# stellungnahme

Opinion of German Trade-Union Federation [DGB]

## On the European Commission draft for a Directive on Harmonisation of Certain Aspects of Insolvency Law (2022/0405 (COD))

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### I. Introduction

The EU Commission with its draft for a Directive on harmonisation of certain aspects of insolvency law made an attempt to find a uniform regulation for all Member States regarding diverse rules currently applicable in individual Member States. The system of avoidance actions very closely follows the example of the provisions of the German Insolvency Code; the proposed pre-pack proceedings already exist in a similar form in The Netherlands.

At the same time, they tried to make insolvencies conducted in a cross-border manner within Member States easier manageable – giving insolvency practitioners better options to trace assets, and providing creditors with enhanced clearness relating to diverse insolvency law-related provisions applicable in Member States.

However, provisions ensuring protection and representation of employees' interests in insolvency proceedings are lacking entirely. Other than in EuInsVO (EU) 2015/848, recitals 22 and 72, and Directive on Preventive Restructuring Frameworks (EU) 2019/1023, protection of employees plays only a very minor role in the Directive draft and its explanations, and if such protection is mentioned at all than merely in a dismissive manner, by emphasising that in some respect particularly no protection of employees shall exist (e.g., Article 20 (2) Directive draft – non-applicability of the Transfer of Undertakings Directive 2001/23/EC in pre-pack proceedings). This is in contrast to the objective of harmonisation of social systems (Article 151 AEUV). Furthermore, regarding competences, it should be noted that in accordance with Article 153 AEUV, in particular paragraph 2 letter b), only minimum requirements in favour of employees and their rights may be stipulated which, in particular, relates to contesting remuneration and the pre-pack proceedings. Relevant corrections are required in further European Union legislation proceedings.

**Brief Summary**

Provisions on protection of employees' interests are lacking. The Directive needs to be amended in this respect.
In particular, preservation of jobs and restructuring of company shall be named as objectives of insolvency proceedings.

- Provisions on avoidance actions are oriented toward the German provisions of §§ 129 et seq of the Insolvency Code (InsO). An exception from the rule of contestability concerning payment on claims made by employees is missing. The Directive should be amended by such provision.
- It should be ensured that in pre-pack proceedings participation rights of the committee of creditors under German laws shall not be curtailed.
- Furthermore, a clear provision shall be included that Article 27 and 28 of the Directive draft are not applicable to employment relationships.
- So far, provisions on committee of creditors do not provide for membership of employees' representatives as in § 67 (2) sentence 2 InsO. This should be amended. And also, that those representatives of employees may be at the same time representatives of the trade union.

## II. In Detail

### 1. General

The project of stipulating further minimum standards in the area of insolvency law in Member States is basically welcomed by the DGB and its member trade unions.

At the same time, we distinctly criticise that the draft does not include any provisions on employees during insolvency proceedings. The present draft wasted the chance of setting individual positive regulations for employees already existing in some Member States as minimum standards for all Member States, and expanding insufficient national insolvency legislation. Objective of insolvency proceedings cannot be to merely satisfy all creditors, as the German insolvency law prescribes it (§ 1 InsO), and as picked up by the explanation for the Directive draft (please see page 14 et seq of the German version). Preserving jobs and restructuring companies should also be objectives of insolvency proceedings, as it is expressly stipulated for example in France under L631-1 Code de commerce. Hence, the DGB and its member trade unions have already before spoken in favour of amending § 1 of the InsO[1].

**Accordingly, the DGB and its member trade unions demand to expressly include preservation of jobs and restructuring of companies as objectives of insolvency proceedings in the Directive.**

[1] DGB, ordinary federal congress, resolution B020 no. 7, item 370 et seq.

2. Avoidance Actions

Under the headline "General provisions regarding avoidance actions" (Articles 6 through 12 of the Directive draft), the Directive stipulates a framework of minimum requirements for avoidance actions. Member States may maintain or adopt provisions which provide for a wider scope of creditor protection (page 15 of the German version). This framework basically equals the German insolvency code provisions under §§ 129 et seq InsO.

Here, too, it is distinguished between contesting of congruent and incongruent coverage (please see recital 8). In case of congruent coverage, a legal act – just like in the German InsO – shall be contestable within 3 months prior to submission of the request for the opening of insolvency proceedings, and also afterwards, provided, a debtor has been insolvent at the time of completing this legal act, and creditor was aware, or ought to have been aware of such insolvency, or relevant application for opening of insolvency proceedings (Article 6 (2) together with Article 6 (1) of the Directive draft). However, in contrast to German laws which in § 130 InsO require positive knowledge of opponent (or at least knowledge of circumstances which strongly indicate the inability to pay, or request for opening of insolvency proceedings, § 130 (2) InsO), here we have an extension to cover negligent lack of knowledge of inability to pay or application for opening of insolvency proceedings. Such extension without exception of avoidance actions in favour of employees would take a negative effect on them. The same applies for contesting of wilful acts under Article 8 (1) sentence 1 lit. b) of the Directive draft. Hence, such extension of contesting opportunities is expressly rejected.

