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The place of micro and small Enterprises in European Insolvency law

Oleksiy Kononov

Faculty of Law, Economics and Finance (FDEF), University of Luxembourg, Luxembourg, Luxembourg

Correspondence
Oleksiy Kononov, Faculty of Law, Economics and Finance (FDEF), University of Luxembourg, Luxembourg, Luxembourg.
Email: oleksiy.kononov@uni.lu

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Abstract

Micro and small enterprises (MSEs) form the backbone of the European economy but remain particularly vulnerable to financial distress and insolvency. Despite the EU's efforts to harmonise insolvency laws, significant divergences persist among Member States, especially regarding tailored frameworks for smaller businesses. The Preventive Restructuring Directive (PRD) (EU 2019/1023) introduced optional provisions for small and medium-sized enterprises (SMEs), yet their selective transposition reflects the reluctance of some jurisdictions to adopt special regimes.

The 2022 Proposal for further harmonisation sought to address these gaps, notably by introducing simplified winding-up procedures for microenterprises. However, disagreements over national legislative autonomy, the roles of insolvency practitioners and courts, and inconsistencies in definitions hindered consensus.

This paper critically examines the evolution of EU insolvency law as it relates to MSEs, evaluates national implementation practices, and explores possible pathways for harmonisation, despite the ultimate failure to establish a

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unified winding-up regime for smaller businesses. It argues that while a coordinated EU approach is necessary, achieving a balance between legal uniformity and national flexibility remains a significant challenge.

1 | INTRODUCTION

1.1 | Small but vital for the economy

On 12 June 2025, the Council of the European Union (EU) reached[1] a general approach[2] on the proposed Directive harmonizing certain aspects of insolvency law ('Directive Proposal').[3] This agreement marked the end of over 2 years of discussions among EU Member States and other stakeholders, opening the door to the Directive's eventual adoption. It will represent the second legislative instrument within the EU *acquis* to align substantive insolvency law across Member States, following Directive (EU) 2019/1023 on preventive restructuring (PRD).[4] Nevertheless, the compromise reflected in the Council's position excluded the initially proposed simplified liquidation regime for insolvent microenterprises, citing "concerns over its practical applicability, and its potential impact on existing national systems."[5]

Micro, small, and medium-sized enterprises (MSMEs) represent 99.8% of all businesses in the EU.[6] This MSMEs dominance is not unique to the EU and corresponds to global trends,[7] including the post-Brexit United Kingdom[8] and countries aspiring to EU membership in the future.[9] MSME' economic and social importance cannot be overstated. At the same time, it is widely acknowledged that MSMEs are particularly vulnerable to economic challenges and insolvency due to their small size and limited financial and intellectual resources.[10] This is especially true for smaller organizations—micro[11] and small enterprises (MSEs)[12]—which make up the majority of businesses in the EU (99%).[13] Despite often having modest turnovers and a tendency to employ only a few workers, or operating solely as family businesses without any hired workforce, in 2024 MSEs accounted for more than 36% of the EU's added value and 49.6% of jobs.[14]

1.2 | Existing economic challenges and vulnerability to insolvency

The COVID-19 pandemic and the Russo-Ukrainian war have caused an unprecedented economic decline in both the European and global economies. COVID-19 lockdowns and other quarantine restrictions led to a collapse in demand for many products and services, creating uncertainty about future demand.[15] The Russo-Ukrainian war has further worsened the lasting effects of the pandemic, disrupting global supply chains and triggering energy and food crises, along with rising inflation.[16] Additionally, the war prompted a significant expansion of sanctions against Russia, imposed by the EU, individual EU Member States, and third countries, such as the United Kingdom and especially the United States, whose extraterritorial sanctions affect other economies globally.

According to the latest European Central Bank's forecast, real GDP in the EUR area is expected to grow by only 0.9% in 2025 and 1.2% in 2026; inflation in 2025 is projected at 2.3%.[17] Along with the stagnation of economic activity, very modest consumption growth in 2023

(0.4%) and 2024 (0.8%),[18] and services price inflation,[19] these projections do not look promising for businesses, especially smaller ones throughout the EU.

Support measures to businesses undertaken by national governments in 2020–2021 contributed to curbing insolvency filings and kept them below pre-COVID levels.[20] Yet, the "delayed effect of the pandemic" along with the end of most support measures took their toll.[21] In 2022 the number of bankruptcies among MSMEs spiked in most EU Member States, sometimes reaching a 10% increase compared to 2021,[22] and in 2023 the numbers rose by 13%.[23] International financial watchdogs' predictions that the relaxation of governmental support may carry some businesses that survived the pandemic to 'the brink of bankruptcy'[24] started to become true. In Q2' 24 the number of bankruptcy declarations among the EU SMEs increased by 3.1% compared to Q1' 24 reaching the highest level since 2018.[25]

The ongoing deterioration of the EU-US trade relations, along with general projections for 2025, suggests that the rise in business insolvencies will persist.[26] Consequently, this dire situation is expected to lead to a further increase in insolvencies, bankruptcies, and subsequent liquidations, particularly among micro and small businesses—the most vulnerable economic actors. This will have significant ripple effects on individuals, increasing reliance on social safety net systems. However, the current economic, political, and military turmoil alone cannot be solely blamed for the difficult situation facing small businesses. In fact, this phenomenon is not new. For years, recognizing the general vulnerability of MSMEs to insolvency, as well as their lack of resources and expertise, international financial watchdogs have promoted the idea that traditional legal insolvency frameworks may not adequately address the specific needs of MSMEs.[27] According to them, it may be necessary to introduce tailored accommodations for smaller businesses within national insolvency and restructuring laws.[28] Between 2021 and 2022, following the updated World Bank's recommendations focusing on the needs of MSEs,[29] the United Nations Commission on International Trade Law (UNCITRAL) released its legislative recommendations on the insolvency of MSEs.[30] In their recommendations, UNCITRAL emphasized that states should establish a simplified insolvency regime to support MSEs by ensuring accessible, low-cost, and flexible proceedings.[31] Key objectives include enabling the swift liquidation of nonviable MSEs and the reorganization of viable ones, protecting creditors, employees, and other stakeholders, and promoting creditor participation while addressing disengagement. Measures should also prevent abuse through effective sanctions, mitigate the stigma of insolvency, and, where possible, preserve employment and investment. These objectives complement broader insolvency law principles, such as market stability, asset value maximization, equitable creditor treatment, transparency, and clear priority rules, as outlined in UNCITRAL's recommendations.[32]

In light of the above, and considering that 'businesses are operating in difficult and uncertain times'[33] this paper aims to address two key questions: How is the EU responding to the challenges faced by MSEs? And why does harmonizing substantive insolvency laws remain so difficult?

Section 2 will focus on analyzing the PRD and its national transpositions concerning MSEs in selected Member States—Spain, France, Belgium, and Ireland—representing the full range of approaches taken to accommodate the interests of smaller businesses. Section 3 will cover the special regime for winding-up microenterprises suggested in the 2022 Directive Proposal[34] and why this special regime was doomed to fail. Special emphasis will be placed on outlining the main objections raised by various stakeholders across different EU Member States and analyzing the key challenges in adopting the proposed Directive. The section will conclude with an analysis of possible ways to overcome the existing difficulties in harmonization.

The combined analysis of the PRD's transposition and the Directive Proposal is intentional. In addition to the PRD's limited impact on SMEs across EU Member States (see below), the decision not to introduce a specific liquidation regime for microenterprises highlights the complexity of harmonizing 27 national insolvency systems. It also underscores the continuing challenge of effectively supporting the very enterprises that contribute significantly to the EU's economic output and employment.

The use of various abbreviations such as SMEs, MSMEs, and MSEs is not an omission to confuse the reader but a deliberate choice to highlight the diverse approaches taken by various international institutions, the EU and its Member States. For example, while Directive (EU) 2019/1023 refers to SMEs without distinguishing between MSMEs, the 2022 Proposal specifically singles out microenterprises for a simplified winding-up procedure. The European Parliament's Committee on Economic and Monetary Affairs subsequently proposed broadening the application of this simplified winding-up procedure to both microenterprises and SMEs. EU program documents frequently use the abbreviation 'SME' to include microenterprises; though in some cases, microenterprises are either excluded or not explicitly mentioned. Furthermore, individual Member States apply different national definitions when determining which enterprises qualify for special treatment during insolvency proceedings. In the author's view, these inconsistencies effectively illustrate that seemingly minor details are not so easily reconciled.

