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NOTE

From: The Bulgarian Presidency and the incoming Austrian Presidency
To: Working Party on Civil Law Matters (Insolvency)

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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
- Revised text on Article 19, 20 & 22 of Title III and related definitions

Delegations will find in the Annex to this note a revised text of Articles 19, 20 and 22 of Title III of the above proposal on "Discharge of Debt and Cancellation of Disqualification", including related definitions, drawn up jointly by the Presidency and the incoming Austrian Presidency in the light of the discussions held in the Working Party on Civil Law Matters (Insolvency) on 12 & 13 February 2018 on the basis of document 5789/18 and taking into account written suggestions from delegations.

Changes compared to the text of the Commission proposal are marked in **bold** or by (...) for deleted text. New footnotes which were not yet included in document 5789/18 have also been marked in **bold**.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on preventive restructuring frameworks, discharge of debt and
disqualifications and measures to increase the efficiency of procedures
concerning restructuring, insolvency and discharge of debt and
amending Directive 2012/30/EU
(Restructuring, insolvency and discharge of debt)

TITLE I

General provisions

Article 2

Definitions

1. For the purposes of this Directive, the following definitions (...) apply:
 - (1) '(...) entrepreneur' means a natural person exercising **or having exercised** a trade, business, craft or profession¹; (...)
 - (2) 'full discharge of debt' means **cancellation of the possibility to enforce against the entrepreneur the dischargeable debt or the cancellation of the outstanding dischargeable debt as such, as part of a procedure which includes (...) a repayment (...) plan² or any other procedure;**
2. For the purposes of this Directive, the following concepts are to be understood as defined by national law:

¹ The recitals will clarify that the term 'profession' means an independent self-employed activity. They will also clarify that this definition does not affect the position of managers or directors of companies, which should be dealt with by national law.

² The recitals will clarify that a repayment plan could be a plan with conditions set by law and that it should not be a requirement for a repayment plan to be supported by the majority of the creditors. They will also clarify that a repayment plan should be different from a restructuring plan under Title II and that it might take the form, for example, of a periodic transfer to creditors of a percentage of the disposable income under national law.

- (a) insolvency³;
- (b) likelihood of insolvency;
- (c) directors; and
- (d) small and medium sized enterprises ("SMEs")⁴.

TITLE III

(...) DISCHARGE OF DEBT AND DISQUALIFICATIONS

Article 19

Access to discharge

1. Member States shall ensure that **insolvent** entrepreneurs **have access⁵ to at least one procedure that can lead to a full discharge** of debts in accordance with this Directive.
Member States may require that the trade, business, craft or profession to which the debts are related has ceased.
2. Member States in which a full discharge of **debts** is conditional on a partial repayment of debt by the entrepreneur shall ensure that the related repayment obligation is based on the individual situation of the entrepreneur⁶ and, **in particular**, is (...) proportionate to **the entrepreneur's seizable income and assets during the discharge period and takes into consideration the equitable interest of creditors.**

³ **The recitals will clarify that the concept of 'insolvency' can be implemented as 'over-indebtedness' in national law.**

⁴ **The recitals will make reference to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Text with EEA relevance) (notified under document number C(2003) 1422).**

⁵ **The recitals will clarify that it is left to national law how the access to discharge operates, including the possibility to introduce a requirement to request the discharge.**

⁶ **The recitals will clarify that Member States may provide for the possibility to adjust the repayment obligation when there is a significant change in the financial situation of the debtor, either an improvement or a deterioration for which the debtor is not responsible.**

Article 20

Discharge period

1. **Member States shall ensure that** the period (...) after which **insolvent** entrepreneurs **are able to** be fully discharged of debts **is** no longer than three years starting from **the date of either:**
 - (a) **in the case of a procedure which includes a repayment plan, the decision by a judicial or administrative authority to confirm the plan or the start⁷ of the implementation of the (...) plan (...)⁸.**
 - (b) **in the case of any other procedure, the decision by** the judicial or administrative authority (...) to open (...) the procedure;
2. Member States shall ensure that (...) **insolvent** entrepreneurs **who have complied with their obligations shall be** discharged of their debts **on expiry of the discharge period** without the need to **apply** to a judicial or administrative authority **to open a procedure additional⁹ to those referred to in paragraph 1.**

Without prejudice to the first subparagraph, Member States may maintain or introduce provisions allowing the judicial or administrative authority to verify, ex officio or upon request of a person having a legitimate interest, whether the entrepreneurs have fulfilled the obligations for obtaining a discharge of debt.¹⁰

3. **Member States may provide that the full discharge of debt shall not impair the continuation of an insolvency procedure entailing the realization and distribution of the entrepreneur's assets that formed part of the insolvency estate as at the time referred to in paragraph 2.**

⁷ The recitals will give examples of what is meant by 'the start of the implementation of the repayment plan', which could be, for example, the first instalment under the repayment plan.

