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Breakout Session I. Pre-packs Proceedings



Panel leader: Bart Heynickx
ALTIUS, Belgium /
Co-Chair of the INSOL Europe
Anti-Fraud Forum



José Carles
Carles Cuesta, Spain /
Co-Chair of the INSOL Legal
Tech Digital Assets Wing



Juliette van de Wiel
DVDW,
The Netherlands

- 1) Introduction Draft Directive 7 December 2022
- 2) Introduction Pre-Pack proceedings (artt. 19 – 35)
 - General provisions (including jurisdiction)
 - Preparation Phase
 - Liquidation Phase
 - Provisions relevant to both stages
 - Closely related parties
 - Protection of creditors

3) General overview of the provisions on Pre-Pack Proceedings in Spain and the Netherlands + comparison with Draft Directive

- Situation in the Netherlands
- Situation in Spain

4) Highlights on some elements of Pre-Pack Proceedings

- Employees and associated social security claims
- Suppliers / customers: Transfer of supply or customer contracts (with(out) cooperation of supplier/customer)
- Secured claims
- Closely related parties

5) Questions and conclusion of the session

Breakout Session II. Tracing and recovery of debtor's assets by insolvency practitioners



Panel leader:
Antonia Mottironi
Ardenter Law,
Switzerland



Louise Brittain
Azets,
UK



Patrik Kalman
Trägårdh
Advokatbyrå,
Sweden



Daniel A. Lowenthal
Patterson Belknap
Webb & Tyler LLP,
US



Xavier Pareja
Xavier Pareja,
Spain

Breakout Session III.

Winding-up proceedings for Microenterprises



Panel leader:
Michala Roepstorff
Plesner Law Firm, Denmark



Jean Baron
CBF Associés, France /
Co-Chair of the INSOL
Europe TRIP Group

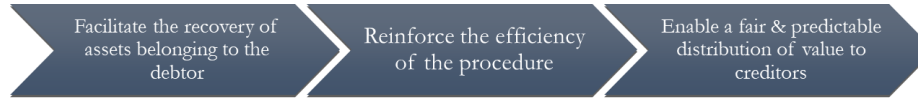



**Rubén García-Quismondo
Pereda**
Quabbala, Spain

Simplified winding-up proceedings of
microenterprises



INSOLVENCY III - EU HARMONISATION PROJECT

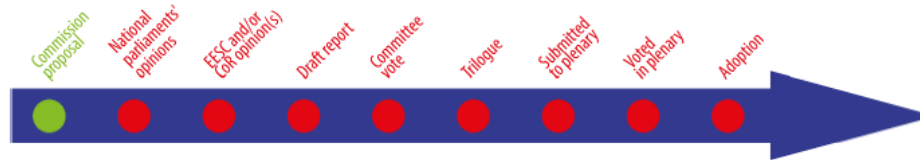


AREAS	ROLE OF THE IP	RISKS LED BY A LACK OF IP
The system of nullity actions	Exclusive or otherwise right to initiate actions	Fraud, infringements of the protection of creditors and employee's interest, and risk of circumventing legal rules 
The transfer of a business as part of a liquidation process	Appointed only for the liquidation phase	
Adoption of a single simplified regime for SMEs	Followed by simplified control of deeds and verification of claims	
Assets recovery	Charged of recovering debts from third-party debtors residing abroad	
The establishment of creditor's committees	The role remains to be defined between practitioners and the courts	



Timeline of the EU directive project's

Proposal for a Directive of the European Parliament and the Council harmonising certain aspects of insolvency law		
<i>Committee responsible:</i>	Committee on Legal Affairs (JURI)	COM(2022) 702 7.12.2022
<i>Rapporteur:</i>	Pascal Arimont (EPP, Belgium)	2022/0408(COD)
<i>Shadow rapporteurs:</i>	René Repasi (S&D, Germany) Yana Toom (Renew, Estonia) Marie Toussaint (Greens/EFA, France) Angel Dzhambazki (ECR, Bulgaria) Emmanuel Maurel (The Left, France)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Awaiting committee decision	



