

Challenges and Potential for Harmonizing Insolvency Legislation Within the European Framework

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Abstract

The functional development of business relations requires the existence of a predictable and coherent legal framework that reduces legal uncertainty. The need to eliminate disparities in insolvency regulations among Member States' legislations has prompted an effort to harmonize the existing rules so that they comply with minimum standards. The previous Directive (EU) 2019/1023 harmonized only aspects related to pre-insolvency restructuring and debt discharge after insolvency, but not the essential characteristics of the insolvency procedure itself. The main areas targeted by Proposal for a Directive COM (2022)702 to improve insolvency rules are: enhancing the efficiency of procedures by reducing their costs and duration; increasing the recovery rate of assets and improving their traceability; and ensuring a predictable and equitable distribution of the recovered value among creditors. These objectives can be achieved by adjusting the rules concerning: strengthening the duties and liability of directors; reinforcing the role of creditors' committees; selling the debtor's business through pre-pack procedures; the regime governing actions for the annulment of prejudicial prior acts; asset tracing and granting insolvency practitioners direct access to bank account registers and information on beneficial owners; interconnecting electronic auction systems for asset sales; increasing transparency through the preparation of a standardized information sheet.

Keywords: directors' liabilities, avoidance actions, asset tracing, pre-pack proceedings, enhancing transparency.

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1. The Importance of Harmonizing the Insolvency Laws of the Member States

The absence of harmonized insolvency regimes has long been identified as one of the principal obstacles to the free movement of capital and to deeper financial integration within the EU market. The European Central Bank has repeatedly emphasized the need “to address deficiencies and divergences among insolvency

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frameworks beyond the scope of the Insolvency, Restructuring and Second Chance Directive,² since a more efficient and harmonized legal framework for insolvency proceedings can enhance investor certainty, reduce costs, and facilitate cross-border investment, while simultaneously making venture capital more attractive and accessible to enterprises.

The efficient functioning of business relations within the European Union requires a stable and coherent legal framework that minimizes legal uncertainty for investors. At present, investors must take into account the diverse national insolvency rules when investing in EU Member States other than their home jurisdiction. Significant differences among the insolvency laws of the Member States have been found to constitute a barrier to investment decisions.

2. Constraints of the Existing European Legal Framework on Harmonization Efforts

With a view to strengthening the Capital Markets Union (CMU), on 7 December 2022 the European Commission presented the “Proposal for a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of insolvency law”³ (hereinafter referred to as the “Proposal for a Directive”⁴). The foundation of the Proposal for a Directive lies in Article 114 of the Treaty on the Functioning of the European Union (TFEU), which grants the European Union the competence to adopt measures aimed at approximating the laws of the Member States for the purpose of establishing and ensuring the functioning of the internal market. The Proposal for a Directive seeks to address the gaps in the EU’s previous legislation on insolvency rules and to provide a favourable context for the harmonization of national laws.⁵

The European Insolvency Regulation 2015/848 (EIR)⁶ introduced uniform rules on jurisdiction, designed to determine the Member State in which cross-border insolvency proceedings are to be conducted and the applicable law. Although it does not affect the substantive content of national insolvency legislation, the Regulation contributes to improving cross-border information exchange and to facilitating the implementation of insolvency proceedings and decisions⁷.

² Directive (EU) 2019/1023 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on procedures concerning restructuring, insolvency and discharge of debt, OJEU, 26.06.2019, L172/18.

³ COM(2022)702 final – 2022/0408 (COD).

⁴ Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 2022/0408(COD) (Harmonisation Proposal).

⁵ Eugenio Vaccari, „Book Review. An introduction to European insolvency law, Robert Galen (1st edition) (2021, Wolters Kluwer, Deventer), viii + 220 pp., EUR 70, ISBN 978-90-131-6458-9”, *International Insolvency Review*, Volume 32, Issue1, Spring 2023: 192-193, <https://doi.org/10.1002/iir.1478>.

⁶ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) OJ L 141, 5 June 2015, 19.

