A closer look at...

The fate of the practitioners in procedures concerning restructuring, faced with the future Directive on Preventive Restructuring Frameworks

EMMANUELLE INACIO
INSOL Europe Technical Officer

> THE NEED FOR NATIONAL REGULATORY FRAMEWORKS OF THE PRACTITIONERS IN SUCH PROCEDURES IS ACKNOWLEDGED BY THE FINAL COMPROMISE TEXT

After the Niebler's Report on the European Commission's Directive Proposal on preventive restructuring frameworks[1] was endorsed by the plenary meeting of the European Parliament on 12 September 2018 and the Council (Justice and Home Affairs) adopted its General Approach during its meeting on 11 October 2018, the co-legislators have successfully concluded their Trilogue[2].

The Committee of the Permanent Representatives of the Governments of the Member States to the European Union (COREPER) confirmed the final compromise text[3] of the Council of 17 December 2018[4] based on the feedback of the Member States and the discussions with the European Parliament which was approved by the Committee on Legal Affairs of the European Parliament on 23 January 2019[5]. Plenary sittings of the European Parliament are scheduled from 25 to 28 March 2019[6] and should the European Parliament adopt its position at first reading, the Council would approve it and the text of 17 December 2018 would be adopted, only the revision by the legal linguists of both institutions remaining to be done[7].

Regarding the fate of the practitioners in procedures concerning restructuring, insolvency and discharge of debt, the European Parliament has largely taken over the text of the General Approach and only little amendments had to be made.

Specialised insolvency practitioners have been identified by the European Commission's Proposal as instruments that can greatly help to reduce the length of procedures, lower costs and improve the quality of assistance or supervision.

Thus, regarding the role of the practitioner in the field of restructuring, insolvency and second chance, the final compromise text as the text of the General Approach puts the emphasis on the need for the Member States to ensure that practitioners who are appointed by judicial or administrative authorities are suitably trained, have the necessary experience and expertise for their responsibilities, that they are appointed in a clear, transparent and fair manner with due regard to the need to ensure efficient procedures and avoid any conflict of interests. Moreover, the final compromise text adds to the General Approach that 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[8].

As a last point, the final compromise text, as the text of the General Approach, strengthens the need to frame the practice in the field of restructuring, insolvency and second chance and increases its transparency. Indeed, Member States shall put in place appropriate oversight and regulatory mechanisms to ensure that the work of practitioners is effectively supervised, with a view to ensuring that their services are provided in an effective and competent way, and, in relation to the parties involved, are provided impartially and independently. As regards the remuneration of practitioners, the final compromise text recommends that the remuneration shall be governed by rules which should be consistent with the objective of an efficient resolution of procedures, and appropriate tools shall be put in place to resolve any disputes over remuneration[9].

Appointment of IPs

If minimum standards for training, appointing, supervising and remunerating practitioners in procedures concerning restructuring, insolvency and discharge of debt are confirmed by the final compromise text, in order to bring the professionalism of practitioners in procedures concerning restructuring, insolvency and discharge of debt to comparable high-levels across the Union, however, the text paradoxically limits their appointment in restructuring procedures. While the need for national regulatory frameworks of the practitioners in such procedures is acknowledged by the final compromise text, the appointment of the practitioner in the field of restructuring is facultative, and this was contested during the negotiations and rendered it difficult to reach an agreement[10].

Regarding the role of the practitioner in the field of restructuring, the Proposal states that the appointment by a judicial or administrative authority of a practitioner in such proceedings shall not be mandatory in every

case. They may be required where the debtor is granted a general stay of individual enforcement actions and where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down. This would avoid unnecessary costs and would incentivise debtors to apply for preventive restructuring at an early stage of financial difficulties.

