

A closer look at...

Update on harmonisation of EU Insolvency Laws

Emmanuelle Inacio reports on recent developments with regard to the harmonisation of EU Insolvency Laws



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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, in the European Parliament, the draft report by Emil Radev, EPP, the Rapporteur of the responsible Committee on Legal Affairs (JURI) of the EU Parliament, was published on 20 March 2025.¹

If the Rapporteur welcomes this Directive Proposal, he considers that amendments are necessary to clarify procedural requirements and consistency with national legal frameworks further to in-depth assessment.

One of the key modifications focuses on avoidance actions (Title II), ensuring that transactions detrimental to creditors can be challenged more effectively. The amendments clarify the conditions to close loopholes that previously allowed transactions to escape scrutiny, strengthening creditors' protection.

Another set of important amendments concern tracing assets belonging to the insolvency estate (Title III). The amendments propose granting insolvency practitioners timely and easy access to national bank account registers, direct access to central beneficial ownership registers, and other relevant registers. The Rapporteur indeed believes that this change will facilitate the identification and recovery of debtor assets, particularly in cross-border cases, addressing a long-standing issue of insolvency practitioners

encountering significant obstacles when tracing assets in different jurisdictions.

As regards provisions on pre-pack proceedings (Title IV), the Rapporteur believes that this mechanism will help to maximize asset value and preserve business continuity, however additional safeguards should be introduced to ensure transparency and fairness.

Concerning the controversial provisions for liquidating insolvent microenterprises to strengthen procedural efficiency (Title VI), the Rapporteur has concluded that the best course of action is to remove Title VI from the Directive Proposal entirely. This decision reflects the need to ensure that insolvency rules are both robust and resistant to manipulation. Indeed, microenterprises, due to their smaller scale and limited resources, require tailored insolvency procedures that provide a balance between efficiency and creditor protection. Following extensive consultations with stakeholders, including legal experts, industry representatives, and financial institutions, the Rapporteur has identified that significant legal uncertainties, risks of abuse and administrative burden transferred to SMEs can be caused/ triggered by the provisions related to simplified winding-up proceedings for microenterprises under Title VI. The framework lacks adequate protections for creditors and other stakeholders, potentially resulting in financial losses and reduced trust in insolvency proceedings.

The Rapporteur also proposes amendments to strengthen

directors' responsibilities (Title V).

Finally, the Rapporteur is of the opinion that the improving the representation of creditors' interests in the proceedings through creditors' committees (Title VII) ensures that creditors have a stronger voice in insolvency proceedings, increasing transparency and participation.

The deadline for tabling amendments is 22 April 2025.

On 21 March 2025 the Committee on Economic and Monetary Affairs' (ECON) opinion for the JURI on the Directive Proposal was also published,² which is identical to the opinion published on 30 November 2023, and will be brought to a vote without changes. In any case, the ordinary procedure is followed, so formally a deadline for amendments will still be opened.

On Council, as a reminder,³ on 13 December 2024, the Council reached a partial general approach on the text of the compromise proposal issued by the Hungarian Presidency.⁴ 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.

The Polish Presidency has planned a number of meetings of the Insolvency Working Party, and immediately began work with a commitment to reach an agreement on the remaining parts of the proposal at the June Justice

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and Home Affairs (JHA) Council in order to close discussions at Council level on the file and launch negotiations with the European Parliament.

If the Rapporteur proposes removing Title VI on winding-up of insolvent microenterprises from the Directive Proposal entirely, the Presidency Compromise on Title VI proposes instead to keep it, but to offer Member States the possibility to establish lower ceilings than those stipulated in the Annex to Commission Recommendation 2003/361/EC⁵ provided that enterprises which employ fewer than four persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 500,000 are included. If Article 39 of the Directive Proposal provides that appointing an insolvency practitioner (IP) in the simplified winding-up proceedings should be the exception, the Presidency Compromise proposes that Member States determine whether and in which circumstances an IP is to be appointed in simplified winding-up proceedings. It is also proposed that Member States shall ensure that IPs are appropriately remunerated, whenever they are appointed.

The second Presidency Compromise on Title VII on creditors' committees⁶ proposes to specify that it applies to collective proceedings which are based on national laws relating to insolvency but do not apply to preventive restructuring procedures under national law. Moreover, the Presidency Compromise proposes that Member States may adopt or maintain laws which provide for a greater level of protection for the general body of creditors.

As regards pre-packs proceedings (Title IV)⁷, Member States support its objectives and agree that introducing such a mechanism across the EU would help strengthen the Capital Markets Union (CMU). However, certain questions have been raised about this procedure, which, as proposed, would constitute a novelty in many Member States. Specifically, concerns have emerged regarding one of the

most important elements of pre-pack proceedings, namely the assignment of executory contracts, which are necessary for the continuation of the business from the debtor to the acquirer of the debtor's business (Article 27).

Under this provision, contracts essential for the continuation of the business are automatically transferred from the debtor to the buyer of the business without the consent of the debtor's counterparty. This mechanism enables the buyer to seamlessly continue the operations of the acquired business. It can, therefore, make the sale more attractive, expand the pool of potential buyers and lead to higher bids. Furthermore, if the crucial operational counterparties of the debtor travel with the business to the acquirer and are not affected by the bankruptcy proceedings, the pre-pack will not have the stigma of bankruptcy attached to it.

During discussions at technical level, different views have emerged on this issue. Some Member States support the automatic assignment of contracts necessary for the continuity of the business, arguing that only with this mechanism in place will the pre-pack proceedings have a meaningful added value and achieve the main goal of the Directive Proposal.

However, other Member States contend that this provision would undermine the freedom of contract, as a principle of civil law, as it does not adequately consider the interests of the counterparty upon whom a new contractual relationship is imposed. They argue that insolvency law should not facilitate sales that are fundamentally different from those involving solvent businesses.

Therefore, Ministers are invited to express their views on how the objective of pre-pack proceedings, which is to facilitate the sale of a business as a 'going concern', notably through the automatic transfer of executory contracts, can be best achieved within the context of the principle of freedom of contracts. Additionally, the flexibility Member States would need in applying the general rule of



automatic transfer of executory contracts in order to accept this rule as part of the pre-pack proceedings proposed in the Directive Proposal is questioned.

Interestingly, the Rapporteur proposes in his draft report of 20 March 2025 to add to Article 27(1) of the Directive Proposal that the assignment of executory contracts shall not require the consent of the debtor's counterparty or counterparties *"unless the court considers that such consent is necessary in order to protect the interests of the debtor's counterparties."* Article 27(2) provides that Member States shall ensure that the court may decide to terminate the executory contracts provided that the termination is in the interest of the debtor's business or part thereof with the exception of executory contracts relating to licenses of intellectual and industrial. The Rapporteur proposes to add to the exceptions *"credit or financial services contracts"*. ■

Footnotes:

1 https://www.europarl.europa.eu/doceo/document/JURI-PR-771863_EN.html

2 https://www.europarl.europa.eu/doceo/document/ECON-AD-768176_EN.pdf

3 Technical Insight, The Committee on Economic and Monetary Affairs' (ECON) Opinion on the EC's Directive proposal harmonising certain aspects of insolvency law, Winter 2023/2024, Issue 94, pp. 16-17.

4 <https://data.consilium.europa.eu/doc/document/ST-61061-2025-INIT/en/pdf>

5 i.e. enterprises which employ "fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million."

6 <https://data.consilium.europa.eu/doc/document/ST-6124-2025-INIT/en/pdf>

7 <https://data.consilium.europa.eu/doc/document/ST-6266-2025-INIT/en/pdf>

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