In the event of incongruent coverage, contesting of legal acts shall be possible under Article 6 (1) of the Directive draft, provided, such acts have been conducted within three months prior to a request for opening of insolvency proceedings, if debtor was unable to pay his due and payable debts, or if such legal acts occur after application for opening of insolvency proceedings. Here, the draft deviates from German provisions insofar as contesting of a legal act conducted within the second or third month prior to application for opening of insolvency proceedings is possible if creditor at the time of conducting this act was aware that such act was to the disadvantage of insolvency creditors, § 131 (1) no. 3 InsO. Hence, this deviation from the requirements of the Directive is an extension of contesting opportunities, and does probably not contradict minimum requirements of the Directive.

According to Article 6 (3) lit. a of the Directive draft, any legal acts which are performed directly against fair consideration to the benefit of the insolvency estate, shall not be able to be declared null and void. Also, the German legal system basically excludes such acts from being contested, provided, it is not about wilful impairment to the disadvantage of creditors, and the other party was not aware that the creditor acted in an unfair manner, §§ 142 (1), 133 InsO. Whether or not the German provision fulfils the requirements of the Directive seems at least doubtful.

A bigger issue from the point of view of the DGB and its member trade unions is, however, to what extent the provision of § 142 (2) sentence 2 InsO is in agreement with the provisions of the projected Directive. There is a close time-wise connection in the meaning of § 142 (1)

InsO, if a debtor pays his employees remuneration, and the period between work performance and payment of remuneration does not exceed three months. In fact, this Directive provision in accordance with recitals shall expressly include, in particular, payment of salary (recital 9); however, if the three months formulated in § 142 (2) sentence 2 InsO within which payment of remuneration shall still be considered as "immediately" in the meaning of the Directive (recital 9), seems doubtful. From the point of view of DGB and its member trade unions, the Directive must not result in the outcome that employees' rights are curtailed. In fact, payment on remuneration claims of employees should not be subject to avoidance actions, as requested by DGB and its member trade unions for German insolvency laws.[2] Payment of salary is regularly only a small share in an insolvency estate. At the same time, employees from whom repayment of salary is claimed are often faced with an endangered economic situation which can only be insufficiently compensated by social benefits. If Article 12 of the Directive draft, however, asserts contesting privileges for creditors under 17 and 18 Directive (EU) 2019/1023, that in contrast to socially required exceptions often bring with them considerable reductions in an insolvency estate, this clearly illustrates the social imbalance of the present draft.

**Hence, the DGB and its member trade unions request to expressly exempt payment of remuneration to employees from avoidance actions under Article 4 et seq of the Directive draft.**

Furthermore, provisions on priority privileges within the order of insolvency claims are missing, such as are existing in individual European countries. Merely in case of interim financing, Article 33 (1) lit b of the Directive draft provides for a privilege according to which payors of interim financing need to be reimbursed their payments on a prior-ranking basis. Social protection of employees by granting privilege to their claims, however, has not been projected, although recital 22 of the EuInsVO (EU) 2015/848 includes the objective "to improve privileges of employees on a European level".

In fact, existing priority privileges of particular groups of insolvency creditors in many Member States – also in favour of employees – remain unchanged by this Directive draft. Hence, any creditors privileged in those countries have at the same time a contesting privilege: under Article 4 of the Directive draft, only legal acts to the disadvantage of the general body of creditors are contestable. Therefore, in the event of privileged creditors even contestation in favour of equally privileged or higher-ranking privileged creditors is excluded. So, while in countries without privilege, such as Germany, even the smallest protection against contestation on part of employees will need to be removed, other countries with comprehensive priority provisions would be able to keep those plus additional exclusion of contestation. This would not mean harmonising, but disharmonising insolvency laws! At the same time, this would be a setback in social matters for several Member States instead of harmonisation by

[2] Please see among others item 5 of salary securing paper of DGB, Kein Entgeltausfall in der Krise – für ein umfassendes Lohnsicherungskonzept! | DGB.

way of progress (please see Article 151 AEUV). According to this draft, however, when considering the welfare state principle in terms of contesting remuneration, doors are ajar in order to reintroduce in Germany an insolvency law privilege of employee's claims.

