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Munich, 14.12.2022

Dear Board Members,

the European Commission has published on **7 December 2022** its "Proposal for a Directive harmonizing certain aspects of insolvency law". The very divergent insolvency rules in the EU are seen by the Commission as a significant obstacle to the further development of the Capital Markets Union as they deliver different outcomes across Member States, and as they lead to different degrees of efficiency in terms of the time it takes to liquidate a company and the value that can eventually be recovered.
Therefore, the Commission's proposal ("Proposal") aims at encouraging cross border investment within the single market through targeted harmonisation of insolvency proceedings and targets the three key dimensions of insolvency law: (i) the recovery of assets from the liquidated insolvency estate; (ii) the efficiency of procedures; and (iii) the predictable and fair distribution of recovered value among creditors.
Insofar the draft provides rules for the harmonisation of these areas of insolvency law and practice:

- Minimum set of harmonised conditions for exercising avoidance actions (Title II).
- Strengthening asset traceability through improved access by insolvency practitioners to asset registers, including in a cross-border setting (Title III).
- Provisions to introduce so called 'pre-pack' liquidation procedures (Title IV).
- Provisions on a duty of directors to timely file for insolvency to avoid potential asset value losses for creditors (Title V).
- Simplified liquidation procedure for insolvent microenterprises (Title VI).
- Requirements for improving the representation of creditors' interests in the proceedings through creditors' committees (Title VII).
- Enhanced transparency for creditors on the key features of national insolvency regimes, including on the rules governing insolvency triggers and the ranking of claims (Title VIII).

EIP has during the drafting period consulted with the co-leads of this project DG Justice and DG FISMA in various ways. EIP's members Robert Hänel, Pawel Kuglarz and board member Daniel Fritz were acting as Private Experts for the Commission for this project.

It was always EIP's general statement that efficient and reliable insolvency proceedings are relying of the involvement of a neutral and professional institution, i.e. the insolvency and/or restructuring practitioner acting as insolvency office holder ("IOH"), being responsible to the general body of creditors. Insofar, EIP is representing the position of insolvency practitioners and their national associations across Europe.

In the light of this and after a first review of our ad-hoc committee of professionals (from the jurisdictions of France, Germany, Poland and Spain) in particular Title II – Avoidance Actions and Title III Asset Tracing may be useful for the powers of the IOH to ensure the best possible recovery for the insolvency creditors. Yet, title VI – Microenterprises must be seen in a more critical light.

To provide you with an overview, first and most relevant questions with regards to the draft proposal we have drawn up with our committee members this first review, that was digested by Daniel Fritz as Harmonisation Law Officer of EIP.

Title II
AVOIDANCE ACTIONS
(Pawel Kuglarz, Poland)

Art. 4 to 12 of the Proposal establish few ways and manners of dealing with avoidance actions.

First and foremost, the proposal for a directive provides in Article 5 that national law that already is in force, can be stricter for debtors, which is a good idea, because many of the EU Member States legal provisions has wide range and long tradition of addressing avoidance actions. Art. 6 provides for so-called look-back period.

As usual avoidance actions are perfected within close relations between interested parties, thus it is very important that in Art. 2 (q) – definitions – the proposal states who should be considered as party closely related to the debtor, identifying situations when debtor is a natural person or an entity.

The proposal provides also for avoidance actions within so-called "Actio Pauliana", well-known across Europe as based on Roman law. It may be discussed that a 4-years look-

back period (as proposed in Article 8) can be too short, however one should remember that certain Member States may need to lengthen this period as result of the Proposal.
As a consequences of avoidance actions, the Proposal states that enrichment or transferred property should be returned or compensated to the insolvency estate, and – what is important – there are no right to set-off claims with this respect.
Finally, the Proposal is addressing the issue of consequences for the party who benefitted from the avoidance actions and liability of third parties, proposing a different approach with regards to few most common situations.

Title III
TRACING ASSETS BELONGING TO THE INSOLVENCY ESTATE

Rubén García-Quismondo Pereda (Spain)

Recitals 13 to 17 and Art. 3 to 18 are aimed at improving IOHs' access to information in public data registers to identify and trace assets, partly set up by Union law and interconnected at European level, such as the Business Registers Interconnection System (BRIS), the system of Insolvency Registers Interconnection (IRI) or the Beneficial Ownership Registers Interconnection System (BORIS).

