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From:	Presidency
To:	Permanent Representatives Committee/Council
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Subject:	Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law – Progress report

I. INTRODUCTION

1. On 7 December 2022, the Commission adopted the proposal for a Directive of the European Parliament and the Council harmonising certain aspects of insolvency law¹.
2. The proposal for a Directive is one of the initiatives envisaged in the 2020 Capital Markets Union (CMU) action plan. It aims to encourage cross-border investment within the single market through targeted harmonisation of insolvency proceedings.
3. The proposed Directive is subject to the ordinary legislative procedure.

¹ 15896/22.

4. In the European Parliament, the committee responsible for the proposal is the Legal Affairs Committee (JURI), while the opinion-giving committee is the Economic and Monetary Affairs Committee (ECON). The rapporteur for the file is Pascal Arimont.
5. The European Data Protection Supervisor adopted its opinion on the proposed Directive on 6 February 2023².
6. The European Economic and Social Committee adopted its opinion on the proposed Directive on 24 March 2023³.
7. In the Council, the examination of the proposal is being carried out in the Working Party on Civil Law Matters (Insolvency) (hereinafter: Insolvency Working Party). Discussions within the Insolvency Working Party have shown that the objectives underlying the proposal are generally welcomed.
8. A policy debate was organised at the JHA Council on 20 October 2023, during which Ministers reiterated their support for the objectives pursued by the Directive while raising a number of key issues in relation to the proposed measures on avoidance actions (Title II). Ministers generally pleaded for more flexibility in the harmonisation of these provisions.
9. As outlined in the Euro Summit's Statement of 22 March 2024, the Heads of State or Government are determined to speed up the deepening of the CMU, taking note of the Eurogroup's Statement of 11 March 2024 which called for the introduction of a wide range of measures to bring about a true EU single market for capital. The Euro Summit invited the co-legislators "to ensure the rapid completion of the outstanding legislative work on the 2020 Capital Markets Union action plan".

² 6147/23.

³ 7856/23.

10. Additionally, the European Council Conclusions of 17-18 April 2024 called for advancement of the work in the Council and the Commission without delay on all identified measures needed to create truly integrated European capital markets which are accessible to all citizens and businesses across the Union, for the benefit of all Member States. One of the measures identified is the harmonisation of relevant aspects of national corporate insolvency frameworks.

II. STATE OF PLAY OF WORK WITHIN THE COUNCIL PREPARATORY BODIES

11. The diversity of insolvency regimes has long been recognised as an issue hindering free movement of capital within the EU and greater integration of its capital markets. Consequently, the proposal aims to harmonise certain aspects of Member States' insolvency laws, thus facilitating cross-border investment.
12. Amongst other aspects, the proposed Directive lays down common rules for the invalidation of transactions entered into by the debtor prior to the opening of insolvency proceedings (avoidance actions); the tracing of assets belonging to the insolvency estate; the preparation of the sale of the business in whole or in part before the formal opening of insolvency proceedings (pre-pack proceedings); the duty of directors to submit a request for the opening of insolvency proceedings; simplified winding-up proceedings for microenterprises; creditors' committees and measures enhancing transparency of national law. Essentially, the proposal seeks to make it easier to recover assets from a liquidated insolvency estate, render insolvency proceedings more efficient, and ensure a predictable and fair distribution of recovered value among creditors.

a) Finalisation of the first examination of the proposed Directive

13. While welcoming the objectives underlying the proposal, delegations have stressed the complexity of the proposed Directive due to its links with other areas of national law and commented on its level of detail. Given its complexity and length, the first examination of the proposal started on 7 March 2023 and was carried out over 12 consecutive Working Party meetings during the Swedish, Spanish and Belgian presidencies.
14. The first examination was finalised by the Belgian Presidency in the Working Party meetings on 31 January, 6 March and 2 April 2024 with a chapter-by-chapter analysis of Title VI ('Winding up of insolvent microenterprises').
15. Title VI ('Winding up of insolvent microenterprises') introduces rules for a streamlined winding-up procedure tailored to microenterprises. The proposal essentially aims to establish a simplified and cost-effective procedure.
16. The Presidency has noted that Member States are divided on this Title. Most Member States have raised objections to the establishment of a special EU regime for insolvent microenterprises. One of the main reservations is that creating such a special regime would steer away from the main objective of the proposal, which is to harmonise important aspects of national insolvency laws, and only has a limited contribution to the CMU. Member States expressed concerns regarding the definition of a microenterprise, the appointment of an insolvency practitioner, the role of the court and the impact on existing national insolvency systems.
17. Some Member States have expressed their support for the special regime, but with important adjustments. The Member States in question considered that this special regime would contribute to the CMU as it would enable an orderly winding-up at a lower cost.

b) Examination of compromise proposals on the text of the Directive

18. Following the finalisation of the first examination of the proposed Directive, the Presidency began the presentation of a first compromise text on Title I ('General provisions') and Title II ('Avoidance actions') at the Working Party meeting on 2 April.
19. Regarding Title I ('General provisions'), the changes proposed in the compromise text are limited since these general provisions will need to be adapted to the changes made gradually in the rest of the proposal. Nevertheless, the compromise text aims to clarify the relationship between the various titles of the Directive and the existing national insolvency regimes.
20. Title II ('Avoidance actions') aims to protect the insolvency estate against the illegitimate removal of assets conducted prior to the opening of insolvency proceedings and bring back those assets into the insolvency estate for the benefit of the creditors. At technical level and during the above-mentioned policy debate at the JHA Council on 20 October 2023, Member States generally expressed concerns regarding the limited level of flexibility left for Member States in these provisions. In order to address these concerns, the compromise text proposed by the Presidency adjusted the notions used for legal acts concluded to the detriment of the general body of creditors in order to cover all situations of national avoidance actions. It also granted Member States the possibility to provide in their national laws greater protection for the general body of creditors with respect to the conditions of avoidance actions and their consequences. Lastly, the Presidency started a reflection on the appropriate different timeframes for avoidance actions in order to better reflect the minimum harmonisation aim of the proposal.
21. The Presidency started the presentation of a compromise text on the next two titles, Title III ('Tracing assets belonging to the insolvency estate') and Title IV ('Pre-pack proceedings') at the Working Party meeting on 7 May 2024 and continued the presentation at the Working Party meetings on 30 and 31 May 2024.