Other provisions of the Directive draft are also parallel to the German Insolvency Code. For example, contestation of legal acts dating back up to one year shall be possible if those were conducted against no or a manifestly inadequate consideration, Article 7 of the Directive draft. This would result in extension compared to § 134 InsO which requires acts without any payment. On the other hand, the German provision of § 133 InsO reaches further. Contestation in case of wilful disadvantage in the Directive draft (Article 8) refers to "intentional" acts; here, it remains unclear to what extent this corresponds to the German type of wilful act of a 1st grade dolus directus. According to the parallel regulation of § 133 InsO, contingent intent is sufficient.[3] Since it is about facilitation of contestation in favour of increase of assets, this would be in compliance with the Directive.

Consequences of contestation under Article 9, 10 of the Directive draft are basically equal to the German provisions of §§ 143, 144 InsO.

### 3. Tracing Assets Belonging to the Insolvency Estate

Article 13 et seq of the Directive draft facilitates opportunities for an insolvency practitioner to trace assets. The DGB and its member trade unions welcome those provisions which will make it easier for insolvency practitioners in the future to trace assets in order to increase insolvency assets.

### 4. Pre-pack Proceedings

In Title IV (Article 19 et seq) of the Directive draft, provisions on pre-pack proceedings are regulated. The description "pre-pack proceedings" means a procedure which in the context of dissolution of debtor's assets serves the purpose of preparing disposal of a company, or parts of a company belonging to debtor's assets in order to increase chances of full satisfaction of creditors.[4]

It is supposed to consist of two phases: preparation phase and liquidation phase (Article 19 of Directive draft). During preparation phase, it shall be attempted to find a suitable buyer for the company. During the liquidation phase, sale of company shall be approved and executed, and proceeds distributed among creditors.

In this respect it is unclear which requirements are applicable for initiating such pre-pack proceedings. Recital 22 refers to "financial distress" of debtor. Whether or not imminent insolvency (in the meaning of § 18 InsO) is sufficient, and which standards shall be used seems unclear; all the more because Article 2 lit. p of the Directive draft refers to "established

[3] BGH, judgment dated 13/04/2006 – IX ZR 158/05 with further evidence.

[4] EuGH, judgment dated 28/04/2022 – C 237/20 ("Heiploeg") referring to the Dutch regulation.

insolvency". For stay of individual execution measures under Article 23 of the Directive draft, however, "likelihood of insolvency" shall be sufficient. Provisions on suspension of execution in accordance with Article 6 and 7 of the Directive (EU) 2019/1023, also comprise suspension of obligation to apply for opening of insolvency proceedings, and third-party application proceedings. Under Article 23 sentence 1 of the Directive draft, also exception of employees under Article 6 (5) of Directive (EU) 2019/1023 shall be applicable, which should be clarified at least in recitals.

Furthermore, it remains unclear how this pre-pack proceeding is included in insolvency proceedings systematics. Again, no precise information can be found on this issue. According to Article 20 (1) of the Directive draft, liquidation phase under Article 19 (1) of the Directive draft shall be considered as insolvency proceedings in the meaning of Article 2 no. 4 of the Regulation (EU) 2015/848. This could be understood in a manner that preparation phase according to the Directive draft is no form of opening proceedings under the German InsO, and hence is not part of insolvency proceedings. Because according to Article 2 no. 4 referred to above with reference to Annex A, insolvency proceedings in the meaning of this Regulation (and hence in the meaning of the present Directive draft) in German laws shall be "the insolvency proceedings" commencing upon the opening proceedings. Clarification of the relationship between preparation phase and insolvency proceedings seems necessary. Abolition of opening proceedings in this context would be an inacceptable setback; at least compared to German laws.

It should be clarified that Articles 27 and 28 of the Directive draft do not relate to employment contracts. According to the wording of those Articles they seem to be included which obviously cannot be meant. Transfer of employment relationships to a buyer without the opportunity to object would otherwise be a violation of basic European Union labour law principles and basic laws. And also, § 613a (5) BGB which expressly stipulates the opportunity of objection to transfer of undertakings, would be in contradiction to this provision, and hence European law.

This is all the more true since Article 27 (2) of the Directive draft stipulates that also courts are possibly permitted to terminate the executory contracts. Implementation of this opportunity to have employment contracts terminated by court can hardly be the intention of the legislator of this Directive. Also, Article 28 of the Directive draft would unjustifiably interfere with employees' protection according to § 613a BGB; this is irrespective of exclusion of applicability of the Transfer of Undertakings Directive in pre-pack proceedings which must also be rejected on a European basis.

