

## **ESIP position on the**

### **Proposal for a Directive harmonising certain aspects of insolvency law of 7 December 2022 (COM(2022) 702 final / 2022/0408 (COD))**

The European Social Insurance Platform (ESIP) represents 46 national statutory social insurance organisations in 18 EU Member States and Switzerland, active in the field of health insurance, pensions, occupational disease and accident insurance, disability and rehabilitation, family benefits and unemployment insurance. ESIP and its members aim to preserve high-profile social security for Europe, reinforce solidarity-based social insurance systems and maintain European social protection quality. ESIP builds strategic alliances for developing common positions to influence the European debate and is a consultation forum for European institutions and other multinational bodies active in the field of social security.

#### *Background*

On 7 December 2022, the European Commission published its proposal for a Directive on the harmonisation of certain aspects of insolvency law. The objective of the proposed Directive is to reduce the existing fragmentation within national insolvency laws, to promote cross-border investment and remove obstacles to the free movement of capital and freedom of establishment.

The European Social Insurance Platform (ESIP) acknowledges the proposed directive and points out that certain aspects have the potential to cause disruptions to national social security systems.

The disruption of the social security systems only becomes apparent at second glance. This is because it is hidden in the provisions on maximising the value of the liquidated insolvency state and the possibility of avoidance actions stipulated therein. These avoidance actions are aimed at being able to declare legal acts null and void which benefit a creditor or a group of creditors by satisfaction, collateralisation or in any other way and which were carried out in a certain period before the filing for insolvency proceedings (“suspect period”).

For, this possibility of challenging also makes it possible for social security contributions paid by the insolvent company to be refunded retroactively by the social security institutions, even for many years, depending on national law. The insolvency estate would be increased for the liquidation or possible reorganisation of the insolvent company to the benefit of other creditors and at the expense of the social security systems. This is a misappropriation of social security contributions.

This is because the assertion of avoidance claims in the context of insolvency proceedings deprives the social security systems of contributions that ‘employer’ or ‘self-employed’ persons are legally obliged to pay. However, these withdrawn contributions were or are required to provide the statutory benefits, including to the employees of the insolvent employer or the self-employed workers.

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*Social security contributions must not be misappropriated.*

Avoidance actions against social security institutions represent a massive intervention in the contribution and insurance system of social security institutions. Challenging social security contributions paid deprives the social security systems of funds that are required by law to be used to protect the insured and stabilise the social security systems. The use of funds for the purpose of satisfying commercial creditors of an insolvency debtor or for the restructuring of an insolvency debtor is not compatible with the legally prescribed use of funds.

### **1. Payments made for commercial claims may not be equated with contributions paid for social security**

Equal legal treatment of commercial claims and social security contribution claims discriminates social security systems against commercial creditors. In contrast to commercial creditors, social security institutions are statutory creditors due to the existing statutory insurance and contracting obligations. This means that they have neither the possibility to choose the debtors of the social security contributions, nor that they can make their statutory benefit obligations dependent on the granting of securities by the debtor. Therefore, they do not have the possibility to secure their claims in a comparable way as commercial creditors.

### **2. The use of social security contributions to restructure insolvent companies is to be considered as unauthorised aid under EU law in certain cases**

The use of social security contributions to restructure insolvent companies can be classified in certain cases as illegal State aid under EU law.

The European Court of Justice (CJEU) made it clear in its [judgment of 17 September 2020, Case C-212/19](#), in paragraph 40 that the exemption from social charges also falls under the concept of State aid:

*“It should also be borne in mind that the concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking. Thus, a partial reduction of social charges devolving upon undertakings of a specific industrial sector constitutes aid for the purposes of Article 107(1) TFEU, if that measure is intended partially to exempt those undertakings from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system (judgment of 5 October 1999, France/Commission, C-251/97, EU:C:1999:480, paragraphs 35 and 36 and the case-law cited).”*

*If the voidability of social security contributions already paid were allowed, this would be equivalent to an exemption from social security contributions. As the effect of the measure is decisive for the assessment of the presence of a State aid (see paragraph 41 loc. cit.) this would suggest, in this case, the presence of an illegal aid.*

### Way forward

The social security contributions lawfully paid by insolvent companies are not the situation described by the European Commission as an ‘*unlawful deprivation of assets prior to the opening of insolvency proceedings*’, ‘*from which the insolvency estate ... must be protected*’<sup>1</sup>. Rather, contributors and social security systems must be protected against the deprivation of their social security contributions.

ESIP therefore calls for contributions paid to social security institutions to be explicitly excluded from avoidance actions. Article 6(3) of the proposed Directive must be supplemented under Title II ‘Actions for avoidance’ to the effect that legal acts of the debtor which serve as satisfaction or collateralisation of social security institutions are not subject to voidability. This shall also apply to possible avoidance actions relating to a period prior to that referred to in Article 6(1)(1)(a), i.e. in particular avoidance actions under Article 8. The relevant recital (9) should be supplemented accordingly.

### Amendment proposals

#### **Recital 9**

##### *Text proposed by the Commission*

(9) Certain congruent coverages, namely legal acts that are performed directly against fair consideration to the benefit of the insolvency estate, should be exempted from the scope of legal acts that can be declared void. Those legal acts aim at supporting the ordinary daily activity of the debtor’s business. Legal acts falling under this exception should have a contractual basis, and require the direct exchange of the mutual performances, but not necessarily a simultaneous exchange of performances, as, in some cases, unavoidable delays may result from practical circumstances. However, this exemption should not cover the granting of credit. Furthermore, performance and counter-performance in those legal acts should have an equivalence in value. At the same time, the counter-performance should benefit the estate and not a third party. This exception should cover, in particular, prompt payment of commodities, wages,

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<sup>1</sup> See the European Commission's proposal for a Directive, p. 14, last paragraph.

or service fees, in particular for legal or economic advisors; cash or card payment of goods necessary for the debtor's daily activity; delivery of goods, products, or services against payment by return; creation of a security right against disbursement of the loan; prompt payment of public fees against consideration (e.g. admittance to public grounds or institutions).

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#### Article 6 - paragraph 3 - subparagraph 1 - new point c a (new)

##### *Text proposed by the Commission*

- (3) By way of derogation from paragraphs 1 and 2, Member States shall ensure that the following legal acts cannot be declared void:
- ...
- (c) legal acts that are not subject to avoidance actions in accordance with Directive 98/26/EC and Directive 2002/47/EC.

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- ...
- (c) legal acts that are not subject to avoidance actions in accordance with Directive 98/26/EC and Directive 2002/47/EC;
- (ca) legal acts that serve as satisfaction or collateralisation of claims of social security institutions.***

##### *Justification*

*Contribution payments to social security institutions must be exempted from voidability because challenging social security contributions that have already been paid would deprive social security systems of funds whose use is prescribed by law for the protection of insured persons and the stabilisation of the social security systems. The use of funds for satisfying commercial creditors of an insolvency debtor or the restructuring of an insolvency debtor is not compatible with the legally prescribed use of funds. This shall also apply to contributions paid before the period referred to in the first subparagraph (a) of paragraph 1, in particular the period referred to in Article 8.*