

EU PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL HARMONISING CERTAIN ASPECTS OF INSOLVENCY LAW

On 13 December 2024, the European Council issued a press release announcing its position on the core Capital Markets Union (CMU) legislation, specifically focusing on the certain aspects aimed at the harmonisation of insolvency laws across EU Member States. [European Council press release](#).

IMPACT ON CROSS BORDER INVESTMENT AND THE COST OF CAPITAL

The draft directive is considered to be an essential part of the CMU initiative, aiming to align insolvency procedures by setting minimum standards across EU Member States in relation to certain aspects of insolvency law. This harmonisation is designed to make it easier for investors when assessing risks. It is expected to have a positive impact on cross-border investment and ultimately reduce the cost of capital.

SUMMARY OF CHANGES SINCE 7 DECEMBER 2022

Since the draft directive was first published on 7 December 2022, there have been a number of significant changes after the European Commission sought feedback from a wide range of stakeholders. Clifford Chance participated in that feedback process and highlighted some areas where additional clarity might be welcomed. It is interesting to note that some of the key updates include such enhancements.

Following the European Council's consideration of the draft directive the suggested amendments focus on three substantive areas: avoidance actions, directors' duties, and tracing assets.

Key Updates:

- 1. Avoidance actions:** The clawback period for avoidance actions that are considered to be intentionally detrimental to creditors has been reduced from 4 to 2 years. Certain presumptions have also been expressed to be rebuttable. Additionally, there is now an express carve-out for netting agreements, including close-out netting agreements in the financial markets, energy, or other commodities sectors.
- 2. Directors' duties:** The obligation for directors to file for formal insolvency within three months of insolvency remains. Insolvency is to be determined

Key issues

- EU measures proposed to harmonise insolvency laws
- Standardising mandatory duty for directors to file for insolvency
- Standardising claw back action
- Availability of asset tracing registers

by reference to national law provisions. A new provision has been included to allow this duty to be displaced if steps are taken to protect creditors' interests. The current wording in this respect, may benefit from further refinement.

- 3. Tracing assets:** The proposals include measures that will benefit insolvency practitioners by improving access to national assets registers and beneficial ownership information. Designated courts or authorities will have direct access to national and cross-border bank account registers which insolvency practitioners can apply to the courts to have information provided to them. Access to the information is limited and only for the purpose of identifying and tracing assets that belong to the insolvency estate.

[Updated draft Proposal with European Council amendments](#)

Notably, the updated directive excludes pre-packs, streamlining winding up for microbusinesses, and creditors' committees, from its harmonisation proposals, despite having featured in the previous draft and which the Council describes as a 'Partial General Approach'.

For more detailed information in relation to the original proposals, please refer to our previous briefing, "More harmonisation of insolvency laws is on its way across Europe" (19 December 2022).

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