Source: European Parliamentary Research Service



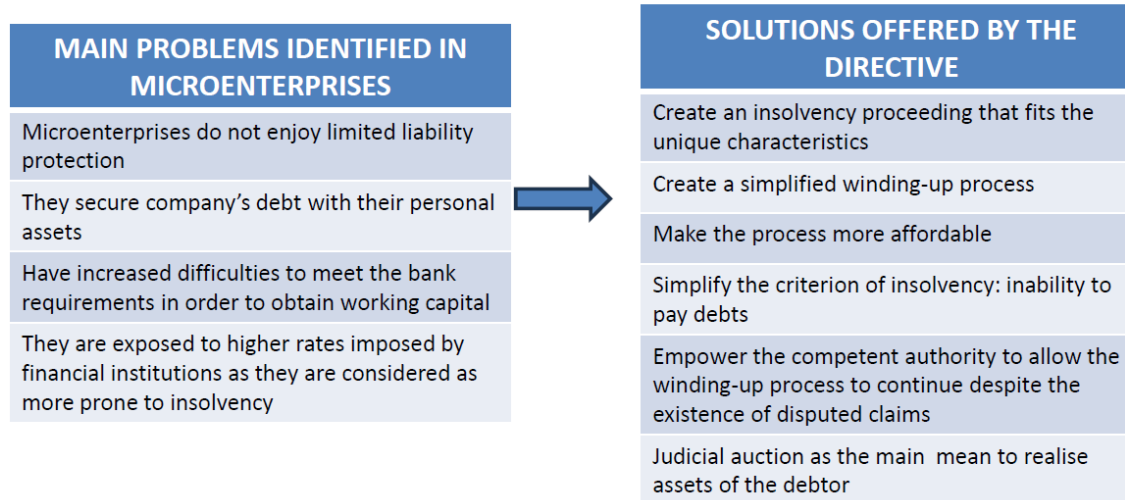
**THE SIMPLIFIED WINDING-UP PROCEEDING
FOR MICROENTERPRISES (PROPOSAL FOR A
DIRECTIVE OF THE EUROPEAN PARLIMENT)**