**Therefore, the DGB and its member trade unions request that Articles 27 and 28 of the Directive draft should include an express exception relating to employment relationships.**

During the preparation phase upon request of debtor, a monitor shall be appointed, Article 22 of the Directive draft, who upon opening of liquidation phase is appointed as insolvency practitioner, Article 25 of the Directive draft. Whether or not Member States are permitted to regulate control and selection process of the insolvency court as well as participation of a

(preliminary, if applicable) committee of creditors, remains unclear. The German InsO in case of appointment of an insolvency practitioner provides for participation of a committee of creditors, § 56a InsO. The same applies in case of appointment of a preliminary insolvency practitioner if a preliminary committee of creditors was appointed, §§ 21 (2) no. 1a, 22, 56a together with § 21 (2) no. 1 InsO. Article 25 of the Directive draft, according to which a court upon opening of liquidation phase is supposed to appoint the previous monitor as insolvency practitioner, would then contradict requirements of the InsO regarding involvement of a committee of creditors. To what extent Member States are permitted to deviate from this Directive remains unclear. Unclear is the situation with view to provisions in Article 34 of the Directive draft relating to "protection of creditor's interests", and, in particular, regarding Article 22 (1) of the Directive draft together with Article 58 of the Directive draft because according to those provisions a committee of creditors must not be appointed before filing of an application for opening of insolvency proceedings. Whether or not upon initiating of preparation phase an application for opening is required, seems doubtful considering the draft. Participation of creditors by means of a committee of creditors, in particular, when appointing an administrator, has stood the test of time in Germany under the impression of past experience with "stakeholders", and is considered the biggest success of the ESUG reform act. Hence, participation shall be introduced and extended on European level. Setbacks towards a purely debtor-driven procedure must not be admitted; in order to prevent associated misuse, participation and control by representative committees of creditors comprising employees are required, and such representatives may also be trade unions or representatives of trade unions (please see item II. 7 below). This should also be applicable to appointment of a monitor in the meaning of the Directive draft during preparation phase.

5. Duty to Request the Opening of Insolvency Proceedings

Articles 36, 37 of the Directive draft regulate the obligation of company management to request the opening of insolvency proceedings. Article 36 of the Directive draft provides for a time-limit of 3 months after company management became aware that the legal entity is insolvent, or reasonably ought to have become aware of it. The German provision of § 15a InsO stipulates such obligation already three weeks after occurrence of insolvency, and six weeks after occurrence of overindebtedness. Since a stricter regulation is probably permitted under the Directive, German laws will most likely not change in this regard.

6. Winding-up of Insolvent Microenterprises

The Directive draft provides for a simplified liquidation procedure for microenterprises. According to the Directive draft, microenterprises are undertakings which employ fewer than 10 persons, and whose annual turnover or annual balance sheet, respectively, does not exceed EUR 2 million. With this definition, the Directive in its Article 2 lit. j refers to the definition included in recommendation 2003/361/EC of the EU Commission dated 06/05/2003 (Article 2 (3) of the Annex).

Simplified procedure shall basically be conducted by debtor itself by way of self-administration, Article 43 of the Directive draft; an insolvency practitioner shall only be appointed under Article 39 of the Directive draft if debtor, creditor, or a group of creditors applied for such appointment, and relevant costs can be funded from the insolvency estate, or by the party who applied for appointment. The regulation to determine self-administration as a rule, and appointment of an insolvency practitioner as an exception, is criticisable from the point of view of the DGB and its member trade unions. Here, already a regulation on supervision of debtor acting by way of self-administration, for example by a court or a monitor as provided by § 270 InsO, is missing.

According to Article 44 of the Directive draft, suspension of individual execution measures shall be possible in this procedure. Then, as a matter of consequence, exception of employees under Article 6 (5) Directive (EU) 2019/1023 should be included, however, at least as long as there is no secured full cover of any and all claims relating to money for salaries owed by insolvent company.

Criticisable is also the provision of Article 46 of the Directive draft on lodgement and admission of claims. According to this provision a debtor would be the "master of the insolvency schedule" which in most cases would hardly be considered responsible.

According to Article 47 of the Directive draft, avoidance actions shall not be mandatory, but in the discretion of creditors, or, if appliable, the insolvency practitioner. In German insolvency law one would need to ask who is permitted to contest legal acts in simplified procedure in the first place. According to the provisions of the InsO, contestation – also in self-administered insolvency proceedings – must only be made by a monitor, §§ 280, 129 et seq InsO. Consequently, the Directive should stipulate that contestation also in simplified procedure should be reserved for a neutral party, such as a monitor in the German meaning of it, and not creditors.