2 | EU *ACQUIS* AND INSOLVENCY

Despite the importance of a coherent insolvency law for the EU internal market,[35] particularly for the advancement of the Capital Markets Union (CMU),[36] EU harmonization efforts in this area remain rather modest at the time of writing. The failure of early European attempts[37] in this field demonstrated that harmonizing the substantive norms of Member States' insolvency laws may not be swift and would require a more limited scope and less ambitious approach from EU institutions.[38] The Insolvency Regulation, first adopted in 2000[39] and later revised in its 2015 recast version,[40] became the first binding act of the EU *acquis* in the field of insolvency law. However, the Regulation covered conflict of law rules and concentrated on jurisdiction, recognition and enforcement, applicable law, and cross-border insolvency proceedings, leaving 'widely different substantive laws'[41] to the Member States. In 2019, the EU adopted the PRD,[42] making it the first and so far the only source of EU secondary law aimed at harmonizing certain aspects of Member States' substantive laws in the field of insolvency.

2.1 | PRD and smaller businesses

First proposed in 2016 and adopted after 3 years of rather difficult negotiations and numerous revisions,[43] the Directive

> [I]s to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications.[44]

It covers all types of distressed businesses. At the same time, the Directive is also 'directed toward facilitating the availability of necessary legal procedures'[45] for SMEs. The PRD became the first binding part of the EU *acquis* to emphasize SMEs' limited resources,[46] and the prevailing trend of liquidating SME debtors instead of restructuring their debts.[47] Based on these premises, the Directive recognized the need to simplify procedures for smaller businesses[48] and to provide them with certain accommodations during PRD procedures. In short, the PRD offers SMEs the following:

1. a possibility for a simplified procedure of formation of creditor classes[49];
2. restructuring plans tailored for their specific needs[50];
3. appropriate early warning tools[51];
4. optional cram-down mechanisms[52];
5. a mandatory debtor's agreement as a precondition for the initiation of restructuring procedures when the debtor is a SME[53];
6. a possibility to exclude SME equity holders from the adoption of restructuring plans.[54]

It is important to note that, except for the provisions on restructuring plans[55] and early warning tools,[56] most of the PRD's specific provisions regarding SMEs are not mandatory for transposition by EU Member States. Instead, by frequently using the phrase 'Member States may...,' the Directive merely presents them as options.[57] During the national transpositions of the Directive, only a few EU jurisdictions introduced special accommodations for smaller businesses, focusing primarily on the Directive's provisions regarding creditor classification and cram-down rules. Others went beyond the PRD, offering distressed MSMEs even greater flexibility. Major EU jurisdiction such as Germany opted not to provide special rules for distressed MSMEs. Smaller jurisdictions found it difficult to give them special treatment. For example, in the case of Estonia, insolvency experts and professionals convened by the Ministry of Justice to discuss the transposition of the Directive advised against a special regulation for SMEs, citing 'the small size of the Estonian economy.'[58] In Denmark, where class voting was a novel concept and stakeholders were reluctant to introduce classes, the legislator willingly allowed SMEs to opt out of the obligation to divide affected parties into classes, expecting that class voting would rarely be used in practice.[59] As a result, the available transpositions appear to be highly selective and dependent on the domestic context of each Member State. Below is a brief overview of notable examples showcasing the diverse approaches taken by Member States toward MSMEs, ranging from the most comprehensive (Spain) to more modest (France and Belgium). The Irish example illustrates a specific approach adopted before the transposition of the PRD and targeting specifically micro and small companies.

2.1.1 | Spain

Spain represents the most interesting example among 27 Member States when it comes to the interests of smaller businesses. Transposition of the PRD into Spanish law was combined with a drastic reform of the country's entire Insolvency Law (*Ley Concursal*).[60] Recognizing the vital importance of microenterprises to the national economy, as well as the possible rise in the number of insolvency-related cases following the COVID-19 pandemic,[61] Spanish legislators introduced a comprehensive system for restructuring viable microenterprises[62] and swiftly liquidating unviable ones.[63] The new procedure represents a flexible, low-cost, and technologically

driven insolvency process that is based on a "modular approach."'[64] The novelties introduced by the Spanish reform emphasize the use of standardized pre-designed electronic forms. In addition to the four minimal options for electronic communications outlined in Art. 28 of the PRD (filing of claims, submission of restructuring plan, notifications to creditors, lodging of challenges and appeals), the Spanish transposition provides additional possibilities. These include the use of an official template for a restructuring plan specifically tailored to the needs of small enterprises[65] and the option to notify the competent insolvency court about the opening of negotiations with creditors on a restructuring plan,[66] to name but a few. The entire procedure dwells on the proactive involvement of the parties, meaning that the adoption of specific measures or access to certain information must be expressly requested by the interested parties. The court is not authorized to take such actions on its own.

Other notable features available to debtor microenterprises include:

i. A non-extendable three-month period during which all individual enforcement actions against the debtor are suspended.[67]
ii. The possibility to opt for either a restructuring plan or a fast-track liquidation of the debtor (provided, in the latter case, that the debtor is in a situation of imminent or current insolvency).[68]
iii. The replacement of face-to-face court hearings with virtual ones and an emphasis on resolving disputes between the parties (especially those related to the approval of a restructuring plan) through written proceedings.[69]

In addition to that, Spanish legislators made a clear distinction between procedures available to microenterprises and medium-sized enterprises.[70] For the latter, it was decided[71] that the following accommodations would apply:

- The debtor's consent—and where required, its shareholders' consent—is always necessary for the court to confirm a restructuring plan[72];
- Only the debtor, and not the creditors, may voluntarily request the court to approve the class formation[73];
- Possibility to use a relative priority rule instead of absolute priority (the latter is a default one according to *Ley Concursal*). For debtors which are medium-sized enterprises, for the approval of the restructuring plan, it is sufficient for the dissenting class or classes of creditors to receive more favorable treatment than any lower-ranking class.[74]

As evident, the reform of the Spanish *Ley Concursal* went beyond a mere copy-pasting of the PRD. Smaller businesses were provided with various tools to manage financial distress, emphasizing electronic communication and minimizing court interactions. Swift winding-up procedures for unviable businesses introduced legislative amendments not envisaged by the Directive, which has led to tensions with the EU's proposal for further harmonization of insolvency law, as will be demonstrated in Section 2.3 below.

2.1.2 | France

Compared to Spain, France, with its well-developed insolvency legislation and various debt restructuring tools that existed long before the PRD, took a more modest approach in

transposing the Directive's special (and optional) provisions on SMEs.[75] French legislators decided that the formation of classes in safeguard and judicial reorganization proceedings would not be mandatory for debtors with fewer than 250 employees and an annual turnover of less than EUR 20 million, or for those with a turnover of less than EUR 40 million, regardless of the number of employees.[76] At the same time, in accelerated safeguard proceedings the formation of classes is mandatory for all debtors including SMEs.[77] The appointment of a judicial administrator in both procedures is not mandatory if the debtor has fewer than 20 employees or a turnover of less than EUR 3 million (excluding taxes).[78] Another SME-related feature of the French transposition is the rules on the cross-class cram-down. The latter cannot be applied unless the debtor's business exceeds 150 employees, or its annual turnover exceeds EUR 20 million.[79]

Finally, the transposition of the PRD in France was accompanied by amendments to the simplified judicial winding-up procedure (*liquidation judiciaire simplifiée*), intended for debtors whose assets do not include immovable property.[80] The reform repealed the qualifying thresholds for debtors—sole proprietors—[81] and allowed them to discharge their debts through this procedure, provided they do not own any immovable property.[82]

To reiterate, the French transposition focused on classes and the cram-down procedure, distinguishing smaller businesses based on turnover and employee numbers. Notably, the qualifying thresholds primarily emphasize the latter. Unlike in Spain, the debtor's interaction with the court remains significant, and the simplification of winding-up applies only to sole proprietors.

2.1.3 | Belgium

The PRD was not a major novelty for Belgium, as the Code of Economic Law (CEL) already contained a well-structured insolvency law[83] offering well-developed restructuring tools for distressed businesses, including special accommodations for SMEs.[84] Regarding the latter, during the transposition of the Directive,[85] only minimal changes were introduced by the legislator to comply with the PRD requirements for smaller businesses.[86] Following the reform, the following peculiar options available to SMEs[87] should be mentioned:

1. In a public judicial restructuring by collective agreement,[88] debtors qualifying as SMEs are not required to divide creditors into separate classes. However, approval of the collective agreement (i.e. the restructuring plan) requires the consent of a majority of creditors, both in terms of their total number and the amount of their claims against the debtor. Once the court approves the plan, it becomes binding for all creditors.[89]
2. Possibility to opt for restructuring procedure for large enterprises which requires the division of creditors into classes.[90] In this case the restructuring plan is to be approved by simple majority in each class.[91] Dissenting creditors will be bound by the plan only if the plan meets the creditor' best interests test.[92] An absolute priority rule is to be used for a cross-class cram-down.[93]

The Belgian transposition of the Directive introduced a two-tier system for judicial restructuring by collective agreement—one for SMEs and another for large businesses. SMEs can choose between the two, determining whether they want to form classes, which in turn affects the complexity of the restructuring plan's approval.

