

# DEFINITION OF INSOLVENCY

Reinhard Bork

Ben Schuijling

Michael Veder

## STARTING POINTS

- **Proposal for a harmonisation Directive, 2022/0408 (COD)**
- **uses „likelihood of insolvency“ (Art. 23), „inability to pay debts“ (Art. 23, 36-38, 41 ), „unable to pay its mature debts“ (Art. 6(2) sentence 2 lit. b)**
- **no further definition**
- **reference to national laws (Art. 23)**

## STARTING POINTS

- Only exception: Art. 38(2) (in connection with Art. 41(2), as the case may be):

*„A microenterprise shall be deemed insolvent for the purposes of simplified winding-up proceedings when it is **generally unable to pay its debts as they mature**. Member States shall set out the conditions under which a microenterprise is deemed to be generally unable to pay its debts as they mature and ensure that these conditions are clear, simple and easily ascertainable by the microenterprise concerned.“*

## STARTING POINTS

- Only exception: Art. 38(2) (in connection with Art. 41(2), as the case may be):

*„A microenterprise shall be deemed insolvent for the purposes of simplified winding-up proceedings when it is generally unable to pay its debts as they mature. **Member States shall set out the conditions under which a microenterprise is deemed to be generally unable to pay its debts as they mature and ensure that these conditions are clear, simple and easily ascertainable by the microenterprise concerned.**“*

## EXAMPLE 1: GERMANY

- **Inability to pay debts (§ 17(2) sentence 1 InsO)**

*„A debtor is deemed illiquid if he or she is unable to meet his or her due payment obligations. “*

## EXAMPLE 1: GERMANY

- Inability to pay debts (§ 17(2) sentence 1 InsO)

*„A debtor is deemed illiquid if he or she is **permanently (= exceeding three weeks) unable to meet a significant part (= 10% or more) of his or her due and seriously demanded payment obligations.**“*

## EXAMPLE 2: LATVIA

- **Insolvency**

**A debtor is insolvent if (*inter alia*)**

- 1) when applying compulsory execution means it has not been possible to execute the court ruling regarding the recovery of debt from the debtor;***
- 2) the debtor (...) has not honoured one or more debt obligations from which the principal debt amount separately or in total exceeds EUR 4268 and which are past due, and the creditor or creditors have issued or sent a warning (...) regarding the intention to submit an application for insolvency proceedings (...), and the debtor has not settled the debt or raised justified objections to the claim within three weeks (...).***

## EXAMPLE 3: CYPRUS [IRELAND/MALTA/UK]

- **Insolvency**

***„A company is deemed unable to pay its debts if (inter alia) (d) it is proven to the satisfaction of the Court that the value of the company’s assets is less than the amount of its liabilities, taking into account its contingent and future liabilities “***



## CONSEQUENCES

- **no common understanding of the terms insolvency/inability to pay debts/likely inability to pay debts**
- **consistent transposition by national legislators and courts unlikely**
- **harmonisation for those rules which use these terms is endangered**

## RESEARCH PROJECT *DEFINITION OF INSOLVENCY*

- **Working group with 33 members from all EU-Member States (+ UK)**
- **14 academics, 4 judges, 15 Insolvency Practitioners (10 female, 23 male)**

## RESEARCH PROJECT *DEFINITION OF INSOLVENCY*

### ▪ Topic

- **not: harmonisation of reasons to open insolvency proceedings etc.**
- **but: Europe-wide acceptable definition of terms of European law**
- **no distinction between entrepreneurs/consumers or legal persons/individuals respectively**

## RESEARCH PROJECT *DEFINITION OF INSOLVENCY*

- **Methodology: principle-oriented**
  - **Identification, weighing and balancing of the relevant basic tenets of insolvency law**
  - **Examples:**
    - **collectivity (shift from general civil law to insolvency law)**
    - **equal treatment of creditors**
    - **effectivity („keep it simple“)**
    - **proportionality**

## RESEARCH PROJECT *DEFINITION OF INSOLVENCY*

January 2023	Establishing the working group	✓
February 2023	Draft questionnaire to members of working group	✓
March 2023	Return of questionnaire	✓
May 2023	Final draft of the questionnaire to members of working group	✓
August 2023	Return of completed questionnaires	✓
October 2023	Draft proposal (Bork/Schuijling/Veder)	
November 2023	Conference in Amsterdam	
December 2023	<i>Impact assessments</i> by members	
December 2023	Final draft of the proposal to EC	