VS

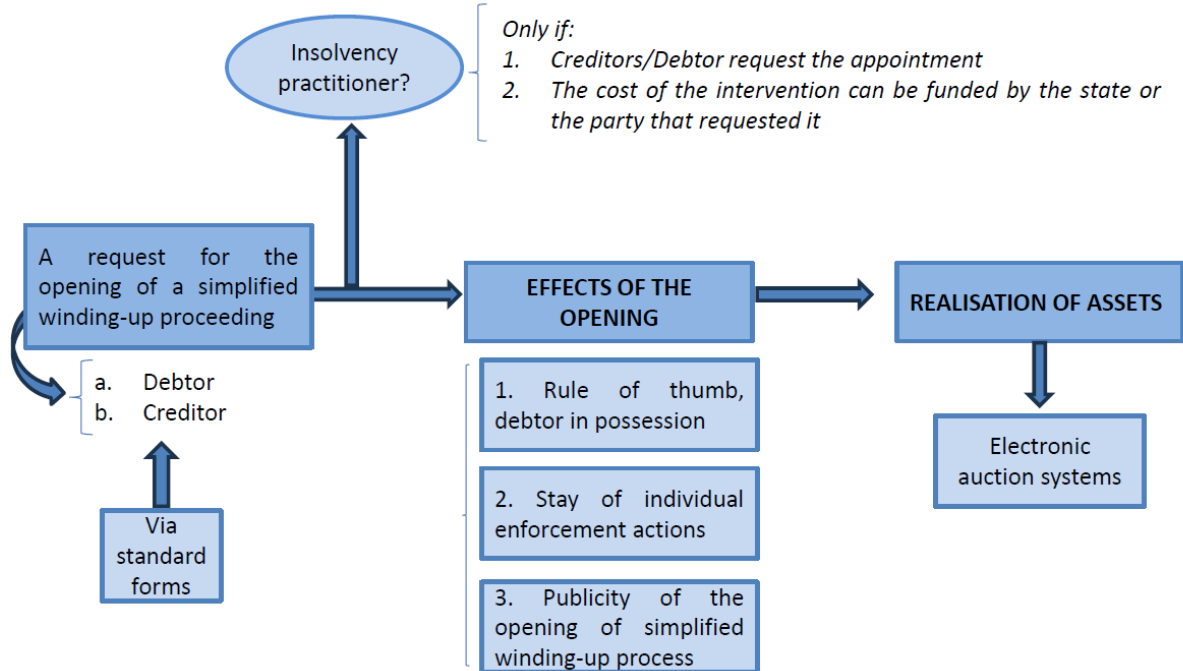
**THE ACTUAL SPANISH REGULATION (SPECIAL
PROCEEDING FOR MICROENTERPRISES)**



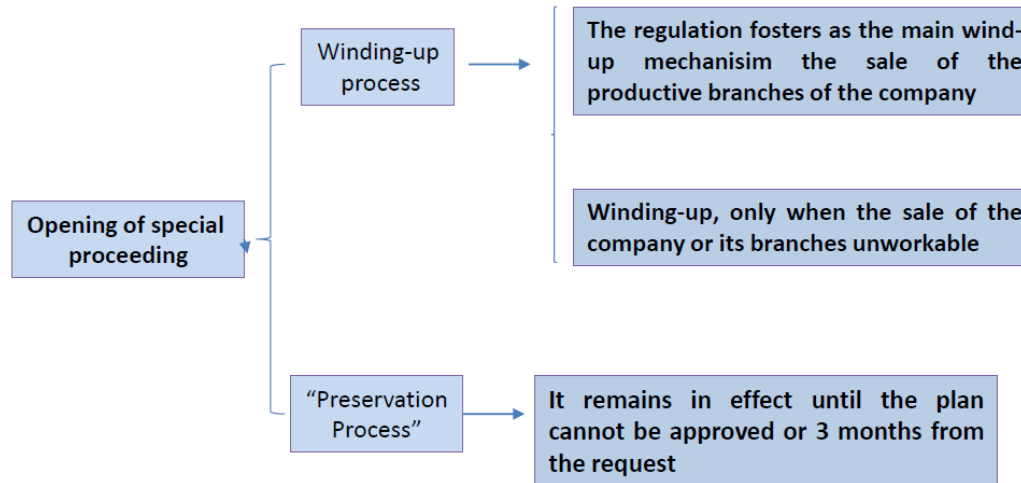
**KEY POINTS OF THE
“PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL”**

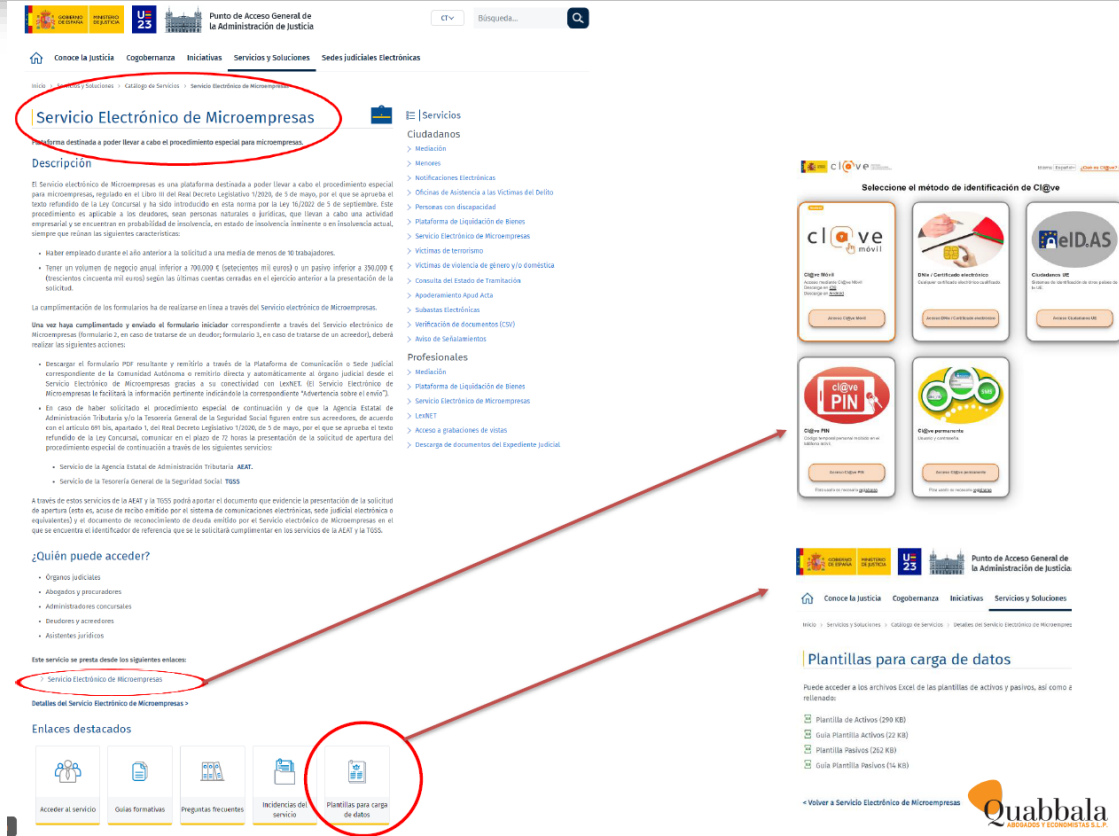


SIMPLIFIED WINDING-UP PROCEEDINGS FOR MICROENTERPRISES



SPANISH REGULATION





Servicio Electrónico de Microempresas

Formulario destinada a poder llevar a cabo el procedimiento especial para microempresas.

