



## CREDITORS' COMMITTEES UNDER NEW INSOLVENCY III DIRECTIVE AS GATEKEEPERS OF ECONOMIC STABILITY: STRENGTHENING THE EU'S POSITION IN THE NEW GLOBAL ORDER\*

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### ABSTRACT

*Discrepancies in national insolvency proceedings are the subject of numerous criticisms and are considered one of the key reasons why the EU single market is not sufficiently attractive to investors in comparison with other competitive markets. In order to address the aforementioned issue, the European Commission published the Proposal for the Insolvency III Directive (Directive) in December 2022. After an extensive legislative procedure on March 30, 2026, the Directive was adopted, with a tendency of harmonising several key substantive legal matters in the national laws of the Member States. Inter alia, the Directive addresses the improvement of the position and enhanced protection of creditors in insolvency proceedings (especially cross-border creditors and employee representatives). The creditors' committee in the context of the Directive is a body that represents the interests of creditors, supervises the activities of the insolvency practitioner, and ensures the harmonization of the conflicting interests of creditors. By representing the interests of all creditors, the creditors' committee ensures the right to ensures*

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*full oversight of insolvency proceedings and a fair distribution of the assets of the insolvency estate. In addition, the Directive introduces the rules for the involvement of cross-border creditors who would otherwise not participate in national insolvency proceedings for the purpose of exercising their rights. Such an approach not only increases transparency in insolvency, but also strengthens legal certainty in the legal system. The paper critically examines the provisions of the Directive, with regard to the establishment, appointment, rights, duties, remuneration and operating costs of creditors' committees in national insolvency proceedings. The final part of the paper analyses the possible implications of the Directive on the Croatian legal framework, i.e. the potential impacts on the efficiency of insolvency proceedings in Croatia and gives recommendations for de lege ferenda.*

**Keywords:** Creditors' committees, Cross-border, EU Insolvency III Directive, Insolvency Law

## 1. INTRODUCTION

Strengthening the position of creditors in national insolvency proceedings among the EU represents a long process. On 7 December 2022, the European Commission (EC) adopted a Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (Proposal), with the aim of improving the Capital Markets Union.<sup>1</sup> The proposal proceeds from the premise that among the Member States there is a difference in the legal regulation of the insolvency proceedings, which often leads to different outcomes of insolvency proceedings. In other words, the non-uniformity of legal norms at the EU level in practice leads to more protracted proceedings, as well as higher costs.<sup>2</sup> Such differences not only entail the issue of legal certainty regarding the outcome of the proceedings in the first place for investors and creditors, but at the same time represent a particular problem for cross-border investors when considering investments.<sup>3</sup> Given that the conditions at the national level are not the same for all, investments in Member States with more developed insolvency rules are generally perceived as safer compared to those in countries with insufficiently developed legal regimes.<sup>4</sup> Such differences ultimately lead to an uneven distribution of investments and constitute an obstacle to cross-border capital movements and the efficient functioning of the single capital market at EU level.<sup>5</sup> With regard to this,

<sup>1</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law*, COM(2022) 702 final, Brussels, 7 December 2022 (hereinafter: Proposal), p. 1. For further discussion on the background, objectives and structure of the Proposal in the context of the Capital Markets Union, see Pool, J. M. W.; Boon, J. M. G. J.; Vriesendorp, R. D., *Harmonisation of European Insolvency Law: Operation Patchwork has Commenced, but Where Will it Take Us?*, Tijdschrift voor Insolventierecht, 2023, pp. 2-4.

<sup>2</sup> Proposal, p. 1.

<sup>3</sup> Proposal, p. 2.

<sup>4</sup> Proposal, p. 2.

<sup>5</sup> Proposal, p. 2.

the European Commission, through its Proposal, emphasises the need to reduce differences between national insolvency regimes, and thereby mitigate existing economic disparities between Member States.<sup>6</sup> In addition, the energy crisis and limited opportunities for public subsidies in the future may greatly influence the increase in the number of companies that would cease to operate, whereby many would be threatened with an unsustainable level of debt.<sup>7</sup> In order to prevent such circumstances, more effective and harmonised insolvency rules were a necessary measures required by the EU when proposing and legislatively adopting the Directive,<sup>8</sup> in order to mitigate the consequences of economic crises and reduce the negative effects on the financial position of companies.<sup>9</sup>

The Directive is structurally divided into six key areas, and the paper is limited to the provisions of Title VI on the creditors' committee. One of the key objectives of the Directive was to strengthen the position of creditors. The current position of creditors in EU law is uneven and subject to national insolvency rules. In other words, it is very limited, primarily due to the small value of the existing insolvency estates, the small value of creditors' claims or cross-border issues<sup>10</sup> such as geographical distance or the inability of cross-border creditors to participate in insolvency proceedings in other Member States due to lack of knowledge and information. Given the different regulation at national level,<sup>11</sup> many Member States do not have mechanisms that would enable creditors to participate in the proceedings to an extent that would enable them to participate in making key decisions.<sup>12</sup> Consequently, such a limited position of creditors at the EU level may lead to reduced transparency and insufficient supervision of insolvency proceedings by creditors.<sup>13</sup> It was precisely for that reason that the EC proposed the establishment of a creditors' committee in the Proposal for a Directive<sup>14</sup> as a body aimed at strengthening the position of creditors, which would represent the interests of

<sup>6</sup> Proposal, p. 2.

<sup>7</sup> Proposal, p. 2.

<sup>8</sup> Directive (EU) 2026/799 of the European Parliament and of the Council of 30 March 2026 harmonising certain aspects of insolvency law [2026] OJ L 2026/799 (Directive).

<sup>9</sup> Proposal, p. 2.

<sup>10</sup> On the role of applicable law in cross-border insolvency and restructuring, see Leandro, A., *The Rome I Regulation in EU Cross-Border Insolvency and Restructuring*, European Insolvency and Restructuring Journal, 2025.

<sup>11</sup> On the impact of the EU insolvency harmonisation efforts on different national legal systems, see Mak, C. H. W., *The Impact of the Recent EU Insolvency Directive on Scottish Insolvency Law*, Scots Law Times, 2024, pp. 1–5.

<sup>12</sup> Proposal, p. 19.