2.1.4 | Ireland

After Brexit, the Republic of Ireland is the only common law jurisdiction remaining in the EU. Even before the development of the PRD, the country's legal framework for business rescue—examinership,[94] was well developed and partially modelled on the US Bankruptcy Code Chapter 11 and English law.[95] Moreover, UK legislators drew inspiration from the Irish examinership when adopting the well-known Corporate Insolvency and Governance Act (CIGA) in 2020,[96] which is sometimes described as legislation aimed at preserving London's role as a restructuring hub for Europe.[97]

Interestingly, in Ireland, a special rescue regime for smaller businesses was introduced before the transposition of the PRD. Referring to smaller Irish businesses heavily affected by the COVID-19 pandemic, it was determined that the existing examinership framework was too costly for them.[98] As a result, the need for'a process akin to examinership, but appropriately nuanced to meet the unique requirements of small and micro enterprise'[99] was recognized. Eventually, in 2021, the so-called Small Companies Administrative Rescue Process (SCARP) was introduced[100] to provide for a new administrative rescue process for viable small[101] and micro[102] companies. The 2022 implementation of the PRD primarily involved amendments to the existing regulations on examinership.[103] These amendments incorporated the Directive's requirements to the extent that they were not already provided for by Irish examinership law.

Qualifying micro and small businesses can choose between the standard examinership proceedings under Part 10 of the Companies Act 2014 (supervised by a court) or the special SCARP proceedings under Part 10A of the same Act (mostly out-of-court with the assistance of a process advisor[104]). SCARP is available unless the company is already in the process of winding-up and has not appointed an examiner or process adviser in the 5 years preceding the application.[105] If a receiver[106] has been appointed to the company and has been exercising their duties for more than three working days, SCARP cannot be used.[107]

SCARP offers smaller businesses the following benefits:

- The entire process is limited to a total of 70 days versus 100 days in examinership[108];
- Directors must prepare a simplified statement of the company's affairs using a prescribed template[109];
- There is no automatic stay (like in examinership) of enforcement proceedings against the company, but the process advisor, the company itself, or its director(s) can petition the court for a stay[110];
- The process adviser plays a key role, including assessing the company's reasonable prospects of survival,[111] liaising with creditors,[112] organizing creditors' meetings,[113] and assisting in preparing a rescue plan[114];
- The process adviser has a reasonable yet short timeframe of 42 days from notifying creditors of their appointment to prepare the rescue plan[115];
- The rescue plan is approved if it receives support from either:
  - a 60% majority in at least one class of creditors, or
  - creditors representing 60% in both number and value of claims[116];
- Creditors and other affected parties have 21 days to object to the plan in court.[117] In case no objections are filed during this period, the rescue plan becomes binding.[118] The process adviser has 'the onus of proof (...) to establish that the objection should not be upheld.'[119] In case the objection is dismissed by the court, the plan becomes binding immediately or on a date specified by the court[120];

- Court approval of the plan is not required; only notifications to the court, creditors, and other affected parties, tax authorities, and the company registrar are necessary.[121]

Thus, the Irish approach, similar to that of Belgium, provides the debtor with the option to choose between two regimes. The main difference is that under the SCARP procedure, court involvement is minimal.

2.2 | PRD: The same directive, the same debtors but different approaches

As one can see, the four special regimes for MSMEs described above do not present a harmonized picture across different EU Member States. Yes, both France and Belgium allow SMEs to avoid dividing creditors into classes, but that is where the similarities end. In France, the requirement for class formation depends on the type of rescue procedure chosen. In Belgium, SMEs can choose between special proceedings or those available to larger enterprises. The exact size of the debtor does not appear to be a determining factor either in Belgium or France, as long as it does not exceed the maximum thresholds to qualify as a large enterprise. Only Spain and Ireland have singled out microenterprises, yet they apply varying thresholds for qualifying as a microenterprise under their respective national laws. While Spain offers a more flexible and 'user-friendly' approach to microenterprises, Ireland applies the same treatment to both micro and small companies, despite the latter sometimes having greater financial and intellectual resources to navigate restructuring. Additionally, while Spain provides smaller businesses with various options for remote communication and electronic document submission, as envisaged by the PRD[122] (and even more), Ireland received a red card from the European Commission for failing to transpose the Directive's provisions regarding the use of electronic means of communication.[123] This situation highlights the significant challenges in achieving a more uniform harmonization of insolvency laws across EU Member States. The differences in economic size, national economic and social contexts, legal definitions, digital infrastructure, and the level of development of national insolvency laws (prior to the transposition of the PRD) are evident.

2.3 | Proposal to further harmonize EU insolvency law

At the time of writing, the PRD remains the only piece of EU *acquis* in the field of substantive insolvency law harmonization. In late 2022, emphasizing the importance of harmonized insolvency regimes for the CMU, the need to overcome 'divergent insolvency regimes' to encourage more cross-border investments, and the necessity of improving the insolvency law framework for SMEs, the Commission released the Directive Proposal.[124] The Proposal, in particular, outlined the shortcomings of the PRD, stressing that its regulations

> [D]o not address the situation where a business becomes insolvent and has to undergo insolvency proceedings. Similarly, the minimum standards on the second chance for failed entrepreneurs (...) do not address the way insolvency proceedings are conducted. They instead relate to the discharge of debts for insolvent entrepreneurs as a consequence of insolvency and could be described as a regulation of post-insolvency effects that, however, does not harmonise insolvency law itself.[125]

Emphasizing the important role of SMEs in the EU economy and the need to strengthen procedural efficiency and ensure 'greater transparency for creditors,' the Directive Proposal also suggested introducing

> [A] special procedure to facilitate and speed up the winding-up of microenterprises, allowing for a more cost-efficient insolvency process for them. These arrangements also support the orderly liquidation of 'assetless' microenterprises, addressing the issue that some Member States reject access to an insolvency proceeding if the projected recovery value is below the judicial costs.[126]

While the PRD emphasized SMEs' limited financial and intellectual resources,[127] the new Directive Proposal narrowed the justification to the 'prohibitively high' costs of 'ordinary insolvency proceedings' for microenterprises.[128] The Proposal concluded that 'the possibility to benefit from a debt discharge would enable them [microenterprises] to unblock entrepreneurship capital for new projects.'[129] Following that logic, the Proposal offered microenterprises a simplified winding-up procedure[130] featuring the following key aspects:

1. proceedings could not be denied solely due to the debtor having no assets or insufficient assets to cover procedural costs[131];
2. the appointment of an insolvency administrator could be avoided if the related costs cannot be covered by the insolvency estate or the requesting party[132];
3. electronic communication between parties, as envisaged by the PRD[133];
4. introduction of a standardized form for submitting requests to open winding-up proceedings[134];
5. guarantees ensuring the microenterprise debtor has the opportunity to respond to creditors' requests to initiate winding-up proceedings[135];
6. a two-week deadline for courts or other competent authorities to decide on a request to open winding-up proceedings[136];
7. a general default rule allowing the microenterprise debtor to remain in possession, with Member States required to clearly specify grounds for restricting the debtor's right to manage and dispose of assets[137];
8. rules governing the stay of enforcement actions against the debtor[138];
9. publicity of proceedings and obligations to inform the debtor of creditors' claims[139];
10. simplified rules for the lodgment and admission of claims against the debtor[140];
11. clear rules on the realization of the debtor's assets and distribution of proceeds, with a focus on the use of electronic auctions[141];
12. full discharge of debts for entrepreneur debtors, as well as those equity holders of an unlimited liability microenterprise debtor who are personally liable for the debts of the microenterprise.[142]

As set out above, the proposed Directive (as worded in the original Directive Proposal[143]) offered a more comprehensive framework for smaller businesses compared to the PRD. The draft incorporated suggestions from international financial watchdogs[144] and strived for precision, leaving little room for interpretation. Furthermore, regarding microenterprises, the Proposal's authors no longer allowed Member States discretion during the transposition process. The only available option was the potential extension of the simplified winding-up procedure for microenterprises to SMEs.[145]

During stakeholder consultations on the Directive Proposal, it became clear that agreement on simplified liquidation for microenterprises could not be reached. In November 2024, the Council of the EU released a Partial General Approach (PGA),[146] proposing amendments to provisions on avoidance actions, directors' duties, and asset traceability. The PGA did not cover simplified winding-up procedures for microenterprises due to numerous comments, objections, and suggestions from EU institutions, Member States, and other stakeholders.[147] In March 2025, the rapporteur of the European Parliament's Committee on Legal Affairs recommended the complete deletion of Title VI dedicated to the special winding-up regime for insolvent microenterprises from the Draft Directive.[148] This recommendation was supported by both the Council and the Committee on Legal Affairs of the European Parliament.[149] As a result, the idea of establishing a dedicated liquidation regime for microenterprises, or for any category of MSMEs, has been abandoned.