⁷ Francisco Garcimartin, Christoph Paulus, „The 28th insolvency law: Reflections on a *lex concursus*

The Regulation confirms that, due to the considerable divergences among substantive national laws, it is not practicable to introduce a “universal insolvency procedure at the EU level” without exceptional solutions (for example, with respect to the guarantees and preferential rights recognized for certain creditors within insolvency proceedings).⁸

Directive 2019/1023 on “preventive restructuring frameworks, discharge of debt and disqualifications, as well as measures to increase the efficiency of restructuring, insolvency and discharge procedures” achieved only limited harmonization, confined to pre-insolvency proceedings (facilitating debt restructuring prior to the opening of insolvency) and post-insolvency discharge procedures. It also harmonizes certain restricted aspects of insolvency proceedings themselves, such as the training of judges and insolvency practitioners, the digitalization of procedures, and data collection. Consequently, the current EU legislation does not harmonize all the fundamental features of insolvency proceedings, which remain highly divergent and constitute a significant obstacle to the single market and to the creation of the Capital Markets Union.

In its resolution of 8 October 2020 on the further development of the CMU, the European Parliament emphasized the importance of enhancing legal certainty for cross-border investments through the efficiency and effectiveness of national insolvency procedures.

3. The Main Objectives of the Proposal for a Directive

The general objective of the Directive is to contribute to the proper functioning of the internal market and to remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and the freedom of enterprise, obstacles arising from the differences among the domestic legal rules of EU Member States concerning insolvency procedures. The streamlining of insolvency proceedings aims to ensure that such procedures are conducted more swiftly, more simply, and with greater accessibility. The objective of the legislative proposal is to mitigate the divergences among Member States’ insolvency laws, thereby enhancing the transparency of proceedings conducted within the European framework and reducing barriers to the free movement of capital. The Proposal for a Directive on the harmonisation of certain aspects of insolvency law within the European Union was adopted by the European Commission together with other measures intended to further develop the EU Capital Markets Union.

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europaea”, *International Insolvency Review*, Volume 34, Issue 2, Summer 2025: 428-447, <https://doi.org/10.1002/iir.70004>.

⁸ Reinhard Bork, Renato Mangano, *European cross-border insolvency law* (2nd edition) (2022, Oxford University Press) p. 150 et seq.

Union. Building upon the initial draft of 2022, several compromise proposals have been elaborated. With each revision, the objective has been to streamline the text, to clarify the obligations of the Member States, and to bring national insolvency regimes closer together.

In December 2024, following an analysis of the positions expressed within the Council, a new amended version was published [COM (2022) 702; 2022/0408 (COD)]. Subsequently, the European Parliament's report issued in July 2025 conducted an in-depth assessment of the form proposed by the Commission and considered that certain amendments were necessary to clarify procedural requirements and ensure consistency with national legal frameworks.

The amendments to the draft report advocate the establishment of minimum standards for essential procedural aspects. This approach indicates an intention to refine the European insolvency framework to make it more predictable and integrated. Upon the conclusion of negotiations among the European Parliament, the Council, and the Commission, agreement will be reached on the final text; the revised form will be adopted in plenary and published in the Official Journal of the EU, with entry into force expected towards the end of 2025.

The purpose of the Proposal for a Directive is to harmonize certain substantive rules on corporate (non-financial) insolvency across the EU, in order to make them more efficient and more predictable. The main areas targeted by the Proposal for a Directive to improve and harmonize insolvency rules are: enhancing procedural efficiency by reducing costs and duration; increasing the rate of asset recovery and improving asset traceability; and ensuring the predictable and equitable distribution of recovered value among creditors.⁹

4. Means Configured to Achieve the Objectives of the Proposal for a Directive

The harmonisation objectives of the Proposal for a Directive can be achieved by reconfiguring certain institutions that are essential for the proper conduct of insolvency proceedings, as well as by creating new mechanisms within national legislations. The main means employed concern reforms in the following directions:

4.1. Determination of Directors' Duties and Liability in Respect of Filing Insolvency Petitions

The Proposal for a Directive establishes the statutory duty of directors to file a request for the opening of insolvency proceedings in a timely manner, no later than three months from the date on which they became aware, or ought to have become aware, that the undertaking had entered into insolvency. Furthermore, it provides that

⁹ Christoph Paulus and Paul Omar, 'Securities Dominance – Once and Forever?', in Eugenio Vaccari, Emilie Ghio (eds.), *The Perpetual Renewal of European Insolvency Law*, (INSOL Europe, 2020), p. 85 et seq.

failure to submit the request within the prescribed period may result in the director being held subsidiarily liable for the coverage of outstanding liabilities.

