Dutch Restructuring Association.

The Insolvency Proposal

The EU Commission Proposal for a Directive on the harmonisation of certain aspects of insolvency law. A preliminary commentary by the Dutch Restructuring Association.

www.vereniging-herstucturering.nl

Content

Preface

The Dutch Restructuring Association (the DRA – *Nederlandse Vereniging voor Herstructurering (NVvH))* was founded and formally incorporated on 31 December 2020. The DRA has the aim to enhance the quality and effectiveness of the restructuring practice in the Netherlands as a jurisdiction for an efficient implementation of restructurings of both domestic and international companies in the Netherlands.

The DRA focuses primarily on financial restructurings, often with judicial restructuring processes as the backdrop. It also collects and shares knowledge and best practices emanating from in- or out-of-court processes either in the Netherlands or abroad. As there is more to a successful restructuring than the management and implementation of the legal framework, the DRA also deals with other aspects involved in restructurings, such as the financial, commercial, operational and human relation aspects that need to be tackled during a successful restructuring.

The membership of the DRA not only reflects all stakeholders and parties who are involved in a financial restructuring process but also those who have a keen interest in the restructuring process from the academic world. The members are diverse in terms of their professional background and experience. This diversity serves as a broad platform to be the leading body in the Dutch restructuring market. It is furthermore a major driver in the continuous high quality and professionalism of the Dutch restructuring practice and community. The DRA, moreover, actively seeks connections with international restructuring associations in order to maximize the collection and sharing of worldwide restructuring expertise.

In light of the aims and goals of the DRA, this publication by the DRA aims to introduce the proposed provisions in the Insolvency Proposal of December 2022 of the European Commission on 'harmonising certain aspects of insolvency law'. Seventeen members of the DRA provide a preliminary assessment and commentary on those provisions. This publication provides a background to the Insolvency Proposal and a short overview of its subject-matter. Although a uniform treatment of the subjects has been aimed for, the authors have been given a fairly free hand. This applies in particular to referencing footnotes and the choice to integrate their own comments on the harmonization proposal into the text itself.

As Chair of the DRA, I am delighted that the DRA, with over 300 members, can present a practical and concise review of the topics selected. I thank all the authors, the editors (Lilian Welling-Steffens, Karen Harmsen and Omar Salah) and the initiator (Bob Wessels) for the dedication and effort to deliver, in some three months, the publication at hand. It certainly demonstrates the bonds between a group of DRA members and their wish to share and disseminate knowhow. We hope that the contributions from our members provide food for thought and spark discussions on these topics to improve the quality of our restructuring regime. More in general, this booklet serves as an 'international business card' of the DRA and shows that in the Netherlands the DRA takes its responsibility in the future development of the restructuring market.

Nico Tollenaar
Chair DRA
April 2023

Introduction of the Insolvency Proposal

Lilian Welling-Steffens

1. Background

1.1. On 7 December 2022 the EU Commission published its proposal for a Directive on harmonising certain aspects of insolvency law (the Insolvency Proposal). The proposal is part of the EU's long-standing plan for a Capital Markets Union (CMU - see EUR-Lex - 52020DC0590 - EN - EUR-Lex (europa.eu)), which is a key project of the Commission to further financial and economic integration within the EU. One of the actions for the completion of the CMU is to address the diverging insolvency laws and regimes in the Member States. The absence of more convergence in insolvency regimes means that cross-border investment and cross-border business relations cannot reach their potential. The proposal attributes to the establishment and functioning of the internal market.

1.2. Previously, in 2015, the EU adopted the Insolvency Regulation (recast) (its predecessor dating from 2000), which harmonizes private international law rules regarding jurisdiction, applicable law and the recognition and enforcement of insolvency proceedings. It came into legal effect in 2017. In 2019 the Restructuring Directive was adopted. It instructs Member States to implement certain minimum standards for restructuring procedures aimed at preventing insolvency and also includes rules that provide insolvent entrepreneurs access to a full discharge of debt. Nearly all Member States have finalised their national implementation of these legal instruments. The Insolvency Regulation determines competent courts and applicable law, and the Restructuring Directive harmonises aspects of pre-insolvency restructuring and post-insolvency debt discharge. Both EU law instruments do not, however, harmonise any of the core features of insolvency proceedings. Here the Insolvency Proposal comes in. It is the first instrument to propose harmonisation of certain aspects of substantive insolvency laws within the EU.

1.3. The Insolvency Proposal contains 63 recitals and no less than 73 Articles. It is not a standalone instrument. The Insolvency Regulation (recast) has been mentioned 18 times, in the Explanatory Memorandum ('Context of the Proposal') (pages 1 – 20) or the recitals (pages 21 – 33), and four times in the articles themselves (Articles 20(1), 45(1), 59(1) and 68(1)). The Restructuring Directive has been referred to 26 times, 18 times in the Explanatory Memorandum (Context of the proposal and the recitals) and eight times in the Insolvency Proposal's Articles (Articles 2(a), 2(f), 12(1), 23, 40, 56, 68(4)(d) and 69). The Insolvency proposal, therefore, should be viewed in consistence and its envisaged coherence with the other two instruments.

2. Aim and proposed provisions

2.1. The Insolvency Proposal does not aim to fully harmonize insolvency laws within the EU, but rather focusses on certain aspects deemed to be most important for the achievement of the CMU. It will be applicable to, roughly speaking, insolvent businesses that are not financial institutions (see art. 1(2) Insolvency Proposal). The Insolvency Proposal can be divided in three main goals or themes. These are to (i) facilitate a higher recovery value of the debtor's assets, (ii) enhance the efficiency of insolvency proceedings, and (iii) achieve a more predictable and fair distribution of recovered value among the debtor's creditors.

2.2. To achieve the first goal the Insolvency Proposal includes rules on avoidance actions (Title II) and asset tracing (Title III). The proposed provisions for pre-pack proceedings (Title IV) and directors' duties (Title V) can also be included within this goal. Under the second goal fall the provisions for a simplified procedure for the winding-up of micro-enterprises (Title VI). The third goal is enhanced by the provisions on creditors' committees (Title VII) and those on measures enhancing transparency for creditors (Title VIII). Title I does not fall within the scope of one of the goals but includes provisions on scope and subject matter and a list of defined terms.

Title I General provisions

2.3. Title I describes provisions on scope of application and definitions. As with many EU instruments, a careful and detailed set of rules builds and aligns the terms and topics of the Insolvency Proposal into existent EU law. It defines which common rules it contains. These rules are further discussed in Chapters II to VIII in this publication. It defines eight types of debtors to which the Insolvency Proposal does not apply. Furthermore, it contains a list of no less than seventeen definitions, which are key to understand the topics provided for in the proposal.

Title II Avoidance actions

2.4. Title II includes minimum harmonisation provisions for avoidance actions of legal acts. The proposal defines legal acts as "any human behaviour, including an omission, producing a legal effect", of either the debtor, a counterparty or a third party. These may be subject to avoidance actions provided that such act was detrimental to the general body of creditors and one of the avoidance grounds listed in Title II is met. The grounds for avoidance depend on the nature of the targeted legal act. The Insolvency Proposal differentiates between three groups of legal acts. These are the following:

i. Legal acts that benefited a creditor (or group of creditors) performed or omitted within 3 months before the filing for insolvency or thereafter (the suspect period), provided that the debtor was unable to fulfil its due and payable debts at the time of performance. If the legal act was performed for congruent coverages (like the payment of a due and payable debt) avoidance is only possible if the counterpart knew or ought to have known

that the debtor was materially insolvent or that a request for the opening of insolvency proceedings had been filed.

ii. Legal acts performed for no value or at an undervalue can be avoided if these were performed within one year prior to the submission of a request for the opening of insolvency proceedings or after such submission.

iii. Legal acts that are intentionally detrimental to the general body of creditors. These legal acts can be declared void, if they were performed either within four years of filing a request for the opening of insolvency proceedings or after such filing, and the counterpart knew or ought to have known of the debtor's intent to cause detriment to the general body of creditors.

2.5. The required knowledge on the part of the counterparty of the legal act is assumed if the counterparty is a party closely connected to the debtor, which is broadly defined as "persons, including legal persons, with preferential access to non-public information on the affairs of the debtor."

2.6. Most noteworthy consequences of the avoidance actions are that (i) the counterparty of the avoided legal act cannot invoke such act to gain satisfaction from the insolvent estate, (ii) the counterparty is obligated to compensate the insolvent estate in full for the detriment caused, (iii) this obligation cannot be set off against a claim on the insolvent estate and (iv) the claim against the counterparty for compensation is assignable.

Title III Asset tracing

2.7. Pursuant to the Insolvency Regulation (recast), insolvency practitioners appointed in main insolvency proceedings in a Member State may also exercise the powers conferred on them by the law of the Member State where such main proceedings have been opened in the other Member States. Such powers include access by insolvency practitioners to various registries containing relevant information on assets of the insolvent estate. Some of these registers are already publicly available but many are not. Title III of the Proposed Directive aims to extend the scope of registers accessible by insolvency practitioners to registers that are currently not publicly available. These include national central bank account registers, national asset registers and ultimate beneficial ownership (UBO) registers of Member States. It furthermore instructs the Member States to make sure that an insolvency practitioner is granted access to bank account information of the debtor upon request. In providing such access, the insolvency court must abide by high professional standards, including respect for data protection and confidentiality, all in line with relevant EU legislation in those areas.

Title IV Pre-pack proceedings

2.8. Generally speaking, insolvency practitioners will achieve a higher recovery rate for the general body of creditors, if the business of the debtor can be sold on a going concern basis compared to a piecemeal sale of assets. Pre-pack proceedings are a means to achieve such going concern sales, as the sale of the business is prepared without any disclosure to the public prior to the opening of insolvency proceedings to liquidate the company. Once the insolvency proceedings are opened, the sale will be completed. Title IV of the Insolvency Proposal aims to introduce pre-pack proceedings in all Member States. The proceedings are composed of two phases: the preparation phase and the liquidation phase. It furthermore includes various safeguards to make sure that potential buyers are reached and the best possible market value for the business is achieved. The proposed provisions also clarify that the liquidation phase of the pre-pack proceedings is to be characterized as an insolvency proceeding aimed at the liquidation of the assets of the company/transferor under the supervision of a competent authority. This is important in relation to art. 5(1) of Directive 2001/23/EC (the Transfer of Undertakings Directive) which provides that a buyer of a business does not have to take over all employees of that business in the event the sale was effected when "the transferor was the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority." Four notable features of the proposed pre-pack proceedings are that (i) the "best interest of creditor" test is applicable, (ii) the debtor can request a moratorium which is in line with the moratorium under the Restructuring Directive, (iii) executory contracts can be assigned to the buyer of the business without the consent of the counterparty to such contract and (iv) the highest bid in the preparation phase can be used as a 'stalking horse' bid in the liquidation phase if the Member State implementing the Insolvency Proposal chooses to include a mandate that a public auction is conducted in the liquidation phase.

Title V Directors' duties – a duty to file

2.9. A short Title V introduces an obligation for directors to file for insolvency of the company in a timely manner to avoid the destruction of value. Directors are typically among the first to know, or at least who ought to know, whether the company is approaching or has passed material insolvency. The proposed time limit is three months after the directors became aware, or can reasonably be expected to have been aware, that the company is insolvent. If the directors fail to file within this time limit, they may be held liable for damages resulting from such failure. The provisions in this Title are minimum harmonisation rules.

Title VI Simplified winding-up proceedings for microenterprises

2.10. Title VI introduces new winding-up proceedings for microenterprises. It basically aims to grant microenterprises better and less costly access to structured winding-up proceedings on the premises that current national insolvency proceedings are too costly and complicated for most microenterprises. The proposed proceedings are in principle debtor-in-pos-

session proceedings. On top of that, the Insolvency Proposal also introduces a simplified (compared to the Restructuring Directive) 'clean sheet' request for entrepreneurs and owners of unlimited liability microenterprises, who are personally liable for their business' debts. Another cost reducing feature is the use of electronic filing and electronic auction of assets.

Title VII Creditors' committee

2.11. Title VII provides for the establishment of a creditors' committee under the assumption that this will increase the involvement of individual creditors who might otherwise not participate due to costs or geographical distance. The creditors' committee is installed to strengthen the position of creditors in the proceedings. A creditors' committee is only installed if the general meeting of creditors agrees to do so. It furthermore provides for minimum harmonisation rules in relation to, *inter alia*, the appointment of members, the composition of the committee, its function, its working methods, and the personal liability of the members. The committee should reflect the different interests of the creditors of various creditor groups and must act independently of the insolvency practitioner. The committee shall have the right to be heard and has the power to request information from the insolvency practitioner. It is, furthermore, to receive notice of certain matters and must be consulted on others, including the sale of assets for instance.

Title VIII Measures enhancing the transparency on national insolvency laws

2.12. The main obligation of the Member States under this Title VIII is to provide creditors and investors with a regular update on the national insolvency laws through the regular publication of an updated key information fact sheet. The fact sheet must be published on the e-Justice Portal.

3. Next steps

The Insolvency Proposal is currently with the Council of the EU and will go through the legislative process. DRA will follow this process closely.

Title I General provisions – scope and subject matter; defined terms

Lilian Welling-Steffens (Greenberg Traurig, LLP Amsterdam / University of Amsterdam)

1. Scope and subject matter

1.1. The scope of the Insolvency Proposal is determined by providing a list of debtors to which it is not applicable. This can be summarized by stating that the Insolvency Proposal is not applicable in case the debtor is a financial organization. The debtors excluded from its scope are listed in article 1(2) and include a large number of organizations connected to financial markets like credit institutions, insurance undertakings, central counterparts, investment firms and central securities depositories. All as defined in the various applicable EU directives and regulations to banking and insurance institutions. Two other groups of debtors are also excluded from the scope: public bodies under national law (in certain Member States hospitals and energy companies) and natural persons who do not run a business.