Below is a brief overview of the key issues that ultimately led to the failure of efforts to harmonize laws on liquidation of insolvent microenterprises. The overview structure is based on the Council's report emphasizing "uncertainty over the definition of a microenterprise, the appointment of an insolvency practitioner, and the role of the court in the proceedings."[150] It also draws on summaries of numerous stakeholder comments and objections.

2.3.1 | Smaller businesses—Who qualified?

In general, the idea of a special procedure for smaller businesses enjoyed broad support at the EU level. In its 2023 opinion on the Proposal, the European Economic and Social Committee (EESC) emphasized that the liquidation of 'assetless' microenterprises accounts for approximately 90% of insolvencies in the EU. Therefore, the Committee considered the proposed special procedure for microenterprises to be 'highly significant.'[151] The SME Relief Package presented by the European Commission in 2023 reiterated the importance of the second chance for SMEs as well as the Directive Proposal emphasizing that the latter's procedure for winding-up microenterprises is 'its most innovative feature.'[152] However, upon the release of the Proposal, other opinions popped up very quickly at the national level. The Finnish Bankruptcy Ombudsman,[153] for example, concluded that 'the proposal on the liquidation procedure for microenterprises would be a substantial and significant weakening of Finland's current effectively functioning insolvency procedure that covers companies of all sizes.'[154] Similar opinions were provided by the French stakeholders who emphasized the well-functioning domestic liquidation framework.[155] Various stakeholders from other Member States pointed out that concessions for microenterprises would worsen the position of creditors and employees.[156]

A key unresolved issue was whether the special winding-up procedure would apply only to microenterprises or also to a broader category that included SMEs. The European Parliament's Committee on Economic and Monetary Affairs suggested amendments to the Draft Directive by introducing the phrase 'microenterprises and SMEs.'[157] The Committee proposed deleting provisions that would make it optional for SMEs.[158] If the Committee's suggestions were accepted, the special winding-up procedure would apply to the majority of all businesses in the Member States. The case of Estonia, which refused to implement special concessions for SMEs under the PRD,[159] can be used to illustrate this point. The implementation of the Directive Proposal in the wording proposed by the Committee would mean that the simplified winding-up procedure would apply to more than 90% of all enterprises in the country.[160] If the Committee's proposal

to expand the scope of application to SMEs[161] were accepted, it would cover more than 99% of all Estonian enterprises.[162] This outcome clearly exceeded the original intent of the Proposal. It seems fundamentally flawed to grant the same concessions to enterprises that, due to differences in size, capital, and available resources, may vary vastly in their preparedness for insolvency proceedings.

The interpretation of the term 'microenterprise' became a real stumbling block. Perhaps the most noteworthy point was made by the Spanish Bar Association, which argued that the threshold proposed in the Draft Directive—enterprises employing no more than 10 people and with an annual turnover or balance not exceeding EUR 2 million—is too broad.[163] This threshold, based on Recommendation 2003/361/EC,[164] contrasts with the narrower definition adopted in Spain. Spanish lawyers emphasized that the 2022 *Ley Concursal* revisions[165] follow the definition outlined in the 2013 Accounting Directive,[166] which classifies microenterprises as those employing up to 10 people and with annual liabilities/balance not exceeding EUR 350,000 or an annual turnover not exceeding EUR 700,000.[167] And indeed, an enterprise classified as micro in Ireland,[168] for example, may be classified as a larger one in Spain.[169] Besides, the Spanish Bar Association did not hesitate to point out that the narrower national threshold proved its efficiency in practice.[170] The Spanish argument became relevant for other Member States with small economies and eventually was singled out by the Council in its general approach on the Draft Directive.[171] This demonstrates the difficulty of harmonization in what seems to be a 'small topic.'

2.3.2 | Insolvency administrators and the strain on courts

One of the most controversial elements of the Draft Directive was the proposal to allow the liquidation of microenterprises without appointing an insolvency administrator (practitioner). Under Art. 39, an administrator would only be appointed if (a) requested by the debtor or creditor(s) and (b) the related costs could be covered by the estate or the requesting party.[172] The rationale was that, for microenterprises, the administrator represents the main cost driver, and their business affairs are generally too simple to justify such involvement.[173]

It is not surprising that Member States' national associations of insolvency practitioners actively criticized this part of the Proposal. The criticisms can be summarized as follows:

1. The insolvency administrator's/practitioner's involvement is not always too costly and may not be a burden for the debtor;
2. The workload for courts or other administrative authorities might become unmanageable without an insolvency administrator;
3. Adherence to the debtor-in-possession principle may create a conflict of interests;
4. Without an insolvency administrator, the creditors' and employees' interests may be harmed;
5. The profession (insolvency administrator) may sustain harm.[174]

EIP—an umbrella organization representing 15 insolvency practitioner associations across 12 EU Member States—warned that the special winding-up procedure for microenterprises could apply to 90–95% of all insolvency cases across the EU. In smaller and medium-sized Member States, such as the Baltic countries, Belgium, or Austria, this may result in the large-scale closure of insolvency administrator offices. With significantly fewer proceedings, it would

become financially unviable to sustain these offices or maintain expertise in this specialized field of law and practice.[175]

Naturally, the profession's vested interests played a key role in this criticism, and the objections to the Proposal are understandable from a business standpoint. At the same time, one could argue that in some Member States, involving an insolvency administrator (acting as liquidator) may place an undue burden on the debtor or other parties, especially in cases where the insolvency estate is insufficient. This contrast becomes evident when comparing the EU's two largest jurisdictions: France and Germany. In France, insufficiency of assets is not by itself a problem to launch liquidation proceedings. The liquidator's minimum fee (EUR 1500) can be covered by the Fund for Financing Impecunious Files (*Le Fonds de Financement des Dossiers Impécunieux*—FFDI)[176] if the debtor has no assets to pay it.[177] In Germany, no liquidation procedures will be opened if the debtor is assetless or has insufficient assets to cover the costs of the proceedings, including the administrator's remuneration.[178] If an insufficiency of funds is discovered after the initiation of liquidation, the process must be 'discontinued for insufficiency of assets.'[179]

The German example above perfectly illustrates the problem of winding-up assetless enterprises, as outlined by the Commission in the Proposal.[180] It demonstrates that covering the administrator's fee might be problematic in some Member States, as there are no external funds like those available in France. In other words, what works well in some jurisdictions may not be as efficient or cost-effective in others. Thus, the idea of appointing a liquidator based on the availability of the debtor's assets or creditors' willingness to cover the costs, as embedded in Art. 39 of the draft Directive, is not entirely groundless. However, from the national perspectives of some Member States and the standpoint of domestic stakeholders, it presents significant challenges.

Both examples demonstrate that neither French law nor its German counterpart complies with Art. 39 of the Draft Directive (as originally worded). If the latter were to be transposed in its original, pre-general approach wording, both countries (as well as many other Member States) would, quite literally, have to 'plough up'[181] their national legislations. As evidenced by the numerous comments on the Directive Proposal, stakeholders did not hesitate to voice their objections, citing their well-tested national laws.

The French model was advocated by European banks[182] as well as the *Association Henri Capitant*[183] in its project to harmonize insolvency law by using synergies from French and German law – *Draft European Business Code – Book VII – Insolvency Law* (Draft Code).[184] According to authors of the Draft Code,

> [T]he appointment of a practitioner is deemed necessary to ensure that the interests of all stakeholders are respected. It also seems necessary to give Member States the option of opening proceedings without assets, if a contribution is requested from the claimant creditor, if a fee is charged to insolvency practitioners, or if public funds are used.[185]

Had the Draft Directive been amended in line with the proposals, it was unclear whether Member States would have accepted rules requiring a third party to compensate the insolvency administrator or obliging the administrator to cover the costs themselves. Adopting an FFDI-style model would likely have posed major difficulties, as it demanded significant reforms not only in insolvency law but also in banking, public finance, and state-owned enterprises.

Doubts also remain about the efficiency and affordability of the French FFDI system—not every Member State could sustain such a model. Shifting costs to administrators or their professional associations might have seemed more realistic; yet both groups were likely to object. These concerns highlight the broader obstacles to harmonization.

Interestingly, from the small businesses' perspective the absence of an insolvency administrator in winding-up procedures also posed problems. *SMEunited*, a major association representing SMEs and crafts from over 30 European and non-EU countries,[186] warned that such procedures could be "quite challenging" for microenterprises.[187] The main issue was the debtor-in-possession model under the Draft Directive,[188] which shifted full responsibility for the process onto the debtor.