In order to ensure that directors do not act contrary to the interests of creditors by delaying the initiation of proceedings despite clear signs of insolvency, Member States should enact provisions establishing the civil liability of directors for breach of the obligation to file such a request. In such cases, directors should be required to compensate creditors for any damages arising from the deterioration of the undertaking's recoverable value, as compared to the situation that would have prevailed had the request been submitted in due time.¹⁰

In response to concerns expressed by Member States that this obligation might trigger a "wave of premature insolvency proceedings," the duty is currently suspended in cases where directors undertake measures aimed at preventing harm to the creditors of the insolvent company and ensuring a level of protection equivalent to that afforded by the opening of insolvency proceedings.¹¹

The amendments reinforce directors' responsibilities while simultaneously lowering the threshold for fulfilling this obligation, allowing directors to comply by submitting a notice in the public register to inform third parties of the company's insolvency.

It has been demonstrated that insolvency reforms aimed at promoting debt restructuring and internal reorganisation contribute to the preservation of employment, while also reducing failure rates among small and medium-sized enterprises and preventing the liquidation of otherwise viable businesses.

4.2. Strengthening the Role of the Creditors' Committee in Ensuring Equitable Representation of Creditors

Another initiative introduced by the Proposal for a Directive is the establishment of creditors' committees in all Member States under certain circumstances. The creditors' committee strengthens the position of creditors within insolvency proceedings¹². This body ensures the involvement of certain creditors who may face difficulties in participating directly in the proceedings, due to factors such as limited resources, the relatively low economic value of their claims, or their geographical distance from the place where the proceedings are conducted. The formal introduction of creditors' committees guarantees that creditors are able to make proposals or express positions during insolvency proceedings, thereby enhancing transparency and participation.

¹⁰ Ana Filipa Conceição, Catarina Frade, Lorenzo Benedetti, Monika Maśnicka, Ruben Hollemans, Ruben Jesus, „Supervision and liability of insolvency practitioners in EU and national law”, *Revista Electrónica De Direito*, vol. 30, Issue 1 (February 2023): 5-26, https://doi.org/10.24840/2182-9845_2023-0001_0002.

¹¹ Reinhard Bork, „Pre-insolvency frameworks: Developments in the European Union”, *International Insolvency Review*, Vol. 33, Issue 1, Spring 2024: 6-22, <https://doi.org/10.1002/iir.1515>.

¹² Frederic Closset, Christoph Grossmann, Christoph Kaserer, Daniel Urban, „Corporate restructuring and creditor power: Evidence from European insolvency law reforms”, *Journal of Banking & Finance*, vol. 149, April 2023, 106756, <https://doi.org/10.1016/j.jbankfin.2022.106756>.

The legislative act harmonises certain features of the creditors' committee across all Member States, including its composition, powers, and the personal liability of its members. In doing so, the Proposal for a Directive simplifies the procedure for establishing creditors' committees and increases their flexibility, rights, and obligations, ensuring that they remain effective and relevant within the framework of insolvency proceedings.

Under the current regulatory frameworks of Member States, the creditors' committee is typically elected by the reporting creditors' meeting, which generally takes place more than 100 days after the opening of insolvency proceedings¹³. Consequently, there is a considerable period during which the insolvent debtor remains unsupervised by a creditors' committee. Although existing legislation allows for the possibility that, upon initiation of insolvency proceedings, the court may establish a creditors' committee, the procedure remains uncovered during the supervisory phase.