1.2. Although article 1(1) of the Insolvency Proposal provides the list of topics dealt with (avoidance actions, asset tracing, pre-pack proceedings, directors' duty to file for insolvency proceedings, simplified winding-up proceedings for microenterprises, creditors' committees, and measures to increase transparency of the applicable national law on insolvency proceedings), it remains unclear which national insolvency proceedings fall within its scope. There is, for instance, no explicit reference to the insolvency proceedings listed on Annex A of the Insolvency Regulation (recast), nor does article 2 (Definitions) include a definition of insolvency proceedings, despite the fact that the term is used throughout the Insolvency Proposal. Article 1(2) provides that the directive will not apply 'to proceedings referred to in paragraph 1 of the Article'. This paragraph 1 does not contain such a definition, which clearly is an omission.

2. Defined terms

2.1 The Insolvency Proposal provides a list of defined terms in article 2. Two notable omissions are, as already mentioned above, a definition of "insolvency proceedings" and a definition of "insolvent". The lack of a definition of "insolvent" is especially challenging for directors, who, under the Insolvency Proposal (Title V), are required to submit a request for the opening of insolvency proceedings within three months after the company becoming insolvent at the risk of personal liability. Who qualifies as a director, for that same purpose, is also not defined in article 2. For a more detailed discussion please refer to the contribution on Title V). Surprisingly, Title VI on simplified winding-up proceedings for micro-enterprises does include a definition of "insolvent" in article 38(2). It provides that a micro-enterprise is deemed insolvent (solely for the purposes of simplified winding-up proceedings) when it is

generally unable to pay its debts as they mature. It is left up to the Member States to determine the conditions under which "a micro-enterprise is deemed to be generally unable to pay its debts as they mature". These conditions must be "clear, simple and easily ascertainable" by the relevant micro-enterprise (for more information on the simplified winding-up proceedings please refer to the chapter on Title VI).

2.2 The Insolvency Proposal does define seventeen other terms in article 2. The most important or remarkable ones (or both) will be discussed here.

2.3 For the definition of insolvency practitioner (article 2(a)), reference is made to article 26 of the Restructuring Directive and not to article 2(5) of the Insolvency Regulation (recast) and Annex B thereto. The first provision includes an instruction to the Member States relating to the expertise of "practitioners", the definition of which can be found imbedded in article 26(1)(a) Restructuring Directive. It provides that "practitioners" are practitioners appointed by a judicial or administrative authority in procedures concerning restructuring, insolvency and discharge of debt. This is quite a broad definition but inherently vague, whereas the definition in the Insolvency Regulation (recast) is more specific and refers to Annex B, where it is clearly indicated what each Member State understands an insolvency practitioner to include in its jurisdiction.

2.4 A "competent authority" (article 2(c)) must be appointed by the Member States in simplified winding-up proceedings and must be a judicial or administrative authority in the Member State, which will be responsible for the oversight or conduct of such proceedings. This may be a court but does not have to be.

2.5 The definition of "legal act" (article 2(f)) is mainly relevant for Title II Avoidance Actions of the Insolvency Proposal. It is quite broad, as it refers to any human behaviour, including omissions, which produces a legal effect. Legal effect is not defined, and thus this may vary from jurisdiction to jurisdiction.

2.6 Title IV on pre-pack proceedings provides that the outcome of such proceedings must pass the "best-interest-of-creditors test". This is defined in article 2(h) Insolvency Proposal, which provides that for a pre-pack to be allowed to go ahead "no creditor is worse off under a liquidation in pre-pack proceedings than such a creditor would be if the normal ranking of liquidation priorities were applied in the event of a piecemeal liquidation". The "best-interest-of-creditors test" is also used in the Restructuring Directive but is defined differently as the position of a creditor in a restructuring is to be compared to its situation under the normal ranking of liquidation priorities, "either in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario". These final words "by sale as a going concern, or in the event of the next-best-alternative scenario" need attention. Although this difference seems logical at first glance, considering that the pre-pack proceedings lead to a sale as a going concern, the proposed pre-pack proceedings in the Insolvency Proposal are clearly described as having two phases, a preparatory phase and a liquidation phase. In the first phase the sale is prepared and in

the second the sale is effectuated (article 19(1)). If a going concern sale is effectuated in insolvency proceedings without the preparatory phase, such proceedings do not seem to qualify as pre-pack proceedings within the meaning of the Insolvency Proposal. However, the definition of pre-pack proceedings in article 2(p) Insolvency Proposal does not clearly distinguish these two phases and refers to "expedited liquidation proceedings that allow for the sale of the business of the debtor" (please refer to the chapter on Title IV pre-pack proceedings in this publication). For a pre-pack to pass the best-interest-of-creditors test it is sufficient that a creditor receives more in the pre-pack than it would have in a piecemeal sale in a liquidation. It is, however, not inconceivable that a going concern sale in insolvency proceedings, that do not qualify as pre-pack proceedings, may yield higher proceeds for the creditors than a sale prepared in a pre-pack.

2.7 The definition of micro-enterprise (article 2(j)) refers to the Annex of the Commission's Recommendation 2003/361/EC. Article 2(3) of that Annex provides that "a micro-enterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million." In the Netherlands, the large majority of SMEs fall within this definition and most insolvency proceedings relate to micro-enterprises (www.cbs.nl). For a further discussion please refer to the chapter on Title VI.

2.8 Finally, for the provisions on avoidance actions and the pre-pack proceedings, the definition of a "party closely related to the debtor" (article 2(q)) is relevant (please refer to the chapter on Title II). The general definition is very broad, stating that closely related parties are "persons, including legal persons, with preferential access to non-public information on the affairs of the debtor". The provision then provides for non-exhaustive but already quite extensive lists of persons who are considered closely related in relation to a natural person being an entrepreneur and in relation to a legal entity. In respect of natural persons these are direct family members of either the debtor or the spouse(s) or partner(s) of the debtor, any member of the debtor's household, employees with formal or informal access to non-public information (including the debtor's advisors) and legal entities in which the debtor or any of the persons listed above is a member of the administrative, management or supervisory bodies or that perform duties which provide for access to non-public information on the affairs of the debtor. In respect of legal entities these are members of its administrative, management or supervisory bodies or persons who perform similar functions, equity holders with a controlling interest and all persons closely related to any of those persons as set forth in the list relating to a debtor being a natural person. Article 3 Insolvency Proposal concludes Title I and provides when this close relationship must exist. For the purposes of Title II (avoidance actions) this is "the day when the legal act subject to an avoidance action was perfected or three months prior to the perfection of the legal act" and for the purposes of Title IV (pre-pack proceedings) this is "the day when the preparation phase starts or three months prior to the start of the preparation phase".

3. Summarising

3.1 The Insolvency Proposal only aims to harmonise certain aspects of insolvency law which are currently deemed important for the completion of the CMU. It is not applicable to insolvency proceedings relating to, broadly speaking, financial market participants and it remains vague on the question which national insolvency proceedings are included in its scope. The Insolvency Proposal includes various defined terms but omits to include a generally applicable definition for very relevant and often used terms such as “insolvent”, “director” and “insolvency proceedings”. Without such definitions the boundaries of the Insolvency Proposal will be rather a blur, with the obvious unclear impact for e.g. avoidance actions and directors’ duties. Moreover, it will be detrimental to the coherency of the system of EU Insolvency law, as it is presently noticeable that definitions taken on board sometimes refer to other EU instruments like the Restructuring Directive, but not once to the Insolvency Regulation. However, what the proposal in any case does is taking a step to create harmonized European insolvency law.

Title II Avoidance actions

Erwin Bos (DVDW)

1. Introduction to the proposal re transaction avoidance rules

1.1. The proposals for harmonization of transaction avoidance rules in the Insolvency Proposal [1] are covered in Title II and consist of 9 articles (Art 4 through 12). The aim of the Insolvency Proposal is to provide a positive impact on three key dimensions of insolvency law: (i) the recovery of assets from the liquidated insolvency estate; (ii) the efficiency of procedures; and (iii) the predictable and fair distribution of recovered value among creditors.[2] In that context, the proposals regarding the transaction avoidance rules and asset tracing rules are meant to mutually reinforce each other.[3] It should be noted that although the Insolvency Proposal itself points out that the insolvency rules are fragmented along national lines and prevent the EU from forming a 'true Capital Markets Union'[4], the proposals regarding transaction avoidance rules merely provide a minimum standard.[5] As a result, differences between various jurisdictions most likely will persist and in that sense the Insolvency Proposal does not substantially reduce fragmentation.

1.2. Given the nature of the international restructuring practice, typically a lot of emphasis is put on the avoidance risks pertaining to transactions in a restructuring process. After all, the success of a restructuring is partly dependent on the absence of successful challenges to its underlying measures and transactions. Obviously, this excludes any restructuring step, transaction or other measure taken or entered into within the context of a formal or court led restructuring process such as the Dutch court enforced restructuring plan.[6]

2. Contents of the Insolvency Proposal

2.1. Introduction

2.1.1. The Insolvency Proposal is aimed at *all* legal acts, meaning *any* human behaviour with legal effects, including omissions.[7] To the extent such act, perfected prior to the opening of insolvency proceedings, is to the detriment of the general body of creditors, each Member

1 Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (2022/0408(COD)), the 'Proposal'.

2 Proposal, 2022/0408(COD), nr. 3, p. 9.

3 Proposal, 2022/0408(COD), nr. 5, p. 12.

4 Proposal, 2022/0408(COD), nr. 1, p. 1.

5 Article 5 Proposal.

6 Specific protection of transaction in that context can be petitioned for with the relevant Dutch court pursuant to Article 42a of the Dutch Insolvency Code as required pursuant to Art. 17 and 18 Directive (EU) 2019/1023.

7 Article 2(f) Proposal.

State will be required to ensure that such act can be declared void in accordance with the rules of the Insolvency Proposal.[8]

2.1.2. The Insolvency Proposal provides for three specific categories of avoidance grounds: 1) legal acts benefitting a creditor; 2) legal acts at an undervalue; and 3) legal acts intentionally defrauding (other) creditors, each of which carried out within its specific suspect period.

2.2. Due claims and suspect period (Art. 6)

2.2.1. The first category relates to legal acts benefitting creditors, whether it be satisfaction of claims of a creditor, waiving of claims by a debtor or the creation of security rights. Such acts should be capable of being voided if they were perfected 1) within 3 months prior to the submission of the request for the opening of the insolvency proceedings (the so-called suspect period), under the condition that the debtor was unable to pay; or 2) after the submission of the request for the opening of insolvency proceedings. The additional requirement of creditor's knowledge is included if the claim that is satisfied or secured was a due claim.[9] The required knowledge is legally presumed to be present in case the creditor is closely related to the debtor.[10] Certain legal acts are exempt from voidance, including any legal act performed directly against fair consideration.[11]

2.3. Transactions at an undervalue (Art. 7)

2.3.1. The second category deals with legal acts at an undervalue; transactions by the debtor with no or manifestly inadequate consideration. Such legal acts can be declared void if they were perfected within one year prior to the submission of the request for the opening of insolvency proceedings.

2.4. Acts intentionally detrimental to creditors (Art. 8)

2.4.1. The third, and last, category creates rules relating to legal acts that are *intentionally* detrimental to creditors. The intent should lie with the debtor, but it is required that the other party knew or should have known the debtor's intent.[12] Again, such required knowledge is legally presumed to be present in case the other party is closely related to the debtor. Such transaction should be voidable if carried out within four years prior to the submission of the request for the opening of insolvency proceedings.

8 Article 4 Proposal.
9 Article 6(2) Proposal.
10 Article 2(q) Proposal.
11 Article 6(3)(a) Proposal.
12 Article 8(1)(b) Proposal.

2.5. Consequences and remedies (Art. 9, 10 and 11)

2.5.1. Each Member State is required to ensure that the consequences and remedies of avoidance actions meet a minimum standard. More specifically, each Member State should firstly ensure that the insolvency estate is compensated in full by the party which benefitted from the legal act(s), while excluding the right to invoke set-off[13], including against any legal successor of such party[14]. Secondly, to the extent the counterparty compensates the insolvency estate, such party's claim against the debtor is reinstated[15] and any counter-performance by the insolvency estate performed (assuming it is still distinguishable and capable of being performed) [16].

3. Commentary regarding the Insolvency Proposal

3.1. Introduction

3.1.1. The following commentary is from the perspective of restructuring practitioners. One will appreciate that these comments therefore focus on the restrictions and opportunities the Proposal offers for the restructuring community.

3.2. Minimum harmonization

3.2.1. As mentioned in the introduction to this chapter, the proposed rules represent a minimum harmonization. Given the nature of international restructurings, this represents a double-edged sword. On the one hand, it creates an equal minimum amount of certainty around the avoidance risks associated with legal acts in restructurings. As such, the Insolvency Proposal plays into the hands of insolvency practitioners looking for compensation for allegedly detrimental legal acts. On the other hand, it maintains a certain level of optionality to appreciate the opportunities for legal restructuring acts in the various Member States.

3.3. Broad scope

3.3.1. Furthermore, what differentiates the Proposal from the current Dutch legal framework on fraudulent preference is its significantly broader scope. Contrary to current Dutch law, these avoidance rules are not restricted to an (active) legal act, but instead encompass *all* human behaviour with legal effects, including omissions. Suffice to say that this equally broadens the risk for a restructuring consisting of numerous steps including the (contem-

13 Article 9(2) and 9(5) Proposal.
14 Article 11 Proposal.
15 Article 10(1) Proposal.
16 Article 10(2) Proposal.

plated) absence certain steps. Under the Insolvency Proposal, each element of such restructuring is exposed to the proposed transaction avoidance rules. Notably, unlike Dutch law (laid down by the Dutch Supreme Court), the Insolvency Proposal does not address the possibility of considering connected transactions as a whole.

