

EUROPEAN DATA PROTECTION SUPERVISOR

Summary of the Opinion of the European Data Protection Supervisor on the proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law

(2023/C 89/05)

(The full text of this Opinion can be found in English, French and German on the EDPS website <https://edps.europa.eu>)

On 7 December 2022 the European Commission issued a proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law. The objective of the proposal is to lay down rules enhancing the convergence in selected aspects of the laws of the Member States concerning business non-bank insolvency procedures.

The present opinion of the EDPS is issued in response to a consultation by the European Commission of 13 December 2022, pursuant to Article 42(1) of EUDPR ⁽¹⁾. It focuses on the provisions which may have an impact on the fundamental right to data protection.

The EDPS welcomes the safeguards provided for the access by designated courts of the Member States to information contained in national centralised bank account registries.

However, he makes the following recommendations:

First, concerning the access by insolvency practitioners to national asset registers, the EDPS recommends specifying the purpose of such access not only in the preamble but also in the enacting terms of the future directive.

Second, the EDPS recommends introducing at EU level the necessary safeguards for the new access by insolvency practitioners, established by the proposal, to personal data contained in beneficial ownership registers and national asset registers.

In addition, concerning the interconnection of the auction platforms, the EDPS recommends clarifying that the legal basis for such interconnection would be the future Directive and not Commission implementing acts.

The EDPS further recommends ensuring that the Commission implementing acts, to be adopted for setting up this interconnection, are in place when the future Directive and the Member States laws transposing it are applicable.

Finally, concerning the electronic communications, the EDPS recommends clarifying, as the case may be, whether the future Regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters would be relied upon for the electronic communications provided for in the proposal.

1. INTRODUCTION

1. On 7 December 2022 the European Commission issued a proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law ('the proposal') ⁽²⁾.

⁽¹⁾ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

⁽²⁾ COM(2022) 702 final.

2. The objective of the proposal is to lay down rules enhancing the convergence in selected aspects of the laws of the Member States concerning business non-bank insolvency procedures ⁽³⁾. According to the impact assessment report, consultations with stakeholders revealed difficulties related to asset tracing ⁽⁴⁾, especially where the asset is situated in another Member State than the one where the proceedings have been opened. The effectiveness of asset tracing is of key importance in the maximisation of the value of the insolvency estate as debtors have an incentive to remove assets from the insolvency estate. The means available for insolvency practitioners to trace and freeze assets belonging to the estate in another Member State are insufficient or inadequate which often results in the dissipation of those assets by the time action is taken. Essential information for the purpose of asset tracing are included in national registers, but these registers are either not accessible and/or not comprehensible by the insolvency practitioners (due to language barriers). In addition, each Member State has its own rules and entrusts the insolvency practitioners with different powers in respect of asset tracing. Missing or cumbersome possibilities of asset tracing impair the capacity of courts, insolvency practitioners or other parties with a legitimate interests to determine and locate the assets, examine the revenue generated by often fraudulent activity, and follow its trail ⁽⁵⁾.

3. Title III of the proposal on tracing assets belonging to the insolvency estate provides for:

- the access by specifically designated competent national courts ⁽⁶⁾ to the national centralised bank account registry ⁽⁷⁾ established pursuant to Directive (EU) 2015/849 of the European Parliament and of the Council ⁽⁸⁾ on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ('Anti-Money Laundering Directive'), and in particular to the bank account information listed in Article 32a(3) thereof ⁽⁹⁾. The access would be granted upon request of the insolvency practitioner ⁽¹⁰⁾ appointed in on-going insolvency proceedings, where necessary for the purposes of identifying and tracing assets belonging to the insolvency estate of the debtor in that proceedings, including those subject to avoidance actions. The future Directive would impose on the Member States an obligation to ensure that such designated courts have the power to access information available in another Member State, through the bank account registers single access point that would be put in place by the new Anti-Money Laundering Directive when adopted ⁽¹¹⁾ (Articles 13 to 16);

⁽³⁾ See impact assessment report (SWD(2022) 395 final), page 7.

⁽⁴⁾ See page 172: 'asset tracing is a "follow the money" tool, that enables courts, insolvency practitioners or parties that demonstrated a legitimate interest to determine and locate the assets, examine the revenue generated by often fraudulent activity, and follow its trail. "Asset tracing" is a legal process of identifying and locating misappropriated assets or their proceeds (values) belonging to the debtor's estate. It includes both the preservation (freezing) of the assets identified and the repatriation (if the asset is to be found in another State)'. [UNCITRAL, Civil asset tracing and recovery in insolvency proceedings. Note by the Secretariat, 4 October 2021 (A/CN.9/WG.V/WP.175), § 29. See previously the Report of the Colloquium on Civil Asset Tracing and Recovery (Vienna, 6 December 2019) (A/CN.9/1008). The documents are available at www.uncitral.org].

