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Subject:	Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law - Third Presidency compromise proposal on Title VII

Delegations will find in the Annex the fourth Presidency draft compromise proposal on Title VII of the above mentioned directive.

Changes in comparison to the Commission's proposal are indicated in **bold** or ~~strikethrough~~, while changes in comparison with the last version of the compromise text are indicated **in bold and underline** or ~~strikethrough~~.

2022/0408 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

harmonising certain aspects of insolvency law

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

¹ OJ C [...], [...], p. [...]

² OJ C [...], [...], p. [...]

Whereas:

[...]

- (47) It is important to ensure **that creditors are appropriately involved in the process, such that creditors' interests can be adequately considered** ~~a fair balance between the interests of the debtor and creditors in insolvency proceedings.~~ Creditors' committees allow for better involvement of creditors in insolvency proceedings, in particular when creditors would otherwise be inhibited from doing so individually, due to limited resources, economic significance of their claims or the lack of geographic proximity. Creditors' committees can especially help cross-border creditors better exercise their rights and ensure their fair treatment. Member States should allow the establishment of a creditors' committee once **insolvency proceedings are opened. Member States should also be able to provide that a creditors' committee is established before insolvency proceedings are opened. Member States are not prevented from extending the application of those provisions to preventive restructuring proceedings.** A creditors' committee should be established ~~only provided that~~ **at least whenever the general meeting of creditors agrees so decides or requests or, where national law does not provide for a general meeting of creditors, if creditors so request in accordance with national law. Member States may decide that the courts, insolvency practitioners or competent authorities can establish the creditors' committee on their own motion or upon request of one or more creditors. In** ~~this case, however, Member States should provide that creditors agree to its continuation and composition at the general meeting. If creditors disagree with the composition, they may also establish a new creditors' committee.~~

[47a. It should be noted that in some Member States the protection of creditors rights in the insolvency proceedings is effectively realised by direct access of creditors to the relevant and necessary information provided by insolvency practitioner, the debtor or the court, by means of different forms of communication. Creditors interests are also ensured by providing them with the right to be heard in the insolvency proceedings by the insolvency practitioner and by the court that is supervising the whole proceedings including the insolvency practitioner. In such systems, it is not necessary to establish a separate institution of creditors' committee with limited powers and rights as provided for in Title VII.

The same is true for those Member States whose laws provide for a separate institution in form of a person or a body with the same scope of functions, duties and rights to protect creditors' interests as it is envisaged for creditors' committee in Title VII.

Therefore these Member States, by way of derogation from the provisions of Title VII, should have the choice not to provide for an establishment of creditors' committee.]

- (48) The cost of setting up and operating a creditors' committee ~~should~~ **ought to** be commensurate ~~to~~ **with** the ~~value~~ **benefits** it generates. **Therefore, Member State should be able to provide that** ~~t~~ **The establishment of the creditors' committee should **would** not be justified in those instances where the cost **and burden** of its set-up and operations is ~~significantly~~ higher than the economic relevance of the decisions it ~~may~~ **might** take. This may be the case where there are too few creditors, where the large majority of creditors has a small share in the claim against the debtor, **where possible delays caused by the establishment of a creditors' committee would lead to a deterioration of the financial situation of the debtor** or where the expected recovery from the insolvency estate in insolvency proceedings is ~~significantly~~ lower than the cost of the set-up and operation of the creditors' committee. ~~This~~ **Such situations** occurs in particular in insolvency cases ~~of~~ **concerning entrepreneur debtors and small** ~~micro~~enterprises.**