Descripción

El Servicio Electrónico de Microempresas es una plataforma destinada a poder llevar a cabo el procedimiento especial para microempresas, regulado en el Libro III del Real Decreto Legislativo 1700/2010, de 3 de mayo, por el que se aprueba el texto refundido de la Ley Concursal y ha sido introducido en esta norma por la Ley 16/2012 de 3 de septiembre. Este procedimiento es aplicable a los deudores, sean personas naturales o jurídicas, que lleven a cabo una actividad empresarial y se encuentren en probabilidad de insolvencia, en estado de insolvencia involuntaria o en insolvencia actual, siempre que reúnan las siguientes características:

- Haber empleado durante el año anterior a la solicitud a una media de menos de 10 trabajadores.
- Tener un volumen de negocio anual inferior a 100.000 € (setecientos mil euros) o un pasivo inferior a 200.000 € (doscientos cincuenta mil euros) según las últimas cuentas cerradas en el ejercicio anterior a la presentación de la solicitud.

La cumplimentación de los formularios ha de realizarse en línea a través del Servicio Electrónico de Microempresas.

Una vez haya cumplimentado y enviado el formulario iniciador correspondiente a través del Servicio Electrónico de Microempresas (Formulario 2, en caso de tratarse de un deudor; formulario 3, en caso de tratarse de un acreedor), deberá realizar las siguientes acciones:

- Descargar el formulario por resultante y remitirlo a través de la Plataforma de Comunicación o Sede Judicial correspondiente de la Comunidad Autónoma o remitirlo directamente al órgano judicial desde el Servicio Electrónico de Microempresas gracias a su conectividad con LEANER (El Servicio Electrónico de Microempresas le facilitará la información pertinente indicando la correspondiente "Adherencia sobre el envío").
- En caso de haber solicitado el procedimiento especial de continuación y de que la Agencia Estatal de Administración Tributaria y/o la Tesorería General de la Seguridad Social figuren entre sus acreedores, de acuerdo con el artículo 601 bis, apartado 1, del Real Decreto Legislativo 1700/2010, de 3 de mayo, por el que se aprueba el texto refundido de la Ley Concursal, consultará en el plazo de 72 horas la presentación de la solicitud de apertura del procedimiento especial de continuación a través de los siguientes servicios:
 - Servicio de la Agencia Estatal de Administración Tributaria **AEAT**.
 - Servicio de la Tesorería General de la Seguridad Social **TGS5**.

A través de estos servicios de la AEAT y la TGS5 podrá aportar el documento que evidencie la presentación de la solicitud de apertura (esto es, acuse de recibo emitido por el sistema de comunicaciones electrónicas, sede judicial electrónica o equivalente) y el documento de reconocimiento de deuda emitido por el Servicio Electrónico de Microempresas en el que se encuentre el identificador de referencia que se le facilitará cumplimentar en los servicios de la AEAT y la TGS5.

¿Quién puede acceder?

- Órganos judiciales
- Abogados y procuradores
- Administradores concursales
- Deudores y acreedores
- Asistentes jurídicos

Este servicio se presta desde los siguientes entornos:


- Servicio Electrónico de Microempresas

Plantillas para carga de datos

Puede acceder a los archivos Excel de las plantillas de activos y pasivos, así como el resultante:

