

- European Commission (DG JUST A1)  
Attention of Directorate-General for Justice and Consumers  
1049 Bruxelles/Brussel  
Belgium

REFERENCE: B/2023/855/GM/MvR/EM

DATE: 17 maart 2023

SUBJECT: Dutch Federation responds to the European Commission's proposal  
for a directive harmonizing aspects of insolvency law

Dear Sir/ Madam,

The Dutch Federation of Pension Funds highly values the European Commission's proposal for a Directive harmonizing aspects of insolvency law. It is a vital building block towards the completion of the Capital Markets Union. In line with a recent appeal by European leaders, we call upon EU institutions to set a fast pace for the agenda. We urge them to build on the work of the Next CMU High-Level Expert Group<sup>1</sup>.

We are convinced that Europe's pension funds play a vital role. Pension funds invest money in diversified long-term portfolios with a long time horizon. They are important shareholders of quoted companies and provide debt funding for corporate capital investments. Notably, in countries with (quasi)-mandatory occupational pension systems households hold most assets in capital markets, thereby deepening cross-border capital markets.

Modernizing Member States' insolvency regimes increase faith in investors' ability to retrieve residual value of cross-border investments in firms that fail. Insolvency procedures are currently lengthy and the diversity of regimes means that investors can be hesitant to commit to higher risk foreign investments, as they struggle to assess the implications of insolvency. We

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<sup>1</sup> Please find the report at [https://finance.ec.europa.eu/news/capital-markets-union-final-report-high-level-forum-pushes-completion-cmu-2020-06-10\\_en](https://finance.ec.europa.eu/news/capital-markets-union-final-report-high-level-forum-pushes-completion-cmu-2020-06-10_en).

therefore welcome the way in which the Commission's proposal makes insolvency proceedings more efficient.

We do see shortcomings with regards to the position of employees in pre-pack proceedings. The proposals mean a deterioration of their rights compared with current Dutch legislation. We would specifically like to point at the treatment of unpaid pension premiums in pre-pack proceedings, in which employees are effectively creditors. Pension premiums are part of the obligations under the employment contract. Pension premium liabilities should therefore be transferred in a pre-pack sale. Amendments are needed to guarantee pension premium payments in coherence with the *IORP II Directive* [(EU) 2016/2341] and the *Directive on restructuring and insolvency* [(EU) 2019/1023].

The *IORP II Directive* safeguards pensions by ensuring pensions are administered outside the control of employers. It therefore makes it compulsory for employers to timely and fully pay premiums owed to pension funds. The same goes for the *Directive on restructuring and insolvency*, which safeguards employees' rights, including to pension premiums the employer owes to a pension provider. The current proposal neglects this obligation.

The Dutch pension system protects the employee to the fullest. A judicial doctrine on the basis of the Dutch Pension Act obliges pension funds to pay out pension entitlements, even if the employer has not paid the respective obliged pension premiums. In an insolvency procedure, pension premium liabilities are transferred as parts of obligations under the employment contract. This practice is supervised by the Dutch Central Bank and the Dutch Financial Markets Authority and clarified in national case law ([ECLI:NL:PHR:2016:851](#) and [ECLI:NL:HR:2016:2375](#)).

Pension premium claims should remain collectible and enforceable in the pre-pack procedure by making the acquirer of (part of) the business liable for unpaid pension premiums. The Dutch Federation of Pension Funds wishes to safeguard employees' interests by suggesting the following amendments:

Article 20 – Paragraph 2

*For the purposes of Article 5(1) of Council Directive 2001/23/EC40, the liquidation phase shall be considered to be bankruptcy or insolvency proceedings instituted with a view to the liquidation of the assets of the transferor under the supervision of a competent public authority. **Member States may safeguard employees' rights such as (collective) labour agreements and pension rights, including pension premiums owed by the employer to a pension provider.***

Article 28

*Member States shall ensure that the acquirer acquires the debtor's business or part thereof free of debts and liabilities, unless*

- the acquirer expressly consents to bear the debts and the liabilities of the business or part thereof; and/or*
- the debtor did not pay or did not fully pay the pension premiums on behalf of the employees.*

Article 34 – Paragraph 5 (new)

*This Directive should be without prejudice to Member States' rights guaranteed by Directive (EU) 2016/2341 and Directive (EU) 2019/1023 of the European Parliament and of the Council to ensure that employees and their pension fund(s) have sufficient means to collect premiums that remained unpaid in line with article 8 of the Directive.*

In case you have any questions, please contact Martin van Rossum ([martin.van.rossum@pensioenfederatie.nl](mailto:martin.van.rossum@pensioenfederatie.nl)) and Gerard Metske ([gerard.metske@pensioenfederatie.nl](mailto:gerard.metske@pensioenfederatie.nl)).

Yours Sincerely,

Edith Maat  
Managing Director