3.3.2. Moreover, the broad scope also negates the nuanced and clear difference that currently exists under Dutch avoidance rules between mandatory (*verplichte*) and non-mandatory (*niet-verplichte*) legal acts. Although the Insolvency Proposal's distinction between congruent and incongruent coverage touches upon the same distinction, the potential of voidance of mandatory legal acts is much more prohibitive under Dutch law. Given the comfort a positive pledge stipulation in finance documentation currently provides, the different approach the Insolvency Proposal takes on voiding legal acts following such positive pledge is likely to have considerable impact.

3.4. Safe haven / Increase certainty

3.4.1. Although some criticism can be raised against parts of the Insolvency Proposal, it also provides elements the restructuring practice can delight in. For instance, the exemption for legal acts performed against fair consideration provides a safe haven of sorts. Ensuring fair compensation therefore (still) offers a level of comfort and protection that enhances the certainty of a restructuring.

3.4.2. In addition, the fairly limited scope of the suspect periods and statute of limitations create additional welcome certainty. Once a certain step is taken or a transaction is executed, the hardening period according to the Insolvency Proposal can easily be determined. However, one should keep firmly in mind that these represent minimum requirements for Member States. As noted before, there still remains plenty of room for Member States to maintain or even create (further) fragmentation.

3.4.3. A final noteworthy part of the Insolvency Proposal relates to the nature of a compensation claim. According to article 9(4) of the Insolvency Proposal, such claim may be assigned to a creditor or a third party. By doing so, the Insolvency Proposal creates the opportunity for the insolvency practitioner to include such claim in an asset transaction out of the insolvency estate, transferring the risk of recovery such claim against the relevant creditor to the acquirer of the assets.

Title III Tracing assets belonging to the insolvency estate

Willem van Nielen, Myrthe Derksen and Ramon Vastmans (Recoup Advocaten)

1. Powers for insolvency practitioners with regard to asset tracing

1.1. Introduction

1.1.1. For a definition of the term "insolvency practitioner", the Insolvency Proposal refers to Article 26 of the Restructuring Directive, indicating that it is 'a practitioner appointed by a judicial or administrative authority in procedures concerning restructuring, insolvency and discharge of debt.'

1.1.2 Given this definition, a court-appointed insolvency administrator (*faillissementscurator*) under the Dutch Bankruptcy Act (*Faillissementswet*) qualifies as an insolvency practitioner within the meaning of the Insolvency Proposal. To avoid confusion with other insolvency practitioners (and the different powers these officers have), the insolvency administrator will be referred to as "insolvency administrator" hereafter (especially in section 4).

1.2. Access to bank account information (Article 13-16)

1.2.1. This power only indirectly accrues to the insolvency practitioner. After all, the authority to access and search information about bank accounts is specifically vested in the designated courts, at the request of the insolvency practitioner appointed in ongoing insolvency proceedings. Use of the power to access bank account information is further limited only to insolvency courts that have been duly designated, and which designation has been notified to the Commission by the Member States.

1.2.2. The designated courts would have the power to access and search, directly and immediately, bank account information listed in Article 32a(3) of Directive EU 2015/849 and in other Member States available through the "bank account registers" (BAR). The condition for using this power would be that this is "necessary for the purposes of identifying and tracing assets belonging to the insolvency estate of the debtor in those proceedings, including those subject to avoidance actions."

1.2.3. Thereafter, the information requested by the designated courts will be provided to them through an automated mechanism. The log data of the searches must be kept and checked for the purpose of monitoring compliance. The staff of the designated courts must ensure that the high professional standards regarding confidentiality and data protection are maintained, and that the security of that data also meets high technical standards.

1.3. Access to beneficial ownership information (Article 17)

1.3.1. The power to obtain access to information about beneficial ownership ("UBOs") would only be exercisable by the insolvency practitioner with a legitimate interest. This will be the case if the information is "necessary for identifying and tracing assets that are part of the insolvency estate of the debtor in ongoing insolvency proceedings."

1.3.2. This information is held in "the beneficial ownership registers" set up in the Member States in accordance with Directive EU 2015/849. The information is limited to the following: (a) the name, the month, the year of birth, the country of residence and the nationality of the legal owner; (b) the nature and the extent of the beneficial interest held.

1.4. Access to certain national registers (Article 18)

1.4.1. Under this provision, insolvency practitioners have direct and expeditious access to national asset registers located in their territory, or in other Member States (as listed in "the Annex"), as long as these registers are available in the Member State. In that context, it is irrelevant in which Member State the insolvency practitioner has been appointed.

1.4.2. At this moment "the Annex" has not been published yet and it is therefore unclear which registers are referred to. In any case, we expect the following Dutch registers to be included in the appendix: the land register (*Kadaster*) and a register regarding owner information about vehicles (*het RDW*).

1.4.3. The Insolvency Proposal stipulates that an insolvency practitioner who requests access to a national asset register in another Member State may not be subject to different access conditions than the insolvency practitioner appointed in that Member State.

2. Proposal in the context of fundamental rights

2.1. While the aim of the asset tracing provisions is to enhance cross-border cooperation and facilitate effective and efficient asset recovery, the directive should ideally also contain clear rules and safeguards preventing disproportionate interference with fundamental rights, and ensure that the asset tracing and recovery process is fair and proportional.

2.2. One of the fundamental rights that could be affected is the right to privacy. After all, asset tracing and recovery, as envisioned in the Insolvency Proposal, implies broader access to sensitive financial information and personal data. Another fundamental right that could be at stake is the right to property. Asset tracing and recovery may involve the seizure of assets, including assets that (in hindsight) do not belong to the insolvency estate or are otherwise not related to the insolvency proceedings. The asset tracing provisions may also have an impact on the right to a fair trial. The current Insolvency Proposal does not contain harmonised minimum standards ensuring that the rights of the debtor and other parties (not) involved in the insolvency proceedings are protected, and that they have access to an effective remedy in case of any violations.

2.3. The explanatory notes of the Insolvency Proposal state that the Insolvency Proposal is fully in line with the fundamental rights and freedoms enshrined in the Charter of the Fundamental Rights of the European Union (Charter), and that any limitations on these rights are proportionate and justified. However, this blanket statement is not further explained, and the notes fail to address the practical impediments to the expansion of access to restricted registers to insolvency practitioners. Importantly, the notes do not explain in which manner the proposed Directive would relate to the protections set out by the EU General Data Protection Regulation (GDPR).

2.4. While the Insolvency Proposal outlines some abstract measures aimed at protecting personal data, such as the obligation of Member States to implement technical and organisational measures to ensure data security and high professional standards for designated court staff, it is not clear what these measures should entail in practice and therefore whether, and under which standards, they will be sufficient in safeguarding the privacy rights of data subjects, especially in terms of practical implementation by the Member States.

2.5. Additionally, the text suggests that the limitations on privacy and data protection are justified by the need to effectively trace assets in insolvency proceedings, but it is not clear whether less intrusive measures were considered or whether the proposed measures are proportionate to the objective pursued.

2.6. In this context, we finally note that the European Court of Justice (ECJ) recently addressed (somewhat) similar issues in its judgement on the 22nd of November 2022, in the combined cases of WM (C 37/20) and Sovim SA (C 601/20).

2.7. In these cases, the ECJ struck down a provision of the Fifth Anti-Money Laundering Directive pursuant to which Member States had to ensure public access to information, including personal data contained in the ultimate beneficial owner (UBO) register. The UBO register was established as part of the effort to combat money laundering and terrorist financing (Fourth Anti-Money Laundering Directive), and as a way to allow competent authorities to identify the natural persons who ultimately own or control legal entities. In short, the ECJ held that the UBO register is a necessary and proportionate measure for achieving the legitimate aim of preventing money laundering and terrorist financing, and that the processing of personal data in the register is compatible with the GDPR. However, the ECJ also noted that the processing of personal data must be subject to appropriate safeguards, including limitations on access to the data, the purposes for which the data is processed, and the duration of its retention. The ECJ has furthermore emphasized the importance of ensuring that the data subjects are informed about the processing of their personal data and have the right to access, rectify, and erase their data. General access by the public to such data, however, results in an interference with fundamental rights that is neither limited to what is *strictly necessary* nor *proportionate to the pursued objective*, according to the ECJ.

2.8. This judgement and the limitations set out by the ECJ, therein, may provide some guidance on interpreting the proposed provisions on asset tracing and recovery. An unanswered but nonetheless important question is whether the Insolvency Proposal's aim of further integrating the Capital Markets Union is actually an aim that would justify the broadening of access to restricted registers containing personal data to insolvency practitioners, and the resulting (potential) interference with fundamental rights as enshrined in the Charter and as protected by, for example, the GDPR.

2.9. While the Insolvency Proposal specifies the purposes for processing personal data and obliges Member States to ensure that the staff of the designated courts maintains high professional standards of data protection, compatibility with fundamental rights will, in our view, depend on whether (i) appropriate (digital) safety measures can realistically be put in place in each Member State, and (ii) the processing of personal data will (in practice) be limited to what is strictly necessary for the purposes of asset tracing in insolvency proceedings. The intricacies of such a system might in reality prove a far cry from the "fast and easy" (cross-border) access by insolvency practitioners to relevant databases within the Member States as envisioned by the authors of the Insolvency Proposal.

3. Our view on the Insolvency Proposal

3.1. Given our experience with court appointments in insolvency proceedings (particularly as an insolvency administrator (*curator*)), this contribution is concluded with a number of observations that we believe may be relevant to Dutch insolvency practitioners.

3.2. Firstly, the power under (a) 'access to bank account information' is discussed. At present, it is not always easy for the insolvency administrator to obtain bank account information of the debtor or the estate from the banks, despite the fact that there is a statutory basis for this. On the basis of Article 105(2)(a) and (b) (in conjunction with Article 106 in the case of the bankruptcy of a legal entity) of the Dutch Bankruptcy Act (*Faillissementswet*), the debtor is obliged to provide the insolvency administrator with information about foreign assets, including bank balances, and, if necessary, a power of attorney to allow the insolvency administrator to dispose of those assets. However, such a signed power of attorney rarely produces a desired result.

3.3. In practice, in our experience as insolvency lawyers, this is often due to:

i. the assets belonging to the bankruptcy estate are deposited in non-EU countries (for example Switzerland, Panama or the British Virgin Islands);

ii. assets not being automatically available to the insolvency administrator, despite their location in a Member State and the insolvency administrator's success, in spite of all the obstacles, in getting sight of the assets. Consider, for example, difficulties in attaching preservation orders due to different procedures/rules in the relevant Member State and the costs involved;

iii. it is a time - consuming process, whereas speed is of the essence when it comes to asset tracing. The provisions in the Insolvency Proposal do not immediately remove the existing problems, as it is only a matter of obtaining information on the existence of a certain asset (and not the access to or disposal thereof). We do recognise the advantages of transmitting bank information via an automatic mechanism to the designated courts, although it remains to be seen whether the appointment of a designated court will increase the speed of the process. It is, however, possible that fewer discussions may arise with banks about the permissibility of sharing that information with a "third party," if the information can only be accessed by those designated courts.

3.4. We also note that it would be somewhat confusing from an international perspective that this power of attorney may be needed, despite the fact that the insolvency practitioner would derive his authority from the powers introduced by the Insolvency Proposal. In practice, a notary or a bank in another Member State, for example, might still need a power of attorney, despite the fact that it is not formally required, unless this contingency (and others like it) would be provided for in the national legislation of each Member State implementing the Directive.

3.5. Secondly, the power under (b) ‘access to beneficial ownership information’ is discussed. The Fourth European Anti-Money Laundering Regulation already provides for individuals and organisations with a legitimate interest to have access to UBO register data, as set out in Article 17(2) of the Insolvency Proposal (the provision of the Fifth European Anti-Money Laundering Regulation expanding the scope to “any member of the general public” has been declared invalid by the European Court of Justice). The Insolvency Proposal provides for the fulfilment of the criterion of a legitimate interest, by providing that it exists if the information is necessary for identifying and tracing of assets belonging to the insolvency estate. This, however, is not necessarily a helpful addition (see above under paragraph 3).

3.6. Finally, the power under (c) ‘access to certain national registers’ is discussed. As already noted, the Annex referred to above has not (yet) been published. It is therefore sufficient, at this point, to note that the Insolvency Proposal would ensure equal treatment of insolvency practitioners. This would mean, for example, that the insolvency administrator appointed by a Dutch court should have access to the Italian land register under the same conditions as an insolvency administrator appointed by the Italian court. Whether this will in practice lead to a relaxation of the applicable access possibilities, is – again – something that remains to be seen.

Title IV Pre-pack proceedings

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1. Introduction

1.1. The Insolvency Proposal includes in Title IV an elaborate and substantive framework for pre-pack proceedings in 19 articles and 'aims to ensure that these proceedings […] are available in a structured manner in the insolvency regimes of all Member States'.[1]

1.2. In general, (the implementation in Dutch legislation of) a pre-pack proceeding is expected to be value enhancing resulting in an extra restructuring tool for distressed companies and the parties involved. It creates additional optionality in a restructuring as well as increases deal certainty. More particular, a pre-pack proceeding is considered value enhancing considering it leads to the (distressed) business being sold on a going concern basis, in a quick process and, hence, against reduced costs. This leads to higher expected returns to creditors and in general job preservation.

1.3. The Insolvency Proposal is work-in-progress. This commentary discusses the Insolvency Proposal on the basis of a selection of topics and, without pretending to be exhaustive, identifies a number of items that require clarification, revision and/or further debate.

2. Preparation and liquidation phase

2.1. Art. 19 of the Insolvency Proposal makes a distinction between the preparation phase, in which the aim is to find an appropriate buyer for the debtor's business or parts thereof, and the liquidation phase, which is aimed at the execution of the envisaged sale and distribution of the sale proceeds to the creditors.[2]

2.2. The reference to a liquidation phase does not seem to warrant the introduction of a new type of insolvency proceeding. It will be the standard winding-up proceeding in a Member State, e.g. bankruptcy (*faillissement*) in the Netherlands. This makes sense because after the pre-pack sale (if the pre-pack sale is authorized or, alternatively, if the pre-pack sale is not authorized by the court) the insolvency practitioner will have to further wind-down the debtor including distributing the proceeds of the sale (if authorized) in accordance with

1 Explanatory Memorandum, p. 15. Although the pre-pack has been applied in the Netherlands there is, as yet, no statutory base. Two legislative proposals may be picked up again by the Dutch legislator after the recent ruling by the ECJ in 'Heiploeg' of 28 April 2022 (C-237/20).