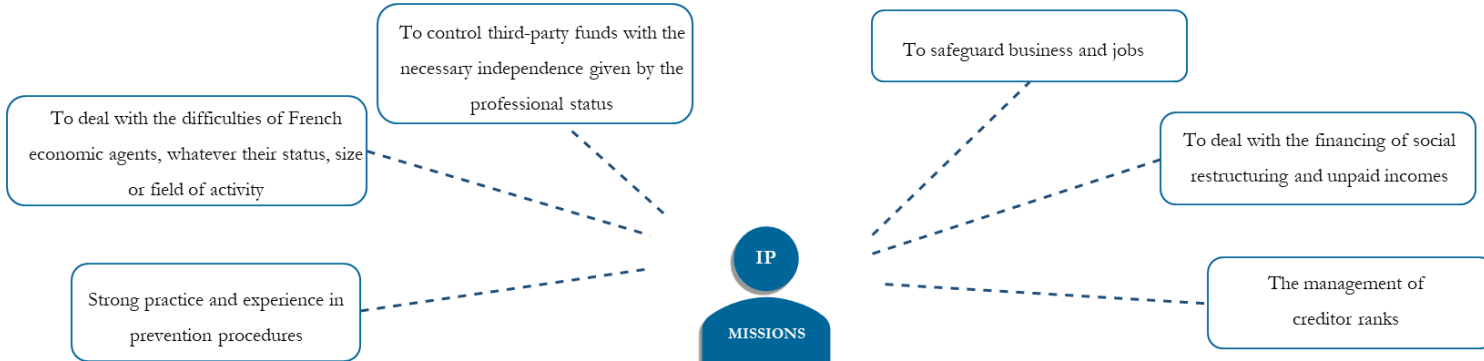
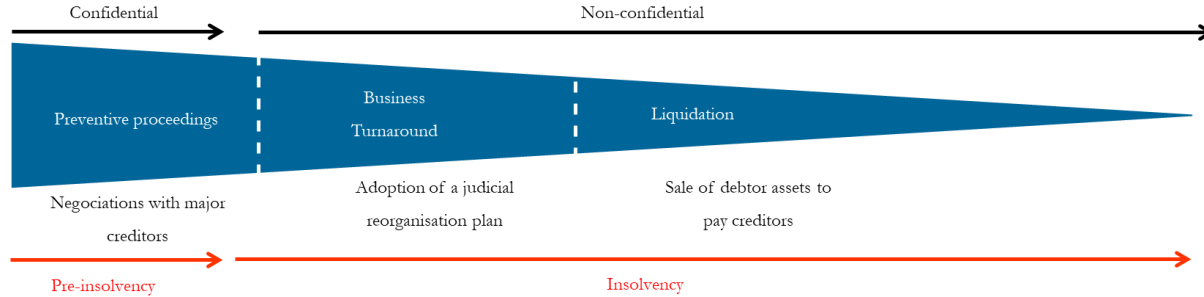
- Plantilla de Activos (209 KB)
- Guía Plantilla Activos (22 KB)
- Plantilla Pasivos (262 KB)
- Guía Plantilla Pasivos (16 KB)