<sup>13</sup> Proposal, p. 12.

<sup>14</sup> On the role and justification of creditors' committees in insolvency proceedings, see UNCITRAL, Legislative Guide on Insolvency Law, United Nations, New York, 2005, pp. 197–202.

all creditors and act independently of the insolvency practitioner.<sup>15</sup> Therefore, the establishment of a requirement for more effective representation of creditors' interests, through a creditors' committee,<sup>16</sup> represents a response to the stated shortcomings of the current national legislative frameworks. In particular, creditors are enabled to participate more actively in the proceedings and, above all, oversee key decision-making during the insolvency proceedings.<sup>17</sup>

The paper therefore provides a doctrinal critical analysis of the Directive, with the key focus on the provisions on the creditors' committee, facilitating their potential application in practice and also providing guidelines for the effective transposition into Croatian law. The paper is based on the legislative procedure for adopting the provisions of the Directive, which concern the creditors' committee from Title VI of the Directive. The central part of the paper analyses the procedure for the establishment and appointment, as well as the rights and obligations of the creditors' committee, as well as the issue of the liability of the aforementioned body in insolvency proceedings under the Insolvency III Directive. Although the adoption of harmonised rules regarding creditors' committees brings substantial advantages, the issue of harmonisation of national insolvency laws in the legislation of the Member States also brings certain challenges. Therefore, the final part of the paper critically analyses the possible implications of the Directive on the Croatian legal framework, i.e. the expected impacts on the efficiency of insolvency proceedings in Croatia. Consequently, based on a comprehensive analysis, the paper examines whether the aforementioned rules will achieve their purpose and provides guidelines on achieving the harmonisation of the Directive with Croatian national legislation.

## **2. LEGISLATIVE PROCEDURE A LONG WAY FROM THE EC PROPOSAL TO THE OFFICIAL VERSION**

The procedure initiated by the EC Proposal of December 2022, concludes on 30 March 2026 with adoption of the final text of the Directive. In the Proposal itself, the EC emphasised that its aim is to address previously reported shortcomings in national insolvency procedures, i.e. to increase cross-border investments, increase legal certainty and to ensure more level playing field conditions for market participants.

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<sup>15</sup> Proposal, p. 20.

<sup>16</sup> Proposal, p. 12.

<sup>17</sup> Proposal, p. 12.

The text of the Proposal <sup>18</sup> is generally focused on three key aspects of insolvency: preserving and increasing the value of the insolvency estate, increasing the efficiency of insolvency proceedings and the predictable and fair distribution of the insolvency estate among creditors.<sup>19</sup>

Title VII of the Proposal regulates the rules on the creditors' committee, which introduces, for the first time, rules governing the legal position of creditors at EU level. Concerning this, the Proposal was primarily focused on strengthening the position of creditors. The Proposal served as a starting point for amendments during the further stages of the adoption of the Directive, which were subsequently considered in the Council of the European Union (Council).

Thereafter, on March 23, 2025, the Council proposes amendments to the provisions on the creditors' committee. However, the Council's amendments do not alter the substance of the EC Proposal regarding the creditors' committee, but to a certain extent specified the conditions for the establishment of the committee, its composition and working methods, while emphasising the flexibility that member states have at their disposal.<sup>20</sup>

At a later stage, the European Parliament in its Report from 1 of July 2025 proposes amendments,<sup>21</sup> which do not introduce substantive changes but rather consist in increasing the representativeness of the creditors' committee. In other words, they refer to the further elaboration and clarification of the existing provisions on the creditors' committee.

Having regard to the proposed measures of the EC, the proposals of the Council and the amendments of the European Parliament, in the course of the legislative process the final text of the Directive was adopted. Therefore, in the next chapter is critically elaborated the legal concept of the creditors' committee as finally regu-

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<sup>18</sup> It should also be noted that the Proposal introduces rules on pre-pack proceedings aimed at facilitating the sale of a debtor's business as a going concern and maximising value for creditors. For a more detailed discussion, see Thery, A., *The Pre-pack Regulation in the EU Commission Proposal for a Second Insolvency Directive*, European Insolvency and Restructuring Journal, 2023; Van Zanten, M. R., *Proposal for European Rules on Pre-pack Proceedings Should Be Supported*, Tijdschrift voor Insolventierecht, 2023, pp. 1-2, 8-9.

<sup>19</sup> Proposal, p. 12.

<sup>20</sup> Council of the European Union, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law – General approach, 9257/25, Brussels, 23 May 2025 (Council General Approach), p. 6.

<sup>21</sup> European Parliament, Report on the proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (COM(2022)0702 – C9-0410/2022 – 2022/0408(COD)), A10-0126/2025, 1 July 2025 (Parliament Report).

lated by the Insolvency III Directive and also examines the potential implications for the EU single market.

### **3. CREDITORS' COMMITTEES UNDER INSOLVENCY III DIRECTIVE**

#### **3.1. Scope of Application and Definition of the Term 'Creditors' Committee**

Whereas, in the Proposal, the provisions on the creditors' committee are set out in Title VII, in the final text of the Directive they are set out in Title VI, in the provisions of Articles 44-50. When comparing the existing provisions of the Directive in detail with the initial EC Proposal, it can be noted that the final text essentially contains the fundamental structure of the creditors' committee from the Proposal.

In particular, in the final version of the Directive, the creditors' committee, regulates in six articles the issue of the establishment of the creditors' committee, then the appointment and composition of the creditors' committee, the removal and replacement of members, the working methods and function of the creditors' committee, the issue of the functions, rights and duties of the creditors' committee, costs and fees and finally the liability of the creditors' committee.<sup>22</sup>

The regulation of creditors' committees at EU level is a very important issue in terms of harmonization of insolvency proceedings because currently at EU level there are countries that have clearly elaborated provisions on creditors' committees and they are relatively frequently used in national insolvency proceedings. Although it is recognised in different legal systems, it is not necessarily established with the same frequency nor is it given the same weight in the proceedings.

