Comments

on the proposal for a Directive for the further harmonisation of insolvency law

Lobby Register No R001459
EU Transparency Register No 52646912360-95

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Berlin, 16 March 2023

The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,700 banks.

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The GBIC is grateful for the opportunity to submit comments on the proposal of 7 December 2022 for a Directive harmonising certain aspects of insolvency law.

Preliminary Remark

The draft Directive published by the Commission is part of the Commission's efforts to improve the framework of the Capital Markets Union. The Commission sees the lack of harmonised insolvency law in Europe as a major obstacle to further integration of capital markets. From the GBIC's standpoint, however, a critical examination is necessary as to whether the published draft Directive can actually contribute to the creation of well-functioning capital markets. In the GBIC's opinion, the components of a unified insolvency law addressed in the Directive do not meet the needs of the capital markets. We therefore suggest that the actual needs of the capital markets with regard to insolvency law be critically re-examined and that the draft Directive be amended accordingly based on robustly identified needs. It should not be overlooked, however, that insolvency law cannot be one-sidedly focused on creating well-functioning capital markets but must address the interests of all parties involved in the conduct of insolvency proceedings in order to be able to perform its regulatory function in this way.

Also, the lack of legislative competence of the European Commission should be critically re-examined. The proposal for a directive is a considerable encroachment on the authority of the national Legislators. In our opinion, a legislative authority of the European Union cannot, based on Article 114 TFEU, be justified by the advantages for the internal market. A justification based on general legal concepts such as the effectiveness and efficiency of the internal market could be applied to any proposed regulation and is therefore not convincing. The envisaged regulations do not promote the internal market, nor does it follow that uniform insolvency law can promote cross-border capital movements. Capital investments are not made with a view to the failure of a company or the quality of the then applicable insolvency law. The focus is rather on economic factors such as the business model or the strategic perspective of the investment project. The lack of a link with the Capital Markets Union and the promotion of cross-border capital movements is evident particularly in view of the rules on the simplified procedure for microenterprises, as microenterprises do not normally feature in cross-border capital market transactions at all.

Finally, the need for a further adaptation of insolvency law must also be questioned against the background of the Restructuring Directive, which entered into force in 2019, and whose transition period has just expired but which has a similar objective. One should first look at the impact of the new procedure on the restructuring landscape in Europe before further harmonising insolvency law.

With regard to the contents of the draft Directive, the GIBC believes that the provisions for a new pre-pack proceeding (Title IV) and for the creation of special winding-up proceedings for microenterprises (Title VI) go too far. In addition, the protection for the termination of financial contracts and/or netting agreements has not yet been sufficiently implemented. These points in detail:

- There is no compelling need for the introduction of pre-pack proceedings (Title IV of the proposed Directive). However, the creation of structured proceedings which guarantee a rapid and final application of all regulations necessary for the sale of the company as a going concern can be a useful addition to the toolbox of national insolvency laws in other legal systems. Member States which already have possibilities for the restructuring transfer of (parts of) undertakings should be allowed to instead apply such procedures. With regard to the proceedings proposed by the Commission, the protection of creditors' interests is not yet sufficiently ensured, which could mean adverse effects, inter alia, on lending practices.

- The rules on simplified winding-up proceedings for microenterprises (Title VI of the proposed Directive) should be rejected. These entail far-reaching changes in national insolvency laws which would become applicable in insolvency practice for the vast majority of insolvencies. It cannot be assumed that the approach adopted in the Directive of accelerated realisation of assets under the debtor in possession ensures a proper winding-up, which has adverse effects on the interests of creditors and, ultimately, on the willingness of credit institutions to lend to microenterprises. Member States should at least be given the right to choose whether to introduce these proceedings.

- Also important are clear exemptions to protect termination rights in financial contracts or netting agreements, as termination in the event of insolvency is a central element of risk management for both parties. In particular, undermining netting as a risk management instrument would have considerable and far-reaching negative consequences for the capital markets. A reference to the Financial Collateral Arrangements Directive (2002/47/EC of 6 June 2002) would not be sufficient, as the scope of application is too narrow and implementation across the EU is too inconsistent. This would be a good opportunity to appropriately amend the Financial Collateral Directive and also the Settlement Finality Directive (98/26/EC of 19 May 1998), each of which is already over twenty years old, with regard to insolvency law for financial market participants. Such a targeted harmonisation of individual aspects of insolvency law, which are particularly relevant for financial market participants, is certainly very well suited to furthering the desired objective of the Capital Markets Union.