According to the final compromise text, the practitioner in the field of restructuring "means any person or body appointed by a judicial or administrative authority to carry out, in particular, one or more of the following tasks:

(a) to assist the debtor or the creditors in drafting or negotiating a restructuring plan;
(b) to supervise the activity of the debtor during the negotiations on a restructuring plan and report to a judicial or administrative authority;
(c) to take partial control over the assets or affairs of the debtor during negotiations"[11]

The Council noted that if the Member States agreed that the preventive restructuring procedure should be a debtor-in-possession procedure (meaning that the debtor should be left in at least partial control of the assets and the day-to-day operation of the business), some of them however considered that the presence of a practitioner in the field of restructuring can increase the efficiency of the procedure and can ensure that the interests of all parties are taken into account.

The General Approach thus lays down the general principle that the appointment of such a practitioner shall be decided on a case-by-case basis, depending on the circumstances of the case or on the debtor's specific needs, except in certain cases, where the national law may require such a mandatory appointment.

This point was particularly problematic during the negotiations as, contrary to the Council, the European Parliament would not deviate from a mandatory appointment of a practitioner at least in some cases. Finally, all parties have agreed to observe the general principle that the appointment of such a practitioner shall be decided on a case-by-case basis, except in certain circumstances, where Member States may require the mandatory appointment of such a practitioner in every case. Moreover, all parties have agreed to add a few cases in which a practitioner shall, at least, assist the debtor and creditors in negotiating and drafting the plan, such as where:

(a) the general stay of individual enforcement actions is granted by the judicial or administrative authority which decides that such a practitioner is necessary to safeguard the interest of the parties;
(b) 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; or,
(c) it is requested by the debtor or by a majority of creditors, provided that in this case the remuneration of the practitioner is borne by the creditors[11].

This slight shift in the final compromise text is more than welcome. Indeed, the appointment of a specialised and independent practitioner is crucial not only in the field of insolvency but also in the field of restructuring where there are also conflicting interests.

The Council's position seems to be inspired by the UK scheme of arrangement concluded between a company and one or more classes of its creditors. A scheme is not an insolvency procedure and can be a useful restructuring tool for both solvent and insolvent entities if the necessary majority of creditors vote in favour and the court approves it. In the UK scheme of arrangement, an insolvency practitioner is not required to encourage the negotiation of a restructuring agreement, although a scheme proposed by a company in administration/liquidation will be overseen by the administrator/liquidator. In France, the preventive and confidential procedures of ad hoc mandate and conciliation, which are very successful in practice to negotiate a restructuring agreement, are on the contrary based on the systematic appointment of an insolvency practitioner by the court.

The fact remains that, the directive cannot call for qualified practitioners in the field of restructuring, insolvency and second chance to ensure efficient procedures on the one hand, and, on the other, make their appointment facultative in restructuring procedures in order to lower costs. Indeed, only appointed qualified and independent practitioners can assist companies efficiently to prevent their difficulties as soon as possible, save jobs and avoid conflict of interests. ■

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Footnotes:

1 Inacio E., "*The Niebler Report on the European Commission's Proposal Directive on Preventive Restructuring Frameworks*" in Eurofenix, 2018 Autumn Edition n°73.
2 www.consilium.europa.eu/fr/press/press-releases/2018/10/11/directive-on-business-insolvency-council-agrees-its-position/
3 www.consilium.europa.eu/en/press/press-releases/2018/12/19/eu-agrees-new-rules-on-business-insolvency/
4 data.consilium.europa.eu/doc/document/ST-15556-2018-INIT/en/pdf
5 oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2016/0359(COD)
6 www.europarl.europa.eu/plenary/en/infos-details.html?id=16721&type=Flash
7 Inacio E., "*The General Approach of the Council on the European Commission's Proposal Directive on Preventive Restructuring Frameworks*" in Eurofenix, 2018/2019 Winter Edition n°74.
8 Article 26.
9 Article 27.
10 See Bork R., "*Directive on Preventive Restructuring Frameworks: Political compromise in the trilogue talks and imminent adoption*", pp. 18-20.
11 Article 2(15).