• Volver a Servicio Electrónico de Microempresas



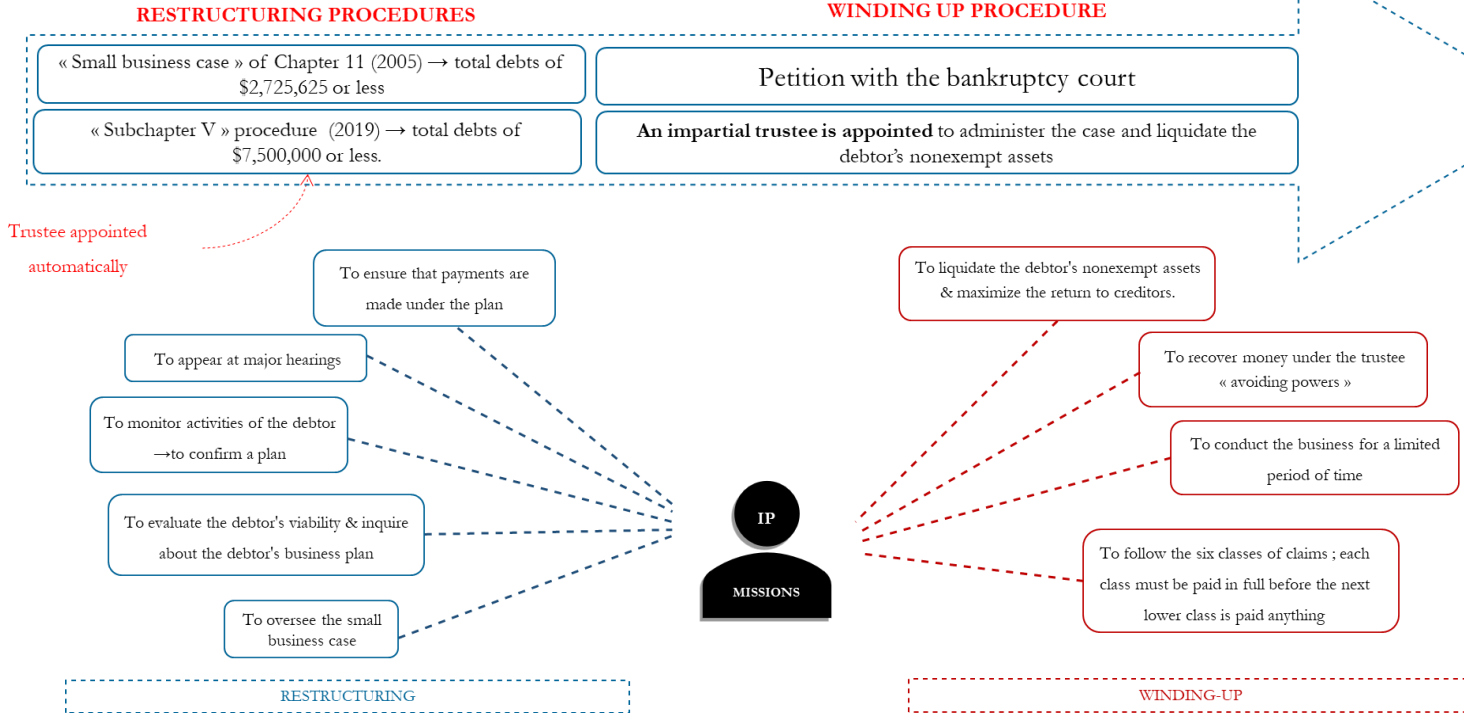


FRENCH PROCESS



In France, isolated assets earn interest → used to finance zero-asset proceedings

The US Example



The Japanese Model



RESTRUCTURING PROCEDURES

Civil rehabilitation procedure
(« Minji-saisei »)

Similar to the Chapter 11 of the US Bankruptcy Code

Corporate rehabilitation procedure
(« Kaisha-Kosei »)

Similar to the Chapter 11 of the US Bankruptcy Code

The debtor's business is managed by a court-appointed trustee

Stock companies only

WINDING UP PROCEDURE

Bankruptcy procedure
(« Hasan »)

Similar to the Chapter 7 of the US Bankruptcy Code

A court-appointed trustee disposes of the debtor assets' & builds up a bankruptcy estate

The appointed trustee is usually a qualified lawyer

Questions

- Are you generally in favour of the harmonization as proposed in COM/2022/702 final - **YES-NO**
- In respect of a winding-up of an insolvent microenterprise, are you generally in favour of the proposal that an IP can only be appointed provided the debtor or creditors request and the costs can be funded either by the estate or the party requesting the appointment - **YES - NO**
- If you have voted YES to question 2, do you believe that it should be mandatory or optional for the member states - **Yes for Mandatory - No for Optional**

Thanks for your participation



Breakout Session IV. Creditors' Committee



Panel leader:
Noor Zetteler
Wijn en Stael Advocaten,
The Netherlands



Michael Thierhoff
Mazars,
Germany



Matthias Prior
Abel,
Austria



Frederic Verhoeven
Houthoff,
The Netherlands

Creditors' Committee in the EU

European Commission's Proposal for a Directive harmonising certain aspects of insolvency law, Title VII (Recitals 47-57; Articles 58-67).

According to Recital 47:

"It is important to ensure a fair balance between the interests of the debtor and creditors in insolvency proceedings. Creditors' committees allow for better involvement of creditors in insolvency proceedings, in particular when creditors would otherwise be inhibited from doing so individually, due to limited resources, the economic significance of their claims or the lack of geographic proximity. Creditors' committees can especially help cross-border creditors better exercise their rights and ensure their fair treatment."

Creditors' Committee

Questions for discussion

- Are the creditors' interests in principle sufficiently represented by the insolvency practitioner?
 - A. Yes
 - B. No

Creditors' Committee

Questions for discussion

- The creditor's committee should primarily be seen as an institute that is part of the proper governance of insolvency process, rather than a body of representation.
- A. Yes
- B. No

Creditors' Committee in MS

EU Proposal	Austria	Germany	The Netherlands
<p>Rights, duties and powers</p> <p>Art. 64</p> <p>1. CC's function is to ensure that in the conduct of the insolvency proceedings the creditors' interests are protected and individual creditors are involved.</p> <p>To that end, CC has at least the following rights, duties and powers:</p> <p>(a) the right to hear the IP at any time;</p> <p>(b) the right to appear and to be heard in insolvency proceedings;</p> <p>(c) the duty to supervise the IP, including by consulting with the IP and informing the IP of the wishes of creditors;</p> <p>(d) the power to request relevant and necessary information from the debtor, the court or the IP at any time during insolvency proceedings;</p> <p>(e) the duty to provide information to the creditors represented by the CC and the right to receive information from those creditors;</p> <p>(f) the right to receive notice of and be consulted on matters in which the creditors represented by the CC have an interest, including the sale of assets outside the ordinary course of business;</p> <p>(g) the power to request external advice on matters in which the creditors represented by the CC have an interest.</p> <p>2. In MS where CC has the power to approve certain decisions or legal acts, they shall clearly specify the matters on which such approval is required.</p>	<ul style="list-style-type: none"> • CC shall have the duty to supervise and assist the IP. It shall inspect the IP's accounts by at least two of its members from time to time and every time the insolvency court so orders. • Members of the CC may acquire property pertaining to the insolvency estate themselves or through third parties by means other than through a motion for acquisition or at a public auction only with the permission of the creditors' meeting. 	<ul style="list-style-type: none"> • Support and supervise IP, monitor trading, inspect records, audit cash receipts and disbursements. • To be consulted by the IP to vote on major transactions outside of the normal course of business such as e.g.: <ul style="list-style-type: none"> - Sale of the business or major parts of it - Commence or settle major litigation - Borrow larger amounts of money 	<ul style="list-style-type: none"> • The CC gives advice. The IP is not bound by it. • If the IP does not agree with the advice, he must immediately notify the CC, which may invoke the decision of the bankruptcy judge.

