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from :            Presidency  
to :                Council

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Subject :        Proposal for a Regulation of the European Parliament and of the Council  
                     amending Council Regulation (EC) No 1346/2000 on insolvency proceedings  
                     **[First reading]**  
                     - Orientation debate

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**I. INTRODUCTION**

1. By letter of 13 December 2012, the Commission transmitted 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 "Insolvency Regulation").

2. In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom<sup>1</sup> and Ireland<sup>2</sup> have notified their wish to take part in the adoption and application of the proposed Regulation.
3. In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark does not take part in the adoption of the proposed Regulation and will not be bound by it or subject to its application.
4. The European Economic and Social Committee adopted its opinion on the proposed Regulation on 22 May 2013.
5. The proposed Regulation aims at making cross-border insolvency proceedings more efficient and effective with a view to ensuring a 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 under the Europe 2020 strategy and to safeguard the development and the survival of businesses, as stated in the Small Business Act.
6. As part of the overall "Justice for Growth" Programme, the proposed 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.
7. The proposed Regulation is subject to the ordinary legislative procedure. The time is not yet ripe for formal negotiations with the European Parliament with a view to reaching a first reading agreement. However informal contacts have been established for information purposes.

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<sup>1</sup> See document 6106/13 JUSTCIV 81 CODEC 811.

<sup>2</sup> See document 8325/13 JUSTCIV 79 CODEC 777.

8. The Council (Justice and Home Affairs) held a first "*orientation debate*" on the proposed Regulation on 6 and 7 June 2013 and, on that occasion, approved a set of general guidelines for future work<sup>1</sup>.
9. The Presidency has put the examination of the proposed Regulation at the top of its agenda owing to the importance of efficient cross-border insolvency proceedings for the European economy and in response to the European Council's call for a swift examination of the proposed Regulation. This priority has been reflected in the scheduling of eleven meeting days of the relevant Council Working Party during the second half of 2013.
10. In view of the discussions held since July 2013, the Presidency is of the opinion that it is necessary to submit once more the file to the Council for an orientation debate on some key issues, which are set out in Part II of this note, in order to pave the way for substantial progress to be made on the proposed Regulation.

## II. GUIDELINES FOR FUTURE WORK

### A. *Jurisdiction for opening insolvency proceedings*

#### (1) *Article 3 International jurisdiction*

11. *Article 3(4)(b)*
12. Article 3(4)(b) of the Insolvency Regulation restricts the category of persons empowered to request the opening of territorial proceedings to certain specified creditors showing a particular connection with the Member State within the territory of which an establishment of the debtor is situated. These are the creditors who have their domicile, habitual residence or registered office within the Member State in whose territory the relevant establishment is situated, or whose claims arises from the operation of that establishment.

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<sup>1</sup> See document 10050/13 JUSTCIV 134 EJUSTICE 51 CODEC 1201.

13. The discussions in the Working Party on Civil Law Matters (Insolvency) have so far shown wide support for extending the category of persons empowered to request the opening of territorial proceedings to include public authorities which, under the law of the Member State within the territory of which the establishment is situated, have the right to request the opening of insolvency proceedings.
14. *The Presidency therefore invites the Council to confirm that public authorities, which under the law of the Member State within the territory of which an establishment is situated have the right to request the opening of insolvency proceedings, should be included in the category of persons empowered to request the opening of territorial insolvency proceedings.*

**(2) *Article 3x Examination as to jurisdiction***

15. On 6-7 June 2013, the Council (Justice and Home Affairs) confirmed the use of the concept of centre of main interests ("COMI"), as clarified by the proposed Regulation, to determine which Member State has jurisdiction, subject to the examination of any additional and proportionate measures which can assist in preventing abusive forum shopping.
16. Following on from that guideline, extensive discussions were held in the Working Party on possible additional and proportionate measures which can assist in preventing abusive forum shopping but it has not yet been possible to reach a conclusion concerning this issue. In view of this, the Presidency wishes to underline the importance of giving further consideration to this issue and invites the Working Party to continue with the work it has started.

**(3) *Article 3y Judicial review of the decision to open main proceedings***

17. The discussions in the Working Party have shown wide endorsement of the proposal to grant all creditors a right to challenge, by way of judicial review, the decision opening main proceedings on grounds of jurisdiction. The same right to be given to other interested parties, including debtors, was also discussed. It was also stated that the provision should be completed to indicate that the decision opening main proceedings may be challenged on grounds other than the jurisdiction, if the national law so provides.

18. However, further discussions at technical level are still needed to determine whether any interested party, including debtors, should have the right to bring such a challenge or whether a unified time limit for challenging the decision opening insolvency proceedings should be included.
19. *In view of this, the Presidency suggests that the Council confirm that any creditor should be granted the right to challenge, by way of judicial review, the decision opening main proceedings on grounds of jurisdiction. Further examination is necessary to determine whether any interested party, including debtors, should have the right to bring such a challenge. Further reflection should also be brought at a technical level on the opportunity to provide for convergences as regards a possible unified time limit for challenging the decision opening main insolvency proceedings which fall within the scope of the proposed Regulation.*

***(4) Article 3a Jurisdiction for actions which derive directly from the insolvency proceedings and are closely linked with them***

20. The Working Party has welcomed the clarification in the proposal that the courts of the Member States within the territory of which insolvency proceedings have been opened also have jurisdiction for actions which derive directly from insolvency proceedings and are closely linked with them. However, some Member States asked for more guidance as to what is an action which derives directly from insolvency proceedings and is closely linked with them.

