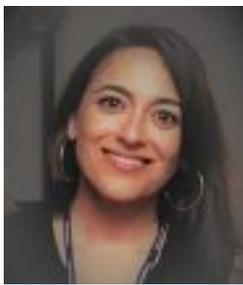


EESC opinion on the EU Directive Proposal harmonising certain aspects of insolvency law

Emma Inacio takes a closer look at the opinion of the European Economic and Social Committee (EESC) on the Proposal for a directive harmonising certain aspects of insolvency law



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On 7 December 2022, the European Commission published a proposal for a directive harmonising certain aspects of insolvency law in the EU¹ that sets out minimum requirements in targeted areas of national formal insolvency proceedings which have a significant impact on the efficiency and length of such proceedings, especially on cross-border insolvency proceedings.

The proposal is part of the Commission’s priority objective of strengthening capital markets union (CMU). In particular, it relates to action 11² of the 2020 CMU action plan:³ “Making the outcome of cross-border investment more predictable as regards insolvency proceedings”.

According to a European Banking Authority (EBA) study published in 2020, the recovery time during insolvency proceedings ranges from 0.6 to 7 years on average across Member States.⁴ The (simple) average recovery rate of corporate loans in the EU was 40% of the amount outstanding at the time of the default, but it varied between 6.9% (Poland) and 95.2% (Denmark).⁵ The average rate for small and medium-sized enterprises (SMEs) was 34% as of 2018.

Therefore, this proposal targets the three key dimensions of insolvency law:

(i) the recovery of assets from

- the liquidated insolvency estate;
- (ii) the efficiency of proceedings; and
- (iii) the predictable and fair distribution of recovered value among creditors.

In order to protect the value of the insolvency estate for creditors, a minimum set of harmonised conditions for exercising **avoidance actions**⁶ is first introduced.

The proposal then improves the possibilities of insolvency practitioners to identify and **trace assets** belonging to the insolvency estate for the maximisation of the value of that estate through targeted rules on the access to various registries containing relevant information on assets that belong or should belong to the insolvency estate, including those from other Member States.⁷

Member States will have to include in their insolvency regime a **pre-pack proceeding** composed of a ‘preparation phase’ followed by a ‘liquidation phase’ in order to maximise the recovery value of the business at an early stage.⁸

To avoid potential asset value losses for creditors, **an obligation of the directors to promptly submit a request for the opening of insolvency proceedings**⁹ is imposed no later than 3 months after the directors became aware or can reasonably be expected to

have been aware that the legal entity is insolvent.

Provisions for **liquidating insolvent microenterprises** are also introduced¹⁰ to strengthen procedural efficiency. The cost of ordinary insolvency procedures for these companies is prohibitively high and the possibility to benefit from a debt discharge would enable them to unblock entrepreneurship capital for new projects.

Although the provisions of this Directive concerning simplified winding-up proceedings only apply to microenterprises, it should be possible for Member States to extend their application also to small and medium-sized enterprises that are not microenterprises.¹¹

To ensure a fair and predictable distribution of recovered values among creditors, the proposal introduces requirements for improving the representation of creditors’ interests in the proceedings through **creditors’ committees**.¹²

Finally, to ensure an enhanced **transparency of the key features of national insolvency proceedings** and help especially cross-border creditors to estimate what would happen if their investments got involved in insolvency proceedings, the proposal provides for an easy access to that information in a pre-defined, comparable and user-friendly format.¹³



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Opinions

The **Council of the EU** started discussions on the proposal on 12 December 2022. In the **European Parliament**, the referral was announced in plenary on 26 January 2023 and the file was assigned to the **Committee on Legal Affairs (JURI)**, with Pascal Arimont (EPP, Belgium) as rapporteur. The Committees on Economic and Monetary Affairs (ECON) and on Internal Market and Consumer Protection (IMCO) have been asked to give opinions; IMCO has decided not to give an opinion. The Committee of the Regions was not asked to provide an opinion.

The European Economic and Social Committee (EESC) adopted its opinion on the Proposal for a directive harmonising certain aspects of insolvency law on 22 March 2023.¹⁴

Firstly, the EESC underlines that a properly designed insolvency regime should find a balance between premature insolvency and proceedings starting too late. Transparency of proceedings, as well as easy access to information of a business' performance, are key factors in this context. Furthermore, a properly designed insolvency scheme should also discourage lenders from issuing high-risk loans, and managers and shareholders from resorting to such loans as well as taking other reckless financial decisions.¹⁵

However, the EESC doubts whether the proposal, which is presented as an important step in closing relevant gaps for the improvement of the EU's Capital Market Union, can actually fulfil this expectation. Indeed, the proposal falls short of providing a harmonised definition of insolvency grounds and the ranking of claims, both of which are key to achieving greater efficiency and limiting the existing fragmentation in national insolvency rules.

Therefore, the EESC urges the Commission, the Parliament



and the Council to revise the proposal in Article 27 to oblige counterparties, e.g. suppliers to a business that is entering insolvency proceeding, to sign executory contracts, which are then assigned to the acquirer of the business without the consent of the counterparty.

If the EESC welcomes the very controversial proposal to introduce a special procedure to facilitate and speed up the winding down of microenterprises, allowing for a more cost-efficient insolvency process for such enterprises, however, the EESC recommends resorting to other competent players, other than national courts, such as insolvency practitioners, to help reduce the burden on the judiciary.

Finally, the EESC is of the view that efficient insolvency and creditor/debtor rights (ICR) regimes are one of the complementary tools in the policy maker's arsenal to contain the growth of NPLs (non-performing loans) by increasing loan repayment probability and by adjusting NPL levels more quickly.

To be continued... ■

Footnotes:

- <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0702>
- https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/capital-markets-union/capital-markets-union-2020-action-plan/action-11-making-outcome-cross-border-investment-more-predictable-regards-insolvency-proceedings_en
- https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/capital-markets-union/capital-markets-union-2020-action-plan_en
- European Parliament, EPRS, Harmonising certain aspects of insolvency law, Initial Appraisal of a European Commission Impact Assessment, March 2023; [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/745671/EPRS_BRI\(2023\)745671_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/745671/EPRS_BRI(2023)745671_EN.pdf)
- Averages weighted by loan size vary between 5.0% (Poland) and 97.7% (Denmark), with the EU average equal to 26.2%.
- Proposal for a Directive harmonising certain aspects of insolvency law, Title II, Art. 4-12.
- Ibid.*, Title III, Art. 13-18.
- Ibid.*, Title IV, Art. 19-35.
- Ibid.*, Title V, Art. 36&37
- Ibid.*, Title VI, Art. 38-57
- Ibid.*, Recital 35.
- Ibid.*, Title VII, Art. 58-67.
- Ibid.*, Title VIII, Art. 68.
- <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/enhancing-convergence-insolvency-proceedings>
- The World Bank, Resolving Insolvency: <https://subnational.doingbusiness.org/en/data/explortopics/resolving-insolvency/why-matters#1>



The EESC recommends resorting to other competent players, other than national courts, such as insolvency practitioners, to help reduce the burden on the judiciary