In Dutch law,<sup>23</sup> the creditors' committee is formally recognised, but its appointment remains exceptional and creditors do not always have an effective possibility to secure its establishment at an early stage. By contrast, German legislative framework gives creditors a stronger position through the creditors' meeting and,

<sup>22</sup> The Proposal also regulates avoidance actions aimed at maximising the value of the insolvency estate. For a detailed analysis, see Pannevis, N. B., *The European Harmonisation of Avoidance Rules, a Dutch Perspective on Reshaping an Age-old Instrument*, Tijdschrift voor Insolventierecht, 2023, pp. 4-7.

<sup>23</sup> Although Dutch law provides for a creditors' committee, it is rarely established in practice because the decision is only made at the late verification hearing. Since creditors have no opportunity to request its establishment earlier, and such requests are routinely rejected in practice, its role in insolvency proceedings is therefore limited.. See in detail Van Galen, R. J., *The creditors' committee under the Proposal*, TvI, 2023, p. 1.

where appointed, through the creditors' committees.<sup>24</sup> At the same time, German practice also points out that such committees may not be established in many cases where the liquidation has limited economic significance. These differences also show why the regulation of creditors' committees may raise concerns of over-harmonisation. The EU framework established by the Directive seeks to strengthen creditors' participation, although its practical effects may vary across Member States. The analysis therefore turns to the way in which the Directive regulates the creditors' committee as a common legal instrument of collective creditor participation.

### 3.2. Establishment of the Creditors' Committee

One of the essential elements when establishing a creditors' committee<sup>25</sup> is the timing of the regulation; whether it is established before or after the commencement of insolvency proceedings. In fact, Article 44 of the final text of the Directive stipulates that Member States must enable the establishment of a creditors' committee after the commencement of insolvency proceedings. Exceptionally, it may be provided by the decision of the Member States, in accordance with national law, that the creditors' committee can be established even before the commencement of insolvency proceedings.<sup>26</sup>

If the creditors' committee is established after the commencement of insolvency proceedings, then it can be established by a decision of the creditors or at the request of the general meeting.<sup>27</sup> In the absence of a general meeting of creditors, the committee may be established at the request of the creditors, in accordance with national law.<sup>28</sup>

Furthermore, the Directive, in accordance with Article 44 (3), also provides for the possibility that, in order to preserve the balance of creditors' interests and

<sup>24</sup> In the German jurisdiction, if the general meeting of creditors decides to establish a creditors' committee, the committee must be established. *Ibid.*, p. 3.

<sup>25</sup> The importance of the timely initiation of insolvency proceedings should also be emphasised, as reflected in the Proposal's establishment of directors' duties to file for insolvency, which are aimed at preventing delays that may reduce the recovery value for creditors, see Karapetian, A.; Lennarts, L., *The Directors' Duty to File for Insolvency Proceedings in the European Commission's Proposal for Harmonising Insolvency Law: the Dutch Perspective*, Tijdschrift voor Insolventierecht, 2023.

<sup>26</sup> The establishment of a creditors' committee prior to the commencement of insolvency proceedings may be justified by the need for early creditor involvement. However, where the rules are not further specified, practical difficulties may arise, particularly with regard to the transition from a provisional to a permanent creditors' committee. See in detail Van Galen, *op. cit.*, note 24, p. 3.

<sup>27</sup> Directive, art. 4 (1).

<sup>28</sup> Directive, art. 4 (1).

rationalise the costs of the proceedings, in some cases a creditors' committee may not be established.<sup>29</sup> Therefore, the Directive in Article 44 (3) lists the cases where the establishment of a committee is omitted.<sup>30</sup> The prescribed cases are not exhaustive listed and, *inter alia*, refer to the following circumstances: a small number of creditors, a small value of the insolvency estate, or if these circumstances would negatively affect the financial position of the creditors.<sup>31</sup> In such a case, Member States must decide not to establish a creditors' committee. At the same time, Member States are allowed to limit the establishment of committees exclusively to proceedings related to larger undertakings.<sup>32</sup> However, for smaller undertakings,<sup>33</sup> as well as for other reasons for its non-establishment, this matter is to be regulated by national law.<sup>34</sup>

On the one hand, this approach takes into account that a committee is not required in every insolvency proceeding, which can be justified by reducing costs and preserving the estate. On the other hand, leaving the decision in the hands of the Member States could lead to the actual purpose of implementing the creditors' committee rules being ignored and to the committee becoming a body that is established only in exceptional cases. Therefore, it is important to interpret the exceptions to its establishment in Article 44 (3) restrictively.

<sup>29</sup> This view is also supported by literature indicating that the establishment of a creditors' committee may prolong the proceedings and increase costs. A similar tendency can be seen in comparative practice, where, even in legal systems that already recognise this institution, often only one committee is formed, or no committee is established at all. See in detail Wessels, B., *Towards a European Code of Conduct for Creditors' Committees*, International Corporate Rescue, Vol. 18, No. 6, 2021, p. 377.

<sup>30</sup> Article 58 (3) of the Proposal allows exceptions only where the establishment of a creditors' committee is not economically justified, especially in cases involving few creditors or a micro enterprise debtor. This exception has been criticised in legal doctrine as too narrowly framed. For further discussion, see Van Galen, *op. cit.* 24, p. 3; Renssen, S., *Simplified Winding-up Proceedings for Insolvent Microenterprises: a Company Law v. Insolvency Law in-between?*, Tijdschrift voor Ondernemingsbestuur, 2023.

<sup>31</sup> Council General Approach, Art. 58 (3). The Council's approach is convincing. A mandatory creditors' committee would be difficult to justify in proceedings involving few creditors or limited complexity, where it may only increase costs and reduce the insolvency estate. In line with the well-founded position of the Council see also Clifford Chance, EU Directive Harmonising Certain Aspects of Insolvency Law: adopted by the Council, Available at: [<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2026/04/eu-directive-harmonizing-certain-aspects-of-insolvency-law-adopted-by-the-council.pdf>], Accessed 26 February 2026.

<sup>32</sup> Directive, recital 65.

<sup>33</sup> Directive, recital 65.

<sup>34</sup> The Council takes a similar approach to Article 58 (3) of the Proposal, through a less prescriptive regulatory framework in which the committee's composition, working methods, organisation and powers are left to national law. Council General Approach, art. 58 (3).