While *SMEunited* acknowledged that excluding an administrator might lower costs, it argued that simplifying procedures and ensuring their practicability, as the Draft Directive intended, placed the entire burden on entrepreneurs.[189] Similar concerns were raised by the Austrian Federal Economic Chamber (WKO), which stressed that without an administrator acting as a neutral and central contact point, an orderly process would be hard to achieve, particularly regarding the treatment of secured, subordinated creditors and employees. Although creditors could request an administrator, they would have to cover the costs themselves, which WKO deemed unreasonable, especially when creditors already faced potential losses.[190]

Of course, WKO's position could also be viewed from the creditors' standpoint, but one thing remained clear—handling the winding-up procedure may be far too complicated for a microenterprise debtor. A hypothetical situation illustrates this point. Imagine an insolvent family-run bakery where four family members are both the owners and the only employees. The bakery is in arrears on rent and utilities, has outstanding tax debts, a small bank loan secured by its only car and some equipment, and debts to suppliers, including an outstanding payment to an external accountant who handled the bakery's finances. Would you expect the family-owners to know that, according to applicable insolvency law, in the event of winding-up, the secured loan to the bank and tax debts take priority? Would it be reasonable to further complicate matters by allowing the owners to pay suppliers and the poor accountant first—simply because they are the family's neighbors who knock on the bakery's door every other day, causing distress—only to later face demands from the bank and tax authorities, who hold legal priority? It is not difficult to imagine such a scenario unless a competent insolvency expert is involved. Regardless of the well-established principle that ignorance of the law does not exempt one from liability, the complications for the insolvent bakery, its owners, and all creditors are evident, not to mention the headache created for the court handling the winding-up.[191] And in many ways, the Draft Directive, as originally worded, would likely have led to more such cases across the EU.

The EESC, in its opinion on the Draft Directive, agreed that involving independent insolvency practitioners benefits poorly organized micro-entrepreneurs in simplified liquidation and should be actively considered.[192] Notably, the Committee based its view on World Bank recommendations[193] but expressed its position very diplomatically. The EESC supported the principle that insolvency administrators should replace or at least monitor management[194] and stated that simplified proceedings should specify exceptional cases where no administrator is appointed.[195] It acknowledged that without insolvency practitioners, national courts would face heavier burdens handling parties directly.[196] However, the opinion's wording was vague, offering no clear stance on the Directive Proposal on how insolvency practitioner involvement should be regulated. The EESC did not clarify whether Art. 39's provision—allowing to skip appointing an administrator if costs cannot be covered—was adequate.

2.4 | Winding-up of microenterprises—*Quo vadis*?

In the analysis above, the author has focused on key concerns in the Directive Proposal regarding the winding-up of microenterprises, drawing on comments and examples from a limited number of EU jurisdictions. A more in-depth analysis of stakeholder feedback and a broader review of insolvency regimes in other Member States would have revealed additional challenges. As the Council's general approach noted, the attempt to create a special regime for insolvent microenterprises was unsuccessful due to unresolved questions around the definition of a microenterprise, the involvement of insolvency practitioners, and court involvement.[197]

The PRD became a compromise among Member States, significantly differing from the original Commission's proposal.[198] This compromise had a limited effect on MSMEs, as demonstrated above. A key lesson from that experience is evident in the general approach on the 2022 Directive Proposal, where the complete omission of special provisions for smaller businesses became a new compromise. In the context, it is interesting to quote Vincent Jamet, Aubert Massengo, Jean-Baptiste Gossé, and Elsa Lamy from *Banque de France* who predicted that outcome.[199] Having said that, they offered five alternatives:

1. Harmonization of other areas of law interlinked with insolvency (e.g., company law, tax law, securities law, and so on);
2. Relying on the "driving force" of some Member States such as France and Germany involved in various bilateral projects aimed at further harmonization among Member States;
3. Sectoral harmonization through soft-law tools;
4. Harmonization by thresholds, that is, harmonizing rules applicable to large enterprises and medium-sized companies, eventually extending them to smaller players;
5. Creating a '28th regime' for the development of the CMU focusing on financial instruments and secured transactions.[200]

Obviously, most of the proposed alternatives will take time. But can MSEs afford to wait that long, given the current challenges they face? This remains an open question. Of course, Member States can always introduce domestic remedies—similar to those implemented in Ireland and Spain[201]—without waiting for decisions from Brussels. But once again, not all Member States are willing or capable of offering tailored solutions for smaller businesses, as observed during the transposition of the PRD. On the other hand, Member States which already have those tailored solutions are reluctant to amend them to comply with new EU requirements, as evidenced by numerous objections to the Proposal. Comments provided by Spanish lawyers[202] are very illustrative. Why fix what isn't broken? Breaking this vicious circle is by no means an easy task.

Additionally, the role of soft-law tools is questionable, as they need to be voluntarily implemented at the local level unless there is certain external and internal pressure (from business associations or international financial watchdogs, for example). As demonstrated above, even when options were available for SMEs under the PRD (which is not soft-law), many Member States chose not to engage. Moreover, soft-law tools such as recommendations and principles developed by UNCITRAL, the EBRD, and the World Bank, discussed in Section 1.2 above, are already in place, and the 2022 Proposal seekes to implement many of these recommendations as EU secondary law. Thus, the alternative of relying on additional soft-law tools is also questionable.

The role of Germany and France as driving forces in this context deserves closer examination. The cited *Banque de France* experts specifically referred to the Draft Code by *Association Henri Capitant*, mentioned in Section 2.3.2. The development of the Code is part of the cross-border cooperation between Germany and France under the Aachen Treaty, signed in January 2019.[203] This initiative builds on the earlier 2018 joint arrangements and agreements between the German *Bundestag* and the French *Assemblée nationale* on 'concrete steps toward the realization of a Franco-German economic area with harmonized rules, particularly in the fields of corporate and bankruptcy law, as well as the harmonization of the corporate tax base.'[204] The Draft Code aims to enhance the EU's standing by emphasizing the codification shared by numerous countries while fostering economic growth and advancing the completion of the common market.[205] The Code seeks to mitigate, where possible, the fragmentation of European commercial legislation, for the fragmentation poses a significant challenge for SMEs, limiting their ability to thrive within the internal European market and ultimately undermining the Union's economic competitiveness.[206] Thus, the Draft Code's status as an initiative based on a bilateral international treaty between the two largest EU jurisdictions—Germany and France—is somewhat unique.

First, the treaty legally binds the two largest EU jurisdictions to cooperate in developing a common initiative for further harmonization of national laws. However, while the Code is a product of this cooperation, it is not legally binding on its own; both the French and German legislatures must enact it accordingly. The treaty does not impose any obligation to do so. Nonetheless, legislative initiatives stemming from an international treaty may carry persuasive weight for lawmakers.

Second, the influence of both French and German law cannot be underestimated. These legal systems have shaped the laws of many other European countries and beyond,[207] and continue to influence the EU's legislative efforts. Of course, the adoption of the European Business Code at the EU level (as a Regulation) in the near future is an ambitious target. After all, the idea of the European Civil Code resulted in numerous proposals and theoretical contributions, but it never turned into real deliverables used by the EU.[208] On the other hand, rather than using an entire Code, the adoption of specific provisions from the Draft Code by national legislators could be key, also in reference to the previous point on the persuasiveness of the Treaty of Aachen. Whether German stakeholders will be 'more persuaded,' for example, by the Draft's provisions on public funds to be used for compensating the insolvency administrator,[209] rather than a bold statement that no administrator should be appointed if they cannot be compensated by the debtor or creditor(s),[210] remains to be seen. Just to reiterate, other Member States might be more willing to transpose rules already present and tested in both Germany and France.

The last proposal regarding the 28th optional regime, which focuses on financial instruments and secured transactions, does not specifically target microenterprises and will, unsurprisingly, benefit larger businesses the most. However, the idea itself holds promise, particularly given its support in the Letta[211] and Draghi[212] Reports, as well as its further endorsement in the EU Competitiveness Compass.[213] The Letta Report even proposed using the aforementioned European Business Code as the 28th regime to 'directly address and overcome the current patchwork of national regulations, acting as a key tool to unlock the full potential of free movement within the EU,'[214] with the potential to become 'a real game-changer for SMEs.'[215] In contrast, the Draghi Report and the EU Competitiveness Compass emphasize the need for a separate 28th regime for innovative SMEs (i.e. startups), though without providing specific details.[216] President von der Leyen summarized the idea well:

> Sometimes companies are dealing with 27 national legislations. We will offer instead to innovative companies the ability to operate all across our Union under one single set of rules. We call it the 28th regime. Corporate law, insolvency, labour law, taxation—one single and simple framework across our Union. This will help bring down the most common barriers to scaling up all across Europe. Because continental scale is our greatest asset in a world of giants.[217]

Indeed, the potential is there. However, it remains to be seen how the 28th regime will be enacted, how long the process will take, and what its final form will be. The key question is whether it will apply exclusively to 'innovative SMEs' or if it will also remain an option for a small traditional coffee shop. Naturally, the new regime will not apply retroactively to insolvent SMEs entering the winding-up stage if they never opted into it in advance. A potential shortcoming of the 28th regime could be a lack of awareness among smaller businesses, similar to the situation with PRD tools.[218]

3 | CONCLUSION

Harmonizing the substantive insolvency laws of EU Member States remains a challenging task. The importance of MSMEs and their vulnerability to insolvency has been recognized by various international institutions as well as the EU. While the need for specific treatment of smaller players, such as microenterprises, has been acknowledged at the EU level, it does not seem to have universal support among Member States. The selective transposition of the PRD's specific provisions on SMEs illustrates this divergence. Further harmonization efforts—such as the 2022 Proposal—demonstrate that the problem persists.