Creditors' Committee

Questions for discussion

- The creditor's committee should include a member that represents employees' interests.
 - A. Yes
 - B. No

Creditors' Committee in MS

EU Proposal	Austria	Germany	The Netherlands
<p>Procedure for appointing its members</p> <p>Art. 59:</p> <ol style="list-style-type: none"> Members of CC appointed either at general meeting of creditors or by court, within 30 days from date of opening of proceedings according to Art. 24(2)(a) of EIR Recast. If members of CC appointed at general meeting of creditors, court certifies appointment within 5 days from date of communication of appointment to court. Appointed members of CC fairly reflect different interests of creditors or groups thereof. Creditors whose claims have only been provisionally admitted and cross-border creditors also eligible for appointment to the CC. Any interested party may challenge before the court appointment of 1 or more members of the CC if appointment was not done in accordance with applicable law. <p>Art. 60:</p> <ol style="list-style-type: none"> Members of CC represent solely interests of the whole body of creditors and act independently of the IP. However, national provisions that allow to set up more than one CC representing different groups of creditors in the same insolvency proceedings may be maintained. In this case, members of CC represent solely interests of creditors who appointed them. CC owes the duties to all creditors it represents. 	<ul style="list-style-type: none"> • CC appointed by the court only. • The proposals of the creditors, employee representatives and other stakeholders shall be taken into account to the best possible extent. • Both natural persons and legal entities as well as the departments of local authorities may be appointed as members of the CC. The appointed person needs not be a creditor. 	<ul style="list-style-type: none"> • Appointment by the court if prior to 1st creditors' meeting. • Debtor, preliminary IP & creditors may suggest members. • Debtor & preliminary IP are to name members upon request by the court. • 1st creditors' meeting to confirm or change composition or even vote not to have a committee. • For the CC current or future creditors representing: <ul style="list-style-type: none"> - Secured creditors - Major creditors - Small creditors - Employees <p>are to be appointed. The CC may also include non creditors.</p>	<ul style="list-style-type: none"> • Court may appoint a provisional CC of an odd number of members, by the judgment declaring bankruptcy or by a subsequent order. • The appointment of the final CC is discussed at the meeting of creditors. The decision on the appointment is made by the creditors.
<p>Composition</p> <p>Art. 61 Number of members of CC is at least 3 and does not exceed 7.</p> <p>Art. 62</p> <ol style="list-style-type: none"> Rules specifying both the grounds for removal and replacement of members of the CC and the related procedures shall be laid down. Rules shall also cater for the situation where members of the CC resign or are unable to perform the required functions, such as in cases of serious illness or death. Grounds for removal shall at least include fraudulent or grossly negligent conduct, wilful misconduct, or breach of fiduciary duties with respect to the creditors' interests. 	<p>CC consists of 3 to 7 members (one in favor of the employees' interests)</p>	<p>No number for members specified</p>	<p>The court decides on the composition of the provisional CC that shall consist of a minimum of 3 members and shall consist of an odd number of members.</p>

Creditors' Committee

Questions for discussion

It is simply too big an ask for a creditor in the creditor's committee to act on behalf of the interests of the joint creditors, due to the fact that its own interests can conflict with that of other creditors.

- A. Yes
- B. No

Creditors' Committee

Questions for discussion

A member of the creditors' committee should be appointed because of his/hers skills and knowledge; not because it represents a (large) claim on the bankruptcy estate.

- A. Yes
- B. No

Creditors' Committee in MS

EU Proposal	Austria	Germany	The Netherlands
<p>Working arrangements</p> <p>Art. 63 CC lays down a protocol of working methods within 15 working days following the appointment of the members. If CC fails, the court lays down the protocol on behalf of the CC within 15 working days following the expiry of the first 15 working day period. In the 1st meeting of the CC, its members shall approve the working methods by simple majority of the present members.</p> <p>2. Protocol shall at least address the following matters: (a) eligibility to attend and participate in the CC's meetings;; (b) eligibility to vote and the necessary quorum; (c) conflict of interests; (d) confidentiality of information.</p> <p>3. Protocol available to all creditors, court and IP.</p> <p>4. Members of CC are given the possibility to participate and vote either in person or via electronic means.</p> <p>5. Members of the CC may be represented by a party supplied with a power of attorney.</p> <p>6. The Commission shall establish a standard protocol by way of implementing acts.</p>	N/A	N/A	N/A

Creditors' Committee

Questions for discussion

Who should pay for the costs of the Creditors' Committees?

