

A closer look at...

Progress on harmonisation of EU Insolvency Laws

Emmanuelle Inacio reports on the progress throughout the Belgian, Hungarian and Polish presidencies of the Working Party on Civil Law Matters (Insolvency)



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Most Member States have raised objections to Title VI on winding up of insolvent microenterprises

As regards the legislative status of the proposal of the European Commission (EC) for a directive harmonising certain aspects of insolvency of 7 December 2022, the work in the new European Parliament restarted from scratch in the second term of 2024.

On 14 October 2024, European Parliament member Emil Radev of EPP in Bulgaria was appointed Rapporteur of the Committee on Legal Affairs (JURI) which has lead responsibility (the former rapporteur was Pascal Arimont of EPP in Belgium).

In the Council, the first examination of the proposal started on 7 March 2023 and was carried out over twelve consecutive meetings of the Working Party on Civil Law

Matters (Insolvency) during the Swedish, Spanish and Belgian Presidencies.

Belgian presidency

During the Belgian Presidency, a first compromise proposal on certain titles of the proposal was presented. According to the Belgian Presidency, most Member States have raised objections to Title VI on winding up of insolvent microenterprises introducing rules for a streamlined winding-up procedure tailored to microenterprises. Indeed, the proposal essentially aims to establish a simplified and cost-effective procedure. The Presidency has noted that Member States are divided on this Title.

One of the main reservations is that creating such a special regime would steer away from the

main objective of the proposal, which is to harmonise important aspects of national insolvency laws, and only has a limited contribution to the Capital Markets Union (CMU).

Member States expressed concerns regarding the definition of a microenterprise, the appointment of an insolvency practitioner, the role of the court and the impact on existing national insolvency systems. Some Member States have expressed their support for the special regime, but with important adjustments. The Member States in question considered that this special regime would contribute to the CMU, as it would enable an orderly winding-up at a lower cost.

Before the European Parliament elections, Title VI introducing winding-up of

insolvent microenterprises was also criticised by the European Economic and Social Committee (EESC) and Committee on Economic and Monetary Affairs (ECON) opinions of 22 March 2023 and 30 November 2023 respectively.

If the co-legislators are invited to ensure the rapid completion of the legislative work on the 2020 CMU action plan to make the outcome of cross-border investment more predictable as regards insolvency proceedings, on 22 May 2024 the Belgian Presidency organised a policy debate in Coreper aimed at finding ways to align the progress at technical level with the ambitions at the highest political level. While there was broad support for accelerating work on the insolvency proposal, Member States emphasised the importance of maintaining its quality. Member States welcomed the increase in the number of meetings dedicated to the text and underlined that it should be thoroughly analysed and discussed so that the result of the negotiations properly addresses the needs of the CMU.

Hungarian presidency

The Hungarian Presidency has decided to focus its efforts on a set of core titles in order to achieve more tangible progress and secure an agreement on part of the proposal.

On 13 December 2024, the Council reached a partial general approach on the text of the compromise proposal issued by the Presidency.¹ The partial general approach does not address all of the provisions included in the European Commission's Proposal. Indeed, provisions on pre-pack proceedings (Title IV); winding-up of insolvent microenterprises (Title VI); and creditors' committees (Title VII) will still need to be negotiated between Member States...

With reference to avoidance actions (Title II), in order to arrive at EU-wide minimum rules which prevent debtors from reducing the value that creditors can obtain

following the insolvency of a company, the Council has agreed on a number of provisions related to avoidance actions. The clawback period for avoidance actions considered to be intentionally detrimental to creditors has been reduced from four to two years. Certain presumptions have also been expressed as rebuttable. The compromise proposal includes technical and linguistic changes to improve clarity and remove unnecessary details for greater flexibility in harmonising avoidance actions as requested by Member States.

Regarding tracing assets belonging to the insolvency estate (Title III), the compromise text provides Member States with the flexibility to designate courts or administrative authorities to access and search national bank account registers. Indeed, the main concerns presented by Member States were related to the fact that Title III did not take into account the specificities of Member States in terms of the role of the courts and insolvency practitioners in accessing and searching for information needed to trace assets belonging to the insolvency estate. Additionally, the recitals clarify that Member States are able to provide direct access for insolvency practitioners to the information contained in the existing national registers and databases listed in the Annex to the proposal.

Other concerns were related to ensuring the protection of the data to be searched, particularly in a cross-border context. The text, among other safeguards, underlines that access to bank account information through the Bank Account Registers Interconnection System (BARIS) should be exercised in compliance with European Union and national law, as well as national procedures on the protection of personal data.

As regards the directors' duty to request the opening of insolvency proceedings and civil liability (Title V), the compromise text provides a ground for the suspension of the duty of the

directors to request the opening of proceedings in cases where directors take measures designed to avoid damage to the creditors of the insolvent company and to ensure a level of protection for the general body of creditors equivalent to the protection provided by the duty to file for insolvency. Indeed, some Member States were particularly concerned that, due to the specificities of their national insolvency laws, introducing a duty for directors to file for insolvency could potentially lead to a wave of premature insolvency proceedings. Additionally, the new text allows directors to fulfil their duty to request the opening of insolvency proceedings by informing the public of the company's insolvency through notification via a public register.

Concerning measures enhancing transparency of national insolvency laws (Title VIII), the Presidency has streamlined the text and clarified the links with the transparency obligations set out in Regulation (EU) 2015/848 on insolvency proceedings.

Polish presidency

The Polish Presidency should adopt its comprehensive general approach by the first term of 2025. Once the Council has agreed on a full general approach, the European Parliament will adopt its own position. Trilogue negotiations between the European Parliament, Council and Commission are now expected to take place during the second term of 2025 with the directive adopted and in force in 2026. ■

Footnote:

¹ www.consilium.europa.eu/en/press/press-releases/2024/12/13/insolvency-law-council-settles-on-position-for-core-capital-markets-union-legislation/



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