In detail:

1. Avoidance Actions, Title II
The rules on avoidance actions are designed as minimum harmonisation standards and thus leave sufficient room for the application of more far-reaching national rules for the protection of the general body of creditors. It can be assumed that national particularities of avoidance actions law can be sufficiently implemented on the basis of this concept.

However, the provisions of Article 6 para. 2 (b) and Article 8 para. 1 (b) are in any case one-sidedly unbalanced to the detriment of creditors. In this case, the words "or should have known" should be deleted, so that only intent, but not negligence, is included.

2. Pre-Pack Proceedings, Title IV
The transfer of a company or substantial parts of the business from the insolvent party to a new company is currently already possible and proven in Germany both in the context of planned debtor in possession proceedings, which are usually preceded by protective shield proceedings or preliminary debtor in possession proceedings, and also in normal regular insolvency proceedings in which a sale is then prepared at, or shortly after, the opening of proceedings by the provisional insolvency practitioner. The main reasons for the failure of transferring restructuring measures (German term: assets of the insolvent entity are transferred to a prospective buyer by way of an asset deal– as opposed to a share deal) or the realisation of unsatisfactory sales proceeds are not the lack of special procedures, but the inadequate execution of a serious sales process aimed at achieving maximum proceeds.

On the other hand, the success factor of any restructuring of the company, also by way of a transferring restructuring, is the existence of a feasible restructuring concept, which shows the necessary measures for a successful restructuring using the possibility of a transferring restructuring. The inclusion of the debtor in the preparation phase should be made dependent on the submission of a viable restructuring concept in the sense of an admission condition in order to avoid cases of misuse at an early stage[1]. Furtheron, inclusion in the preparation phase should be made subject to the existence of grounds for insolvency, which would then have to be assessed in accordance with national law.

In addition, aspects of creditor protection are not taken into account enough in the draft. In particular, there is no provision for the adequate involvement of creditors in the proceedings, although the execution of a transferring restructuring without their sufficient involvement is hardly a recipe for success. Further, regulations for the separation of the enterprise from its corporate group, which is often the case, must be tightened.

Where Member States already have functioning procedures or possibilities for transferring restructuring - such as in Germany the transfer of the enterprise or substantial parts of the business from the insolvent to a new stakeholder (hive down) - Member States should be free to instead apply such proceedings.

Re Preparation Phase (Articles 22- 24):

Article 20:
It should be clarified that the preparation phase can be part of insolvency proceedings[2].

Article 22, Article 2 (h):
Article 22 does not adequately guarantee the rights of creditors.

With regard to the appointment of the monitor provided for in para. 1, the creditors should be involved in the selection of the person to be the monitor. The creditors should be given the right to choose the person to be the monitor, but at least have the right of refusal if the monitor proposed by the court does not have the prerequisites for conducting the proceedings in the interests of those concerned.

The wording of Article 22 para. 2 (b) appears somewhat unclear. In this regard, the necessary requirement is that the monitor declares and justifies that the sale process is competitive, transparent, fair and meets market standards.

The declaration of the monitor provided for in Article 22 para. 2 (d) that the best offer does not constitute a manifest breach of the "best-interest-of-creditors test" is clearly too weak to take account of the interests of the general body of creditors for the best possible repayment of their claims. Here, a declaration by the monitor is required that the best offer meets the "best-interest-of-creditors test", which must be evidenced by an appropriately robust comparison calculation.