⁽⁵⁾ See impact assessment report, pages 26 -28 and 172.

⁽⁶⁾ Under Article 2(b), a Court means the judicial body of a Member State.

⁽⁷⁾ According to Article 2(d) of the Proposal, 'centralised bank account registries' means the centralised automated mechanisms, such as central registries or central electronic data retrieval systems, put in place in accordance with Article 32a(1) of Directive (EU) 2015/849.

⁽⁸⁾ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

⁽⁹⁾ According to Article 32a (3) of the Anti-Money Laundering Directive, the 'following information shall be accessible and searchable through the centralised mechanisms referred to in paragraph 1:

- for the customer-account holder and any person purporting to act on behalf of the customer: the name, complemented by either the other identification data required under the national provisions transposing point (a) of Article 13(1) or a unique identification number;
- for the beneficial owner of the customer-account holder: the name, complemented by either the other identification data required under the national provisions transposing point (b) of Article 13(1) or a unique identification number;
- for the bank or payment account: the IBAN number and the date of account opening and closing;
- for the safe-deposit box: name of the lessee complemented by either the other identification data required under the national provisions transposing Article 13(1) or a unique identification number and the duration of the lease period'.

⁽¹⁰⁾ Article 2(a) of the Proposal defines insolvency practitioners as 'a practitioner appointed by a judicial or administrative authority in procedures concerning restructuring, insolvency and discharge of debt, as referred to in Article 26 Directive (EU)2019/1023'.

⁽¹¹⁾ Proposal for a Directive of the European Parliament and of the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849 (COM(2021)423 final).

- indirect access by insolvency practitioners to this information by requesting the designated courts in the Member State to access and run searches (recital 16);
 - direct access by insolvency practitioners to beneficial ownership information (Article 17);
 - direct access by insolvency practitioners to national asset registers, where available (Article 18).
4. In addition, the proposal (Article 40) would require Member States to ensure that in simplified winding-up proceedings for insolvent micro-enterprises, all communications between the competent authority, and, where relevant, the insolvency practitioner, on the one hand, and the parties to such proceedings, on the other hand, can be performed by electronic means, in accordance with Article 28 of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt and amending Directive (EU) 2017/1132 of the European Parliament and of the Council ⁽¹²⁾ (Directive on restructuring and insolvency) ⁽¹³⁾.
5. Finally, the proposal would provide for the establishment and maintenance by Member States of one or several electronic auction platforms for the sale of assets of the insolvency estate in simplified winding-up proceedings (Article 50) and for their interconnection to be set up by the Commission by means of implementing acts (Article 51).
6. This initiative, announced in September 2020, is part of the Commission's priority to advance the Capital Markets Union ⁽¹⁴⁾, a key project to further financial and economic integration in the European Union ⁽¹⁵⁾.
7. The present opinion of the EDPS is issued in response to a consultation by the European Commission of 13 December 2022, pursuant to Article 42(1) EUDPR. The EDPS welcomes the reference to this consultation in recital 63 of the proposal. In this regard, the EDPS also positively notes that he was previously informally consulted pursuant to recital 60 EUDPR.

5. CONCLUSIONS

22. In light of the above, the EDPS makes the following recommendations:

- (1) to clarify in the enacting terms of the future Directive that access by insolvency practitioners to national asset registers is allowed only where necessary for the purposes of identifying and tracing assets belonging to the insolvency estate of the debtor in an on-going insolvency proceeding;
- (2) to introduce at EU level the necessary safeguards for the new access by insolvency practitioners, established by the proposal, to personal data contained in beneficial ownership registers and national asset registers;
- (3) to clarify that the future Directive would establish the interconnection of the national electronic auction systems;

⁽¹²⁾ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) (OJ L 169, 30.6.2017, p. 46).

⁽¹³⁾ Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (OJ L 172, 26.6.2019, p. 18).

Article 28 Use of electronic means of communication: 'Member States shall ensure that, in procedures concerning restructuring, insolvency and discharge of debt, the parties to the procedure, the practitioner and the judicial or administrative authority are able to perform by use of electronic means of communication, including in cross-border situations, at least the following actions:

- (a) filing of claims;
- (b) submission of restructuring or repayment plans;
- (c) notifications to creditors;
- (d) lodging of challenges and appeals'.

⁽¹⁴⁾ COM/2020/590 final.

⁽¹⁵⁾ Explanatory Memorandum to the proposal, page 1.

- (4) to ensure that the implementing acts to be adopted by the Commission for the setting up of the interconnection of the electronic auction systems would be in place at the time national laws transposing the directive apply so that the data protection safeguards to be specified through these implementing acts are also in place;
- (5) to clarify, as the case may be, whether the future Regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters would be relied upon for the electronic communications provided for in the proposal.

Brussels, 6 February 2023.

Wojciech Rafał WIEWIÓROWSKI