2 The definition of 'pre-pack proceedings' in art. 2(p) of the Insolvency Proposal is limited to the liquidation phase and should be broadened to also encompass the preparation phase. See also the chapter on Title I General provisions paragraph 2.6.

the 'national provisions on winding-up proceedings'[3], and existing insolvency proceedings, such as the Dutch bankruptcy, already provide the framework.

2.3. The liquidation phase will be considered an insolvency proceeding within the meaning of the Insolvency Regulation, which entails that the liquidation phase, including for example (the authorization of) the sale, benefits from automatic recognition in other Member States under the Insolvency Regulation. The preparation phase, under the current Insolvency Proposal, will not be considered an insolvency proceeding within the meaning of the Insolvency Regulation. We do not see this as an issue, because the (preparatory) nature of this part of the process means that there are no specific matters that need automatic recognition.[4]

2.4. We would have expected, however, more detail on the preparation phase in the Insolvency Proposal. Art. 22(1) stipulates that the appointment of the monitor, which can only be requested by the debtor itself, starts the preparation phase. The Insolvency Proposal, however, does not include an insolvency test as entry requirement for the start of the preparation phase. Obviously, the liquidation phase requires the debtor to 'pass' an insolvency test halfway through the pre-pack proceedings. However, it would seem logical that such insolvency test would be included as entry requirement to the pre-pack proceedings as such. Such test could then be aligned with the 'entry' requirement for requesting a moratorium (art. 23 Insolvency Proposal), which requires that the debtor is in a situation of likelihood of insolvency or is insolvent. What is also lacking in the Insolvency Proposal is a requirement for the debtor to justify the opening of pre-pack proceedings. . The proposed Dutch 'pre-pack' legislation includes an insolvency test as well as a justification requirement. Finally, to avoid unnecessary lengthy preparation phases, and to ensure court oversight, we would also recommend including a limit on the length of the preparation phase. A two-week period plus extension options seems reasonable and appropriate.

3. Jurisdiction

3.1. Although the explanatory memorandum suggests that art. 21 of the Insolvency Proposal 'clarifies that the court having international jurisdiction over the main insolvency proceedings of the debtor has jurisdiction over the pre-pack proceedings as well', art. 21 does not actually provide such clarification. The Insolvency Proposal does not include a provision on international jurisdiction for the pre-pack proceedings themselves. Given that the liquidation phase is an insolvency proceeding within the meaning of the Insolvency Regulation, which entails the COMI requirement applies, the same should apply to the preparation phase. A reference to art. 3 of the Insolvency Regulation with respect to the preparation phase would suffice for that purpose.

3 Art. 19(2) second full sentence.

4 The only measure during the preparation phase that would benefit from automatic recognition in other Member States would (theoretically) be the stay of individual enforcement actions in art. 23 of the Insolvency Proposal, but art. 8 of the Insolvency Regulation which excludes rights *in rem* on assets situated in another Member State renders such stay mostly ineffective.

3.2. Art. 21 of the Insolvency Proposal introduces effective management of pre-pack proceedings (see recital 23) by stipulating that the court having jurisdiction in pre-pack proceedings shall have exclusive jurisdiction in matters relating to the scope and effect of the sale of the debtor's business or part thereof in pre-pack proceedings on the debts and liabilities. Recital 23 of the Insolvency Proposal explains that this provision (only) means to include 'issues closely related to the pre-pack sale of the business or part thereof'. Art. 21 of the Insolvency Proposal gives rise to (at least) two questions. First, given that the buyer acquires the business or part thereof free of debts and liabilities (art. 28 of the Insolvency Proposal), how would the scope and effects of the sale impact those debts and liabilities? The second question is what kind of matters are closely related to pre-pack proceedings for which the pre-pack court has exclusive jurisdiction? Although worded slightly different, the 'closely linked' criterium of art. 6 of the Insolvency Regulation and the ECJ case law codified in and interpreting art. 6 of the Insolvency Regulation could provide guidance.

4. Monitor

4.1. The monitor is appointed by the court upon request of the debtor and opens the preparation phase.[5] The monitor will be appointed as the insolvency practitioner in the liquidation phase[6] and therefore will need to be eligible to be appointed as such.[7] For the Netherlands this means the monitor will need to be eligible to be appointed as a bankruptcy trustee (*curator*). The monitor will not have the management and right of disposal over the estate of the debtor; the debtor remains in possession during the preparation phase.[8]

4.2. In addition to the general disclosure requirement to document and report each step of the sale process in writing and to make this available in digital format in a timely manner to all parties involved in the preparation phase[9], the monitor has specific (disclosure) obligations with respect to the sale process.

4.3. If a monitor fails to comply with those obligations, he is liable for damages as a result thereof towards creditors and third-parties affected by the pre-pack proceedings.[10] It is not clear whether this entails liability in his capacity (*qualitate qua*), personally (*pro sé*) or both. In case of liability in his capacity, we assume that the liability will be a liability of the bankrupt estate in the liquidation phase, but the question arises whether this liability is borne by the debtor if the preparation phase is not followed by a liquidation phase. In case of personal liability, to avoid a chilling effect on the actions of the monitor, this liability should have a high(er) threshold.

5 Art. 22(1) Insolvency Proposal.
6 Art. 25 Insolvency Proposal.
7 Art. 22(3) Insolvency Proposal.
8 Art. 22(4) Insolvency Proposal.
9 Art. 22(2)(a) Insolvency Proposal.
10 Art. 31 Insolvency Proposal.

5. Sale process

5.1. Art. 22 (2)(b), art. 24(1) and, indirectly, art. 26(1) of the Insolvency Proposal state that the monitor needs to ensure that the sale process is 'competitive, transparent, fair and meets market standards'. This also needs to be confirmed by the monitor in an opinion upon sale of (part of) the business in the liquidation phase according to art. 26(1) of the Insolvency Proposal.

5.2. It will be interesting to learn how the legislator will translate these requirements for the monitor into Dutch law. In general, a distressed M&A process is characterized by short timelines, a demarcated information package, a limited period of due diligence and negotiations, as well as limited to no contractual representations & warranties. That market practice is not expected to be different for the pre-pack proceedings, apart from the fact that the court needs to authorize the sale in the liquidation phase. Though a full standardization of the process is not realistic as each situation is different, certain legislative directions and guidance on the process (in the law and/or in explanatory notes), will be considered helpful in practice. One could think of setting out a list of information that should be included in the (virtual) data room for interested parties and determining that the process steps and related timelines, and possibly certain selection criteria, are communicated at the start of the process to potential bidders. Article 22(2) already confirms that the monitor's actions shall be in writing and made available to all parties.

5.3. Apart from proactive communication towards the stakeholders involved, under limitations of strict confidentiality considering the adverse effects should the same be breached, this would also lead to the most transparent process given the (private) circumstances. The expectation is that this also works the other way around: the more parties consider the process to be transparent and fair, the more they are expected to commit time and resources to the process and are willing to participate. How many parties will or can be invited in order for the process to be considered "competitive" will need to be determined by the monitor on a case-by-case basis; one would assume that if only one closely related party is interested, the process can still be considered competitive if the monitor can demonstrate he/she has put sufficient effort into inviting other parties (without success unfortunately) or the absence of any such parties.

5.4. As for any M&A process, having a good understanding of the asset and business value is of importance, both on the sell-side (monitor/IP) as well as on the buy-side. Furthermore, in case of the proposed pre-pack procedure this also is of importance for the authorizing court as well as for the creditors involved.

5.5. On the pre-pack sale process the Insolvency Proposal provides mostly indirect guidance but does include some explicit provisions. Articles 22 (2)(c) and 30 concern the criteria on selecting the best bidder, where article 30 states that criteria for determining the best bid are the same as for winding-up procedures. In Dutch practice this means that, primarily, the highest bid for the assets/business will be leading but, secondly, and for instance relevant if

two or more bids are equal, also other interests can be taken into consideration (such as for instance the position of employees). Moreover, in deviation from a winding-up, in pre-pack proceedings certain executory contracts may be assigned to the acquirer, which should also be taking into account and which could mean that the highest bid is not necessarily the best bid.

5.6. However, on the basis of art. 26(1) the monitor needs to issue an opinion including, among others, a statement that such best bid does not constitute a *manifest* breach of the best-interest-of-creditor test (art. 22(d)).[11] Apart from it being unclear what is considered "manifest", this – surprisingly – also seems to suggest that the best-interest-of-creditors test does not apply absolutely, unless the sale is made to a party closely related to the debtor (art. 32(2)). The Insolvency Proposal is however silent as to what would be considered a justified (i.e. not manifest) breach of the best-interest-of-creditors test.

5.7. Moreover, in order to compare the best bid[12] with the recovery for creditors in case of a bankruptcy situation (situation if the pre-pack proceeding fails) the monitor/IP, but also the court in the authorization process (art. 26), would need to know the liquidation value of the assets to assess the same. Unless the monitor/IP has the expertise to prepare such valuation or such liquidation value is available at the start of the pre-pack proceeding (both of which are not likely in most cases), an independent valuation specialist will have to be appointed. Such valuation is even more important as a failure of the monitor/IP to comply with his/her obligations may lead to his/her liability to creditors and third parties affected by the pre-pack proceedings (art. 31). Moreover, it is of importance that the creditors have a good understanding of their recovery value in case of a bankruptcy in order to prevent losing the right to be heard (art. 34(1)(2)). Considering the foregoing it is recommended to give this element of valuation further consideration in the Insolvency Proposal and its implementation. Some elements to be (further) considered are:

i. How much time would such valuator have considering the timelines of the pre-pack proceeding?;

ii. What kind of valuation can/needs to be prepared in this time frame (indicative or full report)?;

iii. Which party/parties will benefit from and/or may rely on this valuation?;

iv. What if parties do not agree on the prepared valuation such as (certain) creditors?; and

v. What will be the (priority) status of the remuneration of the valuation expert?

11 See chapter on Title I General provisions paragraph 2.6 for a discussion of the defined term best-interest-of-creditors test.

12 Which in case of one offer is considered to be the business market price according to article 24(2)) of the Insolvency Proposal.

5.8. A process in the preparation phase is typically run along the principles set out in art. 24(1). However, based on art. 24(3) Member States may depart from running a distressed M&A process along the principles of art. 24(1) if they choose for the option that the court runs a public auction in the liquidation phase in accordance with article 26. This latter article provides that the public auction process may not last longer than four weeks and assumes the monitor has selected an initial bidder in the preparation phase. This type of sale process, public in nature for a company in distress and run by the court, is unknown and untested in the Netherlands so far.[13] It raises, among others, the following questions:

i. What kind of values are achieved compared to a private process?;

ii. How is communication arranged considering the wider range of company stakeholders to be addressed?;

iii. Who is running this process in practice; the court or a party on behalf of the court?; and

iv. How are bids assessed in light of the best-interest-of-creditor test (i.e. how is the liquidation value determined)?

Somewhat surprisingly, wording on the public auction process is only limited to the aforementioned articles in the Insolvency Proposal. As optionality (also on restructuring tools) typically drives value, it would be interesting to explore and further consider whether this type of transaction could also be introduced in the Netherlands. Though a private competitive process may work well in many cases, a public auction process could be interesting from a value perspective if it does not or is considered a better alternative.

6. Court involvement

6.1. The Insolvency Proposal intends to facilitate efficient process management and seemingly, although not made explicit, deal certainty. In addition to the court's involvement to start the preparation phase and the liquidation phase and, potentially, during the preparation phase to address potential issues at an early stage, the court should authorise the sale of the debtor's business or part thereof to the buyer proposed by the monitor.[14]

6.2. It remains an open question whether the authorising court could be the supervisory judge (*rechter-commissaris*) who in a normal bankruptcy in the Netherlands – and we assume that the liquidation phase will be a normal bankruptcy – authorises a sale by the bankruptcy trustee.[15] A preliminary question in this respect is whether there is room for a prospective

13 Although the *Memorie van Toelichting* to the WCO I (Kamerstukken II, 2014-2015, 34 218, nr. 3, p. 15), under reference to this practice in the US, also suggested this as option.

14 Art. 26(1) Insolvency Proposal.

15 Art. 101 Jo 176 Dutch Bankruptcy At (*Faillissementswet*).

supervisory judge (*beoogd rechter-commissaris*) during the preparation phase and, if so, if such supervisory judge is considered to be sufficiently independent.

6.3. The court will not authorise the sale if, on more procedural grounds, the monitor has not complied with the disclosure requirements. In addition, on more substantive grounds, the court will not authorise the sale if the process was not competitive, transparent, fair and meeting market standards, the buyer is not the best bidder or the bid constitutes a manifest breach of the best-interest-of-creditors test and, only if to a related party, does not satisfy the best-interest-of-creditors test.

6.4. Stakeholders' rights are protected in the sense that both creditors as well as holders of equity of the debtor's business have the right to be heard by the court before the authorisation.[16] However, the Member States may exclude out-of-the-money stakeholders and creditors of executory contracts that (will be assigned and) will be paid in full.[17] Excluding these persons will facilitate an effective and efficient process and thereby promote deal certainty. In practice it will, however, require a valuation.

6.5. Deal certainty is further facilitated by limiting the suspensive effect of appeals by requiring the appellant to provide security that is adequate to cover the potential damages caused by the stay of the realisation of the sale.[18] Depending on the timelines for an appeal and on the specifics of each matter, the damages may well be the, potentially quite significant, difference between a piecemeal liquidation and a going concern sale, thereby effectively denying parties the right to appeal. Given the chilling effect of a potential appeal – also without the suspensive effect –, it is at least worth considering whether the appeal possibility should not be altogether excluded.

