Responses to the proposed directive

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Emmanuelle Inacio summarises some of the feedback to the European Union's legislative process on preventive restructuring frameworks

> THE PROVISIONS OF THE PROPOSAL LIMITING THE CIRCUMSTANCES IN WHICH A PRACTITIONER IN THE FIELD OF RESTRUCTURING MAY BE APPOINTED ARE AMENDED

As a reminder, on 22 November 2016, the European Commission has presented a proposal for a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU[1] (the Proposal).

By letter of 23 November 2016, the European Commission transmitted the Proposal, which is subject to the ordinary legislative procedure, to the Council and the European Parliament.

The **European Economic and Social Committee** (EESC), which is the voice of the organised civil society in the EU, delivered its opinion on 29 March 2017[2]. If the EESC supported the Proposal, this consultative body would prefer to see the proposal take the form of a regulation and not be afraid to move towards the maximum possible harmonisation of current systems. The EESC insisted that an obligation on for the company management to inform and consult employees prior to and during negotiations be formally specified in the Directive.

In particular, greater attention should be given to the workers' interests during the early restructuring phases, and similarly, during the insolvency proceedings, explicit reference should be made to Article 5(2) of Directive 2001/23/EC[3] in order to protect the workers' rights in this context. Finally, the EESC recommended that the Directive incorporate the key principle of guaranteeing the status of all the workers as priority creditors in all Member States.

Even if it has not been consulted on the proposed Directive, the **European Central Bank** (ECB) delivered its opinion on 7 June 2017[4], considering that the proposed Directive falls within its scope of competence. Although the proposal introduces a number of highly relevant minimum harmonisation measures for existing restructuring frameworks, the ECB considered it does not take a holistic approach towards harmonising insolvency laws across the Union, including both restructuring and liquidation, nor does it attempt to harmonise core aspects of insolvency law such as:

(a) the conditions for opening insolvency proceedings;
(b) a common definition of insolvency;
(c) the ranking of insolvency claims; and
(d) avoidance actions.

While the ECB fully recognises the considerable legal and practical challenges that developing a holistic approach would involve, due to the far-reaching changes to commercial, civil and company laws that would need to accompany such an endeavour, more ambitious action needs to be undertaken to lay a common ground for a substantive harmonisation of Member States' insolvency laws, thus ensuring a more comprehensive harmonisation in the long term and contributing to a well-functioning Capital Markets Union.

The **European Parliament's Legal Affairs Committee** (JURI) appointed Angelika Niebler (EPP, Germany) as rapporteur and she presented her draft European Parliament Legislative Resolution (Draft Resolution) on the Proposal to the Council on 25 September 2017 containing 85 amendments[5]. 296 amendments to the Draft Report have been tabled on 16 November 2017[6].

The Proposal introduces an obligation for all Member States to ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure their debts or business and to benefit from a stay of individual enforcement actions if, and to the extent that, such a stay is necessary to support the negotiation of a restructuring plan. The Draft Resolution proposes a definition of "likelihood of insolvency" that means a situation in which the debtor is not insolvent according to the national law, but in which there is a real and serious threat to the debtor's future ability to pay the debts as they fall due.

Regarding the role of the practitioner, the provisions of the Proposal limiting the circumstances in which a practitioner in the field of restructuring may be appointed are amended. Indeed, the Draft Resolution requires that the Member States should provide that the supervision of a restructuring procedure by a practitioner in the field of restructuring is mandatory. Moreover, the Draft Resolution adds that all Member States shall require the appointment of a practitioner in the field of restructuring at least: (a) where the debtor is granted a stay of individual enforcement actions;

(b) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down; (ba) where it is requested by the debtor or by a majority of the creditors.

Similarly, the provisions of the Proposal limiting the involvement of a judicial or administrative authority to where it is necessary and proportionate are not mandatory in the Draft Resolution.