- (49) Member States should clarify the requirements, duties and procedures for the appointment of members of the creditors' committee, as well as ~~the-its~~ functions ~~attributed to the creditors' committee~~. Member States should be given the option to decide whether the appointment should be done by the general meeting of creditors, or by the court. To avoid undue delays in the set-up of the creditors' committee, the members should be appointed expeditiously **to ensure an efficient running of the insolvency proceedings**. Member States should cater for a fair representation of creditors in the **creditors' committee** and ensure **creditors that are resident in another Member State are not precluded from the participating** in the creditors' committee ~~is not precluded to creditors whose claim is not yet admitted or to creditors that are resident in another Member State~~.
- (50) Fair representation of creditors in the creditors' committee is particularly important in relation to unsecured creditors-, **including creditors with small claims**, ~~that are micro, small or medium-sized enterprises, which in the case of insolvency of a debtor which is a large enterprise, if not paid promptly, are often also exposed to a risk of insolvency (so-called 'domino effect')~~. Proper representation in the creditors' committee of such creditors could ensure that in the course of the distribution of the recovered proceeds they receive their parts more expeditiously. **Member States may provide that persons other than creditors, such as employees' representatives or creditors' associations, are also eligible for the appointment to the creditors' committee.**
- (51) **The creditors' committee should be involved in insolvency proceedings and ensure that** ~~An important task of the creditors' committee should be to verify~~ **oversee** that insolvency proceedings ~~they~~ are conducted in a way that protects creditors' interests. The committee's role in the monitoring of the fairness and integrity of the proceedings can only be performed effectively if the creditors' committee and its members act independently from the insolvency practitioner and are accountable only to the creditors ~~who established it~~.

- (52) The number of members in the creditors' committee should, on the one hand, be sufficiently large to ensure diversity of views and interests in the committee and, on the other hand, remain relatively limited to deliver on its tasks effectively and timely. **Nevertheless, in particular complex cases Member States should be able to increase the number of creditors' committee members to provide adequate protection of creditors' interests.** Member States should clarify when and how the composition of the committee needs to be altered, which could happen if representatives are no longer able to act, including in the creditors' best interests, or wish to withdraw. ~~They~~ **Member States** should also clarify the conditions for the removal of members ~~that who acted relentlessly against~~ **committed a serious violation of essential duties with respect to the** creditors' interest.
- (53) ~~Members of the creditors' committee retain discretion in the organisation of the work, as long as~~ **The working methods of the creditors' committee should be** ~~are~~ lawful, transparent and effective. Member States should therefore ~~require that the creditors' committee to~~ **set out the working methods, specifying procedures for voting and the necessary quorum, how meetings should be run documented information on the activities of the creditors' committee should be made accessible**, ~~who could attend and vote,~~ and how the impartiality and the confidentiality of the work of the **creditors'** committee is ensured. ~~Thoes~~ **These** working methods should **also** be allowed to ~~also~~ set out a role for **non-creditors' employers'** representatives or transparency towards other creditors. **Member States may provide that the working methods may be further specified by means of protocols.**
- (53a) Creditors should be able to participate and vote electronically or delegate their voting rights to a **duly authorised** third person, ~~provided this person is duly authorised~~. This possibility would be particularly beneficial for creditors resident in other Member States.

- (54) ~~Member States should ensure that the court has the power to determine the working methods for of the creditors' committee, if they are not established expeditiously. The Commission should establish standard working methods that should facilitate the task of the creditors' committee and reduce the need for courts to intervene in the case of missing working methods.~~
- (55) The creditors' committee should be granted sufficient rights to perform its functions efficiently and effectively. Member States should ensure that the creditors' committee **acts in a transparent manner and** can interact with insolvency practitioners, courts, the debtor-**in-possession**, external advisors and the creditors ~~whom~~**that** it represents, as necessary, to enable the **creditors'** committee to form and communicate ~~a~~**its** views on matters of direct interest and relevance to creditors, and for ~~those~~ views to be duly considered in proceedings. **Member States should ensure the right of the creditors' committee to request information from the insolvency practitioner and, where the debtor remains in possession, from the debtor. {Member States could provide for a right of the creditors' committee to be consulted on major decisions.}** Member States could also empower the creditors' committee to ~~make~~**take** decisions.
- (56) Since the operation of the creditors' committee incurs expenses, Member States should ~~determine upfront~~**establish clear rules as to** who pays for them. Member States should also establish safeguards to prevent that the costs of the creditors' committee reduce the recovery value of the insolvency estate in a disproportionate manner.