### 3.3. Appointment and Removal of Members of the Creditors' Committee

When establishing the creditors' committee under Article 45, the Directive itself there is a tendency to avoid prolonging the proceedings by appointing the committee immediately at the general meeting of creditors or by a decision of the creditors.<sup>35</sup> However, the Directive does not provide any limits on the number of committee members,<sup>36</sup> leaving it to the Member States to specify that matter.<sup>37</sup>

Furthermore, Member States may, pursuant to Article 45 (3), also provide for the committee of creditors to include cross-border creditors.<sup>38</sup> The wording of the provision is contentious, stating that "cross-border creditors are eligible for appointment to creditors' committees", which could mean that Member States are not obliged to allow their appointment to the committee.

Furthermore, Member States are also obliged to ensure the representation of different groups of creditors, in order to protect their interests. In this regard, the possibility is expressly provided for of appointing employee representatives to the committee,<sup>39</sup> as well as persons other than creditors themselves but represent the interests of a particular group of creditors.<sup>40</sup> In other words, the appointment of persons other than creditors, provided they represent the interests of certain groups of creditors, entails greater representativeness, making the committee more balanced and helps ensure that the Committee takes fair and balanced decisions.<sup>41</sup>

Upon closer examination, the policy reasons for such a decision lie in the fact that, although creditors who are members of the committee of creditors represent and

<sup>35</sup> By contrast, Article 59 of the Proposal provides for a relatively complex mechanism for representing different creditor interests. While such representation is necessary, the possibility of subsequent challenges to the committee's composition has been criticised in legal doctrine, as it may complicate the procedure and delay the committee's establishment. See in detail Van Galen, *op. cit.*, note 24, p. 4.

<sup>36</sup> Comparative legal doctrine indicates that the creditors' committee represents creditors as a whole and should therefore reflect the different interests within the creditor body. This requirement must, however, be balanced against costs, which is why most legal systems limit the number of committee members. Wessels, *op. cit.*, note 30, p. 377.

<sup>37</sup> Unlike the final text of the Directive, Article 61 of the Proposal fixed the number of members of the creditors' committee at between three and seven. This limitation was justified by considerations of efficiency, since a smaller committee may decide more easily, while the prescribed range still allowed for the representation of different categories of creditors. See in detail Wessels, *op. cit.*, note 30, p. 377.

<sup>38</sup> This approach reflects the increasingly cross-border nature of insolvency proceedings and the need to address divergences between national legal systems through a common framework for cooperation and coordination among Member States. See in detail Das, I., *The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code*, 2016, Vikalpa, Vol. 45, No. 2, 2020, p. 108.

<sup>39</sup> See Parliament Report, art. 59(3)(1a); Directive, art. 59 (3).

<sup>40</sup> Directive, art. 45 (2).

<sup>41</sup> Parliament Report, art. 59 (3) (1a).

advocate the interests of the creditors, they often have conflicting interests among themselves. Therefore, it is necessary to ensure the representativeness of both small and represented groups, regardless of the amounts of the claims and their number. This objective is, to a certain extent, at odds with that set out in Article 45 (2), which states that “Member States must ensure that the composition of the committee of creditors fairly reflects, as far as possible, the different interests of creditors.”

Furthermore, the Directive itself, in Article 46, provides for the possibility of the removal and replacement of members. Moreover, Member States must provide for such matters in their national law, and the reasons for this may include, amongst others, a serious breach of duties, a conflict of interest, wilful misconduct or gross negligence, etc.<sup>42</sup> In this regard, it is evident that the provisions on the removal and replacement of members serve to preserve the integrity of the creditors’ committee. However, the vague criteria contained within them, such as “gross misconduct” for the removal of a member, can make the harmonisation of this provision difficult in practice. There is also a risk of inconsistent application by Member States, as well as unequal protection for creditors at an EU level.

### **3.4. Functioning and Powers of the Creditors’ Committee**

Member States must, in accordance with Article 47 of the Directive, lay down the rules governing the working methods of the committee of creditors, with regard to the voting procedure; who is entitled to vote, how quorum is to be secured and with regard to conflicts of interest; how information is to be kept and how records of the decisions taken are to be kept.

Subsequently, in accordance with Article 47 (2), there is a possibility to further determine the working methods of the committee of creditors through protocols.<sup>43</sup> The possibility of establishing a protocol is an important element of the Directive because, in addition to the rules set out above, it allows other rules of proceedings to be prescribed, which is of particular importance with regard to other non-mandatory but significant elements concerning the creditors’ committee, such as the methods of appointment and removal of members, costs etc. At the same time, it allows other competent authorities, such as the court or an insolvency practitioner, access to information on the functioning of the committee itself.

<sup>42</sup> Directive, art. 46 (2).

<sup>43</sup> By contrast, Article 63 (1) and (2) of the Proposal required the adoption of a protocol on working methods and specified the matters to be regulated by it. This was a more appropriate solution, as the adoption of such a protocol by the committee itself would have reinforced its position in the proceedings. See in detail Van Galen, *op. cit.*, note 24, p. 6.

Furthermore, Article 47 (3) provides for the possibility that participation and voting need not be in person only, but may be by electronic means, in order to keep pace with modern technologies and to enable cost-effectiveness and better participation in the functioning of the committee'. This is of particular importance for cross-border creditors.<sup>44</sup>

Furthermore, with regard to the functions, rights and duties of the committee of creditors,<sup>45</sup> these are laid down in Article 48. First and foremost, they are intended to ensure that Member States safeguard creditors' involvement in the proceedings and, *inter alia*, right to be heard by the insolvency practitioner,<sup>46</sup> the right to be consulted, and the right to be informed.<sup>47</sup> They may also appoint secretaries and seek external advisers to best represent their interests.<sup>48</sup> Indeed, the provision of this article is the fundamental provision regarding the role of the creditors' committee. In particular, the provisions of Article 48 (2) stipulate that "Member States must ensure that creditors' committees, in the performance of their activities, represent the interests of the creditors and act independently of the insolvency practitioner in the event of insolvency", which derives the committee's fundamental function as a representative body. Therefore, this article certainly succeeds in increasing the transparency of the proceedings. However, the effectiveness of its implementation depends on how restrictively these rules are prescribed in the national laws of the Member States.