- A. Debtor
- B. Creditor itself
- C. Largest creditors

Creditors' Committee

Questions for discussion

If the debtor would bear these costs, should these be fixed or can actual costs made be reimbursed?

- A. Fixed costs
- B. Actual costs

Creditors' Committee

Questions for discussion

What should be the liability of Creditors' Committees?

- A. Full liability
- B. Limited liability
- C. No liability

Creditors' Committee

Questions for discussion

Should the debtor provide for an indemnity for the Creditors' Committee?

- A. Yes always
- B. No
- C. Depends

Creditors' Committee in MS

EU Proposal	Austria	Germany	The Netherlands
<p>Remuneration</p> <p>Art. 65 1. MS shall specify who bears the expenses incurred by the CC in exercising its function referred to in Article 64. 2. Where the expenses are borne by the insolvency estate, CC keeps record of such expenses and the court has the authority to limit unjustified and disproportionate expenses. 3. Where members of the CC are allowed to be remunerated and such remuneration is borne by the insolvency estate, it is proportionate to the function performed by the members and the CC keeps record of it.</p>	<ul style="list-style-type: none"> Members of the CC shall not be entitled to any remuneration but shall be reimbursed for their necessary expenses. However, if special duties are assigned to them by order of the insolvency court or by resolution of the CC, they may be granted special remuneration with the approval of the insolvency court. 	<p>Based on time spent, plus out-of-pocket expenses and cost of professional indemnity insurance</p>	<p>N/A</p>
<p>Liability</p> <p>Art. 66 Members of a creditors' committee are exempt from individual liability for their actions in their capacity as members of the committee unless they have committed grossly negligent or fraudulent conduct, wilful misconduct, or have breached a fiduciary duty to the creditors they represent.</p>	<p>Members of the CC shall be liable to all involved parties for the pecuniary losses that they have caused by violation of this rule or any other duty and may be ordered to promptly fulfill their duties through the imposition of fines by the insolvency court</p>	<p>Personal liability only vis-à-vis secured and unsecured creditors (not the IP nor the debtor) for negligence</p>	<p>The CC gives advice to the trustee that is not bound by it. There is no liability on the CC.</p>
<p>Appeal</p> <p>Art. 67 1. Where the CC are entrusted with the power to approve certain decisions or transactions, they shall also provide for a right to appeal against such an approval. 2. Member States shall ensure that the appeal procedure is efficient and expeditious.</p>			

Creditors' Committee in MS

EU Proposal	Austria	Germany	The Netherlands
<p>Requirements for its establishment</p> <p>Art. 58 :</p> <ol style="list-style-type: none"> only if general meeting of creditors so decides. possible before the opening of insolvency proceedings if requested by 1 or more creditors to court. But 1st general meeting of creditors has to decide on the continuation and composition of the CC established. CC excluded when overall costs of its involvement are not justified in view of low economic relevance of insolvency estate, of low number of creditors or if debtor is a microenterprise. 	<ul style="list-style-type: none"> •By court if nature or particular scope of debtor's business makes it appear necessary. •Court obliged to appoint a CC in case of the following transactions: -sale or lease of the debtor's business or its share in a company, -sale or lease of the entire movable fixed and current assets or a part thereof necessary for the business 	<ul style="list-style-type: none"> •As a rule to be appointed already in preliminary proceedings if in last business year 2 out of the following 3 criteria are met: -Total assets > EUR 6 m -Annual revenue > EUR 12 m -Average number of employees > 50 •Else upon request by the debtor, the preliminary IP or a creditor 	<p>By Court</p>

Creditors' Committee

Other question for discussion

- What are your recommendations for the European legislator?

Creditors' Committee

Other questions for discussion

- What are the advantages/disadvantages of the Creditors' Committee?
- What should be the composition of Creditors' Committees?
- Do the Creditors' Committee members should meet certain requirements as regards the debtor's branch of activity?
- What do you think of the possibility of challenging the composition of the creditors' committees by interested parties of Article 59, para. 5?
- When Creditors' Committees are useful? Examples of national and cross-border cases.
- What should be the role of the Creditors' Committee?
- What should be the liability of Creditors' Committees?