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WORKING PAPER

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**WORKING DOCUMENT**

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| From: | Presidency |
| To: | Working Party on Civil Law Matters (Insolvency)<br>JHA Counsellors on Civil Law Matters |
| N° prev. doc.: | WK 12805/2018 |
| 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<br>- Debriefing on issues discussed at the technical meeting on 5 November 2018 and at the political trilogue on 12 November 2018 |

Delegations will find in Annex a debriefing on issues discussed at the technical meeting on 5 November 2018 and at the political trilogue on 12 November 2018

**ANNEX**

## I. Introduction

On 12 November 2018, the second trilogue of the Council, European Parliament and the European Commission was held in the European Parliament premises in Strasbourg on the Directive on Insolvency, Restructuring and Second Chance. The third trilogue will be held on 27 November 2018 in the Council premises in Brussels.

This trilogue was prepared by a technical meeting which took place on 5 November 2018.

During the technical meeting and the trilogue, the institutions have discussed the following:

- Workers rights to information and consultation
- Article 3 (Early warning tools)
- Article 4 (Access to preventive restructuring frameworks)
- Article 5 (Debtor in possession)
- Article 6 (Stay of individual enforcement actions).

Discussions took place in a friendly, constructive and respectful atmosphere. However, they also showed that the position of the European Parliament and of the Council, although they are aligned on a number of issues, also do differ on some key issues. The initial timeline therefore seemed to be too ambitious, and it has been agreed to plan another technical meeting and political trilogue in December.

The position of the European Parliament seems to be focused to a great extent on the protection of workers on the one hand and of creditors on the other hand. In contrast to that, the General Approach left the treatment of workers in a preventive restructuring procedure to a large extent up to national law and EU labour law, and focused more on finding the right balance between the rights and interests of the debtor and of the creditors.

During the discussions, the Presidency presented and defended the general approach and those compromise proposals which seemed to be acceptable for most Member States in the meeting of the JHA Counsellors on 30 October and in writing. The European Parliament seems to have agreed on the Council's position on a number of issues, such as the option for Member States to introduce a viability test as a condition for access to the preventive restructuring framework or the possibility to extend the stay beyond 12 months where the plan has been submitted within 8 months and the judicial or administrative authority needs a longer time to assess the plan.

As regards the timeline, the EP and the Council have slightly amended their goals and have emphasised the need to come to an agreement before the start of the EP election cycle, which, in order to allow for review by the lawyer-linguists, would result in a deadline of end January. In this context, the meeting schedule is currently set as follows:

- 19 November - All day - Technical meeting
- 27 November - 15 to 18h - Third political trilogue
- 5 December - Afternoon - Technical meeting
- 11 December - 14 to 18h - Fourth political trilogue.

## II. Substantive Issues

### 1. Workers rights to information and consultation

The EP again emphasised the importance they adhere to the goal that workers' rights should not be adversely affected throughout the restructuring procedures. The EP wants workers to be informed and to be consulted at a very early stage in the procedure.

The Presidency explained that this Directive does not cover the rights of workers when they lose their jobs. EU and national labour law would continue to apply, and there is no possibility for the creditors to agree on something which is not in accordance with labour law. The Presidency stated that the Council could agree to include specific references to the compliance with EU and national labour law on information and consultation, such as Directive 2002/14/EC, but that this Directive should not go beyond what has been provided there. The Presidency also explained that the correct legal basis is not there to amend existing workers' rights in this Directive on restructuring.

The COM explained that they see two different dimensions of rights: information and consultation of workers and their representatives during the process of developing a restructuring plan, and on the other hand to what extent the restructuring plan could have an impact on their conditions. The COM agreed with the Council that all existing rights of workers under EU and national labour law continue to apply, and that it might be useful to make this fact very clear in the text.

The EP finished by saying that they want to see workers' rights to information and consultation guaranteed before the negotiations have started (in early warning tools) and during the negotiations on the restructuring plan.

The issue will have to be re-addressed during the discussions on the specific provisions.

2. Early warning tools (Article 3)

The EP indicated that there were no major differences on political level left in the text apart from the availability of early warning tools for workers' representatives. The EP considers Article 3(2b) to be of crucial importance. They also consider that this paragraph does not go further than the obligation included in Article 4(2) in Directive 2002/14/EC.

The Presidency explained that early warning tools are very broad and provide a lot of sensitive information about a company, which could deteriorate the existing situation of the debtor or which could damage the potential of a successful restructuring. The Presidency therefore argued that providing access to early warning tools could go further than the obligations regarding information and consultation of workers' representatives in Directive 2002/14/EC.

The COM emphasised that the obligation of information and consultation in Directive 2002/14/EC refers to the situations where there is a threat to employment and where the company has concrete structural changes to the organisation in mind. Early warning tools do not always refer to such situations.

For the EP, it is important that workers' representatives are consulted where there is a likelihood of insolvency. It argued that workers should be borne in mind when companies are thinking about restructuring and that the expertise of workers' representatives can also be used in the form of an early warning tool. Consultation of the workers would be a helpful tool in assessing the need and the possibility for a successful restructuring.

The COM will try to come up with a compromise proposal which reflects the rights to information and consultation in Directive 2002/14/EC in this Directive regarding insolvency, restructuring and second chance, without altering the substance of those rights.

3. Access to preventive restructuring frameworks (Article 4)

*Article 4(1a)*

The Presidency explained that the EP text regarding the option for Member States to exclude companies who have been sentenced for serious bookkeeping and accounting obligations was drafted in a manner which was too vague and could lead to unwanted effects: excluding such companies could have adverse effects on the creditors and on the employees. The Presidency argued that it should therefore be made clear the breach of those bookkeeping and accounting obligations should be linked to the viability of the enterprise.