### 3.5. Costs and Remuneration

Of particular interest is the provision of the Article 49, which deals with the costs and remuneration of the creditors' committee. In particular, Member States must

<sup>44</sup> On improved access to information and asset tracing in cross-border insolvency proceedings, see Moeliker, M., *Tracing Assets by Insolvency Practitioners*, Tijdschrift voor Insolventierecht, 2023.

<sup>45</sup> In support of this, the Council's General Approach reduces the level of detail at EU level and leaves matters such as the organisation of the committee's work, the scope of its powers, its composition and mode of operation primarily to national law. Council General Approach, art. 58 (3).

<sup>46</sup> By contrast, Article 64 (1) (c) of the Proposal expressly provides for the insolvency practitioner to be subject to the oversight of the creditors' committee, which some authors consider particularly significant as it strengthens the position of the creditors' committee. See in detail Van Galen, *op. cit.*, note 24, pp. 5-6.

<sup>47</sup> On the basis of the Proposal, in particular Article 64, a narrowing of the scope of the creditors' committee's powers is evident. Indeed, the Proposal in Article 64(1)(e) provides for the committee's right to provide and receive information from creditors who represent the committee, which, according to authors in the literature, contributes to increased transparency of the proceedings, for example by convening a meeting of creditors when the circumstances of the case so require. See in detail Van Galen, *op. cit.*, note 24, p. 6.

<sup>48</sup> Directive, art. 48 (1).

clearly specify who will bear and cover the costs incurred in carrying out the functions, rights and duties of the creditors' committee..<sup>49</sup> Such costs are covered by the insolvency estate, and it is important that the court or competent authority, or the insolvency practitioner, has the right to reduce them if they are disproportionate, irrational, etc.<sup>50</sup> In this regard, it is necessary to refer to the possibility for the insolvency practitioner to limit unjustified costs of the creditors' committee.<sup>51</sup>

On the one hand, such an approach can be justified because it is based on the need to preserve the insolvency estate and prevent costs that are not necessary for the committee's functioning, in order to conduct the proceedings more economically. On the other hand, such a measure creates uncertainty, given that the committee of creditors is a body intended to have a supervisory function. Since one of the committee's duties is to oversee the activities of the insolvency practitioner, the question arises as to whether the insolvency practitioner's authority to control the costs of the proceedings could affect the independence of the creditors' committee. In particular, it opens up the potential possibility of disapproving certain costs. Of course, the advantage of such an approach lies in protecting the estate, but its effectiveness depends on how restrictively these limitations will be applied in practice. Therefore, it remains to be seen whether this approach will weaken the role of the creditors' committee in insolvency proceedings.

### 3.6. Liability of the Members of the Creditors' Committee

With regard to the liability of creditors, Member States must ensure that at least one of the two proposed rules is applied, in accordance with Article 50 of the Directive. Namely, members of the creditors' committee should, as a rule, be exempt from personal liability for actions taken in their capacity as members in the committee's work, unless they have committed some offences, intentionally or through gross negligence, thereby jeopardising the creditors' interests.<sup>52</sup> In the absence of above, they are required to maintain insurance in place to cover any losses deriving from their liability.<sup>53</sup> Such a solution gives Member States the choice of which rule

<sup>49</sup> Directive, art. 49 (1).

<sup>50</sup> Directive, art. 49 (2).

<sup>51</sup> Such a final arrangement stems from the Council General Approach, in particular Article 65 (2).

<sup>52</sup> By contrast, Article 66 of the Proposal contains a limited rule on the liability of creditors' committee members. It excludes personal liability except in cases of gross negligence, fraud, wilful misconduct or breach of fiduciary duty towards creditors. Since such duties may include oversight of the insolvency practitioner and the duty to inform creditors, the literature points to the need for indemnity insurance for committee members. See in detail Van Galen, *op. cit.*, note 24, p. 6.

<sup>53</sup> Directive, art. 50 (1) (b).

to apply, but it remains to be seen how to treat situations involving minor harm, for which there is a risk that the functioning of the committee may be obstructed.

#### **4. CREDITORS' COMMITTEE UNDER THE CROATIAN BANKRUPTCY ACT: POSSIBLE IMPLICATIONS FOR TRANSPOSITION INTO CROATIAN NATIONAL LAW**

In order to assess the compliance and implications of the Directive on the Croatian legal system, it is first necessary to present the institution of the creditors' committee as regulated by the provisions of the Croatian Bankruptcy Act. Special attention is paid to the composition, appointment and powers of the creditors' committee and the compliance of domestic solutions with the objectives and requirements of the Directive.

##### **4.1. Establishment of the Creditors' Committee**

According to the Bankruptcy Act, the creditors' committee is a special body of the insolvency proceedings, whose purpose is to protect the interests of creditors and to oversee the activities of insolvency practitioners.<sup>54</sup> The current legal framework implies that the creditors' committee is the only optional body in insolvency proceedings.<sup>55</sup> In particular, it is generally established where the insolvency estate is substantial, but also where there are particular issues to be addressed.<sup>56</sup> Accordingly, the existence of a creditors' committee in the Croatian legal system is conditioned by the circumstances of the specific proceedings. For example, if the number of creditors is smaller than the prescribed number or if it is a low-value insolvency proceedings, the committee will not be established.<sup>57</sup>

With regard to the establishment of the creditors' committee, the question arises of when the committee can be established. Thus, according to the Bankruptcy Act, the creditors' committee can be established only after the commencement of insolvency proceedings, i.e. the court can establish the creditors' committee and appoint its members prior to the first hearing.<sup>58</sup> Although, as a rule, the establish-

<sup>54</sup> Bankruptcy Act (Stečajni zakon), Official Gazette, No. 71/2015, 104/2017, 36/2022 and 27/24. In insolvency law, reference is made to the *best creditor interest test*. See in detail McCormack, G., *The European Restructuring Directive*, Edward Elgar Publishing, Cheltenham, 2021, p. 177.

<sup>55</sup> Čuveljak, J., *Komentar Stečajnog zakona*, Official Gazette, Zagreb, 2018, p. 294.

<sup>56</sup> *Ibid.*, p. 297.

<sup>57</sup> *Ibid.*, p. 294.