One of the constructive solutions proposed by the Directive is the establishment of a creditors' committee immediately following the opening of insolvency proceedings, and even prior to their commencement. This would allow for the committee to be instituted either upon submission of the initial application or immediately after the proceedings are opened. The proposal clarifies that Member States may determine whether the establishment of the creditors' committee is to be ordered by the courts, insolvency practitioners, or other competent authorities¹⁴.

According to the compromise text, Member States are permitted to limit the establishment of creditors' committees to large undertakings, on the grounds that "the committee may cause delays in the proceedings or introduce unnecessary complexity, which could ultimately outweigh any benefits it may offer to creditors."

4.3. Pre-Packaged Sale of the Debtor's Business Prior to the Opening of Insolvency Proceedings

Another innovative instrument introduced by the Proposal for a Directive is the implementation of "pre-pack" procedures. These mechanisms are designed to expedite the sale of distressed businesses prior to the commencement of formal insolvency proceedings. It is argued that selling the debtor's business as a going concern may be more advantageous than selling its individual assets separately.

In practice, the sale of the debtor's enterprise (or part thereof) is prepared and negotiated before the formal opening of insolvency proceedings. The proposed framework adopts a two-stage approach: a preparatory phase for identifying potential buyers, followed by a liquidation phase for executing the sale. This structure enables the transaction to be completed and proceeds to be realised shortly after the opening of

¹³ Klaus Heine and Wolfgang Kerber, "European Corporate Laws, Regulatory Competition and Path Dependence", *European Journal of Law and Economics*, vol. 13, (2022): 47–71. <https://doi.org/10.1023/A:1013113925093>.

¹⁴ Anthony Casey, Aurelio Gurrea-Martínez and Robert Rasmussen, "A Commitment Rule for Insolvency Forum", *ECGI Working Paper Law*, no. 754 (2024), https://www.ecgi.global/sites/default/files/working_papers/documents/acommitmentruleforinsolvencyforum.pdf, accessed on 10 December 2026.

insolvency proceedings aimed at winding up the business. Such procedures are already in use in certain EU Member States, such as Spain.

A key feature of the pre-pack mechanism is the possibility of automatically transferring ongoing contracts — those essential to the continuation of business operations — from the debtor to the purchaser, without requiring the consent of the debtor's counterparty. For this reason, the Council has introduced a series of safeguards to protect contractual freedom.¹⁵

In order to prevent a business from losing value solely due to its involvement in insolvency proceedings, it is essential to ensure that operational counterparties — such as the debtor's suppliers or clients — are transferred to the purchaser and remain unaffected by the insolvency process. Accordingly, the opening of insolvency proceedings should not result in the premature termination of contracts under which the parties are still required to perform certain obligations and which are necessary for the continuation of commercial activity. Such termination would unjustifiably jeopardise the value of the enterprise.

The European Parliament's report considers that this mechanism will contribute to maximising asset value and preserving business continuity, but emphasises the need for additional safeguards to ensure transparency and fairness. It is estimated that harmonising pre-pack sales at the European level may generate value and prove beneficial to all stakeholders involved in insolvency proceedings.

4.4. The Legal Regime Governing Avoidance Actions Against Detrimental Pre-Insolvency Transactions

The Proposal for a Directive includes a set of provisions aimed at introducing effective rules on avoidance actions that may be initiated by the insolvency practitioner to reintegrate into the insolvency estate assets that were previously alienated by the debtor. It proposes amendments to national legislation to ensure that transactions detrimental to the interests of creditors can be vigorously set aside.

The Council has agreed on provisions designed to prevent debtors from diminishing the value recoverable by creditors in the event of a company's insolvency. Avoidance actions allow for the challenge of transactions carried out by the debtor prior to the commencement of insolvency proceedings, thereby protecting the estate against the illegitimate removal of assets from the creditors' pool. For instance, if a debtor, prior to filing for insolvency, acquires goods at a certain price and subsequently sells them a year later at half that price or below market value, such transactions fall within the scope of actions that should be subject to avoidance, as they clearly indicate an intent to reduce the value available to creditors in insolvency.