(57) To encourage creditors to become members of the creditors' committee, Member States should limit their ~~individual~~ civil liability when they carry out functions in accordance with this Directive. Nonetheless, members of the creditors' committee ~~acting fraudulently or negligently~~ **that have violated their duties intentionally or in a grossly negligent manner**, ~~when carrying out those functions~~, can be removed and held liable for their actions. In those cases, Member States should provide that the members are held individually liable for the detriment caused by their misconduct. **Member States may decide not to apply such limitation of the civil liability when the expenses for an insurance covering the personal liability of the members of the creditors' committee members is borne by the insolvency estate.** Where Member States entrust the creditors' committee with greater powers, allowing it, for example, to take decisions concerning the assets of the debtor or to accept transactions in insolvency proceedings, Member States should be able to provide that the members of the creditors' committee are held liable in the same manner as an insolvency practitioner.

[...]

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter and scope

1. [...]
2. **Titles II, III and VII apply to collective proceedings which are based on national laws relating to insolvency.**

By derogation from the first subparagraph, Title II, III and VII do not apply to preventive restructuring procedures and Title II does not apply to interim proceedings.

Article 2

Definitions

- 1.** For the purposes of this Directive, the following definitions apply:

[...]

- (o) ‘creditors’ committee’ means a representative body of creditors, appointed in accordance with the applicable **national** law on insolvency proceedings, with consultative and other powers as specified in that law;

Article 3a

National law and minimum harmonisation

1. Member States may adopt or maintain laws in conformity with Union law which provide for a greater level of protection for the general body of creditors than that provided for under Titles II, and V.

[...]

3. Member States may adopt or maintain laws relating to the establishment, functioning, tasks and members of creditors' committees which provide for a greater participation of creditors in insolvency proceedings than ~~those that set provided for out~~ in Title VII.

[4. ~~By way of derogation from the provisions of Title VII~~ Member States may choose not to provide for an establishment of creditors' committee in accordance with the provisions of Title VII, where their national law:

- a) ensures that creditors in the insolvency proceedings have at least the right to be heard and to have access to relevant and necessary information from the insolvency practitioner or the debtor, through different means of communication, or
- b) provides for the possibility to establish in the insolvency proceedings a person or a body, selected by the creditors, independent from the insolvency practitioner, that represents interests of general body of creditors and has at least comparable rights and powers as provided for creditors' committee in Article 64.]

Title VII
CREDITORS' COMMITTEE

Chapter 1

Establishment and members of the creditors' committee

Article 58

Establishment of the creditors' committee

1. Member States shall ensure that a creditors' committee is established **after the opening of the insolvency proceedings at least** ~~only~~ if the general meeting of creditors so decides **or requests or, where national law does not provide for a general meeting of creditors, if creditors so request in accordance with national law.**

2. ~~By way of derogation from paragraph (1)~~ Member States may provide that, ~~before the opening of insolvency proceedings, the creditors' committee can be established as of the submission of a request for the opening of insolvency proceedings, where one or more creditors submit a request to the court for the establishment of such~~ **the creditors' committee can be established before the opening of insolvency proceedings in accordance with national law.**

- 2a. Member States shall ensure that ~~the first general meeting of creditors decides on the continuation and the composition of the creditors' committee established in accordance with subparagraph 1~~ **the number of members of the creditors' committee does not exceed 79.**

Member States may provide for a higher number of members of the creditors' committee in particularly complex insolvency proceedings.

3. Member States may ~~exclude in national law the possibility to establish a~~ **provide that a** creditors' committee is **not established** ~~in insolvency proceedings, where, due to~~ **circumstances related to the nature and scope of the debtor's business, it determines that** ~~the costs of the establishment of the creditors' committee would outweigh the benefits.~~

Where a Member State provides pursuant to the first subparagraph, it shall ensure that the circumstances in which the exception applies are clearly defined in national law.

