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STATEMENT OF THE COUNCIL'S REASONS

Subject: Position of the Council at first reading with a view to the adoption of a
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL on insolvency proceedings (recast)
– Statement of the Council's reasons
– Adopted by the Council on 12 March 2015

I. INTRODUCTION

1. By letter of 13 December 2012, the Commission forwarded to the Council a proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (the "proposed Insolvency Regulation"). The proposed Insolvency Regulation is aimed at modifying Council Regulation (EC) No 1346/2000 on insolvency proceedings (the "current Insolvency Regulation").
2. The European Economic and Social Committee adopted its opinion on the proposed Insolvency Regulation on 22 May 2013.
3. On 5 February 2014, during its plenary session, the European Parliament adopted its position at first reading on the proposed Regulation and the accompanying legislative resolution¹.

¹ See 5910/14 CODEC 2041 JUSTCIV 19 PE 50.

4. On 5 and 6 June 2014, the Council (Justice and Home Affairs) reached an agreement (the "general approach")² on the normative part of the proposed Insolvency Regulation and called for work on the remaining recitals and annexes to be finalised at technical level as soon as possible.
5. On 9 and 10 October 2014, the Council finalised the general approach, reaching agreement on the recitals and annexes³.
6. On 10 November 2014, an agreement was reached with the European Parliament on a compromise package. It was also agreed that the proposed Insolvency Regulation should be adopted as a recast of the current Insolvency Regulation.
7. On 2 December 2014, the compromise package was endorsed by the European Parliament's Committee on Legal Affairs. On the same date, the Chair of the said Committee addressed a letter to the Chair of COREPER II to inform him that, should the Council transmit formally to the European Parliament its position in the form presented in the Annex to that letter, he would recommend to the Plenary that the Council's position be accepted without amendment, subject to legal-linguistic verification, at the European Parliament's second reading.
8. On 4 and 5 December 2014, the Council (Justice and Home Affairs) adopted a political agreement on the compromise package⁴ and instructed the Council's legal-linguistic experts to proceed with the revision of the text.
9. Taking into account the political agreement referred to above and after legal-linguistic revision, the Council adopted its position at first reading on 12 and 13 March 2015, in accordance with the ordinary legislative procedure laid down in Article 294 of the Treaty on the Functioning of the European Union.

² See 10284/14 JUSTCIV 134 EJUSTICE 54 CODEC 1366 + ADD 1 + COR 1.

³ See 13276/14 JUSTCIV 224 EJUSTICE 80 CODEC 1835 + COR 1.

⁴ See 15414/14 JUSTCIV 285 EJUSTICE 109 CODEC 2225 + ADD1+ COR1.

II. OBJECTIVE

10. The proposed Insolvency Regulation is aimed at making cross-border insolvency proceedings more effective with a view to ensuring the smooth functioning of the internal market and its resilience in economic crises. This objective is in line with the European Union's current political priorities to promote economic recovery and sustainable growth, a higher investment rate and the preservation of employment, as set out in the Europe 2020 strategy, and to safeguard the development and the survival of businesses, as stated in the Small Business Act.
11. The proposed Insolvency Regulation also brings the current Insolvency Regulation into line with developments in national insolvency laws introduced since its entry into force in 2002.
12. As part of the overall Justice for Growth Programme, the proposed Insolvency Regulation is an important element of the broad European Union response to the significant economic difficulties being experienced by many companies and citizens throughout the Union.

III. ANALYSIS OF THE COUNCIL'S POSITION AT FIRST READING

A. PROCEDURAL CONTEXT

13. The European Parliament and the Council conducted negotiations with a view to concluding an agreement at the stage of the Council's position at first reading ("early second-reading agreement"). The text of the Council's position at first reading reflects the compromise package agreed between the two co-legislators, with the support of the Commission.