Each Member State shall designate the courts empowered to access and search its national centralized bank account registry established pursuant to Art. 32a of Directive (EU) 2015/849 ("Designated Courts"). 6 months from transposition date each Member State shall notify the Commission of its designated courts.

Designated Courts will have the power to access and search, directly and immediately, bank account information in other Member States available through the bank account registers (BAR) at a single access point, upon request of IOH, only on a case-by-case basis, where necessary for the purposes of identifying and tracing assets, including those subjects to avoidance actions. The staff will maintain high professional standards of confidentiality, data protection, high integrity and are appropriately skilled

Authorities operating the centralized bank account registries ensure logs are kept for each time a Designated Court accesses and searches bank account information and shall check the logs regularly. The logs shall include: case reference number, date and time of the query or search, type of data used to launch the query or search, unique identifier of the results, name of the Designated Court consulting the registry, unique user identifier of the staff member of the Designated Court who made the query or performed the search and, where applicable, of the judge who ordered the query or search and, as far as possible, the unique user identifier of the recipient of the results of the query or search, verifying the admissibility of a request and the lawfulness of personal data processing, and whether the integrity and confidentiality of personal data is ensured. The logs shall

erased five years after their creation, unless they are required for monitoring procedures that are ongoing.
IOHs should have timely access to the information held in the beneficial ownership registers set up in the Member States and is accessible through the system of interconnection of beneficial ownership registers. The information is limited to the name, month, year of birth, country of residence, nationality of the legal owner, nature and the extent of the beneficial interest held.

Insolvency practitioners, regardless of the Member State where they have been appointed as IOH, have direct and expeditious access to the national asset registers listed in the Annex I located in their territory, where available. The access should not be subject to access conditions that are de jure or de facto less favorable than the conditions granted to the IOHs in that Member State.

Title IV
PRE-PACK PROCEEDINGS
Christophe Thevenot (France)

Recitals 21 to 31 and Art. 19 to 15 of the Proposal are aimed at the introduction of a pre-pack proceeding (Pre-Pack or PPP). With the goal to ensure the best value recovery for creditors, the pre-pack proceeding proposed by the European Commission rely on strong principles:

- The PPP must be part of national insolvency laws, where the preparation phase of the sale, usually confidential, is followed by a liquidation phase, ruled as an insolvency regime under supervision of a competent authority;
- A monitor is appointed by the Court as the main actor and IOH in the preparation phase, he will be appointed as insolvency administrator in the liquidation phase. The monitor has to meet all eligibility criteria that the insolvency law in the Member State where the pre-pack proceedings are opened requires for appointing an IOH;
- The debtor can benefit from a stay of individual enforcement actions in accordance with Art.6 and 7 of Directive (EU) 2019/1023, where it facilitates the seamless and effective roll-out of the pre-pack proceedings
- The court may accept the offer proposed by the monitor, provided that the competitiveness, transparency and fairness of the sale process are satisfied, or run a quick (4 weeks) auction process where the previous best bidder remains as a purchase price floor ("stalking horse" bid) ;
- Secured creditors consent, when needed, is applicable if the pre-pack offer does not satisfy the best-interest-of-creditors test

EIP sees in the Proposal the confirmation of the central role of insolvency practitioners, highly specialized professionals, court appointed and liable for their actions. EIP wants to emphasize the effectiveness of pre-pack proceeding and supports the EC's initiative for promoting the sale and continuity of troubled, but viable, businesses to new owners, at the best value in the interest of creditors and other stake holders.

Title V
DIRECTORS' DUTY TO REQUEST THE OPENING OF INSOLVENCY PROCEEDINGS AND CIVIL LIABILITY

Beatrice Dunogué-Gaffié (France)

Title V covers duties of the management board of insolvent legal entities. The main duty, across all Member States will be at least to file an insolvency petition within – as proposed by the European Commission - no later than 3 months from becoming aware of the insolvency situation.