⁸ The recitals will further clarify that the options provided for in points (a) and (b) are alternatives Member States can choose **freely**.

⁹ The recitals will clarify that this provision is without prejudice to national law which requires that within an insolvency procedure the request for discharge may be treated separately from the realisation of assets, provided that such request is assessed by the same judge, does not entail additional procedural costs for the debtor and is treated in the deadlines provided for under Paragraph 1 of Article 20.

¹⁰ The recitals will clarify that this provision does not touch upon the burden of proof, which means that a debtor may be required by law to prove compliance with his obligations.

Derogations

1. By way of derogation from Articles 19 to 21, Member States may maintain or introduce provisions **denying, restricting or revoking**¹¹ access to discharge **of debts** or **providing for** longer periods for obtaining a full discharge **of debts** or longer disqualification periods in certain well-defined circumstances and where such **derogations** are **duly** justified¹² (...), **such as**¹³:
 - (a) **where the insolvent entrepreneur acted towards the creditors dishonestly or in bad faith according to national law when becoming indebted, during the insolvency procedure or during the payment of the debts;**
 - (b) **where the insolvent entrepreneur does not adhere to a repayment plan or to any other legal obligation aimed at safeguarding the interests of creditors, [including as an obligation to maximize returns to creditors]/[including an obligation to generate income and assets];**
 - (ba) **where the insolvent entrepreneur fails to comply with information or cooperation obligations under national law;**
 - (c) **in the case of abusive applications for a discharge;**
 - (d) **in the case of a new application for a discharge within a certain period (...) after the insolvent entrepreneur has been granted a full discharge of debts; or**
 - (da) **where the cost of the procedure leading to the discharge of debt is not covered;**¹⁴
 - (db) **where a derogation is necessary to guarantee the balance between the rights of the debtor and the rights of one or more creditors**¹⁵.

¹¹ The recitals will clarify that Member States may also take into account substantial improvements to the financial situation of the debtor due to unexpected circumstances, such as winning the lottery or getting an inheritance, which occur after the debtor has been granted a full discharge of debt.

¹² **The recitals will clarify that 'duly justified' implies a justified reason put in place by legislation.**

¹³ The recitals could clarify that Article 22(1) & (3) are non-exhaustive.

¹⁴ The recitals will clarify that the costs of the procedure leading to the discharge of debts includes fees of judicial and administrative authorities and insolvency practitioners.

¹⁵ **The recitals will provide examples of cases where the balance between the interests of the debtors and the creditors needs to be balanced, such as where the creditor is a natural person who needs more protection than the debtor.**

2. **By way of derogation from Article 20**, Member States may provide for longer discharge periods in cases where:

(a) protective measures are approved or ordered by a judicial or administrative authority in order to safeguard the the main residence of the insolvent entrepreneur and, where applicable, of their family, or **the essential assets for the continuation of the entrepreneur's trade, business, craft or profession;**

(b) the main residence of the insolvent entrepreneur is not realised.

3. Member States may exclude specific categories of debt, such as:

(a) secured debts¹⁶;

(b) debts arising out of criminal penalties;

(c) debts arising out of tortious liability;

(d) debts regarding maintenance obligations arising from a family relationship, parentage, marriage or affinity,

(e) debts incurred after the application for or opening of the procedure leading to a discharge of debt; and

(f) debts arising out of the obligation to pay the costs of the procedure leading to a discharge of debt;

from discharge of debts, or restrict access to discharge of debts or lay down a longer discharge period where such exclusions, restrictions or longer periods are duly justified (...).

4. By way of derogation from Article 21, Member States may provide for longer or indefinite disqualification periods where the insolvent entrepreneur is a member of a profession to which specific ethical rules apply or a profession dealing with the management of the property of others, or where an insolvent entrepreneur intends to gain access to such a profession¹⁷.

4a. **This Directive is without prejudice to national rules regarding** disqualifications ordered by a **judicial or administrative authority** other than those referred to in Article 21.

¹⁶ The recitals will clarify that **a debt is a secured debt only up to the value of the collateral, at the time of the liquidation of assets and that the rest of the debt is an unsecured debt.**

¹⁷ **The recitals will clarify that, where a Member States authority adopts a decision concerning a specifically supervised activity, it may also take into account, even when the disqualification period under Article 21 has expired, that the insolvent entrepreneur has obtained a discharge of debts, in accordance with this Directive.**