Quite a few Member States oppose a special regime for microenterprises, citing their allegedly well-functioning domestic laws and resisting the introduction of any EU secondary legislation on the subject. The diversity of existing, well-established national rules, differing economic and policy conditions, the vested interests of professional associations of insolvency practitioners, and the close connection of insolvency laws to other legal areas (corporate, tax, labour, to name but a few) all contribute to the challenges of harmonization.

At the same time, the economic and legal challenges faced by MSMEs are not going anywhere. Will Member States be better suited to address these issues individually, or would a coordinated EU approach be more effective? The latter seems more likely. The EU's slogan, *United in Diversity*, takes on a particularly relevant meaning in this context. Differences among Member States should not undermine the common good; rather, they can be leveraged to develop better solutions applicable to all. Insolvency and winding-up may not be particularly glamorous topics, but efficient solutions in this area can unlock new opportunities for the future.

DATA AVAILABILITY STATEMENT

Data sharing not applicable to this article as no datasets were generated or analysed during the current study.

ORCID

Oleksiy Kononov https://orcid.org/0000-0002-8605-1014

ENDNOTES

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[23] ibid. 6.

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[63] Law 16/2022 introduced a separate Book Three 'Procedures for microenterprises' (Arts. 685–720) in *Ley Concursal*. As a matter of fact, Spanish legislators excluded microenterprises from the general framework of the national Insolvency Law.
Ley Concursal, Art. 686(4) contains a special safeguard for public creditors of microenterprises. If at least 85% of all the claims correspond to public creditors, the debtor can only be liquidated via a special accelerated procedure, no restructuring is allowed.

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[65] *Ley Concursal*, Art. 684(1).

[66] *Ley Concursal*, Arts. 690(1)–(2), 691(2), 691 ter.

[67] *Ley Concursal*, Art. 690(5).

[68] *Ley Concursal*, Arts. 690(1), 691(4).

[69] *Ley Concursal*, Arts. 687, 697.

[70] According to *Ley Concursal*, Art. 682, those are natural or legal persons employing up to 49 employees and an annual turnover or annual balance not exceeding EUR 10 million.

[71] *Ley Concursal*, Art. 682.

[72] *Ley Concursal*, Art. 684(2).

[73] *Ley Concursal*, Art. 684(3).

[74] *Ley Concursal*, Art. 684(4).

[75] Transposition was done by amending the Commercial Code (*Code de commerce*). See Ordinance No. 2021–1193 of 15 September 2021 and Decree No. 2021–1218 of 23 September 2021. See also Thomas Mastrullo, 'Between Modernity and Prudence: The Transposition into French Law of Directive (EU) 2019/1023 of 20 June 2019 on Restructuring and Insolvency' [2022] 4 *EIRJ* 5.

[76] *Code de commerce*, Arts. L626-29, R626-52, L631-19. See also André Jacquemont, Nicolas Borga, Thomas Mastrullo, *Droit des Entreprises en Difficulté* (13^{e} éd, LexisNexis 2025) para 760.

[77] *Code de commerce*, Art. L628-4.

[78] *Code de commerce*, Arts. L621-4, L631-9, R621-11.
In both procedures, two types of insolvency practitioners may be appointed: a judicial administrator (*administrateur judiciaire*), responsible for supervising or assisting the debtor's management, and a receiver (*mandataire judiciaire*), whose role is to represent the creditors. The appointment of the latter remains mandatory regardless of the debtor's size. '

[79] *Code de commerce*, Art. L626-32-I- 5°.

[80] Mastrullo (n 75) 22–23.

[81] Under the previous wording of the *Code de commerce* (Arts. L641-2 and R641-10), eligibility was limited to debtors with no more than five employees during the six months preceding the procedure and a turnover not exceeding EUR 750,000 (excluding taxes).

[82] *Code de commerce*, Art. L641-2, al. 1 (as amended).

[83] CEL, Book XX.

[84] Melissa Vanmeenen, Define Taşman, 'Cannot See the Forest for the Trees: The Belgian Transposition of the Preventive Restructuring Directive 2019/1023' *HERO* 2024/W-003 (17 January 2024) sections 1 and 2, section 4.5. <https://www.online-hero.nl/art/4757/special-issue-preventive-restructuring-14-cannot-see-the-forest-for-the-trees-the-belgian-transposition-of-the-preventive-restructuring-directive-2019-1023#_ednref85> accessed 24 July 2025.

[85] Transposition was done by Law of 7 June 2023 by means of revising and amending CEL, Book XX.

[86] Vanmeenen & Taşman (n 84) section 5 ('do-not-fix-what-is-not-broken').

[87] By default, any enterprise which does not qualify as a large one is considered to be a SME, see CEL XX.66/1. A large enterprise is an enterprise meeting one or more of the following criteria:

1. at least 250 employees;
2. annual turnover (excluding VAT) is at least EUR 40 million;
3. assets exceeding EUR 20 million.

At the same time, when restructuring involves a group of companies, SMEs must follow the procedure for large enterprises if they have affiliated SMEs and, collectively, meet the threshold for a large enterprise. See CEL, Arts. I.23(26), XX.83/1.

[88] CEL, Arts. XX.66/1 – XX.83.

[89] CEL, Arts.XX.78/2, XX.82.

[90] CEL, Arts. XX.83/1 – XX.83/21.

[91] CEL, Art. XX.83/14.

[92] CEL, Art. XX.83/17 1(4).

[93] CEL, Art. XX.83/18.

[94] Can be found in Part 10 of the Companies Act 2014.

[95] G Brian Hutchinson and Ronan Keane, *Keane on Company Law* (6th ed., Bloomsbury Professional 2024) paras [38.07]–[38.10].

[96] ibid. para [38.10].

[97] Burigo et al. (n 10) 207; Eugenio Vaccari, 'WHOA, Brexit! Which Future for London as Europe's (Largest) Insolvency Forum?' [2022] 37(2) *Journal of International Banking Law and Regulation* 46; Ali Shalchi, *Corporate Insolvency and Governance Act 2020*, House of Commons Library Document 8971 (6 April 2022) 10 <https://researchbriefings.files.parliament.uk/documents/CBP-8971/CBP-8971.pdf> accessed 24 July 2025.

[98] When considering proposals for a special regime for smaller businesses, the government noted that the average cost of examinership ranged from EUR 80,000 to 120,000, whereas the new special procedures for smaller businesses could cost between EUR 20,000 and 50,000. See Department of Enterprise, Trade and Employment (DETE), 'Regulatory Impact Analysis – General Scheme for the Companies (Small Companies Administrative Rescue Process and Miscellaneous Provisions) Bill 2021′ (May 2021) 4 <https://enterprise.gov.ie/en/legislation/legislation-files/ria-general-scheme-scarp.pdf> accessed 24 July 2025. See also Hutchinson and Keane (n 95) at para [38.142].

[99] DETE (n 98) 5.

[100] Companies (Rescue Process for Small and Micro Companies) Act 2021 (Commencement) Order 2021, SI 673/2021. The latter inserted Part 10A into the Companies Act 2014.

[101] Pursuant to Companies Act 2014, s 280A(3), a company qualifies as small if it meets two or more of the following criteria:

1. max. annual turnover – EUR 15 million;
2. assets not exceeding EUR 7.5 million;
3. max, number of employees – 50.

[102] Pursuant to Companies Act 2014, s 280C, a company qualifies as micro if it meets the criteria for the small company regime and meets two or more of the following requirements:

1. max. annual turnover – EUR 900,000;
2. assets not exceeding EUR 450,000;
3. max, number of employees – 10.

[103] Transposition was done by the so-called European Union (Preventive Restructuring) Regulations 2022 adopted on 27 July 2022 which amended the Companies Act 2014.

[104] An insolvency practitioner appointed within the SCARP framework.

[105] Companies Act 2014, ss 558B(2)(b)-(e).

[106] Under Irish and English law, receivers are appointed by creditors to manage a company's assets that are encumbered by security, such as mortgaged or pledged assets. Receivers can take over the management of the company.

[107] Companies Act 2014, s 558 M(2).

[108] Hutchinson and Keane (n 95) at paras [38.09], [38.143].

[109] Companies Act 2014, s 558B (6)–(7). The statement form can be found in Part I of the Schedule to the Companies Act 2014 (Prescribed Form and Notice) Regulations 2021, SI 675/2021.

