

# A closer look at... The Committee on Economic and Monetary Affairs' (ECON) opinion on the EC's Directive proposal harmonising certain aspects of insolvency law



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**F**urther to the European Commission's (EC) proposal for a directive harmonising certain aspects of insolvency law of 7 December 2022<sup>1</sup>, 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.

If the Committees on Economic and Monetary Affairs (ECON) and on Internal Market and Consumer Protection (IMCO) have been asked to give opinions on the EC's Directive proposal, IMCO has decided not to give an opinion. On 30 November 2023, the ECON, published its opinion, with René Repasi as rapporteur (S&D, Germany)<sup>2</sup>, which brings *inter alia* amendments on the very controversial rules on winding-up of microenterprises of the EC's Directive proposal.

## Rules on winding-up of microenterprises... and SMEs!

As regards Title VI on simplified liquidation proceedings for microenterprises of the EC's Directive proposal<sup>3</sup>, which covers approximately 90% of insolvencies in the European Union, the ECON opinion first proposes that these rules are extended to SMEs<sup>4</sup>.

This extension is coherent with the ECON's proposal to delete the last sentence of Recital 35 of the EC's Directive proposal stating that "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."* (Amendment 11).

According to Article 2(j) of the EC's Directive proposal, "Within the SME category, a "microenterprise" means a microenterprise within the meaning of the Annex to Commission Recommendation 2003/361/EC", i.e. enterprises which employ "fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed €2 million."<sup>5</sup>

Although the ECON opinion does not include the definition for SMEs in Article 2 devoted to definitions, according to the Annex to Commission Recommendation 2003/362/EC cited by the EC's Directive proposal, "Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed € 10 million."<sup>6</sup> and "The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding €50 million, and/or an annual balance sheet total not exceeding €43 million."<sup>7</sup>

Thus, the ECON opinion widens the rules on simplified liquidation of microenterprises to

SMEs, meaning that the insolvency practitioner would only be appointed in large cases... If Title VI has been the most controversial issue of the EC's Directive proposal, the ECON opinion extending the rules on winding-up of microenterprises to SMEs should exacerbate the critical reactions...

## IPs' appointment where no up-to-date current balance sheet

Then, the ECON opinion proposes that the following Article 39 of the EC's Directive proposal relating to "insolvency practitioner" is amended: "Member States shall ensure that in simplified winding-up proceedings an insolvency practitioner may only be appointed if both of the following conditions are met: a) the debtor, a creditor or a group of creditors requests such an appointment; (b) the costs of the intervention of the insolvency practitioner can be funded by the insolvency estate or by the party that requested the appointment."

The ECON calls on the JURI to replace Article 39 with the following wording: "Member States shall ensure that in simplified winding-up proceedings the debtor, a creditor or a group of creditors may request that an insolvency practitioner is not appointed provided that the microenterprise or SME has an up-to-date current balance sheet. The request needs to demonstrate that the microenterprise or SME has submitted its most recent required



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annual statement to the relevant state authorities.” (Amendment 52)

As the ECON extends the rules on simplified liquidation proceedings of microenterprises to SMEs, its opinion proposes that the following Recital 40 of the EC’s Directive proposal is deleted: *“In simplified winding-up proceedings, the appointment of an insolvency practitioner is usually unnecessary given the simple business operations carried out by the microenterprises that make their supervision by the competent authority possible and sufficient. Therefore, the debtor should remain in control of its assets and day-to-day operation of the business. At the same time, to ensure that simplified winding-up proceedings can be conducted effectively and efficiently, the debtor should, upon commencement of and throughout the proceedings, provide accurate, reliable and complete information relating to its financial position and business affairs.”*

Thus, as the ECON opinion proposes that the rules on simplified liquidation proceedings of microenterprises have a bigger scope, extending them to SMEs, the appointment of the insolvency practitioner is not left to the discretion of the debtor, a creditor or a group of creditors. Indeed, Amendment 52 allows for the compulsory appointment of insolvency practitioners. However, the debtor, a creditor or a group of creditors have the possibility to request that an insolvency practitioner is not appointed if the microenterprise or SME has an up-to-date current balance sheet, i.e. has submitted its most recent required annual statement to the relevant Member State authorities.

