Council of the European Union
General Secretariat



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WORKING PAPER

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**WORKING DOCUMENT**

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| From: | The Services of the Commission |
| To: | JHA Counsellors on Civil Law Matters<br>Working Party on Civil Law Matters (Insolvency) |
| 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>- Non-paper from the Commission |

Delegations will find in Annex a non-paper from the Commission on above mentioned proposal.

**ANNEX**

**Commission Non-paper on**

**Proposal for a Directive on preventive restructuring and second chance (COM (2016) 723 final)**





The services of DG Justice would like to thank the Austrian Presidency team for the excellent work on the 4 column Table submitted to delegations on 5 December 2018.

The services of the Commission would like to suggest a few clarifications, some compromise proposals (especially where requested explicitly in the Table) as well as some fall-back options. While we understand that the Presidency will in the first place defend the General Approach, we would be ready to assist the co-legislators find a compromise in case discussions become more difficult.

Many of the fall-back compromise proposals below have previously been discussed with the Member States and have, in our opinion, not received major opposition. In the interest of time, we have worked on that basis, rather than come up with entirely new solutions which may disturb the balance of the text.

**1. Political issues:**

| Line | 4 column Table | COM comments/Fall-back compromise proposals |
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| 67 | ***4a. The Member States may also provide that the restructuring framework under this Directive is available at the request of creditors and workers' representatives [****EP:* ***subject to the agreement of the debtor.]][****Council:* ***Where workers' representatives have the right to request the opening of restructuring procedures, the agreement of the debtor shall be necessary.]*** | In addition to the Presidency's compromise proposal:<br><br>***4a. The Member States may also provide that the restructuring framework under this Directive is available at the request of creditors and workers' representatives. Where workers' representatives have the right to request the opening of restructuring procedures, the agreement of the debtor shall be necessary.***<br><br>*We would like to put on the table a fall back option:*<br><br>***4a. The Member States may also provide that the restructuring framework under this Directive is available at the request of creditors and workers' representatives, subject to the agreement of the debtor. The agreement of the debtor may be waived in respect of debtors which are not SMEs.*** |

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| **72** | 3. Member States [EP: ***shall***][Council: may] require the appointment **by a judicial or administrative authority** of a practitioner in the field of restructuring in [EP: ***at least*** the following] cases [Council: such as]: | As a fall-back option, the Council could consider stipulating in the Chapeau of Para 3 that the appointment may be done either ex officio, or by request of the debtor or a majority of creditors as well as supplementing the optional list in Paragraph 3 all the examples now mentioned in Recital 18a of the GA:<br><br>3. Member States may require the appointment **by a judicial or administrative authority, <u>*ex officio* or at the request of the debtor or of a majority of creditors,</u>** of a practitioner in the field of restructuring in cases such as:<br><br>(a) where the debtor is granted a ~~general~~ stay of individual enforcement actions in accordance with Article 6;<br><br>**<u>(bb) where the restructuring plan contains measures affecting the rights of workers or small suppliers;</u>**<br>**<u>(bc) where the debtor or its management have acted in a fraudulent, criminal or detrimental way in business relations;</u>** |
| **73** | (a) where the debtor is granted a ~~general~~ stay of individual enforcement actions in accordance with Article 6; | |
| **74** | (b) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance with Article 11. | |
| **75** | ***(ba) where the appointment is made with the sole purpose of assisting in drafting or negotiating the restructuring plan*** | |
| **75.1** | | |
| **84** | 3. Paragraph 2 shall not apply to workers' outstanding claims.<br>***Member States may apply paragraph 2 to such claims*** if**,** and to the extent that**,** Member States ensure by other means that the payment of such claims is guaranteed ***in preventive restructuring frameworks*** at a ***similar*** level of protection.<br><br>*[The recitals will clarify that one possible way to provide 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.]* | A fall-back option could be:<br><br>3. Paragraph 2 shall not apply to workers' outstanding claims, ***<u>without prejudice to Member States' possibility to put in place alternative measures of protection for workers.</u>*** |