22. Title III ('Tracing assets belonging to the insolvency estate') requires Member States to designate courts empowered, at the request of an insolvency practitioner, to access and search the national centralised bank account registry containing relevant information on assets that belong or should belong to the insolvency estate. The main concerns presented by Member States were that these provisions would overburden courts with administrative functions, that these provisions should also apply to administrative authorities and that the whole title was overly prescriptive. Consequently, the compromise text provided Member States with the flexibility to designate courts as well as administrative authorities that have jurisdiction in insolvency proceedings to access and search the national bank account registries. The provisions were made more general, without unnecessary bureaucratic measures, but respecting the nature and protection of the data to be searched. Lastly, the text was aligned with the text of the new anti-money laundering reform package⁴.
23. Title IV of the proposed Directive ('Pre-pack proceedings') introduces rules intended to provide a more effective procedure governing value recovery for creditors. Most Member States generally support the objective of Title IV and agree that it could contribute to the CMU. However, concerns have been raised particularly on the coexistence of the proposed provisions with their existing national insolvency systems, on the level of protection for the creditors and on the relationship with the freedom of contract. In the compromise text, the Presidency clarified the interaction of the two phases of the pre-pack proceedings - the preparation phase and the liquidation phase - with the normal insolvency proceedings, as well as the different objectives behind the two phases. It has also ensured more clarity and coherence with other relevant EU instruments. Lastly, the Presidency has tried to provide flexibility for Member States to use their existing national system to implement pre-pack procedures.
24. The Presidency has also issued a compromise text on Titles V ('Directors' duty to request the opening of insolvency proceedings and civil liability') and VII ('Creditors' committee') which will be presented at the last two Working Party meetings in June.

⁴ P9_TA(2024)0364 and P9_TA(2024)0301.

25. Title V ('Directors' duty to request the opening of insolvency proceedings and civil liability') proposes to impose an obligation on directors to submit a request to courts for the opening of insolvency proceedings no later than 3 months after they become aware or can reasonably be expected to have been aware that the company is insolvent. The aim is to maximise the recovery value for creditors. Some Member States were concerned that this duty could be harmful to EU competitiveness and entrepreneurship. In the compromise text, the Presidency addressed requests from some delegations for a more flexible text, which explains in which situations the obligation applies and how to comply with it. It also introduced clarifications regarding the liability of directors for breaches of their duty.
26. Title VII ('Creditors' committee') aims to strengthen the position of the creditors in the insolvency proceedings by providing rules on the appointment of the members of the committee and its composition, working methods and functions, as well as the personal liability of its members. Some Member States asked in particular to stick to a minimum harmonisation approach and to introduce more flexibility. The Presidency responded by giving more flexibility on the appointment of the members of the committee and on the committee's working methods, while clarifying the members' rights and duties.

c) Discussions on the proposed Directive in Coreper

27. On 10 April 2024, a discussion was held in Coreper on the next steps related to the CMU. The proposed directive on insolvency was listed among the outstanding legislative proposals important for the CMU. Ambassadors discussed the key drivers for progress on the CMU, as well as bottlenecks, and invited the relevant working parties to make as much progress as possible by the end of the Presidency.

28. In response to the high-level calls for speeding up of the work on the proposed directive, the Belgian Presidency organised a policy debate in Coreper on 22 May 2024 in order to find solutions to align the progress at technical level with the level of ambition identified at the highest political level. Ambassadors were invited to express their views on the elements of the proposal that are particularly important as contributions to the CMU. Ambassadors were also asked which principles should guide the future work and which concerns they had, with a view to reaching a general approach in the Council without delay, in line with the European Council conclusions of 17-18 April 2024.
29. Regarding the working methods going forward, the debate revealed that Member States welcome the increase in the number of working party meetings and the acceleration of the speed of work, which reflects the high political priority set for the proposed directive. They also underlined that the quality of the text should not be compromised. The proposed directive should be thoroughly analysed and discussed so that the result of the negotiations properly addresses the needs of the CMU.
30. On the substance, Ambassadors generally highlighted Title II on avoidance actions and Title III on asset tracing as core elements of the proposal that contribute to the CMU and on which compromise solutions can more easily be found. On the other hand, some Member States expressed concerns regarding Title IV on pre-pack proceedings, with particular regard to the level of detail of the provisions, the protection of the creditors' autonomy and the relationship with the freedom of contract. Many Member States highlighted Title VI on the special regime for micro enterprises as a main element of concern which could raise difficulties for reaching an agreement on the Directive without delay.

III. CONCLUSIONS

31. The Belgian Presidency is committed to facilitating the continuation of the discussions in the Working Party, together with the incoming Hungarian Presidency, and to ensuring smooth progress towards a General Approach.
 32. In light of the above, the Permanent Representatives Committee and the Council are invited to take note of the present Progress Report.
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