## INABILITY TO PAY DEBTS

- **known in nearly all MS (except for Belgium, Luxembourg, the Netherlands)**

*France: Art. L. 631-1 Code de Commerce: „un débiteur (...) qui, dans l'impossibilité de faire face au passif exigible avec son actif disponible, est en cessation des paiements“*

- **only partly defined in statute (and partly only for business or consumer insolvencies)**
- **great differences regarding details**

## INABILITY TO PAY DEBTS

<b>Debts: only mature debts</b>	<b>19 states: but partly with restrictions</b> <ul style="list-style-type: none"><li>• <b>business debts</b></li><li>• <b>undisputed debts</b></li><li>• <b>debts due since x days / months</b></li></ul>
<b>assets: only liquid assets</b>	<b>15 states; but exceptions:</b> <ul style="list-style-type: none"><li>• <b>only (enumerated) financial means (2 states)</b></li><li>• <b>including future assets (5 states)</b></li><li>• <b>not discussed in 3 states</b></li></ul>

## INABILITY TO PAY DEBTS

### Size of the liquidity gap

- irrelevant in 14 states
- where relevant, size varies greatly:
  - Austria: 5%
  - Czech Republic/  
Germany/Slovakia: 10%
  - Cyprus/Lithuania/Malta  
/Poland: „minor gaps“



## INABILITY TO PAY DEBTS

### Duration of the liquidity gap

- irrelevant in 10 states
- where relevant, duration varies greatly
  - Germany: 3 weeks
  - Czech Republic: 8 weeks
  - Slovakia, Slovenia: 60 days
  - Austria: 3-5 months
  - Belgium, Estonia, Finland, Lithuania, Luxembourg, Portugal, Spain, Sweden: permanent/not only temporary
  - Ireland/Malta/UK: discretion of the court

## INABILITY TO PAY DEBTS

**Establishing (for opening of proceedings only)**

- **formal liquidity status possible but nowhere mandatory**
- **frequently: presumptions**
  - **irrebuttable (Croatia, Cyprus, Hungary, Latvia, Spain)**
  - **rebuttable (Czech Republic, Estonia, Finland, Ireland, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, UK)**
- **or circumstantial evidence (general procedural law)**

## INABILITY TO PAY DEBTS

**Establishing (for opening of proceedings only)**

- **comparable presumptions quite divergent**
- **example: time lapse after formal demand**
  - **1 week (Finland)**
  - **20 days (Hungary)**
  - **3 weeks (Cyprus [ $> 5.000$  €]; Ireland [ $> 10.000$  €]; Latvia [ $> 2,134/4,268$  €]; UK [ $> 750$  ?])**

## INABILITY TO PAY DEBTS

**Establishing (for opening of proceedings only)**

- **in particular: cessation of payments (Austria, Bulgaria, Croatia, Czech Republic, Finland, Germany, Poland, Portugal, Romania, Sweden, Spain)**

## CESSATION OF PAYMENTS

<b>presumption for inability to pay debts</b>	<b>Austria, Bulgaria, Croatia, Czech Republic, Finland, Germany Poland, Portugal, Romania, Sweden, Spain</b>
<b>additional reason to open insolvency proceedings</b>	<b>Greece, Portugal, Spain</b>
<b>only reason to open insolvency proceeding</b>	<b>Belgium, Luxembourg, the Netherlands (France?)</b>

## CESSATION OF PAYMENTS

- **typically no statutory definition**
- **either synonym for inability to pay debts**
- **or factual equivalent (debtor is insolvent because he or she *does not pay*) to a normative term (debtor is insolvent because he or she *cannot pay*)**

## LIKELY/IMMINENT INABILITY TO PAY DEBTS

- **likely: matter of probability**
- **imminent: matter of urgency**

<b>likely</b>	<b>9 states</b>
<b>imminent</b>	<b>10 states</b>
<b>both</b>	<b>5 states</b>

## LIKELY/IMMINENT INABILITY TO PAY DEBTS

### likely

- **two years (Romania, Spain)**
- **one year (Cyprus, Italy, the Netherlands, Slovenia)**
- **three months (Lithuania)**
- **„short“ (Sweden)**
- **undefined (Estonia, Greece, Hungary, Ireland)**

