

The EU Proposal for Insolvency Law Harmonisation: The Polish perspective

Mateusz Kaliński gives his view on how the new EU proposal would work in Poland



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On 7 December 2022, the European Commission published a “Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (“Proposal”), which is currently available for comments from the public and interested entities.

The Proposal regulates the following areas of substantive insolvency law:

- (1) Avoidance actions;
- (2) Asset tracing;
- (3) Pre-packs;
- (4) Duty of directors to submit a bankruptcy petition;
- (5) Simplified winding-up for microenterprises;
- (6) Creditors’ committees; and
- (7) Drawing-up of key information factsheets by Member States on certain elements of their national law on insolvency proceedings.

With the scope as largely outlined, the Proposal seems to harmonize quite a lot of important areas related to insolvency law. It is also another legal act at the European Union level covering insolvency and restructuring law, which subject matter seems to be more important from the economic and legal point of view, especially in the times of crises.

Comments on the merits of the proposal

1. Avoidance actions

In the case of avoidance actions, although this area is already regulated in many Member States, the first principle is that Member States can have stricter

regulations. For clarity, the Proposal sets out a definition of a party closely related to the debtor, which is a broad one. According to Article 2(q), a ‘party closely related to the debtor’ means persons, including legal persons, with preferential access to non-public information on the affairs of the debtor with extensive definitions in the case of both natural persons and legal entities.

Such a (quite) broad definition seems to be good legislation, aimed at both covering most of the situations, but also giving legal certainty. What is also important with regard to avoidance actions, no set-off will be possible with reference to the bankruptcy estate. This issue is not always covered by national legislation, so it is recommended to have it clearly stated within the Proposal.

2. Asset tracing

With regard to asset tracing issues, the Proposal puts the accent on transparency and effectiveness of such actions, also on the use of electronic registers simplifying the whole procedure. The Proposal provides also for access to bank accounts for insolvency practitioners, which should be assessed positively, but, usually, will require changes to the banking law as well.

3. Pre-packs

The Proposal aims to make pre-pack proceedings popular and frequently used as an alternative to restructuring. To ensure transparency, the Proposal provides that a court officer will supervise proceedings – the so-called Monitor, who (taking into consideration the Polish

perspective) can be a Temporary Court Supervisor, appointed by the bankruptcy court upon the filing of a bankruptcy petition by the debtor.

A pre-pack will require the best-interest-of-creditors test, so as to get the highest possible degree of satisfaction of the creditors, whose claims (money) is at stake. The proceedings may be accompanied by an auction, if there are multiple offers from different entities interested in acquiring the estate from insolvent debtor. Bearing in mind the transparency, the effectiveness is also meant to be an extremely important factor and aspect of pre-pack proceedings.

4. Duties of directors

Although this type of rule is very popular among Member States, the Proposal sets a common standard for duties of directors at the brink of insolvency. The Proposal sets a 3-month period for the mandatory filing for bankruptcy – which seems to be quite a long time, taking into consideration that, some time ago in Poland, this period was 2 weeks (currently 30 days). The requirement is connected with the liability of a directors, which in many Member States seems to be a standard.

5. Simplified winding-up

The Proposal creates new rules for the simplified winding-up of microenterprises. The definition will be as in other legal acts of the European Union; thus these “micro” enterprises may employ up to 10 employees and have annual turnovers of up to EUR 10 million. The accent is placed on lowering the costs of the



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proceedings, which is generally a good idea. Also, a more relaxed definition of the insolvency will apply to microenterprises in such proceedings.

However, simplified winding-up at this moment of regulation will not include appointment of the insolvency practitioner, which can be discussed, as for instance in Poland, where transferring consumer bankruptcies from court to insolvency practitioners was a huge success, while ensuring very high standard of proceedings mainly because of appointment of the professional – insolvency practitioner.

6. Creditors' committees

Rules related to the creditors' committees support the idea of active participation of creditors within the proceedings, which should be assessed positively, as creditors at the end will receive their money within the proceeding. However, mainly due to the costs, the Proposal does not require the appointment of creditors' committees in smaller insolvencies. In my opinion, this is not a good rule, because an alternative rule could limit membership of the committee. When it comes to the number of members, the Proposal settles for 3–7, which can meet different standards for different proceedings. A Polish perspective might also add the appointment of deputy members, who can take part in meetings of the committee when regular members cannot do so.

The Proposal requires a high efficiency of proceedings of the creditors' committees, especially by regulating their manner of functioning and internal rules (working method). These rules of course should take into account the electronic means of communication. If conditions are met, member of the creditors' committee may be replaced or removed, which sometimes may be useful for the transparency or conflict of interest.

A very interesting idea is connected with the possibility for multiple creditors' committees in one insolvency proceeding.



Although the Proposal does not create a lot of rules under this idea, it is worth mentioning, because it is not usual to have different bodies having similar competences.

What seems to be natural is that members of the creditors' committees should be eligible for remuneration and to have expenses covered. The Proposal also settles on rules of liability of a creditors' committee, which will be especially important in proceedings where there are multiple creditors' committees appointed.

7. Key information factsheet

The purpose of the regulations on the efficient and free exchange of information on insolvency proceedings is to ensure the greatest possible transparency of proceedings and obtaining information by creditors at the European Union level. This idea is fully justified bearing in mind the situation of increasingly advanced economic integration and conducting international activities by the companies within European Union.

Summary

Summing up, the rules outlined play a very important role within insolvency proceedings and it is surely a good idea to cover these by proposals subject to comments, so as to harmonize the matter at the EU level. From a purely Polish perspective, there will be no requirement for a large transposition exercise, since a lot of issues in question are already within Polish law.

However, some amendments, especially related to asset-tracing and the simplified winding-up, will require attention. ■



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