<sup>58</sup> Creditors generally participate in the creditors' committee. Judgment of the High Commercial Court of the Republic of Croatia, Pž-7504/2018-2, 8 January 2019 concludes the following: 'This court points out that, by operation of law, all of the debtor's personal creditors who, at the time the insolven-

ment of a creditors' committee is decided by the creditors at the creditors' general meeting,<sup>59</sup> as the key decision-making body of the insolvency proceedings.<sup>60</sup> Under the Article 44 of the Directive, Member States may decide to establish a creditors' committee even before the commencement of insolvency proceedings. Since domestic law does not provide for the establishment of a creditors' committee prior to the commencement of insolvency proceedings, it remains to be seen whether the national legislator will decide to introduce such an option.

The Croatian Bankruptcy Act, in terms of the powers of the committee, regulates the legal position of creditors, including in situations where the committee is not established, in a way that enables all creditors to exercise its functions. In particular, if there are fewer than five creditors, the powers of the creditors' committee will be vested in all creditors.<sup>61</sup> Such an approach can be justified because in practice it allows creditors to exercise their critical role in the proceedings, and at the same time does not generate additional costs within that same proceedings. Such a measure in Croatian law also corresponds to the text of the Directive from the provisions of the Article 44 (3) because it explicitly prescribes the cases when a creditors' committee does not have to be established. Therefore, it can be said that the solution from the Directive is already contained in Croatian law.

#### **4.2. Appointment and Composition of the Creditors' Committee**

The Bankruptcy Act also prescribes the composition of the creditors' committee. Namely, participation in the functioning of this body is conditioned primarily by a decision of the court or the creditors' meeting, and then by a specific appointment to the position of a member of the committee.<sup>62</sup> Accordingly, the creditors' committees requires representation of insolvency creditors with the largest claims, but also creditors with small claims, as well as representation of representatives of the debtor's former employees.<sup>63</sup> In addition, creditors with separate satisfaction

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cy proceedings are commenced, have any pecuniary claim against him, have the status of bankruptcy creditors (Bankruptcy Act, art. 137(1)).<sup>7</sup> Therefore, to acquire that status, it is not necessary for the creditor's claim to have been previously established by a decision on the determination of claims, as the appellant incorrectly believes.”

<sup>59</sup> Art. 97 (1) of the Bankruptcy Act.

<sup>60</sup> Marković, N., *Uloga stečajnog upravitelja*, in: Barišić, D. *et al.*, *Stečajni postupak: aktualna pitanja zakonodavstva i pravne prakse*, Inženjerski biro, Zagreb, 2012, p. 64.

<sup>61</sup> Art. 96 (6) of the Bankruptcy Act.

<sup>62</sup> Marković, *op. cit.*, note 61, p. 64.

<sup>63</sup> Art. 96 (2) of the Bankruptcy Act.

right, as well as persons other than creditors, who can contribute their knowledge to the functioning of the committee, may also become members.<sup>64</sup>

Moreover, representatives of, for example, chambers of crafts or chambers of commerce can be appointed on behalf of creditors.<sup>65</sup> Thereby, the maximum number of committee members can reach nine, but must be odd,<sup>66</sup> which is intended to avoid burdening the committee itself and the consequent burden of the insolvency estate with costs.<sup>67</sup> The described legislative framework also seeks to ensure equal representation of different groups of creditors, which is of particular importance because it prevents creditors with larger claims from having a decisive influence on the course of the proceedings. In particular, it is believed that such standardisation of the institute gives importance to transparent proceedings and thereby increases legal certainty.

Croatian law does not explicitly provide for the possibility of cross-border creditors participating in the creditors' committees. However, in Article 13.a (2) of the Bankruptcy Act, according to which a cross-border creditor may, in cross-border cases, lodge a claim, submit a restructuring plan or a repayment plan, send notifications to creditors and lodge objections or legal remedies.<sup>68</sup> Regarding employee representatives, they should be represented in the creditors' committee if creditors participate with significant claims,<sup>69</sup> which in, to some extent, limits the position of the employee as a creditor.

By comparing the text of the Directive and the provisions of the Bankruptcy Act, it is evident that the Bankruptcy Act follows the extensive representation of insolvency creditors in the creditors' committee, which largely overlaps with the objectives of the Directive. It can be concluded that the Bankruptcy Act in this regard it provides for almost all optional forms of representation of different groups of creditors in the creditors' committee, except that it does not explicitly prescribe the possibility of appointing cross-border creditors to the creditors' committee. Therefore, it remains to be seen whether the Croatian legislator will amend these provisions in a way that would explicitly provide for their application in insolvency proceedings. In any event, it is recommended to implement them into national law in order to achieve the aim and purpose of the Directive. As an additional national transposition problem, it is worth noting the marked passivity of credi-

<sup>64</sup> Art. 96 (3) of the Bankruptcy Act.

<sup>65</sup> Čuveljak, *op. cit.*, note 56, p. 296.

<sup>66</sup> Art. 96 (4) of the Bankruptcy Act.

<sup>67</sup> Čuveljak, *op. cit.*, note 56, p. 296.

<sup>68</sup> Art. 13a (2) of the Bankruptcy Act.

<sup>69</sup> Art. 96 (2) of the Bankruptcy Act.

tors in Croatian insolvency proceedings in practice. This is most often due to the low attendance of creditors at meetings, which entails a reduced efficiency of the proceedings.<sup>70</sup>

### 4.3. Powers of the Creditors' Committee

The Croatian Bankruptcy Act does not perceive the creditors' committee solely as an advisory body, but as a body that the legislator authorises and obliges to assist and supervise the insolvency practitioner in the conduct affairs within the insolvency proceedings.<sup>71</sup> In other words, within the scope of its activities, the creditors' committee is required to perform tasks consisting of considering the insolvency practitioner's report, reviewing the accounting records, lodging objection, approving the estimated costs of the proceedings and, ultimately, providing an opinion at the request of the court.<sup>72</sup> Although the literature previously warned about the lack of constant oversight of the activities of the insolvency practitioner, the role of the creditors' committee today represents a key mechanism for overseeing the proceedings.<sup>73</sup>

Moreover, members of the committee can now also request the removal of an insolvency practitioner, for important reasons, such as failure to submit a report on the course of the insolvency proceedings, or in the event of failure to realise assets forming part of the insolvency estate, and especially if he fails to comply with a court order. In doing so, the court takes the position that a request for removal can only be submitted by the creditors' committee or the general meeting of creditors. Accordingly, if the request for removal is not submitted by either the committee or the general meeting of creditors, the court shall dismiss the application as inadmissible. Furthermore, the prescribed task of the committee is particularly emphasised, according to which the creditors are obliged to approve the estimated costs of the proceedings. Such an approach undoubtedly implies the significance of the Committee in the oversight of assets. This is precisely why the legislator grants the committee the possibility to control the costs of the proceedings, in order to contribute to the preservation of the insolvency estate. In other words, if creditors did not control the costs of the proceedings, unjustified costs could occur and consequently the insolvency estate would be reduced, which would pose a

<sup>70</sup> Zubak, G., *Pravni položaj i uloga skupštine vjerovnika u stečajnom postupku*, IUS-INFO, Available at: [https://www.iusinfo.hr/strucni-clanci/CLN20V01D2024B2010], Accessed 18 March 2026.

