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Harmonising insolvency: the EU's next chapter

Nearly three years have passed since the European Commission put forward its ambitious **Proposal** to harmonise core aspects of insolvency law across the European Union. Submitted to the Council and the European Parliament on 7 December 2022, this text targets key shortcomings and divergences that have long characterised insolvency proceedings in the European Union.

At its core, the Proposal seeks to tackle the legal uncertainty and high commercial costs that arise when creditors are faced with (at times) radically different proceedings depending on the Member State involved. By harmonising critical elements of the insolvency procedure that particularly affect timing, efficiency, and outcomes, the Commission aims to remove a stubborn roadblock to the free movement of capital. This drive sits at the centre of the Commission's priority to move towards a Capital Markets Union, a single market for capital where cross-border investments are protected and facilitated.

Timing

On 12 June 2025, the Council agreed its negotiating position, the so-called "General approach", on the Proposal. Shortly after, on 1 July 2025, the European Parliament published its position – marking two significant milestones in the legislative process.

With positions set by both the Council and the European Parliament, trilogue negotiations are scheduled to begin on 24 September 2025, following which meetings are expected to occur every two to three weeks until an agreement is reached on all provisions. A final text might be adopted as early as the first half of 2026, although a longer timeline cannot be excluded at this stage.

Additionally, the final implementation timeline for Member States remains to be settled as well: while the Commission proposes a two-year period, the Council calls for three years and the European Parliament just one. Yet, with discussions gathering pace, the new directive is firmly in sight.

The content of the Proposal

The Proposal focuses on three main areas:

1. **Maximising asset and value recovery**
   The Proposal introduces harmonised rules governing avoidance (or clawback) actions, enabling certain illegitimate legal acts performed before insolvency to be challenged when they diminish the debtor's estate or unfairly favour certain creditors. The Proposal also enhances asset traceability by strengthening insolvency practitioners' powers to access essential information, including bank account and beneficial ownership data.
2. **Enhancing the efficiency of insolvency proceedings**
   The Proposal requires all Member States to introduce pre-pack proceedings, where the sale of (part of) the debtor's business is prepared ahead of formal insolvency proceedings. The Proposal harmonises the core characteristics of pre-pack proceedings across the Union, ensuring going concern sales at the best market value rather than in the context of piecemeal liquidation. The Proposal also addresses executory contracts – contracts that are necessary for the continuation of the debtor's activities – by stipulating that these be automatically transferred to the insolvent business' acquirer(s) without their consent.
3. **Protecting creditors' rights**
   The Proposal introduces the possibility of forming creditors' committees in insolvency proceedings under set conditions to encourage effective creditor involvement, improve information flow between the debtor and creditors, and enable supervision of the insolvency practitioner's role.

Amendments introduced by the Council and the European Parliament

Both the Council and the European Parliament introduced some notable amendments to the initial Proposal, which sometimes diverge, in the following areas:

- **Avoidance actions:** Both institutions narrowed the scope of avoidance actions, requiring actual knowledge of a debtor's insolvency by third parties for a transaction to be challenged – merely negligent ignorance no longer suffices. The Proposal envisages a three-month lookback period for preferential transactions, one year for transactions at inadequate consideration, and two to four years for deliberately harmful transactions, with the Council and Parliament still differing on this last point.
- **Pre-pack proceedings:** The provisions on pre-pack proceedings remain largely consistent with the original Proposal, but both the Council and the European Parliament have included some key amendments:
  - According to the European Parliament, **access to the preparation phase** of pre-pack proceedings, should only be possible if insolvency is likely. The Council would allow Member States to decide whether this threshold is needed. This restriction of access helps ensure that pre-pack proceedings are reserved for companies genuinely at risk of insolvency – preventing abuse and ensuring that valuable resources are allocated only where needed;
  - While both the Proposal and the European Parliament's position allow the debtor to retain **control** over its assets and day-to-day operations during the preparation phase, this provision is removed in the Council's General approach. For debtors, setting aside this provision altogether would however likely remove one of the key advantages of this type of proceedings. Without retaining control, debtors would indeed have a much weaker incentive to opt for pre-pack proceedings. For creditors however, the assurance that their debtor(s) would not retain control can in certain cases be beneficial, especially when they have lost trust in their ability to adequately manage the business. It remains to be seen in which direction the three institutions will ultimately go during the trilogues;
  - For **enforcement actions**, the Parliament limits any stay of enforcement to cases where it is strictly necessary. On the contrary, the Council and Commission would allow a stay where this "facilitates" the preparation of the pre-pack proceedings. This broader criterion offers greater flexibility for companies seeking to relieve pressure from creditors. However, its vagueness could lead to abusive requests for stay of enforcement and more frequent or prolonged stays, reducing certainty for creditors and stakeholders and potentially unduly delaying asset recovery;
  - Prior to the sale of the debtor's business, the insolvency practitioner must report to the court on whether the **best-interest-of-creditors test** is met – that is, whether creditors would be at least as well off under the proposed sale as in a piecemeal liquidation. The Council and Parliament take different approaches to the benchmarks for this test, proposing standards such as a going concern sale or the next-best-alternative scenario. However, relying on such broad or varied benchmarks can reduce predictability and transparency, which is generally unfavourable for both companies and creditors; and
  - Notably, both Council and Parliament now propose that the **automatic transfer of executory contracts** to acquirers may require their consent, with Member States to determine the specific conditions for such transfers. It remains to be seen whether parties will be allowed to derogate from this rule, or whether contractual freedom will be wholly curtailed in this context. This issue is particularly relevant in the context of *intuitu personae* contracts, an aspect which the institutions seem not to have discussed so far.
- **Creditors' committee:** The Proposal initially allowed Member States to allow the establishment of multiple creditor committees. However, both Council and Parliament have removed this provision. This amendment leaves key questions about committee structure and composition unresolved – for example, whether creating multiple committees is possible and, if so, whether these should be established per class of creditors or enjoy specific voting rights.
- **Directors' duty to file for insolvency proceedings:** All three institutions agree on a maximum three-month window for directors to file for insolvency proceedings once they become aware of insolvency, yet both Council's and Parliament's amendments introduce exceptions where directors have proactively safeguarded creditors' interests. However, it remains to be seen whether the scope of such proactive actions will be defined in the final version of the directive and especially whether anti-abuse safeguards will be inserted. This would be particularly necessary in order to avoid uncertainty for creditors and other stakeholders as to whether the exception is being properly invoked.

Given the presence of certain divergences between the positions of the three institutions, it can reasonably be expected that some of the aforementioned points might still significantly evolve in the course of the trilogue negotiations.

Businesses outlook

The proposed directive represents a welcome development for businesses operating across EU borders, creditors, shareholders and employees, addressing long-standing inefficiencies that have hindered cross-border insolvency proceedings. This harmonisation should be welcomed as overall beneficial, as it promises greater predictability when navigating insolvency in multiple Member States.

In particular, multinational groups will be better positioned to implement more coherent, streamlined policies for managing financial distress. For creditors and debtors alike, the directive is expected to enhance efficiency and cost-effectiveness especially for what concerns asset recovery.

Nonetheless, the directive's impact will inevitably vary across Member States. Jurisdictions with advanced and efficient insolvency regimes may experience only incremental amendments on technical points. Conversely, those with less developed insolvency frameworks or more substantial divergence from the directive will likely require substantial legal reforms, especially in the area of pre-pack proceedings.

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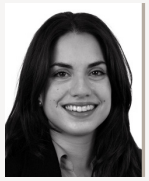

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