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| **92** | 7. The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed **[***Council:* twelve**]**[*EP:* ***ten***] months. **[***EP:* ***Subject to Article 3 of Regulation 848/2015 on Insolvency Proceedings, the total duration of the stay shall be limited to two months if the registered office of the company has been transferred to another Member State within a three-month-period prior to the filing of a request for the opening of restructuring proceedings.*** **]** | **Fall-back option:**<br><br>7. The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed twelve months.<br><br>***Where Member States chose to implement this Directive by means of one or more procedures or measures which do not fulfill the conditions for notification under Annex A of Regulation 848/2015 on Insolvency Proceedings, the total duration of the stay under such procedures shall be limited to no more than four months if the registered office of the debtor company has been transferred to another Member State within a three-month-period prior to the filing of a request for the opening of restructuring proceedings.***<br><br>**[7a. deleted]** |
| **93** | ***7a. By way of derogation from paragraph 7, where, according to national law, the restructuring plan is to be submitted within eight months from the start of the initial stay of individual enforcement actions to a judicial or administrative authority for confirmation, Member States may provide that that stay is extended until the plan is confirmed.*** | |

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| **138** | 2. Member States shall ensure that affected parties are treated in separate classes which reflect the class formation criteria. Classes shall be formed in such a way that each class comprises claims or interests with rights that are sufficiently similar to justify considering the members of the class a homogenous group with ***sufficient*** commonality of interest ***based on verifiable criteria, in accordance with national law***. As a minimum, creditors of secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan. Member States *[EP:* ***shall***][*Council:* may] also provide that workers' *[Council:* ***claims*** are treated in a separate class of their own *[EP:* ***where they are affected by the plan****.]*<br>***Member States may also provide that equity holders*** are treated in a separate class of their own ***where they are affected by the plan.***<br><br>***Member States may provide that debtors which are SMEs may opt to not [****EP: **apply]****[****Council:* ***not treat affected parties] in separate classes.*** | **Fall-back option:**<br><br>2. Member States shall ensure that affected parties are treated in separate classes which reflect the class formation criteria. Classes shall be formed in such a way that each class comprises claims or interests with rights that are sufficiently similar to justify considering the members of the class a homogenous group with ***sufficient*** commonality of interest ***based on verifiable criteria, in accordance with national law***. As a minimum, creditors of secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan.<br>Member States ***shall*** also provide that workers' ***claims*** are treated in a separate class of their own ***where they are affected by the plan***.<br><br>***Member States may also provide that equity holders which have claims against the debtor*** are treated in a separate class of their own ***where they are affected by the plan.***<br><br>***Member States may provide that debtors which are SMEs may opt to not treat affected parties in separate classes.***<br><br>A recital would clarify that SMEs should not be required to treat workers in a separate class:<br><br>***Debtors which are SMEs should be able to have access to simplified class formation rules. To this end, they may opt not to treat affected parties in separate classes, and they may opt not to treat affected unsecured creditors in more than one class.*** |

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| **140** | 4. A restructuring plan shall be deemed to be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each and every class. ***Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.*** Member States shall lay down the required majorities ***required*** for the adoption of a restructuring plan , which. ***Those majorities*** shall be in any case not ***be*** higher than 75% in the amount of claims or interests in each class ***or, where applicable, in the number of affected parties in each class.*** | **Fall-back option:**<br><br>4. A restructuring plan shall be deemed to be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each and every class. ***Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.*** Member States shall lay down the required majorities ***required*** for the adoption of a restructuring plan , which. ***Those majorities*** shall be in any case not ***be*** higher than 75% in the amount of claims or interests in each class ***or, where applicable, in the number of affected parties in each class.*** |