Insofar, the Proposal is highlighting the obligation of the member states to ensure that company directors are obliged to request the opening of insolvency proceedings less than three months after the getting aware of insolvency.

The consequence of missing this duty shall be the personal liability of the management towards their creditors in the event of default. EIP is quite supportive to this general principle which would be imposed on the states. In fact, EIP has always defended the idea of a timely consideration in a crisis situation, i.e. as early as possible in case of financial difficulties, e.g. within the framework of amicable procedures for the prevention of difficulties. Yet, in the stage of a proven situation of insolvency, EIP considers that the success of the rescue of a company in financial difficulties depends largely on the speed with which the problems are detected. Here, the term of three months seems to be a reasonable average period, which will have to be assessed in each Member State according to each national notion of the state of insolvency.

Moreover, it is clear, that the second chance, and the question, whether it should be granted to entrepreneurs, shall be restricted to those who act compliant to their legal obligations.

Title VI
WINDING-UP OF INSOLVENT MICROENTERPRISES

Dr. Robert Hänel (Germany)

Recitals 34 to 46 and Art. 38 to 57 of the Proposal deal with the introduction of a special regime for winding-up insolvent microenterprises, defined in Art. 2 lit. (j) according to the Commission's recommendation 2003/361/EC, i.e. enterprises with a maximum turnover and balance sheet total of 2 mio. € and less than 10 employees, but subject to the Member States definition of a wider scope of application.

The Proposal aims to ensure that insolvent – in the sense of easily ascertainable illiquidity (recital 37 and Art. 38 para 2) – microenterprises are wound up, on request of the debtor or a creditor (Art. 41 para 1 and 2), in an orderly manner using a swift and cost-effective proceeding. As the ability to cover the administrative costs shall not be a precondition to access the proceeding, Member States will have to introduce rules to ensure funding.

One major aspect to achieve cost effectivity is, that, as a rule (recital 40), debtors shall remain in control of their assets and day-to-day operation of the business, overseen only by a court or administrative authority (Art. 43) and optionally protected by a stay of individual enforcement actions (recital 41 and Art. 44). An IOH may only be appointed, if both there's a request by the debtor or (a) creditor(s) and the costs of the IOH's intervention are covered by the insolvency estate or the requesting party (Art. 39).

In order to make the proceeding speedy and lean, the Proposal establishes short deadlines and the use of standard forms (recital 38), communication via electronic means (Art. 40) and the "cry or die" principle for creditors, i.e. the claims listed by the debtor are considered as lodged and undisputed as far as creditors don't raise objections or concerns on claims included (recital 42 and Art. 46).

Furthermore, the competent authority decides on whether the value of the assets justifies a sale, whether secured creditors may take over encumbered assets themselves and, whether a sale – piecemeal or the business as a going concern – is to be made via an electronic auction platform Member States will have to establish (recital 44 and Art. 50 ff.) or, as an exception, by other means (Art. 49). The pursuit of avoidance actions shall be left to the discretion of the creditors or, if applicable, to the IOH; in case of significant or complicated avoidance claims the competent authority may convert the simplified proceeding into standard insolvency proceedings (recital 43 and Art. 47).

Entrepreneur debtors as well as individuals who are personally liable for the debts of an unlimited liability microenterprise debtor shall be fully discharged from their debts according to Title III of the Directive (EU) 2019/1023 (recital 46 and Art. 56). In case the

microenterprise is a legal person, the insolvency or individual enforcement proceeding against a personal guarantor for business-related debts shall be coordinated or even consolidated with the simplified winding-up proceedings (Art. 57).

The suggested special regime for microentrepreneurs is bold and its implementation will require substantial changes in many national laws. One major question is whether the explicit aim to allow an orderly (see page 17 of the explanatory memorandum) winding-up even for asset-less microenterprises can be achieved by a "quick and dirty" approach with, as a rule, a debtor in possession, who, as the proposal itself recognizes (see recital 37), may in many cases not even be able to maintain orderly bookkeeping and recognize his insolvency. The new Spanish law tries to tackle this issue with requiring the debtor to have a mandatory (qualified) representative, but that's just shifting procedural costs for an (independent) IOH to a (dependent) debtor's counsel without reducing the overall costs.