### imminent

- **two years (Germany)**
- **one year (Austria, Bulgaria, Hungary, Romania, Slovakia)**
- **three months (Spain)**
- **„short“ (Poland, Sweden)**
- **undefined (Belgium, Croatia, Czech Republic, Finland, Greece, Portugal, Romania)**



## LIKELY/IMMINENT INABILITY TO PAY DEBTS

### likely

- two years (Romania, **Spain**)
- one year (Cyprus, Italy, the Netherlands, Slovenia)
- three months (Lithuania)
- „short“ (Sweden)
- undefined (Estonia, Greece, Hungary, Ireland)

### imminent

- two years (Germany)
- one year (Austria, Bulgaria, Hungary, Romania, Slovakia)
- three months (**Spain**)
- „short“ (Poland, Sweden)
- undefined (Belgium, Czech Republic, Finland, Greece, Portugal, Romania)

## OVERINDEBTEDNESS

<p><b>term known in 21 states</b></p>	<ul style="list-style-type: none"> <li>• <b>Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Hungary, Ireland, Italy, Lithuania, Malta, Poland, Portugal, Slovakia, Slovenia, Sweden, UK</b></li> <li>• <b>for consumer insolvencies in France, Luxembourg</b></li> </ul>
<p><b>autonomous reason to open proceedings in 15 states</b></p>	<p><b>Austria, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Germany, Hungary, Italy, Lithuania, Poland, Portugal, Slovakia, Slovenia, (France, Luxembourg)</b></p>
<p><b>presumption for inability to pay debts in 4 states</b></p>	<p><b>Cyprus, Ireland, Malta, UK</b></p>

## OVERINDEBTEDNESS

**trigger of duty to file for  
insolvency proceedings in 10  
states**

- **Austria, Bulgaria, Croatia,  
Czech Republic, Estonia,  
Germany, Lithuania,  
Poland, Slovakia, Slovenia**

## OVERINDEBTENESS

<b>Viability prognosis necessary</b>	<b>Austria, Croatia, Czech Republic, Estonia, Finland, Germany, Italy, Lithuania, Poland, Portugal</b>
<b>Duration of prognosis period</b>	<ul style="list-style-type: none"><li>• <b>one year (Germany)</b></li><li>• <b>current and next business year (Austria)</b></li><li>• <b>two years (Poland)</b></li><li>• <b>discretion of the court (Croatia, Czech Republic, Estonia, Finland, Italy, Lithuania, Portugal)</b></li></ul>

## CORNERSTONES OF OUR PROPOSAL

- **restriction to terms used in EU law (inability to pay debts, likely inability to pay debts)**
- **no statements on establishing/burden of proof**
- **no trust in self-regulation by national legislators or courts**

## CORNERSTONES OF OUR PROPOSAL

- **Only exception: Art. 38(2) (in connection with Art. 41(2), as the case may be):**

*„A microenterprise shall be deemed insolvent for the purposes of simplified winding-up proceedings when it is generally unable to pay its debts as they mature. **Member States shall set out the conditions under which a microenterprise is deemed to be generally unable to pay its debts as they mature and ensure that these conditions are clear, simple and easily ascertainable by the microenterprise concerned.**“*

## CORNERSTONES OF OUR PROPOSAL

- **main problem: (irrebuttable) presumptions**

## CORNERSTONES OF OUR PROPOSAL

**Establishing (for opening of proceedings only)**

- **formal liquidity status possible but not nowhere mandatory**
- **frequently: presumptions**
  - **irrebuttable (Croatia, Cyprus, Hungary, Latvia, Spain)**
  - **Rebuttable (Czech Republic, Estonia, Finland, Ireland, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, UK)**
- **or circumstantial evidence (general procedural law)**



## CORNERSTONES OF OUR PROPOSAL

- **Example (Hungary): irrebuttable presumption for inability to pay debts where the debtor failed to pay a so far undisputed debt within 20 days after maturity and written demand.**
- **similar rules on *statutory demand* in Cyprus, Finland, Ireland, Latvia, Malta, UK**

**Many thanks for your attention!**

[bork@uni-hamburg.de](mailto:bork@uni-hamburg.de)

[ben.schuijling@ru.nl](mailto:ben.schuijling@ru.nl)

[michael.veder@ru.nl](mailto:michael.veder@ru.nl)