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| **153.1** | ***(ca) different classes are not treated [disproportionately]/[unfairly], unless Member States provided for the requirement of the majority of creditors in Article 9 (4).*** | |
| **157-173** | ***There are now 3 options on the table put forward by the Presidency.*** | In our view, Option 3 would be the better fall-back solution, as it conserves the GA almost intact and would also meet the request of the EP to simplify the article. The only material difference would be that in MS where the majority of classes in Para 1(b)(ii) is not reached, the plan is not out-right rejected (which would be very inefficient where for example the negotiations took several months and the situation of the debtor has in the meantime deteriorated), but that there is still a chance to approve the plan on the basis of a valuation and the support of at least one class of creditors 'in the money' (or more than one, where so required by national law....although this solution could result in another failure of the plan...)<br><br>Small drafting suggestions would be needed in Para 2 of that Option, to ensure that the second sub-paragraph of Para 2 is not a derogation from the derogation in the first sub-para... |

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| **253.1** | 1a. By way of derogation from Articles 19 , 20 and **to** 21, Member States ***shall*** maintain or introduce provisions ***denying,*** restricting **or** ***revoking*** access to discharge ***of debt*** or laying down ***providing for*** longer periods for obtaining a full discharge ***of debt*** or longer disqualification periods ***where*** the over-indebted ***insolvent*** entrepreneur acted ***towards the creditors or other stakeholders*** dishonestly or in bad faith towards the creditors ***according to national law*** when becoming indebted, ***during the insolvency procedure*** or during the collection ***payment*** of the debts ***debt***; | We would like to suggest a slightly amended drafting, to enable MS to keep their rules on burden of proof (in particular the presumption of honesty):<br><br>1a. By way of derogation from Articles 19 , 20 and **to** 21, Member States ***shall*** maintain or introduce provisions ***denying,*** restricting **or** ***revoking*** access to discharge ***of debt*** or laying down ***providing for*** longer periods for obtaining a full discharge ***of debt*** or longer disqualification periods ***where*** the over-indebted ***insolvent*** entrepreneur acted ***towards the creditors or other stakeholders*** dishonestly or in bad faith towards the creditors ***according to national law*** when becoming indebted, ***during the insolvency procedure*** or during the collection ***payment*** of the debts ***debt, without prejudice to the national rules on burden of proof***;<br><br>A recital could clarify that :<br><br>**'Where entrepreneurs do not benefit from a presumption of honesty and good faith under national law, the burden of proof of the honesty and good faith of the entrepreneur should not make it unnecessary difficult or burdensome for debtors to enter the procedure.'** |
| **292** | ***1a. Any shift of the debtor's centre of main interest as defined in Regulation (EU) 2015/848 shall not be permissible during restructuring proceedings.*** | A recital could clarify that:<br><br>**'In cross-border insolvency proceedings, Regulation 2015/848 provides for safeguards against abusive relocation of the debtor's centre of main interest during proceedings.'** |

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| **307, 310, 311,** | | We can suggest the following compromise:<br><br>(ga) ***the number of jobs lost as a result of collective redundancies falling within the scope of Directive 2008/59;***<br><br>MS can easily collect data on collective redundancies.<br><br>In the case of Directive 98/59, there is however an obligation to notify to national authorities (and workers ' representatives) intentions to proceed with collective redundancies (Article 3). This notifies includes number of planned redundancies and reasons for them (e.g. insolvency).<br><br>It is understood that MS would have to limit the data to collective redundancies in insolvency proceedings, but they will need on the other hand to break up the data by type of procedure and size of debtor etc. |
| **316** | 2. Member States shall break down the statistics ***data*** referred to in ***points (a) to (c) of*** paragraph 1 ***and, where applicable and available, the data referred to in paragraph 1b*** by: | A change is required pursuant to the change in litt. (ga) above:<br><br>2. Member States shall break down the statistics ***data*** referred to in ***points (a) to (c) and (ga) of*** paragraph 1 ***and, where applicable and available, the data referred to in paragraph 1b*** by:<br><br>It is understood that Litt. (c) of Para 2 are not relevant and litt. (b) will only be relevant whether the collective redundancy falls within the scope of Directive 98/59. |
| **344** | To be discussed at political level | The EP expressed their wish that implementation and review periods are made shorter. We would agree to making the implementation period for most parts of the Directive of 2 years. The main argument for raising that limit to 3 years in the CLC was that 3 years are needed across the board to ensure consistency (Art. 28 had a 3 year implementation |