Summarising one has to note that orderly and lawful winding-up procedure interests have not been taken seriously enough in this draft.

## 7. Committee of Creditors

Title VII of the Directive draft regulates establishment of a committee of creditors. Basically, we welcome the intention to provide for a committee of creditors as a supervisory authority for the interests of creditors. However, there should not be an exclusive determination of committee's work aiming at maximising of assets (please see II.1 above) as Article 60, 64 (1) sentence 1 of the Directive draft suggests.

Provisions on a "mandatory committee" such as in § 22a (1) InsO are missing. However, this would be required – also on a European level – in order to ensure regulated and supervised procedure with involvement of creditors and employees.

Furthermore, beside creditors' interests also employees' interests should be heard in committees of creditors, regardless whether they form a group of creditors or not. Because for employees of an insolvent company it is not merely about payment claims, but often enough about their occupational existence. Hence, it should be guaranteed that employees' interests are represented in a committee of creditors. Such provision is missing in the present Directive draft. However, the reasons state that when determining the method of work also a role for representatives of employers shall be provided for (recital 53). The meaning of employ**ers'** representation in insolvency proceedings is not obvious while representation of employees is of the essence for continuation of an enterprise and preservation of jobs.

Provisions on committee of creditors included in this Directive draft are basically in accordance with the provisions of the German Insolvency Code; however, the relevant provision on representation of employees in a committee of creditors has not been included. According to § 67 (2) sentence 2 InsO, representatives of employees shall be included in a committee of creditors. This should be applicable regardless whether employees are at the same time creditors or not. The provision included in the old version according to which representatives of employees shall only be included in a committee of creditors if they are insolvency creditors representing considerable claims, was deliberately deleted by the legislator upon introduction of the ESUG from 2012. According to the reasons for this reform, in particular in case of continuation and reorganisation of a company in insolvency proceedings involvement of representatives of employees is of the essence.[5]

Besides, it should be possible – just like in German laws (§ 67 (3) InsO) – that employees are represented in a committee of creditors by trade unions or trade union representatives. The German legislator itself stated in the legislation procedure of the SanInsFoG from 2020: "In particular, involvement of trade union representatives also in preliminary proceedings can be favourable for the process since trade unions often play a significant role for reorganisation, and they possibly know the conditions of an enterprise better than suppliers, customers or other creditors."[6].

**Hence, the DGB and its member trade unions demand to amend provisions on committee of creditors in a manner to include a provision that a representative of employees should also be a representative of the trade union. Required representation of employees' interests shall also be achieved by trade unions or trade union representatives.**

Furthermore, contrary to Article 61 of the Directive draft, there should be no limitation of the number of committee members, because in the event of large insolvencies with sufficient assets there is no reason to prohibit larger committees. Representation in committees of creditors should basically be possible; however, here it should be clarified that for "power of attorney" as stipulated by the English version of Article 63 (5) of the Directive draft, simple proxy shall be sufficient. Areas of responsibility and rights of the committee of creditors shall

[5] German parliament printing matters 17/5712, p. 27 on no. 10 (amendment to § 67).

[6] German parliament printing matters 19/24181, p. 197 on Article 5 no. 12 (amendment to § 21 InsO).

at least be in accordance with the current level of German laws (please see, e.g., Däubler/Wroblewski, The Insolvency Manual for Practice, Part 4, item 63 et seq, item 80 et seq) which also includes involvement with choice of administrator and monitor, respectively (please see item II. 4 above).

Statutory insurance against pecuniary damage should be regulated for members of a committee of creditors in order to "encourage creditors to become members of a committee of creditors" (please see recital 57 of the Directive draft). In fact, the draft provides for a supposed limitation of liability restricted to violation of monitor's obligations ("breached a fiduciary duty to the creditors"), Article 66 of the Directive draft; however, since members of the committee of creditors work for the general body of creditors, almost every act conducted in the context of their capacity as member of a committee of creditors may be deemed as "fiduciary duty" which results in unlimited liability.

8. Measures Enhancing Transparency of National Insolvency Laws

Furthermore, the draft provides that the Member States in the context of the European Justice Portal make available a leaflet containing major information on certain elements of national insolvency laws. This shall, in particular, help creditors with debtors located in another Member State to assess what can happen if their investments become involved with insolvency proceedings (recital 58).

Those provisions in favour of enhanced transparency and improved information on insolvency law provisions in individual Member States are basically welcomed.