Courts themselves will (in many Member States) not be able to provide qualified oversight (which was one of the motivations for the Directive 2019/1023). If the new Directive doesn't leave it to the courts' discretion to appoint a qualified person to supervise the debtor, simplified proceedings will not lead to orderly liquidations.

Title VII
CREDITORS' COMMITTEE

Mateusz Kaliński (Poland)

Recitals 47 to 57 as well as Art. 58 to 67 of the Proposal cover important issues regarding regulation for Creditors' Committees, because they can enhance creditors participation within the proceedings. Basically, the role of Creditors' Committees is to supervise the IOH, and good and sound communication between IOH and creditors is crucial within insolvency proceedings.

When it comes to more details, pursuant to Art. 58.2., covering the possibility of establishing even in the decision on the declaring of bankruptcy may speed up proceedings and allow creditors to participate even in earlier stage, what can be especially important with regards to creditors' bankruptcy petition. However, national Member States regulations may also apply as the Proposal is flexible in this regard.

The Proposal sets forth in Article 60.1. the possibility to establish few Creditors' Committees related to different groups of creditors. Also, as proposed in Article 58.3., Member States may decide whether the Creditors' Committees should be established in all proceedings or only in major ones.

Subject to Article 61, the number of members may be divided between the 3 – 7 members, who can be also replaced or removed.

One of the most important part, ensuring smooth proceedings is the duty to drafting a protocol of working methods, which can constitute a self-governance document with regard to the Creditors' Committees meetings and operational issues. More detailed provisions on these issues are covered by Article 63 of the Proposal.

Article 64 refers to powers and in fact the role of Creditors' Committees within proceedings, which can be quite important and can give the creditors proper tool for supervising the proceedings.

The Proposal provides also for expenses and remuneration of the members of Creditors' Committees and important provisions on their liability (rationale behind limiting the liability of Creditors' Committees members is clear and should encourage taking active part therein, benefiting the general body of creditors and efficiently controlling the trustee) and possibility to appeal certain decisions of Creditors' Committees. With regard to the appeal, the key issue to consider is the time and efficiency of such court control.

Title VIII
MEASURES ENHANCING TRANSPARENCY OF NATIONAL INSOLVENCY LAWS

Luis Martin (Spain)

Article 68 Key Information Factsheet shall be submitted to the Commission six months after the deadline for transposition of this directive.
Content:

(a) Conditions for the opening including:
- The list of persons that can request the opening of insolvency procedures.
- 2.The list of conditions that trigger the opening of insolvency proceedings.
- 3.Where and how the request for the opening of insolvency proceedings can be submitted.

4. How and when the debtor is notified of the opening of insolvency proceedings.

(b) The rules governing the lodging, verification and admission of claims. Containing:
- List of persons that can lodge a claim.
- The list of conditions to lodge a claim.
- The time limit to lodge a claim.
- Where to find the form to lodge a claim, when applicable.
- How and where to lodge a claim.
- How the claim is verified and validated.

(c) The rules governing the ranking of creditors´ claims and the distribution of proceeds from the realization of assets ensuing from the insolvency proceedings. Containing:

- A brief description of how rights and claims of creditors are ranked.
- A brief description of how proceeds are distributed.
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(d) The average reported length of insolvency proceedings, as referred to in Article 29(1) of Directive (EU)2019/1023.
The rest of this title refers to formal presentation, wording, translations and an update when there may be relevant amendments to national law.

EIP will stay involved in this process and draft an even more comprehensive statement to be sent and discussed with the European Commission by end of January 2023. Offering our leverage as the only pan-european association purely dedicated to the professions of insolvency practitioners we hereby want to encourage you as our member association to share your views and positive criticism on the European Commission's Proposal with us. To reflect your views in our formal statement we ask you to come back to us in case you want to be involved here with your comments no later than 15 January 2023. In the meantime we will publish papers of our ad hoc-committee members with their more detailed readings and findings regarding the proposal on our homepage.
We wish you a Merry Christmas and a happy and prosperous 2023.
Kind regards

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