The Proposal allows a cross-class cram-down mechanism if the restructuring plan is not supported by the required majority in each class of affected parties, leading to a dissenting voting class. In the case of a cross-class cram-down, the restructuring plan must always be confirmed by a judicial or administrative authority. The cross-class cram-down mechanism is subject to a number of minimum harmonised requirements in order to ensure that the rights of the parties involved are appropriately protected.

This means that the plan must be supported by at least one class of affected creditors, and dissenting voting classes must not be unfairly prejudiced under the proposed plan. The Draft Resolution proposes the plan must be supported by the majority of classes. The Member States also have the option of increasing the minimum number of classes required to support the plan "to the extent that that minimum number covers still the majority of classes", adds the Draft Resolution.

Regarding the question of maximum duration of stay, the Proposal requires the Member States to allow the debtor to apply for a general or limited stay of individual enforcement actions to support the negotiations of a restructuring plan of up to 4 months, which can be extended or renewed for up to 12 months by the judicial or administrative authorities, precluding the opening of insolvency proceedings, security enforcement, and any contractual rights of termination or acceleration. The Draft Resolution and amendments require that the maximum duration of stay goes from two months extended or renewed up to 18 months.

Regarding the rules to provide a second chance for entrepreneurs, the Proposal states that the Member States are required to ensure that honest over-indebted entrepreneurs may be fully discharged from their debts after maximum three years and have the benefit of short disqualification orders without the need to re-apply to a judicial or administrative authority. The Draft Resolution states that the period of time after which over-indebted entrepreneurs may, for the first time, be fully discharged from their debts after they have undergone an insolvency procedure shall be no longer than three years. Some amendments propose to extend this period to five years.

On his notes of 23[7] & 30[8] November 2017, the Presidency invited the Coreper/Council (Justice and Home Affairs) to discuss whether they can agree to extending flexibility for the Member States by providing them with an option to introduce or maintain a viability test under national law, provided that the assessment has the purpose to exclude debtors with no prospect for viability and can be carried out without detriment to the debtor's assets.

The Council was invited to agree on the principle that, where there is more than one class of affected parties participating in the adoption of the restructuring plan and the required majority is not reached in one or more voting classes of affected parties, the restructuring plan may still be confirmed by a judicial or administrative authority, provided that the requirements for such cross-class cram-down, as agreed during future discussions at technical level, are met. This is without prejudice to the outcome of the future discussion on class formation at technical level.

The Council was also invited to discuss whether they can agree that there should be a harmonised discharge period of up to three years, subject to limitations in cases where such a discharge or discharge period is not deemed to be appropriate.

The **Committee on Employment and Social Affairs** (EMPL), a Committee of the European Parliament, which delivered its opinion on 5 December 2017, also shared that a matter of concern of the Proposal is the fact that workers employed in companies are, as creditors, being placed on the same footing as banks or any other equity holders[9]. The **Committee on Economic and Monetary Affairs** (ECON), which delivered its opinion on 7 December 2017[10], emphasizes inter alia on the need to provide specific support to SMEs in the Directive.

On 7 & 8 December 2017, the Council held a debate on the European Commission's Proposal[11]. Ministers focused on the viability of the topics of viability of the debtor, the cross-class cram-down mechanism and on the second chance for honest entrepreneurs.

In some aspects there was a certain common ground, but further work at technical level is needed to address the concerns expressed, in particular on the cross-class cram-down and the discharge period.

To be continued… ■

Footnotes:

1 http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50043
2 http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52016AE6275&from=DE
3 http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001L0023
4 http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52017AB0022&from=DE
5 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-610.684+01+DOC+PDF+V0//EN&language=EN
6 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-613.399+02+DOC+PDF+V0//EN&language=EN
7 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL%3AST_14734_2017_INIT&from=EN
8 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL%3AST_15201_2017_INIT&from=EN
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10 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-608.079+02+DOC+PDF+V0//EN&language=EN

FURTHER WORK AT TECHNICAL LEVEL IS NEEDED TO ADDRESS THE CONCERNS EXPRESSED, IN PARTICULAR ON THE CROSS-CLASS CRAM-DOWN AND THE DISCHARGE PERIOD

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