~~When the overall costs of the involvement of such a committee are not justified in view of the low economic relevance of the insolvency estate, of the low number of creditors or the circumstance that debtor is a microenterprise.~~

Article 59

Appointment Composition of the members of the creditors' committee

1. ~~Member States shall ensure that the members of the creditors' committee are appointed either at the general meeting of creditors or by decision of the court, within 30 days from the date of the opening of the proceedings as referred to in Article 24(2), point (a) of Regulation (EU) 2015/848.~~

- ~~2. Where the members of the creditors' committee are appointed at the general meeting of creditors, Member States shall ensure that the court certifies the appointment within 5 days from the date of the communication of the appointment to the court.~~
3. Member States shall ensure that the **composition of the appointed members of the creditors' committee fairly reflects, as far as possible, the different interests of creditors or groups thereof. Member States may provide that persons other than creditors are eligible for the appointment to the creditors' committee.**
4. Member States shall ensure that ~~creditors whose claims have only been provisionally admitted and~~ cross-border creditors are also eligible for the appointment to the creditors' committee.
- ~~5. Member States shall ensure that any interested party may challenge before the court the appointment of one or more members of the creditors' committee on the ground that the appointment was not done in accordance with applicable law.~~

Article 60

Duty of creditors as members of the creditors' committee

~~1.~~

~~By way of derogation from the previous subparagraph, Member States may maintain national provisions that allow to set up more than one creditors' committee representing different groups of creditors in the same insolvency proceedings. In this case, the members of the creditors' committee represent solely the interests of the creditors who appointed them.~~

~~2. The creditors' committee owes the duties to all creditors it represents.~~

Article 61

Number of members

~~Member States shall ensure that the number of members composing the creditors' committee is at least 3 and does not exceed 7.~~

Article 62

Removal of a member and replacement

1. Member States shall lay down rules specifying ~~both the grounds and procedures for the~~ removal and replacement of members of the creditors' committee ~~and the related procedures~~. Those rules shall also ~~provide~~ **provide** ~~for~~ the situation where members of the creditors' committee resign or are unable to perform their ~~duties~~ **duties** ~~required functions, such as in cases of serious illness or death~~.
2. Grounds for removal **referred to in paragraph 1** shall at least include ~~fraudulent-intentional~~ or grossly negligent **serious-violation of essential** ~~conduct, wilful misconduct, or breach of~~ **conduct** ~~fiduciary~~ duties with respect to the creditors' interests.

Chapter 2

Working methods and function of the creditors' committee

Article 63

Working method of the creditors' committee

1. Member States shall ensure that a creditors' committee lays down a protocol of working methods **lay down rules specifying:** within 15 working days following the appointment of the members. If the creditors' committee fails to comply with this obligation, the court shall be empowered to lay down the protocol on behalf of the creditors' committee within 15 working days following the expiry of the first 15 working day period. In the first meeting of the creditors' committee, its members shall approve the working methods by simple majority of the present members.
2. That protocol referred to in paragraph (1) shall at least address the following matters:
 - (a) ~~eligibility to attend and participate in the creditors' committee's meetings;~~
 - (b) **the eligibility to voting procedure** and the necessary quorum;
 - (c) conflict of interests;
 - (d) confidentiality of information;-
 - {(c) ~~the documentation of the activity of the creditors' committee.~~ access to information on the activities of the creditors' committee.}**
3. Member States shall ensure that the protocol referred to in paragraph (1) is available to all creditors, the court and the insolvency practitioner.