The ECON opinion is in accordance with the European Economic and Social Committee’s (EESC) one of 22 March 2023 on the EC’s Directive proposal as regards the necessary appointment of insolvency practitioners in simplified liquidation of microenterprises. Indeed, the effective involvement of independent insolvency practitioners has proved to be beneficial, especially for poorly

organised micro-entrepreneurs in simplified liquidation proceedings<sup>9</sup>.

### IPs’ appointment even where intervention’s costs not funded

Additionally, the opinion proposes that a second paragraph is inserted to the amended Article 39 which states that *“The lack of funding by the insolvency estate or by the party that requested the appointment shall not constitute a reason for requesting that an insolvency practitioner is not appointed.”* (Amendment 55).

The ECON opinion confirms that in winding-up proceedings of microenterprises and SMEs, the appointment of the insolvency practitioner is not left to the discretion of the debtor, a creditor or a group of creditors. By way of exception, if the debtor, a creditor or a group of creditors have the possibility to request that an insolvency practitioner is not appointed if the microenterprise or SME has an up-to-date current balance sheet, however, they don’t have the possibility to request that an insolvency practitioner is not appointed if the costs of his/her intervention cannot be funded by the insolvency estate or by the party that requested the appointment

The ECON is in line with the EESC’s opinion: if national courts are made responsible for assessing whether a microenterprise is indeed insolvent and for conducting the necessary lengthy proceedings, including the realisation of assets and distribution of the proceeds, this can lead to an overburdening of national judicial systems. In previous opinions<sup>10</sup>, the EESC reminds that it had already stated that resorting systematically to the courts may not be the preferred option. Therefore, the EESC recommends resorting to other competent players, such as insolvency practitioners which would assume responsibility for this task, to help reducing the burden on the judiciary. The EESC is of the view that engaging insolvency practitioners should be actively considered.

In any case, the appointment of an insolvency practitioner in all insolvency proceedings would be consistent with Title III of the EC’s Directive proposal which aims to strengthen the tracing of assets belonging to the insolvency estate since only an insolvency practitioner can request the courts to access bank account registries or access registries relating to the debtor’s assets<sup>11</sup>. Indeed, access to this information would not be possible in the context of simplified winding-up proceedings for microenterprises if an insolvency practitioner is not appointed. Therefore, it would not be possible to protect the value of the insolvency estate for creditors in this case...

To be continued... ■

#### Footnotes:

- 1 European Commission, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 7 December 2022, COM/2022/702 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0702>
- 2 Opinion of the Committee on Economic and Monetary Affairs for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 30 Nov. 2023, COM/2022/0702 - C9-0410/2022 - 2022/0408(COD), [https://www.europarl.europa.eu/doceo/document/ECOM-AD-752615\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/ECOM-AD-752615_EN.pdf)
- 3 EC, Proposal for a Directive harmonising certain aspects of insolvency law, Rec. 34-46; Art. 38-57.
- 4 Ibid., Amendments 5, 11-13, 15, 16, 19, 49-52, 56-63, 66-69.
- 5 Commission Recommendation concerning the definition of micro, small and medium-sized enterprises, 6 May 2003, C(2003) 1422, OJ L 124 of 20.5.2003, p. 36-41, Art. 2§2, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003H0361>
- 6 Ibid., Art. 2§3.
- 7 Ibid., Art. 2§1.
- 8 Opinion, European Economic and Social Committee, Enhancing the convergence of insolvency proceedings, 22 March 2023, INT/1007-EESC-2022-01-01-05781-00-00-AC-TRA, <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/enhancing-convergence-insolvency-proceedings>
- 9 The World Bank, Principles for effective Insolvency and Creditor/debtor Regimes, Revised Edition 2021, Principles C6.1 and C19.6, <https://openknowledge.worldbank.org/server/api/core/bitstreams/3824f8e-edb3-5f9b-aa28-f5ak759e562/content>
- 10 Including EESC Opinion on Business insolvency, Opinion of the Economic and Social Committee on the “Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU”, 30 June 2017, COM(2016) 723 final - 2016/0359 (COD), [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:OJ.C.\\_2017.2.09.01.0021.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:OJ.C._2017.2.09.01.0021.01.ENG)
- 11 EC, Proposal for a Directive harmonising certain aspects of insolvency law, Title III, Art. 13-18.



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