The EP stated that companies who have been negligent regarding their accounting and bookkeeping obligations for a long period could not be trusted as there would be no guarantee that they would comply with these obligations once they have been restructured.

The COM argued that the trustworthiness of the debtor is something which should be assessed by the creditors, as this would impact their willingness to enter into restructuring negotiations anyway. However, the COM suggested to come up with a compromise proposal to reflect the fact that the breach of the accounting and bookkeeping obligations should be linked to the viability of the business in the recitals.



*Article 4(3)*

The EP explained that it cannot agree at this stage with the compromise proposal of the Council to limit the involvement of the court to where it is necessary and appropriate *"so as to ensure that the rights of any affected parties and other relevant stakeholders are safeguarded"*.

The issue will have to be discussed when the institutions discuss the definition of "affected parties". The EP is opposed to defining this term in a way that diverges from its colloquial meaning.

*Article 4(4)*

The EP indicated that it considers that a restructuring plan would be impossible to implement without the agreement of the debtor. The EP does not consider that it is realistic to go over the head of the debtor.

The Presidency explained that in a number of Member States, the possibility exists for the creditors to start the restructuring procedures, and that the General Approach reflects the system in those member States, where it already works well. The last sentence in recital 18 was not a sufficient solution for the EP.

The COM considers this a minor difference between the institutions and will provide a compromise solution.

4. Debtor in possession (Article 5)

The EP emphasised the importance it gives to the mandatory appointment of a practitioner in a number of cases so as to ensure appropriate creditor protection. In a certain cases, the EP considers that it would be absolutely necessary to appoint a practitioner to ensure the proper balance of interests between the debtors and the creditors. This is the case where the debtor is granted a stay of individual enforcement actions, where a cross-class cram-down mechanism would be needed or where it is requested by a majority of creditors.

The Presidency explained that the Council position is that it might be useful in some cases to allow Member States to require the appointment of a practitioner, but that it should be up to the Member States to decide on those cases. The Presidency indicated that the Council has made a lot of efforts to provide an extensive list of examples of such cases in the recitals.

The EP indicated that this is not protecting creditors enough and that a mandatory appointment of such practitioner should be required in all Member States in those cases. According to the EP, those cases are the ones where the interests of the creditors are heavily affected. The control by a judicial or administrative authority would not be sufficient according to the EP, as they argue that such control only comes in at the end of the procedure.

The COM explained that the EP and Council positions are not far apart, but that the COM would also prefer to allow flexibility as regards the cases in which the appointment of the practitioner is required. For the COM it is important that the debtor is incentivised to enter into preventive restructuring in a timely manner, without fearing that a practitioner would take over possession of the debtor. The COM can accept that a practitioner is brought in as a broker to assist in the negotiations and the drafting of a restructuring plan but not that such practitioner would take over possession of the debtor.

The COM proposed to suggest a compromise proposal which reflects the concerns of both institutions.

5. Stay of individual enforcement actions (Article 6)

Due to a lack of time, the discussions on the stay of individual enforcement actions were relatively short. The Presidency reiterated that the stay of individual enforcement actions was one of the most difficult compromises found within the Council. It indicated that a careful balance has been found between those Member States who have an automatic stay and those where a stay needs to be applied for, as well as between those Member States who prefer a short stay and those who want to give the debtor a longer stay.

The EP indicated that the approach taken by both institutions regarding the stay of individual enforcement actions is not too different. The important thing for the EP is to avoid the knock-on effects a stay could have on the creditors, arguing that one in six insolvencies concerns a creditor in the supply chain of an insolvent company.

For the EP it is also important that a stay does not apply where there is an obligation of the debtor to file for insolvency. Where insolvency procedures are available and a debtor is under the obligation to file for such a procedure under national law, than that procedure should apply according to the EP.

The Presidency explained to the EP that the Council has addressed the issue of a debtor becoming insolvent during the preventive restructuring procedure in Article 7. The Council has also drafted the text in such a way that the concept of insolvency in such a case would apply only where the debtor has actually become unable to pay his debts as they fall due, as this is a common feature in most of the Member States.

The EP was not in a position during the negotiations to indicate whether it could agree to the arguments of the Council.

*Article 6(2)*

The Presidency explained that limiting the possibility of applying a limited stay only where "a debtor involves a creditor in a procedure" would be a difficult criterion to apply for a stay of individual enforcement actions. In many Member States, the stay is linked to the beginning of the negotiations, so it is not clear yet at that stage which creditors would be involved. In this context, the Presidency defended the Council compromise proposal to only involve those creditors to whom the stay has been notified in accordance with national law.

The EP was not in a position during the negotiations to indicate whether it could agree to the arguments of the Council.

*Article 6(3)*

The Presidency shortly explained that its compromise proposal is more friendly for workers, as the main principle used in the text is that the stay does not apply to workers' claims. However, Member States can opt to apply such a stay where these claims receive "a similar level of protection". The recitals would then clarify that such a "similar level of protection" could also be a level at least equivalent to a level provided for under the relevant national law transposing Directive 2008/94/EC.

The EP was not in a position during the negotiations to indicate whether it could agree to the arguments of the Council.

The general conclusion regarding Article 6 is that further work would be done at the next technical meeting on 19 November 2018 on the basis of compromise proposals prepared by the Commission.

## III. Conclusion

*Delegations are invited to take note of the information provided by the Presidency in this document.*