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WORKING DOCUMENT

From:	Presidency
To:	Working Party on Civil Law Matters (Insolvency)
N° 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 - Revised text proposal on Article 1, 2(1) & 2(2) and 3.

Delegations will find in the Annex the revised versions of Articles 1, 2(1) & 2(2) and 3 drawn up by the Presidency in the light of the discussions held in the Working Party.

Changes compared to the Commission proposal are in **bold** or (...) for deletions.

Article 1

Subject matter and scope¹

1. This Directive lays down rules on:
 - (a) preventive restructuring **frameworks²** available for debtors³ (...) ⁴ when **they are in** a likelihood of insolvency;
 - (b) procedures leading to a discharge of debts incurred by **insolvent⁵** entrepreneurs and **limitations of disqualification periods (...)**
 - (c) measures to increase the efficiency of the procedures **within the frameworks** referred to in point (a) and (b) as well as **other** insolvency procedures.
2. This Directive shall not apply to procedures referred to in paragraph 1 of this Article that concern debtors who are:
 - (a) insurance undertakings and reinsurance undertakings as defined in points 1 and 4 of Article 13 of Directive 2009/138/EC;
 - (b) credit institutions as defined in point 1 of Article 4 of Regulation (EC) No 575/2013;
 - (c) investment firms and collective investment undertakings as defined in points 2 and 7 of Article 4(1) of Regulation (EC) No 575/2013;
 - (d) central counter parties (**CCP**) as defined in point 1 of Article 2 of Regulation (EU) No 648/2012;
 - (e) central securities depositories as defined in point 1 of Article 2 of Regulation (EU) 909/2014;
 - (f) other (...) entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU;
 - (g) **[public bodies for debts incurred in the execution of their public functions]**
 - (h) natural persons who are not entrepreneurs.
3. Member States may extend the application of the procedures referred to in point (b) of paragraph 1 to **insolvent** natural persons who are not entrepreneurs.
[Member States may restrict the application of point (a) of paragraph 1 to legal persons.]

¹ The objectives of the proposal are clarified in the recitals.

² This makes it clear that Article 18 on duties of directors also falls within this Title and that multiple procedures can be a part of a framework.

³ A recital will clarify that debtors in the sense of Title II can be entrepreneurs, enterprises and groups, subject to the limitation in the second sub-paragraph of Paragraph 3.

⁴ To ensure perfect alignment with Regulation (EU) No 2015/848, a recital will clarify that the scope of the Directive includes non-financial difficulties, provided that such difficulties give rise to a real and serious threat to the debtor's actual or future ability to pay its debts as they fall due, according to the language used in Recital 17 of Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

⁵ Title III will clarify that 'insolvent' has the meaning given under national law.

4. **[Point (a) of paragraph 1 shall not apply to the claims and interests of employees.]**⁶

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

- (1) (Deleted)^{7 8}
- (2) 'restructuring' means **measures that include** changing the composition, conditions, or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, **such as sales of assets or parts of the business, as well as operational changes or changes to the management, (...) or a combination of those elements (...)**^{9 10}

Article 3

Early warning and access to information

1. Member States shall ensure that debtors (...) have access to early warning tools which can detect (...) **circumstances which may give rise to a likelihood of insolvency** and signal to the debtor (...) the need to act **without delay**. **[These tools may include accounting and monitoring duties for the debtor or the involvement of third parties with relevant information in alerting a debtor about the need to act.]**¹¹
2. Member States shall ensure that debtors (...) have access to relevant [up-to-date, clear, concise and user-friendly]¹² information about **available** early warning tools and (...) **the procedures and measures (...) concerning preventive restructuring (...)** or (...) discharge of debts.
3. Member States may limit the access provided for in paragraphs 1 and 2 to small and medium sized enterprises **(SMEs) and** entrepreneurs.¹³

⁶ If Member States opt to include this paragraph, it is suggested to delete all other references to worker's rights in this Directive (except Article 31)

⁷ A recital will clarify the relation between Regulation 2015 (EU) 848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings and this Directive. The European Commission will submit a document in this context to clarify the relation.

⁸ Changes have been made throughout the text in order to avoid the need for a definition.

⁹ The deleted parts (i.e. 'with the objective of enabling the enterprise to continue in whole or in part') can be moved to a recital to provide further clarification.

¹⁰ The scope of the definition is now clarified. In order to ensure an appropriate protection of smaller creditors, changes to Article 4(3) will also give Member States greater flexibility to involve courts more intensely where operational restructuring is undertaken and changes to Article 5 will ensure that MS can appoint an insolvency practitioner in cases where an operational restructuring is undertaken.

¹¹ Recital 16 will be brought in line with the text of the article. More examples will be provided in the recitals.

¹² It is suggested to move the part between brackets to a recital.

¹³ A recital will clarify that small and medium sized enterprises are to be understood as defined under national law and reference can be made to the Commission Recommendation of 2004. The recital can also clarify that Member States may adapt the early warning tools to different types of enterprises.