<sup>71</sup> Čuveljak, *op. cit.*, note 56, p. 299.

<sup>72</sup> Article 98 (2) of the Bankruptcy Act.

<sup>73</sup> Bodul, D.; Vuković, A., *Još jedna reforma stečajnog zakonodavstva - funkcionalizacija stečajno pravne zaštite ili placebo efekt*, Zbornik Pravnog fakulteta u Rijeci, Vol. 36, No. 1, 2015, p. 203.

certain risk to creditors legal position. Case law results in a limitation of the powers of the committee, in the sense that it does not have decisive powers regarding the liquidation of assets, but rather gives an exclusive opinion, and final decisions remain within the jurisdiction of other insolvency proceedings bodies.

In addition, what supports increased control over the insolvency proceedings itself is expressed through the possibility of lodging an objection with the court. Also, in accordance with the provisions of the Bankruptcy Act, the duty to report to the court on the course of the proceedings and the state of the insolvency estate is emphasised. It follows that the creditors' committee is not fully independent of the creditors. Therefore, in general, with this approach to the duties of the committee, the legislator introduce greater control and enhanced oversight of the proceedings, but also seeks to reduce potential irregularities in the activities of the insolvency practitioner. It can be concluded that the described powers of the creditors' committee in the Bankruptcy Act overlap with those set in the Directive.

#### **4.4. Participation in the Functioning of the Creditors' Committee**

Upon closer examination of the issue of oversight over the internal functioning of the committee, the provisions of the Bankruptcy Act indicate that the committee decides on issues within its scope at meetings of the committee, with the presence of a majority of members.<sup>74</sup> In other words, in order to adopt valid decisions, the presence of a majority of members of the creditors' committee is required.<sup>75</sup> Both the court and the insolvency practitioner are required to be invited to the meetings of the committee, however, they do not have voting rights.<sup>76</sup> Notwithstanding this, the meetings of the committee may be validly held without their presence, but given the duty to submit reports to the committee, most meetings cannot be held without the presence of the insolvency practitioner.<sup>77</sup> Furthermore, it is stipulated that the first meeting, at which the members elect the chair of the creditors' committee, is convened by the court,<sup>78</sup> and subsequent meetings are also authorised to be convened by the chair of the committee.<sup>79</sup> However, such an approach does not mean that the judge is not able to convene a meeting when it is necessary to obtain the opinion of the creditors' committee, which relates to issues within

<sup>74</sup> Article 101 (1) of the Bankruptcy Act.

<sup>75</sup> Čuveljak, *op. cit.*, note 56, p. 309.

<sup>76</sup> *Ibid.*, p. 310.

<sup>77</sup> *Ibid.*

<sup>78</sup> Art. 101 (2) of the Bankruptcy Act.

<sup>79</sup> Art. 101 (3) of the Bankruptcy Act.

their scope of competence.<sup>80</sup> In the event of a tie vote, the matter in question is decided by the court,<sup>81</sup> which implies that, in certain cases, the court is entitled to vote.<sup>82</sup> This is intended to simplify the decision-making process in the case of conflicting views and ultimately prevent a potential delay in the proceedings. The importance of the will of the bankruptcy creditors is also expressed through the possibility of the court annulling the committee's decision, if such a decision is contrary to the common interest of the bankruptcy creditors.<sup>83</sup> It aims to "correct" decisions that could be contrary to the interests of the creditors or the insolvency estate. Such clearly defined rules of proceedings of the committee's also serve to ensure the timely adoption of decisions that are important for the course of the insolvency proceedings.

The current text of the Bankruptcy Act does not explicitly provide for the possibility of online participation in the functioning of the creditors' committee. However, such a possibility may nevertheless be inferred from the broader context of the insolvency proceedings and the application of Article 115 of the Civil Procedure Act<sup>84</sup> to insolvency proceedings in Croatia. The provision stipulates that the court may order that the hearing be held remotely, with the use of appropriate audio-visual devices and a technological platform for remote communication, or that certain evidence be presented in that manner.<sup>85</sup> Nevertheless, it would be preferable to expressly provide for this in order to clearly achieve and apply the objectives of the Directive in the practice of Croatian insolvency proceedings.

#### 4.5. Removal and Liability of Members

The court may dismiss a member of the creditors' committee *ex officio* or at his request.<sup>86</sup> Namely, it is authorised to do so throughout the insolvency proceedings, if there is no longer any interest in their being members of the committee or for other, particularly important reasons.<sup>87</sup> This is intended to ensure the effective

<sup>80</sup> Čuveljak, *op. cit.*, note 56, p. 309.

<sup>81</sup> Art. 101(6) of the Bankruptcy Act.

<sup>82</sup> Čuveljak, *op. cit.*, note 56, p. 310.

<sup>83</sup> Art. 101 (7) of the Bankruptcy Act in conjunction with Article 108.

<sup>84</sup> Art. 115 of the Civil Procedure Act (Zakon o parničnom postupku), Official Gazette, No. 4/1977, 36/1977, 36/1980, 6/1980, 69/1982, 43/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990, 35/1991, 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 148/2011 – consolidated text, 25/2013, 89/2014, 70/2019, 80/2022, 114/2022, 155/2023, 146/2025.

<sup>85</sup> *Ibid.*

<sup>86</sup> Art. 99 (1) of the Bankruptcy Act.