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| | | period in COM proposal). That argument is no longer valid after the implementation period for Art. 28 has been increased to 5/7 years. The compromise is that for Art. 28 the longer implementation period of the GA can be kept.<br><br>1. Member States shall adopt and publish, by **[2** ~~***3***~~ *years from the date of entry into force of this Directive*] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive***, with the exception of the provisions necessary to comply with Article 28(a), (b) and (c) which shall be adopted and published by [5 years from the date of entry into force of this Directive] at the latest and the provisions necessary to comply with Article 28(e) which shall be adopted and published by [7 years from the date of entry into force of this Directive] at the latest***. They shall forthwith ***immediately*** communicate to the commission the text of those provisions ***to the Commission***.<br><br>They shall apply ***the laws, regulations and administrative*** provisions ***necessary to comply with this Directive*** from [**2** ~~***3***~~ *years from the date of entry into force of this Directive*], with the exception of the provisions implementing Title IV ***necessary to comply with Article 28(a), (b) and (c)*** which shall apply from ***[5 years from the date of entry into force of this Directive] and of the provisions necessary to comply with Article 28(e), which shall apply from [7 years from the date of entry into force of this Directive]***. *(...)*<br>When Member States adopt those provisions ***measures***, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made. |

**2. Technical issues**

| | **4 column Table** | **COM comments** |
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| 17 | 3. Member States may extend the application of the procedures referred to in point (b) of paragraph 1 to over-indebted **insolvent** natural persons who are not entrepreneurs.<br>***Member States may restrict the application of point (a) of paragraph 1 to legal persons.***<br><br>*(COM to provide language for the recitals stating the reasons why the limitation to legal persons might be necessary.)* | A recital could explain that:<br><br>**'Since the financial difficulties of natural persons who are entrepreneurs may be efficiently resolved not only by means of preventive restructuring procedures but also by means of procedures which lead to a discharge of debt, Member States may opt to restrict the scope of preventive restructuring procedures to legal persons.'** |
| 30 | (5) 'executory contracts ***contract***' means contracts ***a contract*** between the debtor and one or more creditors under which both sides ***parties*** still have obligations to perform at the moment the stay of individual enforcement actions is ordered ***granted or applied****;* | COM understating is that executory contacts are, at least for a party, of a continuing or recurring nature. For example, a sale of equipment concluded before the stay on which no party has yet performed, will not qualify as an executory contract; however, a contract for the rent/lease of equipment would qualify as such.<br>We thought about how best to express this, but could not come to a satisfactory result. We suggest that a **recital** would give several examples of executory contracts which could help interpreting this provision:<br><br>**'Executory contracts are, for example, lease and licence agreements, long-term supply contracts and franchise agreements.'** |

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| 34 | (9) 'best-interest-of-creditors test' means that no dissenting creditor would be worse off under the restructuring plan than they ***such a creditor*** would be**,** ***either*** in the event of liquidation, whether piecemeal or sale as a going concern***, if the normal ranking of liquidation priorities under national law were applied, or in the event of the next best alternative scenario if the restructuring plan was not confirmed****;* | The Commissions notes (regrettably late) a possible drafting issue in the text. As it is drafted, it is not clear that the order of priorities will have to apply also when MS chose the 'next best alternative scenario'. Or, the same ranking would need to apply even in those cases, to ensure predictability of outcomes. A possible drafting could be:<br><br>(9) 'best-interest-of-creditors test' means that no dissenting creditor would be worse off under the restructuring plan than ~~they~~ ***such a creditor*** would be ***if the normal ranking of liquidation priorities under national law were applied*** ***either*** in the event of liquidation, whether piecemeal or sale as a going concern***, ~~if the normal ranking of liquidation priorities under national law were applied,~~ or in the event of the next best alternative scenario if the restructuring plan was not confirmed****;*<br><br>If MS agree with this explanation, the change could also be made later, with lawyer linguists. |
| 61 | ***1a. Member States may provide that debtors that have been sentenced for serious breaches of accounting and bookkeeping obligations under national law may only access a preventive restructuring framework after taking adequate measures to correct the issues given rise to the sentence with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations.***<br>*[Council: a recital should clarify that this possibility does not limit Member States from preventing access to a debtor where his books and records are incomplete or deficient to a degree that makes it impossible to ascertain the debtor's viability under the viability test.]* | We note that the Recital would go farther than the EP amendment and also farther than the GA.<br><br>We continue to believe that smaller debtors which have no obligations to keep books should not be then penalised for having complied with their legal obligations. we propose therefore the following amendment:<br><br>*'A recital should clarify that this possibility does not limit Member States from preventing access to a debtor where his books and records are incomplete or deficient* ***in violation of legal obligations*** *to a degree that makes it impossible to ascertain the debtor's viability ~~under the viability test~~* |