7. Employees

7.1. In line with the judgment by the Court of Justice of the European Union in the 'Heiploeg' case,[19] the liquidation phase shall be considered to be bankruptcy or insolvency proceedings instituted with a view to the liquidation of assets of the transferor under the supervision of a competent authority for the purpose of Article 5(1) of Council Directive 2001/23/EC. In other words, Member States may exclude in full the employee protection offered by said Directive in the event of a transfer of undertaking thereby allowing pre-pack proceeding in case the workforce needs to be rightsized in order to arrive at a viable business case.

16 Art. 34(1) Insolvency Proposal.

17 Art. 32(2) Insolvency Proposal.

18 Art. 29(1) Insolvency Proposal.

19 Judgement of the Court of 28 April 2022 in Case C-237/20 (Federatie Nederalndse Vakbeweging v. Heiploeg Seafood International BV).

7.2. Member States, however, also have the option to apply a more employee-friendly regime on the basis of art. 5(2) of Council Directive 2001/23/EC. In this respect, it will be interesting to see whether the Dutch legislator will continue with the draft 'Bill for the transfer of undertakings in bankruptcy' (*Wetsvoorstel overgang van onderneming in faillissement, WOVOF*) pursuant whereto, all affected employees are transferred to the buyer while retaining their rights, provided that employees' terms and conditions of employment may be altered in consultation with representatives of the employees to safeguard employment opportunities. The buyer will also have the option, subject to additional procedural requirements, not to take on all employees for economic, technical or organisational reasons.

8. Secured creditors

8.1. Although Article 19(2) of the Insolvency Proposal suggests that the pre-pack proceedings in principle have no impact on the ranking of claims, the position of secured creditors could be significantly impacted under the Insolvency Proposal.

8.2. First, the Insolvency Proposal allows for priming of interim financing in two situations. In subsequent insolvency procedures – we assume not the liquidation phase but subsequent insolvency procedures because either the preparation phase has not resulted in a (authorized) pre-pack sale, or no liquidation phase has (directly) followed – grantors of interim financing are entitled to receive payment with priority over other creditors that would otherwise have superior or equally ranked claims.[20]

8.3. The monitor may also grant security (in advance) over the sale proceeds.[21] This is somewhat similar to the situation that a bankruptcy trustee grants security for estate financing (*boedelkrediet*), where the difficulty often is that the (existing) secured creditor's position as *separatist* in the bankruptcy entails that no, or limited, unencumbered assets are available and sale proceeds will have to be used to repay the secured creditor to release the secured assets subject to the sale. Although the scope and effect are not entirely clear, in combination with the release of security without the consent of the secured creditor, this could potentially also entail a situation where interim financing is granted super senior status (in the event of a successful pre-pack sale) in the liquidation phase .

8.4. Secondly, the Insolvency Proposal seems to protect unsecured creditors by providing that secured creditors may only credit bid 'provided that the value of those secured claims is significantly below market value of the business'.[22] This would imply that if a secured creditor would credit bid, it should be accompanied by a cash component to be distributed amongst the unsecured creditors. It is difficult to see the economic rationale for protecting unsecured creditors in this way and this may even be detrimental, for example in case executory contracts of trade creditors are assigned to the buyer.

20 Art. 33(1)(b) Insolvency Proposal.

21 Art. 33(1((c) Insolvency Proposal.

22 Art. 33(3) Insolvency Proposal.

8.5. Third, Member States may introduce the release of security without the consent of the secured creditor, provided that the security interests relate to assets that are necessary for the continuation of the day-to-day operations of the debtor's business or part thereof and either (i) creditors of secured claims fail to prove that the pre-pack offer does not satisfy the best-interest-of-creditors test *or* (ii) creditors of secured claims have not filed (directly or through a third party) an alternative binding acquisition offer that allows the insolvency estate to obtain a better recovery than with the proposed pre-pack offer. In other words: even if the best-interest-of-creditors test is not satisfied with respect to the secured creditor, a secured creditor may lose its secured position if it has not made an alternative bid or teamed-up with an alternative bidder. We fail to see how this can be justified.

9. Assignment of executory contracts

9.1. Executory contracts which are necessary for the continuation of the debtor's business and the suspension of which would lead to a business standstill may be automatically assigned to the buyer without the counterparty's consent.[23]

9.2. Although the reasoning behind this infringement on the freedom of contract is understandable, 'termination would unduly jeopardise the value of the business, or part thereof, to be sold in the pre-pack proceedings'[24], it is both questionable if it can be justified and if it will result in a long(er) lasting relationship between the buyer and the counterparty.

9.3. That being said, the fact that art. 34(2)(b) implies that, in deviation from the principle that the buyer acquires the debtor's business free of debts and liabilities[25], outstanding claims of counterparties of such executory contracts may be paid in full under the terms of the pre-pack offer and this would provide sufficient justification for the infringement and may actually provide a practical and balanced solution to the otherwise cumbersome process of having to enter into new agreements with these necessary trade creditors.

23 Art. 27 Insolvency Proposal.

24 Recital 28 Insolvency Proposal.

25 Art. 28 Insolvency Proposal.

10. Supporting measures

10.1. The Insolvency Proposal includes a number of supporting measures to facilitate a pre-pack proceeding. In addition to the interim financing, which has been discussed in connection with the position of the secured creditors, and the prohibition on conceding pre-emption rights to bidders[26], the Insolvency Proposal also introduces a stay on individual enforcement actions in accordance with art. 6 and 7 of Directive (EU) 2019/1023 on preventive restructuring frameworks.[27] The stay is not automatic, but only 'where it facilitates the seamless and effective roll-out of the pre-pack proceedings' and after the monitor is heard. The reference to the Directive of preventive restructuring frameworks suggests that the stay may be general as well as specific and also suspends any (other) insolvency filing.

26 Art. 33(2) Insolvency Proposal.

27 Art. 23 Insolvency Proposal.

Title V Directors' Duty to request the opening of insolvency proceedings and civil liability

Jasper Berkenbosch (JonesDay) and Jaap van der Meer (Turnaround Advocaten)

1. Content of the provision

1.1. The Insolvency Proposal introduces in article 36 of Title V an obligation for directors to file for insolvency. Pursuant to this provision, if a legal entity becomes insolvent, its directors are obliged to submit a request for the opening of insolvency proceedings with the court no later than 3 months after the directors became aware or can reasonably be expected to have been aware that the legal entity is insolvent. Further, pursuant to article 37, the directors are liable for the damages incurred by the legal entity's creditors as a result of their failure to comply with this obligation.

1.2. From a Dutch law perspective, the introduction of this provision will be a significant change. At present there is no statutory duty for directors to file for insolvency proceedings. In practice the key guideline for directors of a legal entity in distress is that they should not enter into obligations of which they know, or reasonably should know, that the entity will not be able to satisfy, or for which it could not offer recourse (the so called '*Beklamel*-rule'). Under those circumstances the directors will have to stop trading and file for insolvency proceedings, not because they have a legal obligation to do so, but to avoid the risk of being held liable for wrongful trading by creditors of the entity.

1.3. The director's duty to file for insolvency is already part of the law in a number of Member States and in particular Germany is known for the director's duty to file for insolvency proceedings in case of '*Uberschuldung*' and '*Zahlungsfähigkeit*', including its punitive consequences for directors who fail to do so. We welcome the idea to adopt the obligation for directors to file for insolvency proceedings and to harmonize this obligation throughout the EU Member States. The current differences between the Members States give rise to much legal uncertainty and learning costs for creditors in a cross-border setting as regards the outcomes of insolvency proceedings, in particular in order to understand the different tests in the various Member States compared to those who only operate domestically. Furthermore, there is presently - without an obligation to request for insolvency proceedings in case of insolvency - in our view too much room for abuse by directors to the detriment of creditors. However, as we will explain in more detail below, the Insolvency Proposal should be more specific and clearer about the meaning of, for example, (the actual moment) of 'insolvency', the scope of the term 'directors' and which 'insolvency proceedings' are meant, in order to be sufficiently clear and effective. Below we set out in paragraph 2 the background of the provisions and in paragraph 3 our recommendations.

2. Background

2.1. In the Explanatory Memorandum of the Insolvency Proposal (p. 12) it is explained that Title V forms part of the measures aiming to maximise the value of the insolvency estate. In recitals 32 and 33 it is described that the director's duty to file for insolvency aims to avoid a late filing by directors which may lead to lower recovery values for creditors. To ensure that directors do not act in self-interest by delaying the submission of an insolvency request, Member States should lay down provisions making directors liable under civil law for breach of the duty to (timely) submit such a request. These considerations clearly show that the new provisions aim to protect creditors and avoid entities to continue loss-making businesses. The Netherlands is also home to many 'zombie companies', i.e. overindebted entities without any clear outlook of recovery to continue their operations. This problem is also signalled in the Commission's impact assessment report (p. 143). The introduction of the proposed new provisions aims to protect creditors, whilst directors will be more exposed to risks. According to the Commission's impact assessment report (p. 48) directors may demand higher salaries and insurers will likely demand higher premia for D&O liability insurance. Once the legal entity is in distress the directors will have to monitor closely when the entity becomes 'insolvent' and they should either improve the situation of the entity within the 3 months or file for insolvency proceedings. The Commission's impact assessment report (p. 65) recognizes the need for implementation of better cash flow management systems. The report mentions as an indirect benefit of the obligation to file for insolvency in an earlier stage a higher chance of timely (pre-pack) sales of going concern parts of the business. The Explanatory Memorandum furthermore stresses that the provisions (including articles 36 and 37) are minimum harmonisation rules so Member States may maintain or introduce stricter obligations for directors of companies close to insolvency.

2.2. The Explanatory Memorandum emphasizes that the Insolvency Proposal is coherent with other EU legislation, including the EU Directive on Restructuring and Insolvency 2019, which stipulates in article 19 that in case there is a likelihood of insolvency, the directors are obliged "to take steps to avoid insolvency". Obviously one of such steps could be filing for preventive insolvency proceedings, including the Dutch Scheme (or 'WHOA'-proceedings) in the Netherlands. Although the Dutch legislator has not codified this obligation for directors, it is assumed this obligation can be addressed by the existing Dutch law. This means directors will have to sail between Scylla and Charybdis, i.e. between the obligation in case of likelihood of insolvency to take steps to avoid insolvency proceedings, and the obligation to actually file for such proceedings once the entity has surpassed the brink of 'insolvency'.

2.3. A key question is the question when the entity is (de facto) 'insolvent' within the meaning of article 36. There is no clear guidance in the Insolvency Proposal itself or the Explanatory Memorandum. In recital 37 reference is made to the cessation of payments test and the balance sheet test as the two usual triggers among Member States for opening of standard insolvency proceedings. However, no reference is made as to what the test of insolvency should be in the context of article 36. In the context of microenterprise debtors, the recitals state that the balance sheet test may be unfeasible because of the possible lack of proper

record. For that reason, the inability to pay debts as they mature should be the criterion for the opening of winding-up proceedings for such microenterprises. Furthermore, the recitals state that for such entities Member States have to define the specific conditions under which this criterion is met, as long as these conditions are clear, simple and easily ascertainable by the microenterprise concerned. Again, no such guidance of how to establish de facto 'insolvency' is given for the obligation to file for directors of 'normal' companies.

3. Recommendations

3.1. Although we are mindful of the difficulty of finding a common ground between the Member States, we recommend including in the Insolvency Proposal a definition of 'insolvency'. Otherwise, it is unlikely that the aim of the Insolvency Proposal will be met as the uncertainties and the increased costs to understand the different tests in different Member States will remain. We propose to apply "the inability to pay debts as they mature" as the criterion for the opening of insolvency proceedings also to 'ordinary' entities (and not only to microenterprises). Furthermore, we recommend including in the recitals additional guidance as to when such criteria are met or at least that Members States have to adopt a definition for the sake of legal certainty. As stated in the Commission's impact assessment report (p. 43) it could for example set out that a company that was not in a position to meet its debt obligations within a pre-defined period (e.g. 90 or 180 days) would be deemed insolvent. Court discretion and case-by-case assessment should be limited to exceptional cases. According to this report two thirds of the respondents to the public consultation supported such a harmonized definition of 'insolvency' as the trigger event.

3.2. There is no definition of "Insolvency proceedings" in article 2 of the Insolvency Proposal. The director who is obliged to request for an insolvency proceeding according to article 36 would like to understand what kind of insolvency proceeding he or she is obliged to petition. It would be practical to rely on the European Insolvency Regulation (EIR) and the various insolvency proceedings of the Member States as mentioned in Annex A of the EIR. However, this would include preventive restructuring procedures like the public "WHOA" procedure. Given the background of the Insolvency Proposal we question whether that is the purpose of this Insolvency Proposal. According to the Explanatory Memorandum (p. 3) "preventive restructuring frameworks (…) do not address the situation where a business becomes insolvent and has to undergo insolvency proceedings". Recital 3 states that "Insolvency proceedings ensure the orderly winding down or restructuring of companies". Although the Insolvency Proposal is not entirely clear, we believe that based on these considerations the director in respect of a Dutch entity will have to file for either bankruptcy or suspension of payments to avoid liability under article 36. We recommend clarifying the definition of insolvency proceedings.

3.3. There is no definition of "Director" in article 2 of the Insolvency ProposalInsolvency Proposal. In recital 32 it is described that Member States should define to who the directors' duties should apply and that the notion of "director" should be interpreted broadly to cover

all persons charged with making, or those who do in fact make or ought to make, key decisions with respect to the management of the company. It is mentioned that this in line with the UNCITRAL Legislative Guide on Insolvency, Part four: Directors' obligations in the period approaching insolvency. The core obligation in article 36 is to submit a request for the opening of insolvency proceedings, which can only be done by a statutory director, and not by a de-facto director. In view thereof we question whether a person acting as a de-facto director should be held liable as provided in article 37 if that person in question would not be the legally competent person to submit the request for opening the insolvency procedure. Moreover, under Dutch law a statutory director can file for bankruptcy only after instruction of the shareholders meeting. The articles of association may stipulate that also for suspension of payments such instruction is required. We therefore recommend that the directors are obliged, within this period of three months, to use best efforts to submit a request for the opening of insolvency proceedings.