In this regard, taking into account the best-interest-of-creditors test is the key issue of a proper approach in the context of pre-pack proceedings. With regard to its definition in Article 2 (h), however, there is a compelling need for improvement. This definition is based on a comparison of the proceeds obtained from the sale in pre-pack proceedings with the proceeds obtained if the normal ranking of liquidation priorities were applied in the event of a “piecemeal liquidation”. Here, a focus on a – possibly more advantageous – sale as a going-concern company in normal insolvency proceedings is not taken into account; a procedure without sale must also be taken into account in the settlement (composition of debt with creditors) in

[1] similar to the currently modified access requirements for debtor in possession proceedings under German Insolvency Law.
[2] e.g., as is the opening procedure under German law.

order to prevent such a possibility from being misused and disregarded to the detriment of the general body of creditors. By way of a uniform legal approach, it is therefore necessary that the "best-interest-of-creditors test" be taken into account to the same extent as in the context of the Restructuring Directive (Directive (EU) 2019/1023 of 20 June 2019, cf. Article 2 para. 1 (6)): According to Article 2 para. 1 (6) of the Restructuring Directive - adapted for the Proposal for the Directive in question – "no creditor would be worse off under [a pre-pack procedure] than such a creditor would be if the normal ranking of liquidation priorities under national law were applied, either in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario" if the pre-pack offer were not approved.

Furthermore, it is necessary that, in addition to the documents to be submitted by the monitor under Article 22, a Fairness Opinion on the appropriateness of the achievable sales prices is also submitted in order to ensure a minimum level of information about, and an evaluation of, the planned sale.

Article 23:

The stay of individual enforcement actions (moratorium) in the preparation phase must be rejected for various reasons. On the one hand, the necessary stability of the company's situation can be achieved only if all creditors of the company observe a moratorium by mutual agreement. On the other hand, carrying out a transferring restructuring without the support of the major secured creditors is not expedient.

In any event, a moratorium is worth considering only if there are strict conditions vis à vis individual disruptors who stubbornly and uncompromisingly oppose a promising restructuring plan for selfish reasons. Moreover, in order to impose a moratorium, it is not sufficient that such a moratorium would "facilitate the seamless and effective roll-out of the pre-pack proceedings". Rather, it is necessary, in the context of an appropriate balance of interests, that the order for the execution of the pre-pack proceeding is necessary.

A moratorium always requires – if only because of the encroachment on creditors' rights – provisional or opened restructuring or insolvency proceedings and a court review and order. This needs to be regulated.

In addition, completely unclear and urgently in need of clarification are the effects of the proceedings on (financial) forward transactions and/or netting agreements, with regard to both a possible moratorium and the transfer of assets:

Moratorium (stays):
First of all, there is urgent need for clarification and explicit regulation that the envisaged moratorium (stay) does not apply to contractual termination rights (by giving notice or automatic termination) with regard to forward transactions or financial futures transactions or transactions under netting agreements within the meaning of sect. 104 para. 3 of the German Insolvency Code. This is best achieved through a clear/explicit exemption. Recourse to the Financial Collateral Arrangements Directive is not sufficient for this. The possibility of (uniform) termination in the event of insolvency (or other default such as the non-provision of contractually required collateral /default) is a central element of risk management for forward transactions/financial futures or netting agreements and an essential component of all contracts for these transactions, both in contractual netting agreements and just like in the rules and regulations for market infrastructures and as in the case of individual contracts for such transactions without a framework/master agreement.

Termination in the event of the initiation of insolvency proceedings or other default ultimately protects both sides from the considerable volatility risks arising from the transactions. This ensures that the transactions are terminated immediately and settled on the basis of the prevailing market prices at that time and that both sides are protected from fluctuations in the market values of the positions after initiation of the proceedings until their conclusion. In effect, the positions are frozen at the value at the time of termination. The claim for payment arising from termination (to which either the insolvent party or the other party may be entitled) would be an insolvency claim and would be subject to the regulations applicable thereto.

Even non-financial enterprises, including SMEs and microenterprises use futures/financial futures (under netting agreements or as individual transactions) in the normal course of business for hedging purposes (in particular to hedge against interest rate, currency and price risks). The extension of a moratorium or the elimination of the right of termination in the event of insolvency would undermine the central risk mitigation techniques and thus considerably increase the risks for the counterparties in an unreasonable manner and to an unforeseeable level. Under these conditions, counterparties would also no longer be able to offer the hedging instruments in question or only under dramatically worse conditions and in conjunction with drastically stricter and more onerous collateral requirements. Undermining the termination option would also have profound and very serious implications for the EU capital markets, not least in terms of further regulatory recognition of netting agreements and related capital requirements.