Accordingly, legal acts concluded in favour of a creditor without consideration, for manifestly inadequate consideration, or with the deliberate intent to prejudice

¹⁵ Emiel Schipper, „Third-Party and Proprietary Effects of Assignment in EU Private International Law.”, *European Review of Private Law*, Vol. 32, Issue 6 (2024): 1037–1068, <https://doi.org/10.54648/erpl2025013>.

creditors (provided that the counterparty knew or ought to have known of the debtor's intent), may be annulled if executed within three months, one year, or four years prior to the filing of the insolvency petition — or after the filing, but before the opening of insolvency proceedings.¹⁶

Member States have requested greater flexibility in the harmonisation of avoidance actions. The compromise text introduces technical and linguistic amendments aimed at improving clarity and eliminating unnecessary detail. National legislations should be permitted to establish presumptions or evidentiary requirements that ease the burden of proof for the party asserting that a legal act is voidable or unenforceable. Accordingly, the burden of proving that the act is not detrimental may be shifted to the purchaser and the debtor. It is proposed that the obligation may be deemed fulfilled through restitution in kind or by payment of its monetary equivalent.

The amendments introduced by the European Parliament's report clarify the conditions for eliminating legislative gaps that previously allowed certain transactions to escape scrutiny.

4.5. Asset Tracing and Direct Access of Insolvency Practitioners to National Bank Account Registries and Beneficial Ownership Information

It is proposed that Member States designate courts or authorities empowered to access and consult national centralised bank account registries and other relevant registers, at the request of an insolvency practitioner. This measure aims to improve access to information concerning assets that belong or should belong to the insolvency estate.

National legislation will determine whether the insolvency practitioner's access to data held in relevant public registers is to be granted directly or indirectly, through a specialised body. Such access may also extend to bank account registries, provided that personal data protection is ensured.

Granting insolvency practitioners either direct or indirect access enables the identification and tracing of assets belonging to the debtor's estate, as well as assets subject to avoidance actions. It also allows for the tracing of assets held by the beneficial owners of insolvent undertakings and by persons in positions of responsibility.

The report considers that this amendment will help eliminate the obstacles faced by insolvency practitioners in tracing assets across jurisdictions¹⁷. Improving the legal framework will particularly facilitate the identification and recovery of debtor assets in cross-border insolvency cases.

¹⁶ Tuomas Hupli, „Rethinking the legitimacy of expectations: Speculative crossclaims, fraudulent transactions, and the immunity rules of the European Insolvency Regulation: Finnish (and some Swedish) perspectives”, *International Insolvency Review*, Vol. 30, Issue 2, Summer 2021: 191-212, <https://doi.org/10.1002/iir.1411>.

¹⁷ Christoph Paulus, „The Eternal Struggle for Supremacy Between Creditor and Debtor”, *Juridica International*, no. 31(2022): 59-67, https://www.juridicainternational.eu/article_full.php?uri=2022_31_the_eternal_struggle_for_supremacy_between_creditor_and_debtor, accessed on 10 December 2026.

4.6. Interconnection of Electronic Auction Systems for Asset Sales

The Proposal for a Directive emphasises the protection of creditors' rights to participate in voting through electronic means. It also highlights the importance of digital transformation in communication with creditors, courts, and insolvency practitioners.¹⁸ Two distinct mechanisms are being established: unified electronic platforms for the interconnection of insolvency registers across all EU Member States, and tools to facilitate creditors' access to the proceedings. All communications within the simplified liquidation procedure must be conducted electronically.

Member States are required to comply with Article 28 of Directive (EU) 2019/1023 concerning electronic communications. Auction systems should be interconnected via the European e-Justice Portal to ensure accessibility. The Commission is expected to assess existing solutions for potential reuse in the establishment of these systems.

The costs associated with the creation and maintenance of electronic auction systems are to be borne by the Member States, while the interconnection system will be financed by the Union's general budget. Electronic auctions must be announced in advance, and all known creditors must be duly informed. Interested parties, including existing shareholders, may participate in the auction.

4.7. Enhancing Transparency Through the Creation of a Standardised Information Sheet via the European E-Justice Portal

The Proposal for a Directive imposes new obligations on Member States to prepare an information sheet containing practical details on the main features of their national insolvency legislation. This measure aims to reduce barriers to investment in other Member States and has been broadly accepted during negotiations.