[110] Companies Act 2014, s 558 N.

[111] Companies Act 2014, s 558C(2).

[112] Companies Act 2014, ss 558I – 558 J, 558 L.

[113] Companies Act 2014, ss 558ZA, 558 T(2), 558 U – 558X.

[114] Companies Act 2014, s 558Q.

[115] Companies Act 2014, ss 558Q, 558ZA. Also see Hutchinson and Keane (n 95) at para [38.159]; KPMG, 'Small Company Administrative Rescue Process' (KPMG Restructuring, September 2021) 3 <https://assets.kpmg.com/content/dam/kpmg/ie/pdf/2021/09/ie-scarp.pdf> accessed 24 July 2025.

[116] Companies Act 2014, s 558Y(4).

[117] Companies Act 2014, s 558Y(5).

[118] Companies Act 2014, s 558ZB(1).

[119] Companies Act 2014, s 558ZD(4).

[120] Companies Act 2014, s 558ZD(12)–(13).

[121] Companies Act 2014, ss 558ZA, 558Z(5)–(6).

[122] PRD, Art. 28.

[123] European Commission, 'Commission takes action to ensure complete and timely transposition of EU directives' (26 September 2024) <https://ec.europa.eu/commission/presscorner/api/files/document/print/ro/inf_24_4661/INF_24_4661_EN.pdf> accessed 14 February 2025.

[124] European Commission (n 3).

[125] ibid. 3.

[126] ibid. 10, 12.

[127] N 46.

[128] European Commission (n 3) 12.

[129] ibid.

[130] Draft Directive, Title VI.

[131] Draft Directive, Art. 38(3).

[132] Draft Directive, Art. 39.

[133] PRD, Art. 28; Draft Directive, Art. 40.

[134] Draft Directive, Art. 41(3)–(5).

[135] Draft Directive, Art. 41(2).

[136] Draft Directive, Art. 42.

[137] Draft Directive, Art. 43.

[138] Draft Directive, Art. 44.

[139] Draft Directive, Art. 45.

[140] Draft Directive, Arts. 46–48.

[141] Draft Directive, Arts. 49–55.

[142] Draft Directive, Arts. 56–57.

[143] European Commission (n 3).

[144] N 27, n 29, n 30.

[145] Draft Directive, recital 35.

[146] Council of the EU, 'Proposal for a Directive of the European parliament and of the Council harmonizing certain aspects of insolvency law – Partial general approach' (29 November 2024) 16283/24.

[147] See below.

[148] European Parliament, 'Draft Report on the proposal for a directive of the European Parliament and of the Council harmonizing certain aspects of insolvency law (COM(2022)0702 – C10-0410/2022–2022/0408(COD))' (20 March 2025) PE771.863v01-00, 80.

[149] Council of the EU (n 2); European Parliament, 'Report on the proposal for a directive of the European Parliament and of the Council harmonizing certain aspects of insolvency law (COM(2022)0702 – C9-0410/2022–2022/0408(COD))' (1 July 2025) A10-0126/2025.

[150] Council of the EU (n 2) 5.

[151] EESC, 'Opinion – Enhancing the convergence of insolvency proceedings – Proposal for a directive of the European Parliament and of the Council harmonizing certain aspects of insolvency law [COM(2022)] 702 final – 2022/0408 (COD)' (22 March 2023) INT/1007, paras 1.5, 4.5.

[152] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – SME Relief Package' (12 September 2023) COM(2023) 535 final, section 3.1.11.

[153] The Ombudsman's primary responsibility is to ensure that bankruptcy estates in Finland are administered in compliance with the law and established best practices. Additionally, the Ombudsman is tasked with developing proper practices for managing bankruptcy estates. See <https://www.konkurssiasiamies.fi/> accessed 24 July 2025.

[154] The Bankruptcy Ombudsman of Finland, 'Feedback on the Proposal for a directive of the European Parliament and of the Council harmonizing certain aspects of insolvency law' (17 March 2023) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/F3389046_en> accessed 24 July 2025.

[155] French Institute of Insolvency Practitioners (IFPPC), 'Feedback: Proposal on a directive harmonizing some aspects of insolvency law, 7th December 2023' (15 March 2023) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/F3388623_en> accessed 24 July 2025.
National Council of Judicial Administrators and Judicial Agents (CNAJMJ), 'Position of the CNAJMJ – Proposal for a new Insolvency Directive harmonizing certain aspects of insolvency law, 7 December 2022, COM/2022/702 final' (14 March 2023) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/F3388453_en> accessed 24 July 2025.

[156] See, for example, European Banking Federation (EBF), 'EBF Position on the Directive harmonizing certain aspects of insolvency law' (14 March 2023) 12–15 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/F3388493_en> accessed 24 July 2025; Austria: Austrian Federal Economic Chamber

(*Wirtschaftskammer Österreich-WKO*), 'European Commission: Proposal for a directive harmonizing certain aspects of insolvency law; Opinion' (30 January 2023) 9 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/F3377936_en> accessed 24 July 2025; Netherlands: FNV, 'Feedback on the Proposal COM(2022) 702' (10 March 2023) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/F3387907_en> accessed 24 July 2025; Slovakia: KONFRERO Insolvency k.s., 'Feedback on the Proposal for a directive of the European Parliament and of the Council harmonizing certain aspects of insolvency law COM(2022) 702' (17 March 2023) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/F3389254_en> accessed 24 July 2025.

[157] European Parliament (Committee on Economic and Monetary Affairs), 'Opinion of the Committee on Economic and Monetary Affairs for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council harmonizing certain aspects of insolvency law (COM(2022)0702 – C9-0410/2022–2022/0408(COD))' (30 November 2023) PE752.615v02-00.

[158] ibid.; Draft Directive, recital 35.

[159] Kasak (n 58).

[160] European Commission, '2019 SBA Fact Sheet: Estonia' 2 <https://ec.europa.eu/docsroom/documents/38662/attachments/9/translations/en/renditions/native> accessed 24 July 2025.

[161] European Parliament (n 157).

[162] European Commission (n 160).

[163] General Council of Spanish Lawyers, 'Comments on the Proposal for a Directive of the European Parliament and of the Council (COM (2022) 702 final) of 7 December 2022 on the harmonization of certain aspects of insolvency law (17 March 2023) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/F3389155_en> accessed 24 July 2025.

[164] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) [2003] OJ L124/36.

[165] N 60.

[166] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L182/19.

[167] General Council of Spanish Lawyers (n 163).

[168] N 101.

[169] N 62 and n 70.

[170] General Council of Spanish Lawyers (n 163).
The argument was supported by the European Insolvency Practitioner's Organizations (EIP), see European Insolvency Practitioners (EIP), 'Statement of the European insolvency practitioners' organizations (EIP) on the EU Commission's proposal for a directive on the harmonization of certain aspects of insolvency law dated 07/12.2022 (COM(2022) 702 final)' Sections 1.1.–1.2. <https://eip-association.eu/covid_19/statement-of-the-european-insolvency-practitioners-organisations-eip-on-the-eu-commissions-proposal-for-a-directive-on-the-harmonisation-of-certain-aspects-of-insolvency-law-dated-07-12-2022-co/> accessed 24 July 2025.

[171] Council of the EU (n 2) 5, n 150.

[172] Draft Directive, Art. 39.

[173] European Commission (n 3) 12.

[174] See France: Association Syndicale Professionnelle judicial Administrators (ASPAJ), 'Position of the ASPAJ – Proposal for a new Insolvency Directive harmonizing certain aspects of insolvency law, 7 December

2022, COM/2022/702 final' paras 21–22 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/F3389072_en> accessed 24 July 2025; IFPPC (n 155); CNAJMJ (n 155); Germany: Association of Insolvency Administrators and Administrators of Germany (VID), 'Opinion of the VID on the proposal for a Directive of the European Parliament and of the Council on the harmonization of certain aspects of insolvency law submitted on 7 December 2022 – COM (2022) 702 final' (10 March 2023) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/F3387919_en> accessed 24 July 2025; Federal Working Group Insolvency and Restructuring Courts e.V. (BAKinso): Group of insolvency judges, restructuring judges and insolvency practitioners, 'Opinion on Proposal for a Directive of the European Parliament and of the Council on the harmonization of certain aspects of insolvency law, COM(2022) 702 = 2022/0408 (COD) of 7/12.2022' (24 February 2023) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/F3424413_en> accessed 24 July 2025; Slovakia: KONFRERO Insolvency k.s. (n 156).

[175] EIP (n 170) 3. The argument of a 'disappearing profession' was challenged by Prof. Stephan Madaus, Vice President of the International Insolvency Institute and Member of the European Commission's Expert Group on Restructuring and Insolvency. He argues that Art. 39 of the proposed Directive 'could offer a solution for some cases, including those with empty estates.' See Gert-Jan Boon, Defne Tasman, 'An Assessment of the EC Proposal on Harmonization of EU Insolvency Law' [2023] 20(6) *International Corporate Rescue* 389, 394.