A clear exemption provision is therefore necessary. However, an exemption based on the Financial Collateral Directive (FCD) would be inadequate: the FCD protects netting agreements and the termination rights contained therein only in connection with financial collateral agreements. Even larger companies often do not have sufficient liquid collateral to meet the strict requirements for financial collateral within the meaning of the FCD. In addition, the FCD has been implemented very inconsistently in the EU, so that the functional and personal scope of application in the EU is very divergent.

Transfer rights:
With regard to any possible transfer rights, it should in addition be noted that this also endangers the uniformity of netting agreements and could thus in turn undermine another, very central risk control function, namely if the transfer rights allowed the transfer of individual but not all transactions under a netting agreement. It should at least be clarified here that, in the case of netting agreements, the transfer can in all cases include only the portfolio of transactions and receivables combined under a netting agreement to form a single uniform contract as a whole (and only to the extent that there has been no termination).

Article 24:
The provision of Article 24 para. 2 is susceptible to misuse and is not suitable for adequately protecting the interests of the general body of creditors. It should be deleted. Cases in which, for factual reasons, there is only one tender may be sufficiently taken into account within the framework of paragraph 1. If the provision is to be retained, a vote of the creditors on the offer and, at their request, an evaluation of the offer prepared by an independent expert would be appropriate.

Re Liquidation phase (Articles 25 - 29):

Article 25:
It should be made clear that opened insolvency proceedings are a prerequisite for the transition to the liquidation phase.

Article 26:
The implementation of a transferring restructuring should, in principle, also be geared to safeguarding the interests of the general body of creditors. For this reason, it is imperative to make the approval of the sale additionally dependent on the approval of the creditors' committee or, in the absence thereof, of the creditors' meeting.[3]

Article 27:
It should be made clear – if necessary, by elaborating the definitions in Article 2 (g) – that the business relationship with credit institutions, including credit and collateral agreements, does not fall under the "executory contracts" referred to in Article 27. On the one hand, such contracts are not intended here, but rather involve contracts for the maintenance of de facto business operations, such as rental contracts or contracts with suppliers. On the other hand, when selecting contracting parties, credit institutions are subject to a variety of regulatory and civil law requirements (e.g., the requirements under the keyword "know your customer", for loans for start-ups the creditworthiness check or for corporate loans the requirements for avoiding NPLs). The change of contracting party provided for in Article 27 without seeing the person is due to legal requirements therefore already excluded in the case of credit institutions.

Irrespective of this, the forced exchange of debtors provided for in Article 27 also constitutes for all creditors a violation of the freedom of contract[4]; this provision is unreasonable and should therefore be deleted altogether. If the acquirer cannot convince the creditors of entering into the contractual relationship in place of the previous – (impendingly) insolvent – debtor, a takeover is likely to run counter to the interests of the general body of creditors.

Only as a precautionary measure in the event that Article 27 is not deleted or no derogation for credit institutions is provided for, Article 27 should at least be amended to the effect that contractually agreed termination rules remain in place. The retention of termination rights is required for credit institutions for various reasons, including anti-money laundering regulations, consumer protection, data protection, supply chain law and change of control regulations.

Furthermore, the possibility provided for in Article 27 para. 2 for contracts whose termination is in the debtor's interest to be terminated by the court also appears neither appropriate nor implementable. As a rule, the court will not be able to assess the details of the debtor's transactions and the valuation of its contractual relationships.

Article 28:
The provision in Article 28 must be clarified in order to avoid the devaluation of credit collateral and the associated consequences for lending. A debt-free takeover of a business or part thereof pursuant to Article 28 necessarily requires that collateral provided by the business or part thereof is redeemed. The criterion must also be the appropriately improved best-interest-of-creditors-test (see Article 22 above). Third-party collateral must remain in place. If the acquirer assumes the debts and liabilities of the business or part thereof, it must be ensured that (within the framework of joint and several liability) the corresponding claims against the insolvency estate also remain in place (for the relevant background in the case of credit institutions see remarks already made under Article 27 above).

Unclear is also how to deal with corporate group liabilities and the joint liability of corporate group collateral.

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[3] See for this sect. 160 (1) no. 2 of the German Insolvency Code.
[4] See for this Article 2 of the German constitution.