4. Conclusion

4.1. We welcome the Insolvency Proposal, especially the obligation of the directors to "promptly submit a request for the opening of insolvency proceedings to avoid potential asset value losses for creditors" as laid down in Title V of the Insolvency Proposal.

4.2. However, as we have explained above, we recommend the proposal to be more specific and clearer about the meaning various definitions and terms, including the actual moment of 'insolvency', the scope of 'directors' and 'insolvency proceedings' in order to be sufficiently clear and effective.

Title VI Winding-up of insolvent microenterprises

Lucas Kortmann, Stijn Zonneveld en Angelina Bakker (RESOR) en Robin de Wit (HVG)

1. Introduction

1.1. The Insolvency Proposal introduces new insolvency proceedings for microenterprises: the simplified winding-up proceedings. These are covered in the articles 38 through 57 of the Insolvency Proposal.

1.2. The special procedure for microenterprises is introduced because of the unique characteristics of microenterprises and their specific needs in financial distress. In particular, the need for faster, simpler, and less costly insolvency procedures.[1]

1.3. This contribution contains an analysis of articles 38 to 57 of the Insolvency Proposal, and examines to what extent the Insolvency Proposal is consistent with current Dutch law.

1.4. The proposed simplified winding-up proceedings for microenterprises are, in principle, debtor-in-possession proceedings. In line with this, an insolvency practitioner is not automatically appointed, and if an insolvency practitioner is appointed, its duties could be considered more as monitoring the proceedings instead of managing them. Furthermore, in order to quickly complete the proceedings, the administration of the microenterprise is used as a basis, and creditors have 30 days to raise concerns on other claims and/or lodge new claims. Other characteristics of these simplified proceedings are an automatic stay on individual enforcement actions during the proceedings and an electronic auction as the standard method for realizing assets.

2. A microenterprise

2.1. For the purposes of the Insolvency Proposal, a microenterprise has the meaning as defined in the Annex to Commission Recommendation 2003/361/EC. In this Annex, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million. Each company or entrepreneur can qualify as a microenterprise, irrespective of its legal form.[2] In principle, the provisions for simplified winding-up proceedings only apply to microenterprises, but Member States can extend the application to small and medium-sized enterprises.[3]

1 Recital 35 of the Insolvency Proposal.

2 A microenterprise could also include self-employed persons, article 1 of the Annex to Commission Recommendation 2003/361/EC; An entrepreneur being: a natural person exercising a trade, business, craft or profession (article 2(1), point (9) of Directive (EU) 2019/1023).

3 Recital 35 of the Directive.

2.2. According to the European Commission, the data on small and medium-sized enterprises, as subjects of insolvency proceedings, are scarce. However, the available observations from Member States suggest that 80 to 95% of all insolvency cases concern entities with fewer than 10 employees.[4] The available data on Dutch insolvencies show that between 2017 and 2021 each year around 70% of the insolvency cases concern companies or entrepreneurs with 10 or less employees.[5] As a result, it is likely that a substantial part of the Dutch insolvency cases would qualify for the simplified winding-up proceedings.

3. Simplified winding-up proceedings

3.1. When is a microenterprise insolvent?

3.1.1. Whereas the Insolvency Proposal does not define "insolvency" for the standard insolvency procedure, it does for the simplified winding-up proceedings. According to article 38(2) a microenterprise is deemed insolvent when it is generally unable to pay its debts as they mature. The Member States have to set out the conditions under which a microenterprise is deemed to be generally unable to pay its debts as they mature.

3.1.2. Dutch law provides that a debtor can be declared bankrupt when it has ceased to pay its debts as they fall due. In Dutch case law[6] it is established that a debtor is deemed to have ceased to pay, if (i) it has at least two creditors, (ii) of which one has a due and payable claim, (iii) and the debtor leaves its debts unpaid. Although there is a difference between a debtor *ceasing* to pay its debt and *being generally unable* to pay its debts, it seems likely that if the Insolvency Proposal would be implemented in Dutch legislation, the same conditions must be met to gain access to simplified winding-up proceedings in the Netherlands.

3.2. Requesting a simplified winding-up procedure

3.2.1. Pursuant to article 41 of the Insolvency Proposal, both the insolvent microenterprise and any of its creditors can submit a request for a simplified winding-up procedure. The European Commission aims to introduce a standard form for this purpose. This form will include

4 Data from DE, ES, FR and SE, Annex 7 of the Commission staff working document impact assessment report accompanying the document Insolvency Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law.

5 All insolvency cases excluding natural persons not being entrepreneurs, Source: opendata.cbs.nl.

6 *i.a.* Dutch Supreme Court 11 July 2014, ECLI:NL:HR:2014:1681, *NJ* 2014/407.

(i) identification data of the debtor, (ii) a list of assets, (iii) contact details of the creditors, and (iv) a list of debts (which must include applicable security rights in rem and reservation of title). If the request is filed by a creditor, the microenterprise is required to provide the competent authority, to be appointed in each Member State, with this information if the request is awarded.

3.2.2. The Insolvency Proposal provides in article 42 that Member States' competent authorities, in the Netherlands this would be the competent district court,[7] must decide on the request within two weeks. An application for simplified winding-up proceedings may only be rejected on the following four (exhaustive) grounds:

i. the debtor does not qualify as microenterprise,

ii. the debtor is not insolvent,

iii. the competent authority has no jurisdiction, or

iv. the Member State has no international jurisdiction.

3.2.3. t follows from the above that the Member State's competent authority cannot reject a request for simplified winding-up proceedings if it finds standard bankruptcy proceedings more appropriate for the matter at hand.

3.2.4. In article 38 of the Insolvency Proposal, it is explicitly stated that a request for simplified winding-up proceedings may not be rejected on grounds that the debtor has no assets, or the value of debtor's assets is not sufficient to cover the costs of the proceedings. This is one of the main reasons cited by the European Commission for the introduction of the simplified winding-up proceedings. Apparently, in many jurisdictions, a debtor has no access to insolvency proceedings if he has no assets or the value of its assets is insufficient to cover the costs of the proceedings. In the Netherlands, however, this provision seems of less relevance. An insolvency application could be dismissed under Dutch law if it is deemed as abuse of right (*misbruik van recht*).[8] Under certain circumstances, the appointed insolvency practitioner in Dutch bankruptcy proceedings may invoke this legal concept in order to have the insolvency judgment set aside if there are no funds available in the bankrupt debtor's estate. However, such actions are extremely rare. Furthermore, in cases where an appointed insolvency practitioner establishes, during the insolvency process, that the insolvent estate does not have sufficient means to pay the costs of the proceedings and estate creditors, Dutch insolvency law provides for the possibility of an early termination and completion of the bankruptcy.[9]

7 Article 2 of the Dutch Bankruptcy Act.

8 Dutch Supreme Court dated 22 December 2017, ECLI:NL:HR:2017:3269, *NJ* 2018/154.

9 Article 16 Dutch Bankruptcy Act.

3.2.5. Finally, Dutch law provides for a type of simplified and fast winding-up proceedings outside of insolvency proceedings; the so-called turbo or fast track liquidation.[10] By virtue thereof, companies without assets can be dissolved and cease to exist by shareholders' resolution and deregistration from the trade registry even if such company has (substantial) outstanding debt. Minimal formalities need to be observed in this regard. Given the lack of transparency of such proceedings (which may compromise protection of creditors' rights), new legislation[11] has been passed by both chambers of the Dutch Parliament and is expected to enter into force in July 2023. This is intended to increase the transparency of the turbo liquidation and thus limit improper use of such proceedings. At its core, this new legislation seems similar to the simplified winding-up proceedings laid down in the Insolvency Proposal, with the exception that the Dutch turbo liquidation proceedings can only be used if the debtor has no assets.

3.2.6. The Insolvency Proposal does not seem to prohibit a microenterprise or its creditors to apply for standard bankruptcy proceedings instead of simplified winding-up proceedings. As with standard insolvency proceedings, the opening of simplified winding-up proceedings must be published in the insolvency register of the Member State.

3.3. Costs of the proceedings

3.3.1. Article 38(4) of the Insolvency Proposal provides that Member States have to ensure that the costs of the simplified winding-up proceedings are covered when the debtor has no assets, or when its assets are not sufficient to cover the costs of simplified winding-up proceedings.

3.3.2. The Insolvency Proposal does not define *costs of the proceedings*. In the Netherlands this could raise some interesting issues. By virtue of Dutch law, besides the costs directly related to managing and distributing the bankrupt estate, like the salary of the appointed insolvency practitioner, the cost of the insolvency proceedings, in principle, include all other so-called estate claims. Estate claims can consist of a wide range of claims. For example, the Dutch Bankruptcy Act provides that rent accrued after the opening of bankruptcy proceedings qualify as estate claims.[12] The same applies to wages and premium debts related to employment agreements that accrue after the date of bankruptcy.[13] Also, costs relating to reversal of the negative consequences of environmental breaches could qualify as an estate claim.[14] If the "costs of simplified winding-up proceedings" under the Insolvency Proposal would include all such "estate claims" as well, then the amount of costs to be borne by the Member State could be substantial.

10 Article 2:19 sub 4 Dutch Civil code.

11 Bill on Temporary Statute Transparency Turbo Liquidation Proceedings (*Tijdelijke Wet Transparantie Turboliquidatie*), passed by the First Chamber of the Dutch Parliament on 14 March 2023.

12 Article 39 sub 1 Dutch Bankruptcy Act.

13 Article 40 sub 2 Dutch Bankruptcy Act.

14 Dutch Supreme Court dated 4 June 2021, ECLI:NL:HR:2021:833, *NJ* 2021/233

3.4. Insolvency practitioner

3.4.1. Although an insolvency practitioner can be appointed in simplified winding-up proceedings, this should be the exception, according to article 39 of the Insolvency Proposal. An insolvency practitioner can only be appointed if (a) the debtor, or one or more creditors, requests such an appointment; and (b) the costs of the insolvency practitioner are paid by the estate or by the party that *requested* the appointment. As the costs of the insolvency practitioner are borne by the applicant, creditors may not always be inclined to request the appointment of an insolvency practitioner, although this could be in the best interest of the creditor. The Insolvency Proposal does not provide for the court to appoint an insolvency practitioner at its own initiative.

3.4.2. The duties of an insolvency practitioner in simplified winding-up proceedings seem to differ from his duties in standard Dutch bankruptcy proceedings. For example, if appointed, an insolvency practitioner in the simplified winding-up proceedings does not automatically have the right to manage and dispose of the assets of the debtor, but only when this is decided by the competent authority.[15] Furthermore, the insolvency practitioner does not have to inform creditors of the opening of the proceedings, as article 45(2) of the Insolvency Proposal assigns that task to the competent authority. The duties of the insolvency practitioner in simplified winding-up proceedings, therefore, could be considered more as monitoring the proceedings rather than managing them.

3.4.3. Another item for consideration is that the Dutch Bankruptcy Act assigns special powers to the insolvency practitioner which simplify the management and winding-up of insolvency proceedings. For example, under Dutch law, insolvency practitioners are authorised to terminate employment and lease agreements with relatively short notice.[16] As a result, the corresponding estate claims arising out of those agreements are limited. Furthermore, under certain circumstances, an insolvency practitioner is allowed to breach existing contracts.[17] The microenterprise itself is not granted such powers under Dutch law. As the proposed simplified winding-up proceedings are in principle debtor-in-possession proceedings, the implementation of the Insolvency Proposal on this would require amendments to Dutch law to allow the debtor itself to settle the winding-up proceedings in a fast, simple and less-costly fashion.

15 Article 43 of the Insolvency Proposal, as opposed to Article 68 Dutch Bankruptcy Act.

16 Articles 39 and 40 Dutch Bankruptcy Act.

17 Dutch Supreme Court 11 July 2014, ECLI:NL:HR:2014:1681, NJ 2014/407.

4. The simplified winding-up proceedings in practice

4.1. Debtor in possession

4.1.1. Pursuant to article 43 of the Insolvency Proposal, in principle, the debtor will remain in control of its assets and the day-to-day operation of the business during simplified winding-up proceedings. When an insolvency practitioner is appointed, the competent authority needs to address whether these rights and powers of the debtor are transferred to the insolvency practitioner. Following article 43(3) of the Insolvency Proposal, Member States must specify under which circumstances the competent authority may rule that the insolvency practitioner is allowed to dispose of and manage the assets of the debtor. The court's assessment needs to be case-by-case based, with consideration of all relevant elements of law and facts.

4.1.2. Also, in the event that no insolvency practitioner is appointed, the court may decide that the debtor can no longer freely manage and dispose of its assets. In such cases, Member States need to ensure that either (i) any decision of the debtor becomes subject to the approval of the competent authority, or (ii) the competent authority entrusts the right to manage and dispose of the assets of the debtor to a creditor. The first option is best aligned with Dutch law and is likely to result in decisions being subject to the approval of a member of the court (supervisory judge).

4.2. Stay on individual enforcement actions

4.2.1. Under Dutch insolvency law, the court dealing with the insolvency application is authorized to order a two month-period stay at the request of the debtor or the applying creditor.[18] If insolvency proceedings are opened and a stay has not been proclaimed, the supervisory judge is entitled to do so at its own discretion or at the request of the appointed insolvency practitioner.[19] Article 44 of the Insolvency Proposal, however, provides for an automatic stay of individual enforcement actions upon the decision to open simplified winding-up proceedings.