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| 98 | *Council proposal:*<br>*The recitals will clarify that the notion of unfair prejudice also comprises a situation in which a creditor would encounter* | Fall-back option:<br>***[(bb) if the stay would give rise to the ~~likelihood of~~ insolvency of a creditor and enforcement is not likely to prejudice the restructuring of the debtor's business].*** |
| 109 | ***5b. Member States may provide that the stay of individual enforcement actions shall not apply to netting arrangements, including close out netting arrangements, on financial markets, energy markets and commodity markets even in circumstances where Article 31 does not apply, if such arrangements are enforceable under national insolvency law. The stay shall, however, apply to the enforcement by a creditor of a claim against the debtor arising as a result of the operation of a netting arrangement.*** | Fall-back option:<br>***5b. Without prejudice to Paragraphs 5 and 4/5a, Member States may provide that the stay of individual enforcement actions shall not apply to netting arrangements, including close out netting arrangements, on financial markets, energy markets and commodity markets even in circumstances where Article 31 does not apply, if such arrangements are enforceable under national insolvency law. The stay shall, however, apply to the enforcement by a creditor of a claim against the debtor arising as a result of the operation of a netting arrangement.***<br>And in Article 31(1), the following litt. will be added:<br>**(ca) Regulation (EU) 1227/2011.** |
| 126.1 | ***(iid) the financial flows, if provided by national law;*** | ***Fall-back option:***<br>***(iid) the estimated financial flows during the implementation of the plan, ~~if provided by national law;~~*** |
| 233 | ***1a. Member States shall ensure that entrepreneurs who have been discharged from their debts are not excluded from national frameworks providing for business support for entrepreneurs where such frameworks exists under national law.***<br>***1b. Member States shall ensure that entrepreneurs who have been discharged from their debts have access to relevant and up-to-date information about the availability of administrative, legal, business or financial support and any means available to them to facilitate the setting-up of a new business.*** | *Slight drafting change, to make this simpler, more positive, less defensive (substance is not changed):*<br>***1a. Member States shall ensure that entrepreneurs who have been discharged from their debts ~~are not excluded~~ may benefit from existing national frameworks providing for business support for entrepreneurs ~~where such frameworks exists under national law,~~ including access to relevant and up-to-date information about this frameworks.*** |

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| 253 | ***(db) where a derogation is necessary to guarantee the balance between the rights of the debtor and the rights of one or more creditors.*** | *EP has expressed a wish to merge this provision with litt. (a) of the same paragraph.*<br>*However, on reflection, the matters regulated are so different that it is impossible to logically merge the two into one paragraph. Furthermore, Litt. (a) has now been extracted from Para 1 and made a stand-alone, mandatory provision.* |
| 268 | ***1a. The Commission shall facilitate the sharing of best practices between Member States with a view to improving the quality of training across the Union, including by means of networking and the exchange of experiences and capacity building tools.*** | *We would like to propose a change (the Commission is not a PR firm):*<br><br>***1a. The Commission shall facilitate the sharing of best practices between Member States with a view to improving the quality of training across the Union, including by means of ~~networking and~~ the exchange of experiences and capacity building tools.*** |