A well-designed insolvency regime should support viable businesses in remaining operational, thereby avoiding premature liquidation. The objective should be to strike a balance between initiating insolvency proceedings too early and delaying them excessively. Transparency of procedures, along with facilitating access to information on a company's performance, are essential factors in this context.

5. Prospects and Limitations of Transposing the Provisions of the Proposal for a Directive

The adoption of the Proposal for a Directive is expected to strengthen confidence in cross-border investments and have a positive impact on the sustainability

¹⁸ Bernard Santen, „Communication and cooperation in international insolvency: on best practices for insolvency office holders and cross-border communication between courts”, *ERA Forum*, Vol. 16, (2015): 229-240, <https://doi.org/10.1007/s12027-015-0398-8>.

of enterprises within the internal market. By ensuring predictability in the rules governing insolvency proceedings and harmonising disparities among Member States' legal frameworks, entrepreneurial risks can be significantly reduced. This could substantially stimulate capital inflows, thereby supporting the long-term viability of businesses across the European area.

Nonetheless, the Proposal for a Directive presents certain limitations in harmonising key aspects of insolvency law. It does not yet address the harmonisation of grounds for insolvency or the ranking of claims, despite these being critical elements for enhancing procedural efficiency and mitigating legal regime discrepancies at the national level¹⁹.

Although included in the initial version of the Proposal for a Directive, the harmonisation of rules concerning the insolvency of microenterprises was not retained in the version approved by the Council, on the grounds that such entities require a distinct approach due to their smaller size and limited resources.

It was considered that legal uncertainties and risks of abuse could be exacerbated by provisions relating to simplified liquidation procedures for microenterprises. Given that the proposed framework lacks adequate safeguards for creditors and other stakeholders, there is a likelihood of financial losses and a decline in confidence in insolvency proceedings.

Given these vulnerabilities, the European Parliament's report concluded that, in order to ensure that insolvency rules are robust and resistant to manipulation, it is preferable to remove the provisions concerning microenterprises from the draft Directive. Consequently, it was determined that microenterprises require tailored insolvency procedures that strike a balance between procedural efficiency and creditor protection²⁰.

Member States are encouraged to ensure that microenterprises without assets have access to simplified liquidation procedures. Accordingly, the harmonisation process must continue even after the transposition of the Directive's provisions, in order to advance the establishment of a Capital Markets Union. Transposing the Directive into national legislation will contribute to the development of the external business environment, as the existence of coherent and consistent legal systems in the field of insolvency will enhance investor confidence and foster cross-border investment within the Union.

6. Conclusions

The Proposal for a Directive aims to strengthen the convergence of insolvency proceedings across the European area. The central objective of harmonising certain national insolvency regulations is to enhance accessibility by reducing information

¹⁹ Oleksiy Kononov, „The place of micro and small Enterprises in European Insolvency law”, *International Insolvency Review*, Vol. 34, Issue 3, Winter 2025: 685-712. <https://doi.org/10.1002/iir.70010>.

²⁰ Francisco Garcimartin, Christoph Paulus, *op. cit.*, pp. 428-447.

costs, thereby mitigating risks for cross-border investors. It is anticipated that narrowing the legal disparities in insolvency regimes will expand financing options available to enterprises within the Union. Implementing the Directive's provisions would mark a significant step toward achieving convergence of insolvency frameworks among EU Member States. Although certain aspects of insolvency procedures remain outside the scope of the Directive, the harmonisation of EU insolvency law is approaching a unified approach.

It is indisputable that the introduction of these reforms will generate substantial progress in national regulatory frameworks; however, their effectiveness will depend on consistent implementation across all Member States. Provided that these changes are properly enacted, they will enhance investor confidence, improve creditor recoveries, and contribute to a more resilient and dynamic EU economy. It will be the responsibility of Member States to undertake timely efforts to adopt the new standards by updating legislative instruments and accelerating the digitalisation and transparency of insolvency procedures.

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