Re Both phases (Articles 30 - 35):

Article 30:
For the selection of the best bid, Article 30 refers to the criteria applied in national winding-up proceedings for the choice between competing bids. Since the disposal constitutes a significant encroachment of the legal position of creditors entitled to security interests in assets covered by the sale under the pre-pack procedure, it is necessary to establish an adequate safeguard mechanism in that regard. Accordingly, it should additionally be provided that, in order to select the best offer, account must also be taken of the rules in national winding-up proceedings involving the participation of creditors who are entitled to security interests in assets included in the sale.[5]

Article 33:
The privileged treatment of interim financing under Article 33 clearly goes too far and, in its current wording, leads to the devaluation of loan collateral. Hence, the privileged treatment of interim financing cannot be at the expense of higher- or equal-ranking existing creditors (cf. Article 33 para. 1 (b)). Under no circumstances may the privileged treatment of interim financing be at the expense of creditors' existing security interests. Also, the privilege according to para. 1 (c) may be enjoyed only insofar as assignment has not already been made in advance. In addition, para. 1 (d) should be deleted here, since this provision is unilaterally to the detriment of the creditors and – especially in combination with the privilege in rank – opens up a lot of room for fraudulent arrangements.

The privileged treatment of shareholders and shareholder loans or interim financing granted by parties closely related to the debtor should be excluded in order to avoid cases of misuse.

Article 34:
The reference in Article 34 para. 3 to national regulations on the release of collateral in national winding-up proceedings is inappropriate. The rules stemming from national winding-up proceedings are often not tailored to the specific circumstances of the intended pre-pack procedure. Rather, in order to avoid a devaluation of collateral, it is necessary to provide that in any case a release of collateral can occur only with the consent of the holder of the secured claim and redemption of the collateral, in accordance with the criterion of an improved best-interest-of-creditors test (cf. Article 22 above).

Under the options in Article 34 para. 4, it is possible to depart from the consent of holders of secured claims required under national law for the release of collateral rights (security interests) if the security interest relates to assets necessary for the continuation of the day-to-day operations of the debtor’s business or part thereof and
(a) either creditors of secured claims fail to prove that the pre-pack offer does not satisfy the “best-interest-of-creditors test” or
(b) creditors of secured claims have not filed a better alternative binding acquisition offer.
In its current wording, this provision is inappropriate. Of course, consent to release collateral is required; it can be dispensable only if the collateral is redeemed in accordance with the criterion of an improved best-interest-of-creditors test (cf. Article 22 above). Otherwise, there is a risk of a considerable devaluation of credit collateral with the ensuing consequences for lending policy. Alternative subpara. (b) should

[5] See for this sect. 158 et seq. of the German Insolvency Code.

therefore be deleted. Also, irrespective of the conflicting requirements of banking supervisory law, it is inappropriate to force secured creditors to submit a purchase offer.

There are moreover no regulations on the separation of a company from any existing corporate group.

3. Directors' duty, Title V

Article 36:
The three-month deadline laid down in Article 36 for the directors of the legal entity to file for insolvency appears to be clearly too long. This considerably increases the risk of delay in filing for insolvency and consequently also of harm to the creditors. In any event, in view of the very different rules in the Member States on directors' obligations to file for insolvency, it would seem to make sense to opt for a more generally worded rule which enables the Member States to take account of national particularities.

4. Winding -up of insolvent microenterprises, Title VI
The GBIC rejects the proposed winding-up proceedings for microenterprises. The rules for winding-up proceedings for microenterprises are not necessary to achieve the objective of the Capital Markets Union, are to considerable extent susceptible to misuse, are likely to have a negative impact on lending and should therefore be deleted. With regard to this regulation, the lack of legislative competence of the European Commission, which has already been criticised in the preliminary remark, is particularly clear. it is obvious that these special rules for microenterprises are in no way suitable for promoting the desired Capital Markets Union.

First of all, it is already unclear what exactly is meant by the term "winding-up proceedings" in Title VI. It is not clear from the provisions in Title VI which types of proceedings are to fall under this term; whether, for example, procedures for transferring restructuring are also included. In this context, the exclusion of over-indebtedness as a reason for insolvency, which is probably intended in Article 38(2), must also be rejected. This has a regulatory function that should not be underestimated.