4.2.2. Under the Insolvency Proposal, Member States may provide that – upon request by the debtor or a creditor - the competent authority excludes a claim from the stay when both of the following conditions are met: (i) the enforcement is not likely to jeopardise the legitimate expectations of the general body of creditors, and (ii) the stay would unfairly prejudice the creditor of that claim.[20]

18 Article 63a sub 4 Dutch Bankruptcy Act.

19 Aticles 63a sub 1 Dutch Bankrutpcy Act. Such stay can once be prolonged with another two months.

20 Article 44(2) of the Insolvency Proposal.

4.2.3. Under Dutch bankruptcy proceedings, secured creditors may in principle – unless a stay has been ordered by the court or the supervisory judge – foreclose on their collateral regardless of the bankruptcy proceedings.[21] This is not the case for simplified winding-up proceedings under the Insolvency Proposal due to the automatic stay and secured creditors may only foreclose on their collateral if their claims are excluded from the automatic stay which, as set out above, is determined on a case-by-case basis. This means that the position of secured creditors in the simplified winding-up proceedings is a lot weaker than under the current Dutch bankruptcy proceedings.

4.3. Notifying creditors

4.3.1. Article 45(2) of the Insolvency Proposal requires the competent authority to immediately inform the debtor and all known creditors of the opening of simplified winding-up proceedings by individual notices. These notices must include the list of claims and an invitation to rectify any incorrect statements and/or lodge new claims. In Dutch bankruptcy proceedings it is the insolvency practitioner who informs the creditors and invites them to file their claims.[22]

4.4. Lodging claims

4.4.1. Pursuant to article 46, all claims on the list of creditors that is provided by the debtor upon the opening of the simplified proceedings are considered as lodged. Relying on the administration of the microenterprise is fast and cost-efficient, provided, of course, that the administration is complete and accurate. However, it is likely that this is not always the case where it concerns microenterprises, and even more so in case of individual entrepreneurs. The latter because of a possible lack of proper administration and of a clear distinction between personal and business assets and liabilities.[23] This may result in an incomplete and inaccurate list of lodged claims.

4.4.2. A creditor has 30 days from the publication of the opening of the proceedings or after the receipt of the individual notice (whichever is the latest) to lodge (other) claims, file statements of objection, or raise concerns on other claims, pursuant to article 46(2) of the Insolvency Proposal. For some creditors this deadline may not be feasible simply due to the fact that their claim cannot be determined within 30 days. This could, for example, apply to the claim of the Dutch Employee Benefits Agency (*UWV*), in respect of the salary due to employees with regard to the notice period. As this notice period could concern six weeks, the *UWV*'s claim is not certain until that period has expired.[24]

21 Article 57 sub 1 Dutch Bankruptcy Act.

22 Article 109 Dutch Bankruptcy Act.

23 See Recital 37.

24 Based on Dutch legislation, the *UWV* takes care of the payment of, among other, overdue salaries and the salaries regarding the employees' notice period. Upon payment of these claims, the *UWV* subrogates in the rights of the involved employees and has a claim against the insolvent employer.

4.4.3. Pursuant to article 46(3), if no objection or concern is raised within the 30 days-period, the claims on the list of creditors construed by the debtor are deemed undisputed. As for claims that are lodged in addition to the aforementioned list, it is at the discretion of the competent authority, or when appointed, the insolvency practitioner, to accept or deny these claims being admitted. The insolvency practitioner, if appointed, is not authorised to dispute a claim on the debtor's list of creditors. This is a deviation from Dutch law which allows a claim to be disputed by the bankruptcy trustee, the debtor or any other creditor.[25]

4.4.4. Following article 46(5) of the Insolvency Proposal, disputed claims must be dealt with promptly by the competent authority or court. The competent authority may choose to, in the meantime, proceed with the simplified winding-up proceedings with regard to the undisputed claims. We assume that this means that the settlement of these disputed claims does not suspend the winding-up proceedings and, consequently, an interim distribution on undisputed claims. This is similar to current Dutch law.

4.5. The insolvency estate

4.5.1. Article 48 of the Insolvency Proposal provides that the competent authority, or the insolvency practitioner if appointed, establishes the final list of assets that constitute the insolvency estate. The insolvency estate includes assets in the possession of the debtor at the time of opening of the proceedings, assets acquired after the submission of the request for opening of such proceedings, and assets recovered through avoidance actions or other (legal) actions. This is similar to current Dutch law.[26]

4.5.2. The Member States have to ensure that if a debtor is an entrepreneur,[27] the competent authority, or insolvency practitioner if appointed, specifies which assets are excluded from the insolvency estate and remain with the debtor.[28] Dutch law currently already specifies which assets are excluded from the insolvency estate.[29]

4.6. Realisation of assets and distribution of the proceeds

4.6.1. Pursuant to article 49 of the Insolvency Proposal, once the insolvency estate and the list of claims against the debtor have been established, the competent authority can either proceed with realising the assets and distributing the proceeds or decide to close and terminate the simplified winding-up proceedings without the realisation of the assets.

25 Articles 112, 119 and 126 Dutch Bankruptcy Act.

26 Article 20 Dutch Bankruptcy Act.

27 A natural person exercising a trade, business, craft or profession (article 2(1), point (9) of Directive (EU) 2019/1023).

28 Article 48(3) of the Insolvency Proposal.

29 Reference is made to article 21 of the Dutch Insolvency Act (Faillissementswet).

4.7. Electronic auction

4.7.1. In simplified winding-up proceedings, the standard method for realising assets is through electronic auction, according to article 50 of the Insolvency Proposal. Other methods may only be selected if the competent authority deems this more appropriate in light of the nature of the assets or the circumstances of the proceedings.

4.7.2. For the electronic auction, an electronic auction system must be set up and maintained by the Member States.[30] Although the electronic auction system must be used for the auction of assets in simplified winding-up proceedings, the system can also be used for existing insolvency proceedings. These auction systems of the Member States must be interconnected with the European e-Justice Portal.[31] At time of writing, the Netherlands does not have such an electronic auction system in place, nor is it connected to the European e-Justice Portal.

4.7.3. Pursuant to article 54(2) of the Insolvency Proposal, all known creditors must receive an individual notice from the competent authority (or where relevant the insolvency practitioner) on the object, time and date of the electronic auction and the requirements to participate therein. All interested parties, including the debtor's shareholders and directors, may participate in the bidding process. This is already the case under Dutch law.

4.7.4. Following article 54(4), in case of bids on both the debtor's business as a going concern and on the individual assets, the creditors shall decide which option is preferred. As a voting procedure needs to be initiated for this purpose, this may result in a more complicated, time consuming and expensive procedure.

4.8. Closure of the simplified winding-up proceedings

4.8.1. After the realisation of the assets and the distribution of proceeds, pursuant to article 55(1), the competent authority decides on the closure of the simplified winding-up procedure within two weeks. This decision must include a deadline by which the (remaining) debts of an individual entrepreneur, or, in the event that the debtor is a legal person, the founder, owner or members of the microenterprise, who are jointly and severally liable for the debts of the enterprise, are discharged (reference is made to paragraph 5.3 below).[32]

4.8.2. According to article 49(2) of the Insolvency Proposal, the competent authority may also decide on an immediate closure of the simplified winding-up proceedings if (i) there are no assets in the estate, (ii) the assets in the estate are of such low value that it would not justify the costs or time involved in the realisation of the assets, or (iii) the apparent value of

30 Article 50(1) of the Insolvency Proposal.

31 Article 51 of the Insolvency Proposal.

32 Article 55(2) of the Insolvency Proposal.

encumbered assets is lower than the amount due to the secured creditors involved and the competent authority considers it justified to transfer these assets to those secured creditors. In that case, an auction will not be organised.

5. Other

5.1. Avoidance actions

5.1.1. Pursuant to article 47 of the Insolvency Proposal, the pursuit and enforcement of avoidance actions in simplified winding-up proceedings is not mandatory but left to the discretion of creditors or of the insolvency practitioner, if appointed. As creditors in general do not have access to the books and records of the debtor, it may be challenging for creditors to establish whether avoidance claims could be initiated.

5.1.2. In case avoidance actions are brought to court, the competent authority may convert the simplified winding-up proceedings into standard insolvency proceedings. Such decision can be made if the simplified winding-up proceedings do not seem suitable for legal proceedings concerning avoidance claims due to the significance of such claims and the anticipated length of such proceedings.

5.1.3. The Insolvency Proposal explicitly determines that if creditors, or when applicable the insolvency practitioner, decide not to commence legal (avoidance) actions, the debtor can still be held liable under civil or criminal law at a later stage if it is established that the debtor withheld relevant information or provided false information with regard to his assets and debts.[33] This is similar to current Dutch law.

5.2. Electronic means of communication

5.2.1. Pursuant to article 40 of the Insolvency Proposal, all communication between the competent authority and, where relevant the insolvency practitioner, on the one hand, and the parties involved in such proceedings on the other hand, can be performed by electronic means.[34] This entails that parties should at least be able to perform the following actions by electronic means: (i) filing claims; (ii) notifying creditors, and (iii) lodging of objections and appeals. In the Netherlands, in many cases, insolvency practitioners already use applications which provide for digital communication with creditors, but they are currently not obliged to facilitate this.

33 Article 47(c) of the Insolvency Proposal.

34 In accordance with article 28 of Directive (EU) 2019/1023.

5.3. Discharge of debts and treatment of personal guarantees for business related debts

5.3.1. Individual entrepreneurs or founders, owners or members of the microenterprise could be (joint and severally) liable for (remaining) debts of the microenterprise after the closing of the proceedings. Under Dutch law, entrepreneurs who run a business as a sole proprietor or under a (limited or joint) partnership are personally liable for the debts of their enterprise. In case of a simplified proceeding, according to article 56 of the Insolvency Proposal, Member States should facilitate a full discharge of this (remaining) personal liability of such individual entrepreneurs, or of founders, owners or members of a microenterprise in accordance with Title III of Directive 2019/1023. In the Netherlands, the existing Natural Persons Debt Restructuring Act (*Wet Schuldsanering Natuurlijke Personen*) seems to qualify for that purpose.[35]

5.3.2. If insolvency proceedings or individual enforcement proceedings are requested in relation to a personal guarantee of the entrepreneur or a family member of that entrepreneur or the founder, owner or member of a microenterprise, these proceedings should either be coordinated or consolidated with the simplified winding-up proceedings, following article 57 of the Insolvency Proposal. It does not follow from the Insolvency Proposal who qualifies as a family member of the entrepreneur, but it seems likely that - in order for the consolidation to make sense - that it relates to a spouse belonging to the same household.

6. First assessment

6.1. With the simplified winding-up proceedings, the European Commission aims to introduce cost-effective, fast and simple insolvency proceedings for microenterprises. Although these proceedings clearly seem to add value in comparison to existing insolvency proceedings in certain jurisdictions, this does not seem to apply to the Dutch legal system. Dutch law already provides for fast, simple and cost-effective proceedings to liquidate a debtor's assets. The existing Dutch insolvency proceedings are accessible for microenterprises with or without assets and, besides that, a debtor that has no assets can choose to enter into so-called turbo liquidation proceedings which are concluded outside bankruptcy. Currently legal safeguards are introduced for such proceedings which most likely will result in proceedings that at its core are similar to the simplified winding-up proceedings.

6.2. It could be questioned whether the fact that the appointment of an insolvency practitioner is not the standard in simplified winding-up proceedings, is appropriate. Insolvency practitioners have specific knowledge and experience on winding-up companies (including microenterprises) and insolvency law (including ranking of creditors), which knowledge and experience a debtor itself may not have. Furthermore, from an independent insolvency practitioner it can be expected that he properly safeguards the interests of the creditors

35 Articles 282 and further Dutch Bankruptcy Act.

and will address and follow-up on any irregularities. Obviously, the debtor itself will not be (overly) critical of the way the enterprise has been managed and it could be questioned whether a creditor is adequately equipped to identify and address irregularities. As it seems impossible under the Insolvency Proposal, except in the case of avoidance proceedings, to convert simplified winding-up proceedings to standard bankruptcy proceedings, - which particularly seem appropriate upon indications of director's liability or abuse of simplified proceedings - simplified winding-up proceedings could be detrimental to creditors' protection.

Title VII Creditor's Committees

Jerôme Nadels (Jerna Consulting), Barbara Schogt and Vincent Vroom (Loyens & Loeff)

1. Introduction

1.1. Creditors' committees are bodies formed during the insolvency process to represent the interests of creditors. The Impact Assessment Report from the European Commission sets out that the role and powers of these committees vary widely across Europe, thus posing challenges for foreign investors seeking to exercise their rights or participate in insolvency proceedings. If a foreign investor is not familiar with the specific rules and practices in a given country, it can be difficult to navigate the insolvency process and protect their interests. Furthermore, in countries with less efficient and effective creditors' committees, foreign investors may face a disadvantage. Without adequate representation on the creditors' committee, foreign investors may have less influence over the insolvency proceedings and the distribution of assets.

1.2. The use of creditors' committees in insolvency proceedings can also vary based on the size and complexity of the matter. In the Netherlands, for example, the primary driver for installing a creditors' committee is the size and complexity of the bankrupt entity. This raises the question of whether small and medium-sized enterprises (SMEs) and their creditors could also benefit from the use of creditors' committees. While the use of creditors' committees may add complexity to the insolvency process for smaller matters, it could also provide a mechanism for more efficient and effective communication between the insolvency practitioner and creditors.

1.3. As a result of the diverging roles and impact of creditors' committees across Europe, the use of these committees can create a lack of level playing field, disadvantage foreign investors, and create challenges for small and large firms. The European Commission's Impact Assessment Report illustrates the potential impact on the wider economy of these challenges. The introduction of effective creditor committees would, for example, lift the World Bank's institutional indicators of insolvency, resulting in an estimated increased recovery rate of between 2.5 to 3.5%.

1.4. The Insolvency Proposal includes a chapter laying out a set of minimum requirements for creditors' committees across Member States. Before discussing those rules in more detail (paragraph 3), we will look at the current framework and use of creditors' committees in the Netherlands (paragraph 2). Lastly, we review the implications of the proposed harmonisation for the Dutch insolvency practice (paragraph 4).