<sup>87</sup> Čuveljak, *op. cit.* note 56, p. 301.

functioning of the creditors' committee and prevent the possibility of its abolition, if the number of members were to decrease. Of course, the court is obliged to adhere to the rules on the mandatory composition of the creditors' committee.<sup>88</sup> What the Bankruptcy Act additionally provides is the possibility of appointing another member of the committee by the creditors. Accordingly, if the number of members were to fall below three due to removal, the court is obliged to appoint a new member of the committee.<sup>89</sup> For instance, if a member were removed from office as a member of the Committee due to a conflict of interest, the court may appoint a new member, so that the proceedings can continue without any disruption. The legislator next defines the issue of the liability of the members in the event of a breach. In other words, in the event of a breach of their legal duties, the committee members are obliged to compensate creditors with separate satisfaction right and insolvency creditors,<sup>90</sup> which demonstrates the importance of the duty that the creditors' committee has towards creditors, but also the responsibility for the consequences of performing that duty. Consequently, in action for damage, it is necessary to prove that the committee member breached his statutory duty by a culpable act or omission, which caused the claimant to suffer certain harmful consequences.<sup>91</sup>

The domestic legal literature has discussed whether the Croatian legal framework reduces the interest of creditors in participating in committee, given that taking on such a function also means taking on responsibility for potential damage, because the establishment of the above-mentioned strict rules on liability may not motivate creditors' committee members to act within the committee, expecting that other members will take on the obligations, which may lead to passivity of members of the creditors' committee.<sup>92</sup> However, the aforementioned discussions become irrelevant after the implementation of the Directive, since the text of the Directive provides an alternative option for Member States to either introduce liability of committee members or to conclude a liability policy for damage caused by members of the creditors' committees in the performance of their duties within. Therefore, it remains to be seen which alternative the Croatian legislator will decide on, although it is assumed that it will remain in favour of the existing solution and will not make any amendments to the Bankruptcy Act in this regard.

<sup>88</sup> *Ibid.*

<sup>89</sup> Art. 99 (2) of the Bankruptcy Act.

<sup>90</sup> Art. 100 of the Bankruptcy Act.

<sup>91</sup> Čuveljak, *op. cit.*, note 56, p. 308.

<sup>92</sup> McKenzie, T. A., *Representing the Interests of Creditors in Insolvency Proceedings*, *American Bankruptcy Institute Law Review*, Vol. 15, 2007, p. 5.

#### **4.6. Costs and Remuneration**

The Croatian Bankruptcy Act provides for the right to remuneration for work on the committee, as well as the right to reimbursement of expenses. Accordingly, the legislator also determines the amount of remuneration for each day spent performing tasks within its scope. Furthermore, a special remuneration may exceptionally be determined for a member of the committee who is not a creditor, given the scope of the tasks entrusted to him, which is decided by the court, in a special decision, based on the proposal of the creditors' committee. This exception was introduced because experts are often appointed to the creditors' committee who, although they are not representatives of creditors, undoubtedly contribute to the functioning of the committee with their knowledge. This precise legislative regulation, which aims to prevent the granting of disproportionate fees and remuneration, aims to ensure the protection of the insolvency estate from unnecessary costs, but at the same time fair remuneration for the members of the creditors' committee. It can be concluded that this solution also corresponds to the approach of the Directive because, in relation to costs, according to which the costs of the proceedings are generally covered from the insolvency estate. Therefore, no major changes to the existing provisions of the Bankruptcy Act are expected here.

The cost issue is of particular importance because it may directly affect whether a creditors' committee is established at all. Although the Croatian Bankruptcy Act contains relatively developed provisions on creditors' committees, they appear to be established rather rarely in practice, mainly because they generate additional costs. This shows that the practical role of the committee depends not only on the existence of legal rules, but also on whether its establishment is economically justified in the particular proceedings.

### **5. INSTEAD OF CONCLUSION: IMPLICATIONS OF THE TRANSPOSITION OF THE INSOLVENCY III DIRECTIVE INTO THE CROATIAN INSOLVENCY REGIME: WHAT TO EXPECT?**

The Insolvency III Directive was adopted on 30 March 2026, after an extensive legislative proceeding of almost 3.5 years. The Directive introduces a range of objectives and innovations in terms of introducing minimum harmonisation of certain aspects of insolvency law. In relation to the creditors' committee, the Directive seeks to unify the differences currently existing in national laws and ensure a minimum of harmonisation in order to fairly and evenly represent the interests of creditors in insolvency proceedings, all in order to increase the competitiveness of the EU capital market.

Following an analysis of the final text of the Directive, it can be concluded that the Directive is highly successful in terms of the set objectives, at least on paper. However, it remains to be seen how the national transpositions will proceed, and to what extent the objectives and proposed amendments will be effectively implemented in the practice of the Member States.

With regard to the current regulation of the Bankruptcy Act concerning the creditors' committee, it is evident that the Croatian Bankruptcy Act already contains a highly sophisticated, developed and precise legislative regulation of the institution of the creditors' committee. In other words, the Bankruptcy Act prescribes in detail the legal rules regarding the establishment, appointment, dismissal, composition, powers, costs and remuneration of committee members, the functioning and the responsibilities of the creditors' committee.

However, certain open issues introduced by the Directive remain, and those are not explicitly or at all contained in the Bankruptcy Act. These include, for example, the possibility of establishing a creditors' committee even before the commencement of insolvency proceedings, the possibility of cross-border creditor participation in the creditors' committee, etc.

In conclusion, the regulation of the creditors' committee in the Bankruptcy Act is currently already highly aligned with the provisions of the Directive.

Therefore, the existing framework in Croatia should not only focus on formal alignment with the Directive, but also on the conditions under which creditors' committees can exist. Accordingly, the Croatian legislator should not only maintain the existing provisions on creditors' committees, but should clarify how the economic justification for their establishment is assessed in practice. This should not diminish the importance of the creditors' committee as an instrument for creditor participation. Instead, since its establishment entails additional costs, the decision to establish it should be based on whether the committee can effectively contribute to the proceedings in a way that justifies the burden on the insolvency estate. Such an approach would better align the objective of the Directive on improving creditor participation with the practical reality of Croatian insolvency proceedings.

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