According to the definition of the European Commission (see Article 2 (j)), "microenterprises" are enterprises with fewer than ten employees and an annual turnover of up to two million euro or a balance sheet total not exceeding two million euro. The majority of all companies in Europe come under this definition. In Germany, 85% of all medium-sized companies achieved an annual turn-over of up to one million euro in 2021[6]. According to official statistics, moreover, with a share of over 80%, this company size accounts for the absolute majority of all companies in Germany that go through insolvency. The high share of microenterprises, including in Europe, suggests that their share of the total number of insolvencies is not lower than that in Germany. In fact, a procedure for "microenterprises" would therefore not provide for an "exemption" procedure but would define the principle national insolvency proceedings. Existing national corporate insolvency proceedings would thus be unduly marginalised (without the Commission's regulatory power to do this).

There may well be an interest in individual Member States in instituting simple rules for the winding-up of insolvent microenterprises. However, in a very large number of Member States there are already well-established and functioning regulations for the winding-up of companies, including microenterprises. Therefore, the Directive should, in our assessment, completely drop the introduction of insolvency pro-

[6] Medium-sized companies according to annual turnover 2021 | Statista

ceedings for microenterprises, or at least give Member States the choice so as to ensure that well-functioning insolvency regimes can remain unchanged.

In addition, consideration should be given to whether the objective of creating more efficient insolvency proceedings for microenterprises could not simply be achieved by introducing statutory deadlines for existing national regulations for the steps to be carried out in the proceedings (finalisation of the schedule of liabilities/list of claims, filing actions for avoidance, conclusion of the proceedings).

To be on the safe side, the main problems of the proceedings should be addressed nevertheless:

The assumption in the recitals that an insolvency practitioner is not normally required in microenterprises - because of the simple operating structures - (Article 39) is incorrect. Practice has shown that only a minority of the debtors covered by the regulations have the necessary know-how for the proper conduct of proceedings; the debtors will very likely be unable to cope with this type of debtor in possession (Article 43). An orderly winding-up of an insolvent enterprise can be left to the debtor only in exceptional cases. The mere fact that the debtor has led the company into insolvency would suggest that it does not have the necessary qualifications for an orderly winding-up. The creditors' right in Article 39 to bring about the appointment of an insolvency practitioner is de facto diminished by the obligation of that creditor to bear the costs - without at the same time triggering a corresponding privilege (such as preferential dividend from the proceeds). The possibilities provided for in Article 43 para. 4 furthermore to make the decisions of a debtor who has been deprived of the power of disposal over his assets subject to the approval of the insolvency court or a creditor does not appear to be robust. Neither a court nor a creditor has the necessary qualifications to manage the debtor's business.

Accordingly, debtor in possession should at best be provided for as an exemption and should be available only to debtors who can guarantee an orderly winding-up in the interests of the creditors. Only debtors who fulfil clearly to-be defined requirements should be allowed to conduct debtor in possession winding-up proceedings. The following prerequisites should be specifically included: proper bookkeeping and accounting, timely payment of social security contributions, timely payment of taxes, keeping of an inventory of assets and a list of creditors. Even in these cases, however, debtor in possession should be tied to the appointment of a monitor.

The modalities laid down in Article 46 for the preparation and maintenance of the list of claims are open to a high potential for misuse by the debtor. In particular, claims indicated by the debtor in the application for the opening of simplified winding-up proceedings or in response to a corresponding creditors' application are to be included in the list. In contrast, for other creditors whose claims are not included in the debtor's submissions, each creditor has a registration period of 30 days from the publication of the date of the opening of simplified winding-up proceedings or after receipt by the creditor of the notification of the opening of simplified winding-up proceedings. This simplified mechanism allows the debtor to fill the list with questionable claims of closely related parties, while legitimate claims of non-related parties are not taken into account. An examination of the claims by the insolvency court or an insolvency practitioner or monitor appears indispensable. Efficiency gains can result simply from setting reasonable deadlines for the filing or contesting of claims.

