request to open secondary proceedings, shall, at the request of the insolvency practitioner, not open secondary proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors.

E. Consequences for the secondary proceedings of a temporary stay of individual enforcement proceedings granted in the main proceedings (Article 29a(2a))

32. The proposed Insolvency Regulation aims to give a second chance to entrepreneurs, individuals and businesses, and to encompass in its scope national procedures of that nature.
33. Temporary stays of individual enforcement are sometimes granted to the debtor, in accordance with national proceedings, in order to allow for negotiations between the debtor and the creditors.
34. However, the opening of secondary proceedings could jeopardise the benefits of the stay granted in the Member State of the opening of main proceedings. In order to maximise the second chance given to the debtor, it would be sensible to ensure that when a temporary stay of individual enforcement is granted in the Member State where main proceedings have been opened, this stay would also have an effect in the Member State where secondary proceedings could be opened, provided that sufficient safeguards are in place.
35. The Presidency therefore suggests adding a new paragraph to Article 29a(2a), as set out in the Addendum to this note.

F. Coordination of the insolvency of members of a group of companies

36. The current Insolvency Regulation does not contain specific rules dealing with the insolvency of members of a group of companies, and the proposed Insolvency Regulation includes specific provisions on cooperation between the courts and insolvency practitioners involved in the insolvency of members of groups of companies.
37. Some delegations have proposed completing this cooperation with a system for the coordination of the insolvency proceedings of members of a group of companies. Discussions have taken place on whether such a coordination system should be created, and on the extent to which such coordination could be organised. Different schemes of coordination have been examined, ranging from a maximum coordination scheme with one court having jurisdiction for coordination procedures, to a more flexible coordination based on the consent of all courts and insolvency practitioners involved in the insolvency proceedings of the members of the group.
38. In the light of the discussions that took place, the Presidency proposes to provide for a system of coordination, on the basis of Articles 42d1 to 42d17 of the Addendum to this note.
39. Five years after the entry into force of the proposed Insolvency Regulation, the Commission is invited to submit a report on the implementation of this coordination system accompanied with, if need by, a proposal for adaptation of the Regulation.

III. CONCLUSION

40. Coreper is asked to suggest that the Council (Justice and Home Affairs), at its meeting of 5 and 6 June 2014:
- (a) confirm a general agreement on the compromise text as set out in 10284/14 ADD 1 JUSTCIV 134 EJUSTICE 54 CODEC 1366;
 - (b) agree that this text will constitute the basis for the negotiations with the European Parliament; and
 - (c) ask the Working Party on Civil Law Matters (Insolvency) to finalise the examination of the recitals and of the Annexes.