B. SUMMARY OF THE MAIN ISSUES

1. SCOPE OF THE PROPOSED REGULATION

14. One of the key objectives of the proposed Insolvency Regulation is to move away from a traditional liquidation approach to insolvency to a "second-chance approach" for businesses and entrepreneurs in financial difficulties when cross-border insolvency proceedings are involved.
15. The scope of the proposed Insolvency Regulation, set out in Article 1(1), is therefore broader than the scope of the current Insolvency Regulation and extends to hybrid and pre-insolvency proceedings, as well as to proceedings providing for a debt discharge or a debt adjustment for consumers and self-employed persons.

2. JURISDICTION FOR OPENING INSOLVENCY PROCEEDINGS

16. The proposed Insolvency Regulation improves the procedural framework for determining jurisdiction for opening insolvency proceedings. The concept of centre of main interest ("COMI") and that of "establishment" are further clarified to provide useful guidance to all those concerned and increase legal certainty.
17. Before opening insolvency proceedings, courts must actively examine whether the debtor's COMI is actually located within their jurisdiction. As regards the determination of the COMI, special consideration should be given to creditors and to their perception as to where the debtor conducts the administration of his business. In the event of a shift in COMI, this may in due course require informing creditors of the new location from which the debtor is carrying out his activities in due course.

18. Moreover, the new rules contain a set of safeguards aimed at preventing abusive forum shopping. Presumptions as to COMI are rebuttable and do not apply if the registered office/principal place of business/habitual residence is moved in the relevant period before the request to open insolvency proceedings.
19. In all cases, where the circumstances give rise to doubts regarding the court's jurisdiction, the court should ask the debtor to supply additional evidence to support his assertions as to the location of the COMI and, where the law applicable to the insolvency proceedings so allows, give creditors an opportunity to present their views on the question of jurisdiction.

3. SECONDARY PROCEEDINGS

20. In order not to hamper the efficient administration of the insolvency estate, the proposed Insolvency Regulation sets out two specific situations in which a court seized with a request to open secondary proceedings should be able, at the request of the insolvency practitioner in main proceedings, to refuse or to postpone the opening of such proceedings.
21. Firstly, the proposed Regulation allows the insolvency practitioner in the main proceedings to propose an undertaking to local creditors according to which they will be treated, in the main proceedings, as if secondary proceedings had been opened. Where such an undertaking has been given, the court seized with a request to open secondary proceedings should be able to refuse the opening when it is satisfied that the undertaking adequately protects the general interests of local creditors.
22. Secondly, the proposed Insolvency Regulation provides for the possibility that the court temporarily stays the opening of secondary proceedings when a temporary stay of individual enforcement is granted in the Member State where main proceedings have been opened.
23. In addition, a number of rules of cooperation and communication between the actors involved in the main and in the secondary proceedings have been added.

4. INSOLVENCY REGISTERS

24. In order to improve the provision of relevant and timely information to creditors and courts involved and to prevent the opening of parallel insolvency proceedings, the proposed Insolvency Regulation imposes on Member States an obligation to establish insolvency registers that contain, under the conditions set out in the Regulation, certain information on the debtor and the insolvency practitioner, as well as information relating to the insolvency proceedings.
25. These national insolvency registers are to be interconnected and accessible via the European e-Justice portal, in full conformity with the European legislation on data protection.

5. GROUP OF COMPANIES

26. The proposed Insolvency Regulation includes specific provisions on cooperation and communication between the courts and the insolvency practitioners involved in the insolvency of members of groups of companies.
27. The provisions on cooperation and communication referred to above are completed with a system for the coordination of the insolvency proceedings of members of a group of companies.

IV. CONCLUSION

28. The Council's position at first reading reflects the compromise package agreed between the Council and the European Parliament, with the support of the Commission.
29. As indicated in paragraph 6 above, this compromise package was confirmed by a letter from the Chair of the European Parliament's Committee on Legal Affairs addressed to the Chair of COREPER II on 2 December 2014. It was subsequently endorsed by the Council (Justice and Home Affairs) on 4 and 5 December 2014, through the adoption of a political agreement.

30. The Council believes that its position at first reading represents a balanced package and that, once adopted, the new Regulation will significantly contribute to making cross-border insolvency proceedings more efficient, benefiting debtors and creditors, both corporate and natural persons, throughout the European Union, facilitating the survival of businesses and presenting a second chance for entrepreneurs.
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