Furthermore, restricting the avoidance of insolvency (Article 47), which must be rejected in its entirety, opens the floodgates for misuse, in particular through pre-insolvency asset shifting by the debtor. An insolvency practitioner would ensure the orderly and legitimate execution of the insolvency proceedings. Establishing and securing the estate as well as avoidance actions by the insolvency administrator in the event of actions to the detriment of the estate are indispensable for the proper conduct of proceedings and the best possible creditor satisfaction. Avoidance actions cannot be transferred solely to creditors, who generally lack the necessary insight into the debtor's financial circumstances. In addition, false statements by the debtor that deter the creditor avoidance (contesting the claim) are also exempt from sanctions (Article 47 (b)). In contrast, in order to avoid delays and effort, it seems appropriate for creditors to have the right to refuse enforcing avoidance claims that do not exceed a certain de minimis threshold. Accelerations can also be achieved by a statutory specification of a period within which avoidance actions must be filed by the insolvency practitioner. In any case, if avoidance of insolvency is to be expected, the opening of simplified proceedings pursuant to Article 42 para. 2 – in favour of regular insolvency proceedings – should be rejected; if the need for insolvency avoidance does not become apparent until during the course of the proceedings, the simplified procedure must be converted into a normal one. Finally, with regard to Article 47, it should be mentioned that there are already disadvantageous experiences from national legal systems in this respect. The Austrian Bankruptcy Code of 9 January 1869 desisted from special grounds for avoidance due to a presumed lack of requirement and merely invoked general civil law. In the aftermath of the crisis of 1873, this almost "avoidance-free" area led to "a legislative gap in the business world", so that the Austrian legislator had to remedy the legal situation in 1884 by means of a special avoidance law. In Germany, too, the idea of the Insolvency Code of 1999 to place avoidance of supposedly simple private insolvency proceedings in the hands of creditors foundered (Sect. 313 para. 2 Insolvency Code old version). On 1 July 2014, the provision was deleted without replacement and avoidance was placed back in the hands of an insolvency practitioner. The European legislator should draw lessons from such experiences in the Member States and not repeat the historic mistakes of the past.

Also, the regulation of the discharge of residual debt is clearly too extensive (Article 57). Guarantors, indemnifiers or joint and several debtors liable for the liabilities of the microenterprise shall, in the event of insolvency resulting from a claim, be treated under the insolvency proceedings applicable to their assets. Special treatment based on the connection with the insolvency proceedings concerning the estate of a microenterprise is neither necessary nor expedient. In financing decisions, the liability of managing directors or shareholders is an important basis for the bank's willingness to lend, which must not be detracted from.

The comments on the need for an exemption for futures/financial futures and netting agreements with regard to a possible moratorium or transfer rights apply in the same way to a moratorium or transfer rights with regard to insolvency proceedings for microenterprises. It should be noted here that even microenterprises may be dependent on hedging transactions in the form of futures/financial futures.

5. Creditors' Committee, Title VII

The provisions in the Directive on creditors' committees correspond largely to the legal situation applicable until now in Germany. Nevertheless, the provisions on creditors' committees require some clarification:

Articles 58, 59:

It should be clarified that the creditors' committee is appointed by the creditors' meeting by election in accordance with the national requirements of Member States. The elected candidates must be at liberty to accept their election. A legal entity may also be elected as a member of the creditors' committee.

The 30-day deadline for appointing the members of the creditors' committee seems too inflexible. It would be better to have a period of 6 weeks, if possible, but not longer than 3 months.

Not any “interested party” but (only) parties actually affected, i.e., “every creditor” should be entitled to contest the appointment of a member of the creditors' committee – if only in the interest of speeding up proceedings.

Article 64:
The Directive should also strengthen the role of the creditors’ committee. To this end, the support of the insolvency practitioner should be added to the list of duties in Article 64 para. 1.

Article 66:
There are uncertainties regarding the liability of the members of the creditors’ committee, however. Article 66 provides that the members of the creditors’ committee shall be liable for acts in their capacity as creditors' committee members only for gross negligence, fraud or breach of fiduciary duties to the creditors they represent. However, the distinction between fiduciary duties towards creditors and other obligations of creditors' committee members remains unclear. Furthermore, in order not to expose the members of the creditors' committee to undue risks, it should be added that there is no breach of duty if a creditors' committee member could reasonably assume that s/he was acting on the basis of adequate information for the benefit of the creditors represented by the creditors' committee (Business Judgement Rule).

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