[176] The Fund itself is funded by a fraction of interest generated by the deposits of judicial liquidations opened in France. *Code de commerce*, Arts. L663-3; R663-41 – R663-50. See also « Comment éviter la liquidation de nos petits commerces? » (22 mars 2022) <https://politiques-sociales.caissedesdepots.fr/actualites/comment-eviter-la-liquidation-de-nos-petits-commerces> accessed 24 July 2025.

[177] IFPPC (n 155).

[178] As provided by the German Insolvency Code (*Insolvenzordnung*), §26. An exception applies to debtors-natural persons. In that case, an insolvency administrator has the right to claim compensation from the federal or state budget if the debtor's assets are insufficient to cover his/her fees. See *Insolvenzordnung*, §§4a, 63(2).

[179] *Insolvenzordnung*, §§207–208.
German practitioners expressed their discontent with the potential obligation for Germany to amend these provisions when transposing the Directive harmonizing certain aspects of insolvency law. See BAKinso (n 174).

[180] European Commission (n 3), 10, 12.

[181] The expression was applied at the event organized by the Conference on European Restructuring and Insolvency Law (CERIL) in April 2023. See Boon & Tasman (n 175) 389.

[182] EBF (n 156) 13.

[183] Established in 1935 in France, the Association unites scholars, judges, and lawyers from more than 45 civil law jurisdictions. The Association's aim is to promote, disseminate, and modernize civil law through comparative legal studies and the advancement of common legal principles. See <https://www.henricapitant.org/lassociation/> accessed 24 July 2025.

[184] Draft Code, Art. 7.3.10.3 states:

> If the debtor does not have sufficient assets, the judicial authority nonetheless opens the procedure if it is in the interest of the creditors, or if liability actions or avoidance actions are to be brought and the costs of a practitioner and the procedure can be financed.

<https://www.henricapitant.org/wp-content/uploads/2024/10/Book-VII-Insolvency-Law-Englishtext_final_23072024.pdf> accessed 24 July 2025.

[185] Draft Code, Comment to Art. 7.3.10.3.

[186] Members include associations of small businesses from all 27 EU Member States, as well as from Andorra, Norway, Serbia, Türkiye, Ukraine, and the UK.

[187] SMEunited, 'Reaction on the proposal for a Directive harmonizing certain aspects of insolvency law (COM (2022)) 702 final' (17 March 2023) 1, 8–9 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/F3389087_en> accessed 24 July 2025.

[188] Draft Directive, Art. 43.

[189] SMEunited (n 187) 1, 8.

[190] WKO (n 156) 9.

[191] See also insolvency practitioners' comments (n 174).

[192] EESC (n 151) para 4.6.

[193] ibid., footnote 8; the World Bank, 'Principles for Effective Insolvency and Creditor and Debtor Regimes' (n 27).

[194] Principle C6.1 states:

> In liquidation proceedings, management should be replaced by an insolvency representative with authority to administer the estate in the interest of creditors. Control of the estate should be surrendered immediately to the insolvency representative. In creditor-initiated filings, where circumstances warrant, an interim administrator with limited functions should be appointed to monitor the business to ensure that creditor interests are protected.

The World Bank, 'Principles for Effective Insolvency and Creditor and Debtor Regimes' (n 27).

[195] ibid., Principle C19.6.

[196] EESC (n 151) paras 1.6, 4.6.

[197] Council of the EU (n 2) 5.

[198] Fannon et al. (n 43) 163, 192; Gerard McCormack, 'The European restructuring Directive – a general analysis' [2020] 33(1) *Insolv. Int.* 11, 21; Reinhard Bork, 'Directive on Preventive Restructuring Frameworks: Political Compromise in the Trilogue Talks and Imminent Adoption' 75 *Eurofenix* (Spring 2019) 18 <https://www.insol-europe.org/download/documents/1563> accessed 24 July 2025.

[199] Vincent Jamet, Aubert Massengo, Jean-Baptiste Gossé & Elsa Lamy, 'Speeding Up the Process of Harmonizing European Insolvency Law to Strengthen Financial Integration' 249/3 *Bulletin de la Banque de France* (November–December 2023) 1, 6.

[200] ibid., 6–7.

[201] Sections 2.1.1. and 2.1.4. *supra*.

[202] General Council of Spanish Lawyers (n 163).

[203] *Vertrag zwischen der Bundesrepublik Deutschland und der Französischen Republik über die deutsch-französische Zusammenarbeit und Integration* 22.01.2019 <https://de.ambafrance.org/IMG/pdf/2019-01-19-vertrag-von-aachen-data.pdf?24531/00390d5439ac1e125b4e6879b9c66f1a173bcf20> accessed 24 July 2025.

[204] *Kapitel VI ("Erfolgreiche Wirtschaft für den Wohlstand von morgen"), Seite 55, Zeilen 2480–2485 des Koalitionsvertrags vom 7. Februar 2018 zwischen CDU, CSU und SPD* cited from Şirin Özfirat, '*Un grand pas au lieu d'une optimisation lente des détails: En faveur d'un code européen du droit des affaires*' *(22 août 2019)* 11 <https://www.europaischeswirtschaftsgesetzbuch.eu/wp-content/uploads/sites/2/2019/08/Publikation-Dr.-%C5%9Eirin-Ozfirat.pdf> accessed 24 July 2025.

The 2019 Treaty of Aachen (n 203), Art. 20, reads as follows:

1. The two States shall deepen the integration of their economies with a view to establishing a Franco-German economic area governed by common rules. The Franco-German Financial and Economic Council shall promote bilateral legal harmonization, particularly in the field of economic law, and shall regularly coordinate economic policy measures between the Federal Republic of Germany and the French Republic. These efforts shall aim to foster convergence between the two States and enhance the competitiveness of their economies.
2. The two States shall establish a Franco-German "Council of Economic Experts," composed of ten independent specialists, with the mandate to provide economic policy recommendations to their respective governments.

[205] Association Henri Capitant, 'Draft European Business Code' <https://www.henricapitant.org/actions/draft-european-business-code/> accessed 24 July 2025.

[206] European Law Institute (ELI), 'Feedback on the European Business Code of Henri Capitant Association' <https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/feedback-on-the-european-business-code-of-henri-capitant-association/> accessed 24 July 2025.

[207] Mathias Siems, *Comparative Law* (CUP 2014) 202–203; Edward L Glaeser and Andrei Shleifer, 'Legal Origins' [2002] 117(4) *The Quarterly Journal of Economics* 1193, 1211 cited from Fannon et al. (n 43) 256.

[208] Siems (n 207) 246.

[209] Draft Code, Art. 7.3.10.3.

[210] Draft Directive, Art. 39.

[211] Enrico Letta, *Much More than a Market – Speed, Security, Solidarity. Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens* (April 2024) 10, 15, 108–109.

[212] Mario Draghi, *The future of European competitiveness. Part A – A Competitiveness strategy for Europe* (September 2024) 51, 68; Mario Draghi, *The future of European competitiveness. Part B – In-depth analysis and recommendations* (September 2024) 34, 315, 325.

[213] European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A Competitiveness Compass for the EU' (29 January 2025) COM(2025) 30 final, 4, 8.

[214] Letta (n 211) 10.

[215] ibid. 15.

[216] Draghi, *The future of European competitiveness. Part B – In-depth analysis and recommendations* (n 212) 325; COM(2025) 30 final, 4.
By itself, the idea of an 'additional' regime is not new, see, for example, EESC, 'Opinion of the European and Social Committee on 'The 28th regime – an alternative allowing less lawmaking at Community level' (own-initiative opinion)' [2011] OJ C 21/26.

[217] European Commission, 'Special Address by President von der Leyen at the World Economic Forum' (Davos, 21 January 2025).

[218] See, for example, McCarthy (n 45) 906 (general lack of awareness among SMEs); Ionel Didea and Diana Maria Ilie, 'COVID-19 – The Catalyst of a Legislative Reform in the Field of Insolvency' in Thierry Bonneau & Cristina Elena Popa Tache (eds), *Innovation and Development in Business Law* (ADJURIS 2021) 112, 130 (problems with awareness in Romania); Morten Møller and Piya Mukherjee, 'Early Warning Systems in Denmark and Europe' 76 *Eurofenix* (Summer 2019) 20, 21 (reluctance of business owners to act and need to foster a new culture among entrepreneurs); Padraig Gallagher, Tara Doherty and Simon Stevens, 'Early Warning Systems for Small Business: Insights from Across Europe'[2022] 30(4) *JEC* 453, 461, 464 (the problem with already existing warning tools and managers'/owners' unwillingness to use them; the need to improve the owners' managerial and accounting skills; the need to increase awareness about the existing tools).

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