Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL harmonising certain aspects of insolvency law

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The **lack of harmonised** insolvency regimes has long been identified as one of the **key obstacles** to the freedom of capital movement in the EU and to greater integration of the EU's capital markets.

In 2015, the European Parliament, the Council, the Commission and the European Central Bank jointly identified insolvency law as a key area for achieving a 'true' **Capital Market Union**.

This has also been the consistent view of international institutions, such as the **International Monetary Fund**, who in 2019, identified insolvency practices as one of 'the three key barriers to greater capital market integration in Europe', alongside transparency and regulatory quality.

The **European Central Bank** has repeatedly stressed the need "to address the major shortcomings and divergence between insolvency frameworks [..] beyond the draft Directive on Insolvency, Restructuring and Second Chance since 'more efficient and harmonised insolvency laws can improve certainty for investors, reduce costs and facilitate cross-border investments, while also making risk capital more attractive and accessible to companies´.

For that reason, a **proposal for a new Directive** on this subject has been drafted and launched on December 7th 2022.

The proposal for a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of insolvency law consists of 63 recitals, 73 articles, distributed in nine titles, and one Annex.

The **objective** of this Directive is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures in the area of insolvency.

The **wide differences** in substantive insolvency laws acknowledged by Regulation (EU) 2015/848 of the European Parliament and of the Council **create barriers** to the internal market by reducing the attractiveness of cross-border investments, thus impacting the cross-border movement of capital within the Union and to and from third countries.

Subject matter and scope

This Directive lays down **common rules on**:

- avoidance actions
- the tracing of assets belonging to the insolvency estate
- pre-pack proceedings
- the duty of directors to submit a request for the opening of insolvency proceedings
- simplified winding-up proceedings for microenterprises
- creditors' committees
- the drawing-up of a key information factsheet by Member States on certain elements of their national law on insolvency proceedings.

What about the new Directive and the LR?

1. Avoidance actions and the third parties.
2. Location of assets: movable and **immovable**.
3. Pre-pack procedures.
4. Simplified settlement procedures.

Avoidance actions and the third parties

Article 11. Liability of third parties

1. Member States shall ensure that the rights laid down in Article 9 are **enforceable against an heir or another universal successor of the party which benefitted** from the legal act that has been declared void.

2. Member States shall ensure that the rights laid down in Article 9 are **also enforceable against any individual successor of the other party to the legal act** that has been declared void if one of the following conditions is fulfilled:

   (a) the successor acquired the asset against no or a manifestly inadequate consideration;

   (b) the successor knew or should have known the circumstances on which the avoidance action is based.

   The knowledge referred to in the first subparagraph, point (b), shall be presumed if the individual successor is a party closely related to the party which benefitted from the legal act that has been declared void.

Location of assets

Article 18. Access by insolvency practitioners to national asset registers.

1. Member States shall ensure that insolvency practitioners, regardless of the Member State where they have been appointed, **have direct and expeditious access to the national asset registers listed in the Annex** located in their territory, where available.
2. With respect to access to the national asset registers listed in the Annex, every Member State shall ensure that the insolvency practitioners appointed in another Member State **are not subject to access conditions that are *de jure* or *de facto* less favourable** than the conditions granted to the insolvency practitioners appointed in that Member State

Pre-pack procedures

Article 34. Protection of creditors' interests.

4. Member States in which the consent of holders of secured claims is required in winding-up proceedings for the release of security interests **may waive such consent**, provided that the security interests relate to assets that are necessary for the continuation of the day-to-day operations of the debtor's business or part of it and one of the following conditions is met:

(a) creditors of secured claims fail to demonstrate that the pre-pack offer does not satisfy the creditors' best interest test;

(b) the secured creditors have not submitted (directly or through a third party) an alternative binding takeover offer that would allow the estate to obtain a better recovery than under the proposed pre-pack offer".

Thank you