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Proposal for a Directive harmonising certain aspects of insolvency law (COM(2022) 702 final)

Opinion from German Social Insurance
issued 17 March 2023

I. Preliminary remark

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 draft Directive is to reduce the existing fragmentation of national insolvency regimes. To this end, among other things, the conditions for avoidance actions are to be harmonised.

The German Social Insurance suggests using the new directive to strengthen the legal position of social security institutions in insolvency proceedings and to exempt the claims of social security institutions from voidability. This is justified by the fact that claims under private law are not to be equated with statutory social security contributions to be collected.

In contrast to commercial creditors, social security institutions are statutory creditors due to the existing statutory insurance and contracting obligations. Another argument in favour of the exception from the voidability of contributions already paid is that social security contributions are an integral part of employees' wages and, like these, are to be given preferential treatment in insolvency proceedings. In addition, a loss of contributions in the event of insolvency or a challenge of social security contributions already paid deprives the social security system of funds that are prescribed by law for the protection of insured persons and the stabilisation of the social security system, which could also be categorised as illegal state aid in favour of the insolvent company according to the current case law of the Court of Justice of the European Union (CJEU).

II. Amendment proposal

Goal

A provision should be included in Article 6 of the Directive that legal acts of the debtor which serve to satisfy or secure claims of social security institutions are not subject to voidability. The relevant recital should also be amended accordingly.

Proposed amendment: Recital 9

Commission text	Amendment proposal
<hr/> <p>(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. [...]</p>	<p>(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. [...] <i>In addition, payments to the social security institutions, i. e. in particular social security contributions, should also be excluded from voidability. This is because the social security institutions as statutory creditors would otherwise be discriminated against compared to the other creditors and the financial stability of the social security systems is protected by the exception. In addition, the de facto exemption from social security contributions as a result of voidability could constitute both an improper use of funds to the detriment of the payers of social security contributions and, according to the case law of the Court of Justice of the European</i></p>



Union (judgment of 17 September 2020, Case C-212/19, paragraph 40), an illegal State aid in favour of the insolvent company.

Art. 6

(1)

...

Sentence
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new

(3) By way of derogation from paragraphs 1 and 2, Member States shall ensure that the following legal acts cannot be declared void:
[...]

(1)

...

(3) By way of derogation from paragraphs 1 and 2, Member States shall ensure that the following legal acts cannot be declared void:
[...]
d) legal acts that serve as satisfaction or collateralisation of claims of social security institutions.

Justification

The claims of social security institutions are to be excluded from voidability, because a legal equal treatment of private law claims and social security contribution claims to be collected discriminates social security systems against commercial creditors. Unlike commercial creditors, social security institutions are statutory creditors. 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. In addition, a loss of claims in the event of insolvency or a challenge to social security contributions already paid deprives the social security system of funds, the use of which is prescribed by law for the protection of insured persons and the stabilisation of the social security system. The use of funds for the purpose of satisfying commercial creditors of an insolvent debtor or for the restructuring of an insolvent debtor is not compatible with the legally prescribed use of funds and could lead overall to a destabilisation of the social security systems.

In addition, the use of social security contributions for the restructuring of undertakings could be categorised as illegal State aid. This is because the 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.

In order to prevent this, all social security contributions as part of the employees' wages should be satisfied with priority over other claims in the event of insolvency and should not be subject to voidability in insolvency proceedings. This preferential treatment in favour of all social security contributions should also apply to the health insurance and long-term care insurance contributions of self-payers (e.g. agricultural entrepreneurs subject to mandatory insurance) as well as to the contributions to the statutory accident insurance and old-age insurance of farmers.

About us

The German Federal Pension Insurance (DRV Bund), the German Social Accident Insurance (DGUV), the National Association of Statutory Health Insurance Funds (GKV-Spitzenverband), the national associations for statutory health and longterm care insurance funds at the federal level and the Social Insurance for Agriculture, Forestry and Horticulture (SVLFG) have joined forces to form the "German Social Insurance - Working Group Europe" (Deutsche Sozialversicherung Arbeitsgemeinschaft Europa e. V.) with a view to their common European policy interests. The association represents the interests of its members vis-à-vis the bodies of the European Union (EU) as well as other European institutions and advises the relevant stakeholders in the context of current legislative projects and initiatives. As part of the statutory insurance system in Germany, health and longterm care insurance, pension insurance and accident insurance offer effective protection against the consequences of major risks to life.