21. Broad support has been also expressed for the proposal to give the insolvency practitioner, in cases where an action referred to in paragraph 20 above is related to another action in civil and commercial matters against the same defendant, the possibility to bring both actions in the courts of the defendant's domicile or, where an action is brought against several defendants, in the courts of the Member State where any of them is domiciled, provided that these courts are competent pursuant to the rules of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). This means that jurisdiction should be based in principle on Article 4 and Article 8(1) of the above-mentioned Regulation. However, it was considered that the debtor in possession should be given the same opportunity, provided that this debtor is able under national law to bring actions on behalf of the insolvency estate.
22. *The Presidency therefore invites the Council to confirm the principle that courts of the Member States within the territory of which insolvency proceedings have been opened also have jurisdiction in respect of actions which derive directly from the insolvency proceedings and are closely linked with them, provided that examples of such actions are included by way of a recital in the revised Regulation. Such examples need not prejudice or exhaust the generality of the term.*
23. *In addition, the Presidency invites the Council to confirm that, where an action which derive directly from the insolvency proceedings and is closely linked with them is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions in the courts of the Member State within the territory of which the defendant is domiciled or, where the action is brought against several defendants, in the courts of the Member State within the territory of which any of them is domiciled, provided that these courts have jurisdiction pursuant to the rules of Regulation (EU) No. 1215/2012. This means that jurisdiction should be based in principle on Article 4 and Article 8(1) of the above-mentioned Regulation. The debtor in possession should have the same possibility, provided that he is able under national law to bring actions on behalf of the insolvency estate.*

**B. Insolvency registers**

24. To improve the provision of relevant and timely information to creditors and courts involved and prevent the opening of parallel insolvency proceedings, the proposed Regulation includes a requirement for Member States to establish insolvency registers that contain certain information on the debtor and the insolvency practitioner, as well as information relating to the insolvency proceedings. These national insolvency registers are to be interconnected and accessible via the European E-justice portal.
25. On 6-7 June 2013, the Council (Justice and Home Affairs) confirmed, taking into account the opinion of the European Data Protection Supervisor, the commitment to work towards the establishment of relevant insolvency registers at national level and the interconnection and accessibility of these insolvency registers via the European E-justice portal.
26. *In accordance with that guideline and in response to the concerns expressed by some Member States at technical level, the Presidency invites the Council to approve the following principles:*
27. *The establishment of insolvency registers at national level and their interconnection and accessibility via the European E-justice portal should be carried out in conformity with the European legislation on data protection.*

***(a) Companies, legal persons and individuals exercising an independent business or professional activity***

28. *In view of the interconnection of national insolvency registers, Member States should include in their national insolvency registers information relating to insolvency proceedings falling within the scope of the revised Regulation concerning companies, legal persons and individuals exercising an independent business or professional activity.*

29. *The information referred to in paragraph 28 above should comprise at least core information relating to the insolvency proceedings. However, further discussions at technical level are still needed in order to identify the type of information that should be included within this core information.*
30. *This should not preclude Member States from including additional information or documents in their national insolvency registers, such as insolvency-related directors' disqualifications.*
31. *The core information referred to in paragraph 29 should be made publicly accessible through the system of interconnection of registers in the E-justice portal.*
32. *Nothing should preclude Member States from interconnecting any additional information or documents included in their national registers through the system referred to in paragraph 31.*

***(b) Individuals not exercising an independent business or professional activity***

33. *Member States should include in their national insolvency registers core information relating to insolvency proceedings falling within the scope of the revised Regulation concerning individuals not exercising an independent business or professional activity.*
34. *Member States should be able to make access to this information subject to supplementary search criteria relating to the debtor. Any such search criteria should not place an excessive burden on the requesting persons.*
35. *In addition, Member States should be able to require that access to the core information concerning individuals referred to in paragraph 33 be made conditional upon adequate safeguards for accessing such information. However, further discussions would need to take place in order to determine which safeguards should be considered adequate; any such safeguards should not place an excessive burden on the requesting persons.*



***(c) Fees for access to the core information***

36. *Many Member States consider that an essential part of the core information relating to insolvency proceedings falling within the scope of the revised Regulation should be made accessible free of charge, irrespective of whether the debtor is a natural, a legal person or a company. However, further consideration will need to be given to determining the exact scope of this information.*
37. *Other delegations have different views with respect to the issue referred to in paragraph 36 above.*
38. *In light of the above, the Presidency considers that further discussions at technical level are still necessary on the question of fees for access to the core information.*

***(d) Establishment of national insolvency registers and publication procedures at national level***

39. *In addition to the publication of information in national insolvency registers interconnected and accessible via the European E-justice portal, it should be obligatory to publish information about the opening of insolvency proceedings in the Member State where an establishment of the debtor is located, in accordance with the publication procedure provided for in that Member State.*

***C. Cooperation between main and secondary insolvency proceedings***

40. The discussions in the Working Party during the second examination of the proposed Regulation have shown wide support for the improved mechanisms of cooperation between main and secondary proceedings set out in the proposed Regulation.
41. *Given the positive feedback received from Member States, the Presidency reports that there is a wide support for a cooperation framework between main and secondary proceedings.*

### **III. CONCLUSION**

42. The Presidency invites the Council (Justice and Home Affairs) to have an orientation debate on the basis of the guidelines set out in part II of this note on 5-6 December 2013.
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