4. Member States shall ensure that the members of the creditors' committee are given the possibility to participate and vote either in person, ~~in writing~~ or via electronic means.
Member States may provide that the members of the creditors' committee are given the possibility to participate and vote through other means of communication.
5. Member States ~~shall ensure~~**may provide** that members of the creditors' committee ~~may~~**can** be represented by a **duly authorised person** ~~party supplied with a power of attorney.~~
6. ~~The Commission shall establish a standard protocol by way of implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 69(2).~~

Article 64

Function, rights, and duties and powers of the creditors'¹ committee

1. ~~Member States shall ensure that the creditors' committee's function is to ensure that in the conduct of the insolvency proceedings the creditors' interests are protected and individual creditors are involved.~~

~~To that end~~**For the purposes of the first subparagraph,** Member States shall ensure that the creditors' committee has at least the following rights, duties and powers **that safeguard its involvement in the insolvency proceedings and enable it to oversee examine the activities of the insolvency practitioners, including:**

- (a) the right to ~~hear~~**and to be heard** by the insolvency practitioner **on matters of interest to the general body of creditors [including major decisions such as the sale of assets outside the ordinary course of business]** ~~at any time;~~
- (b) the right to ~~appear~~**and to be heard** in insolvency proceedings;

- (c) ~~the duty to supervise the insolvency practitioner, including by consulting with the insolvency practitioner and informing the insolvency practitioner of the wishes of creditors;~~
- (d) ~~the power~~ **right** to request **and receive** relevant and necessary information from ~~the debtor, the court or the insolvency practitioner~~ **or, where the debtor remains in possession, from the debtor, at any time during insolvency proceedings;**
- (e) ~~the duty to provide information to the creditors represented by the creditors' committee and the right to receive information from those creditors;~~
- (f) ~~the right to receive notice of and be consulted on matters in which the creditors represented by the creditors' committee have an interest, including the sale of assets outside the ordinary course of business;~~
- (g) ~~the power to request external advice on matters in which the creditors represented by the creditors' committee have an interest.~~

1a. Member States shall ensure that the creditors' committee represents solely the interests of the general body of creditors and acts independently of the insolvency practitioner.

2. In performing its duties, upon request, the creditors' committee shall inform creditors about its activity, subject to rules on confidentiality.

~~2. Where Member States entrust the creditors' committee with the power to approve certain decisions or legal acts, they shall clearly specify the matters on which such approval is required.~~

Expenses and remuneration

1. Member States shall specify who bears the expenses incurred by the creditors' committee **or its individual members** in exercising ~~its~~~~the~~ function referred to in Article 64.
2. Where the expenses referred to in paragraph 1 are borne by the insolvency estate, Member States shall ensure that the creditors' committee **or its individual members** keep record of such expenses and the court, **insolvency practitioners or competent authority** has the authority to limit unjustified ~~and~~~~or~~ disproportionate expenses.
3. Where Member States allow members of the creditors' committee to be remunerated and such remuneration is borne by the insolvency estate, they shall ensure that the remuneration is proportionate to the function performed ~~by the members and that the creditors' committee or its individual members~~ keeps record of it.

Article 66

Liability

1. **Member States shall ensure that at least one of the following rules apply:**
 - (a) ~~m~~**Members of the creditors' committee are exempt from individual personal liability for their actions in their capacity as members of the committee unless they have committed been found to have violated their duties with respect to the creditors' interests intentionally or in a grossly negligent manner; grossly negligent or fraudulent conduct, wilful misconduct, or have breached a fiduciary duty to the creditors they represent.**
 - (b) **the personal liability of the members of the creditors' committee for their actions in their capacity as members of the committee is covered by insurance which is borne by the insolvency estate in accordance with Article 65(2).**
2. **Where Member States entrust the creditors' committee with the power to approve certain decisions or transactions, Member States may provide that the members of the creditors' committee are held liable in the same manner as an insolvency practitioner.**

Article 67

Appeal

1. ~~Where Member States entrust the creditors' committee with the power to approve certain decisions or transactions, they shall also provide for a right to appeal against such an approval.~~
2. ~~Member States shall ensure that the appeal procedure is efficient and expeditious.~~