2. Current framework and practice in the Netherlands

2.1. Framework

2.1.1. Since its implementation in 1896, the Dutch Bankruptcy Act (Fw) has allowed for the establishment of a (provisional) committee of creditors. In large bankruptcies with many concurrent creditors and the expectation of a substantial pay-out, creditors' committees can play a valuable role. Generally, however, creditors' committees are not very common.

2.1.2. The purpose of appointing a creditors' committee is amongst others to provide specific sector, technical, or company knowledge that can take years to acquire, especially in a large company setting, and that may not be available to the trustee. In cases where the trustee does not have the required knowledge, the trustee would need to hire outside advisors at potentially much higher costs. The creditors' committee can provide this knowledge and expertise at a lower cost, as it is made up of creditors who have a vested interest in the outcome of the bankruptcy proceedings. The committee's expertise can help ensure that the trustee makes informed decisions and takes appropriate actions, ultimately benefiting both the creditors and the estate.

2.1.3. There are two types of creditors' committees: provisional and definitive. The provisional creditors' committee is appointed by the court upon declaration of bankruptcy or at a later stage, while the definitive creditors' committee is established by the court after consultation of the creditors at the verification meeting.

2.1.4. The establishment of a definitive creditors' committee is rare, as the verification meeting occurs very late, if at all. Since it occurs so late in the process, there may not be a need for a definitive creditors' committee to be established. These factors contribute to the relative infrequency of creditors' committees in practice.

2.1.5. If a (provisional or definitive) committee of creditors has been appointed, the trustee must seek the committee's advice on various proposed actions. Examples include taking legal action and deciding on the continuation of the company, as well as certain specific actions under the Dutch Bankruptcy Act. This advice is not binding, but if the trustee does not want to follow the advice, he must inform the creditors' committee immediately. The committee may then request a decision from the bankruptcy judge (*rechter-commissaris*), in which case the trustee must suspend its proposed action by (a minimum of) three days.

2.1.6. If the trustee fails to seek advice from the committee of creditors when required or does not comply with the requirements set out above, this does not affect the validity of the legal act. The trustee, however, may be held personally liable towards the bankrupt estate and its creditors if its actions harm the interests of the estate and therefore the recovery possibilities of the creditors.

2.2. Creditors' committees in practice in the Netherlands

2.2.1. The number of insolvencies in the Netherlands in which a creditors' committee was established has historically been very small. Creditors may be hesitant to submit a request because it is unclear when the "size and nature" of the bankruptcy warrant the establishment of the committee.

2.2.2. We highlight two bankruptcies in which a creditors' committee was established to illustrate the practical difficulties that creditors' committees may face.

KPNQWest

2.2.3. KPNQWest was a joint venture between KPN, a Dutch telecom company, and Qwest Communications, a US telecom company. The company built and operated a fiber-optic network throughout Europe and Asia, but it ran into financial difficulties and filed for bankruptcy in 2002. During the KPNQWest bankruptcy, a provisional creditors' committee was formed to represent the interests of the company's creditors. The committee was made up of representatives of the company's largest creditors, including banks and bondholders. The relationship between the trustees and the creditors' committee was governed by a confidentiality agreement, which proved to be a source of litigation between the trustees and one of the members of the committee. The trustees argued that certain information was leaked by one of the lenders to affiliated parties and subsequently used in various court proceedings. In its judgment dated 15 January 2007, the summary judge of the Haarlem District Court ruled that Citibank Plc. acted unlawfully when it shared certain information that it received in its capacity as member of the creditors' committee with third parties.

2.2.4. The case demonstrates the significance of well drafted confidentiality agreements (or, in a broader sense, protocols) to govern the relationship between the trustee(s) and the committee. This is in particular the case since the creditors' committee may all times request the consultation of books and other data carriers relating to the bankruptcy and the trustee must provide all information that the committee requests.

Imtech

2.2.5. Over a decade after the KPNQWest case, a provisional creditors' committee was formed to represent the interests of the company's creditors in the Imtech bankruptcy. Imtech was a large Dutch engineering services company that went bankrupt in 2015. The bankruptcy was one of the largest in Dutch history and involved multiple jurisdictions and thousands of creditors. Notably, the committee was only installed for Royal Imtech NV as the group's holding company. The creditors sought to have a central creditors' committee installed to oversee the various bankruptcies within the group, but the Rotterdam District Court ruled on 18 December 2015 that whether to install a creditors' committee must be determined for each relevant bankrupt entity and as such, only Royal Imtech NV met the criteria laid down in Section 74 Fw.

2.2.6. When the Rotterdam District Court installed the provisional creditors' committee, it appointed its members and suggested that the committee establish a protocol with its working methods. Although the trustees initially opposed the institution of the creditors' committee, the committee has been in force for more than six years.

2.2.7. No protocol for the creditors committee is in place in respect of the Imtech bankruptcy, but the use of a protocol has become fairly standard in the Dutch market as a practical way to establish clear working arrangements. In 2019, a provision on the use of such protocol (*reglement*) was introduced into Dutch legislation by way of a new Section 75a Fw. The Insolvency Proposal also includes a requirement that a protocol is adopted and sets out a list of topics that must be covered, which provides more guidance on the scope of Section 75a Fw.

3. Proposed framework in the Insolvency Proposal and practical implications

3.1. Framework

3.1.1. The Commission identifies three key dimensions of insolvency law in the Insolvency Proposal: (i) the recovery of assets from the liquidated insolvency estate, (ii) the efficiency of the proceedings and (iii) the predictable and fair distribution of recovered value among creditors. Creditors' committees are considered an essential component of the third dimension as they serve to ensure a predictable distribution of recovered values among creditors.

3.1.2. The Insolvency Proposal aims to provide a uniform and predictable framework for insolvency proceedings across the EU, and the use of creditors' committees is seen as an important element of this framework. Title VII of the Insolvency Proposal sets out provisions on creditors' committees, which are considered a key tool to protect creditors' interests and ensure the involvement of creditors who might otherwise not participate in the bankruptcy process.

3.1.3. The Insolvency Proposal sets out minimum harmonisation rules on key aspects of the use of creditors' committees in insolvency proceedings. These rules establish a common set of minimum requirements on key aspects of creditors' committees, including the establishment of the committee, the appointment, removal, and replacement of its members, the duties of its members and the number of members, working methods, duties and powers, expenses and remuneration, liability, and appeal procedures. The Insolvency Proposal sets out minimum requirements for each of these areas, but also allows Member States to adopt more specific rules and procedures as needed.

3.2. Provisions on creditors' committees in the Insolvency Proposal

3.2.1. Title VII of the Insolvency Proposal is divided into two chapters. Chapter 1 deals with the establishment and members of the creditors' committee (Articles 58 through 62). Chapter 2 lays down the working methods and function of the creditors' committee (Articles 63 through 67).

Chapter 1: Establishment and members of the creditors' committee

3.2.2. Article 58 sets out the requirements for the establishment of the creditors' committee. The decision on whether to establish a creditors' committee should be made at the general meeting of the creditors. Member States are allowed to enable creditors to establish a creditors' committee as of the filing for insolvency (and before the opening of the proceedings). In that case, the first general meeting of creditors is called to decide on its continuation and composition. Member States may provide in national law for the possibility to not establish a creditors' committee when its costs would not outweigh its benefits.

3.2.3. The procedure for the appointment of its members as well as certain requirements for the fair representation of creditors in the committee are set out in Article 59.

3.2.4. Article 60 prescribes the principle that the creditors' committee only represents the interests of the entire body of creditors and acts independently of the bankruptcy trustee. Member States may keep any national provisions that allow for more than one creditors' committee to be established. The number of members and procedures for removal and replacement of members are included in Article 61 and 62.

Chapter 2: Working methods and function of the creditors' committee

3.2.5. Article 63 instructs Members States to ensure that creditors' committees use a protocol with working methods and lists various topics that should be included in such protocol. It also identifies certain minimum working arrangements for the creditors' committee, such as voting procedures.

3.2.6. The minimum rights, duties and powers of the creditors' committee, such as the right to be heard in insolvency proceedings, the duty to supervise the insolvency practitioner and the power to request external advice on certain matters, are provided for in Article 64.

3.2.7. Article 65 describes how expenses and remuneration of (members of) the creditors' committee should be dealt with. Article 66 prescribes that members of the creditors' committee are exempt from individual liability for their actions in that capacity, with a carve-out for gross negligence and wilful misconduct.

3.2.8. Finally, a right of appeal against the creditors' committee decisions is provided for in Article 67, in cases where the creditors' committee has been given the power to approve certain decisions or transactions under national law.

3.3. Practical implications

3.3.1. The Insolvency Proposal introduces new requirements for the use of creditors' committees in insolvency proceedings across the European Union. A key aspect of the Insolvency Proposal is the requirement to establish working methods and protocols for the use of creditors' committees in insolvency proceedings. The Insolvency Proposal sets out specific guidance on the topics that must be covered in these protocols, including the appointment, removal, and replacement of committee members, the duties and powers of committee members, and the procedures for making decisions and resolving disputes. The European Commission would be responsible for drafting a standard protocol that member states could use as a basis for their own procedures.

3.3.2. Another essential element of the Insolvency Proposal is the introduction of fiduciary duties for members of creditors' committees. This means that committee members would be required to act in the best interests of the creditors they represent and would be held accountable for any breaches of these duties. At the same time, the Insolvency Proposal would limit the personal liability of committee members to encourage participation and ensure that creditors are effectively represented in the bankruptcy process.

3.3.3. The Insolvency Proposal also provides for a specific list of duties and powers for creditors' committees in insolvency proceedings. These would include the power to monitor the progress of the bankruptcy process, to request information from the insolvency practitioner, and to make proposals for the sale or liquidation of assets. The Insolvency Proposal would also provide for a right to appeal in cases where the committee's decision-making powers are limited by the insolvency practitioner or the court.

3.3.4. Overall, the Insolvency Proposal seeks to provide a more uniform and predictable framework for the use of creditors' committees in insolvency proceedings across the European Union, while also ensuring that the interests of all creditors are effectively represented and protected.

3.4. Position Dutch government

3.4.1. The Dutch government submitted a fiche to Parliament on 3 February 2023 outlining its position on the Insolvency Proposal. The fiche sets out the government's initial assessment of the Insolvency Proposal, including its strengths and weaknesses, and outlines the key areas that will be the subject of further negotiation and discussion as the Insolvency Proposal moves forward.

3.4.2. The Dutch government is generally supportive of the use of creditors' committees in insolvency proceedings but has expressed doubts as to whether the proposed increase in costs and time spent will outweigh the suggested benefits. The government has emphasised the importance of ensuring that any new requirements for creditors' committees are proportion-

ate and do not unduly burden the bankruptcy process. These concerns will be discussed further during consultations on the Insolvency Proposal.

4. Going forward

4.1. The Insolvency Proposal ensures more of a level playing field when it comes to creditors' committees in European insolvencies. From a Dutch perspective, the number of material changes to the standing practice would be relatively limited. We do believe that the introduction of European harmonisation on this point provides an opportunity for debate on a number of issues that we will discuss in this paragraph in relation to the Insolvency Proposal.

4.2. The current system where the supervisory judge (*rechter-commissaris*) appoints and supervises the trustee arguably does not correspond with the more classic view of agency theory: instead, a system should be devised in which the creditors (i.e., the principal) monitor the trustee (i.e., the agent) since the latter acts on their behalf. Having the creditors' committee monitor the trustee's actions on the merits rather than merely procedurally would lead to a reduced workload of the supervisory judge.

4.3. We also note that in large insolvencies it is fairly common that any decision to apply for insolvency is the result of considerable debate and analysis amongst stakeholders that can span many months and is supported by the involvement of many different external advisors. It is not uncommon that considerable sums of money are spent on performing an extensive strategic option analysis that provide the principal with a knowledge advantage that will be very challenging for the trustee to bridge and almost impossible to bridge for a supervisory judge considering the amount of time available to supervise an individual case.

4.4. It is not uncommon in large insolvencies that the creditors consist of (syndicated) financiers that during the pre-insolvency (restructuring) phase organize themselves via a coordinating committee with representatives from each of the layers within the capital structure to assist the company through its financial difficulties. Such a committee can easily be in existence for one or two years thereby gaining a considerable amount of knowledge about the company and its assets. That knowledge will be very challenging for the trustee to match within a comprehensible timeframe and against reasonable costs, especially in light of generating the highest possible value to creditors in case of an insolvency.

4.5. The establishment of a creditors' committee early on in insolvency proceedings is consistent with the Dutch legislator's original intention of having a verification meeting early on in bankruptcy proceedings. A general creditors' meeting may need to be introduced into the Dutch Bankruptcy Act specifically for this purpose to prevent the risk of establishing a committee at a later stage when it would slow things down and might be too costly.

4.6. The position of smaller creditors/stakeholders and shareholders is another topic that should be sufficiently addressed in the formation of the committee. The position of certain stakeholders may not be adequately represented if they are not part of the committee while they can contribute to generating the highest possible value to creditors. A special position in that respect can be attributed to shareholders. Their network and (technical) knowledge may be very advantageous when trying to sell (part of) the business, while in many cases they will be out-of-the-money and not considered a creditor and therefore unlikely to participate in the creditor's committee. This further extends to any potential distribution to the shareholders in return for their support in selling the company or its assets. It could understandably be argued that because the shareholders are out-of-the-money they are not entitled to any distribution before higher ranking creditors are repaid. Such a 'narrow' viewpoint may harm the estate in terms of recoverable value.

4.7. Establishing a creditors' committee is generally only considered necessary in large, complex cases, but in smaller cases, the trustee should explore all available options and not resort to liquidation too soon. Selling the individual assets of a company would normally generate less value than when the trustee is able to sell the underlying cash flows of the company. This does, however, require a certain corporate finance mindset that in smaller cases may not always be at hand but may be present with the creditors or their advisors. Establishing a creditors' committee also in those cases may be advantageous to all parties involved.

4.8. In the Imtech file discussed earlier, the court ruled that the appointment of a creditors' committee must be assessed for each legal entity separately, while a consolidated committee at the group level may be more efficient. A consolidated committee can still be made up of representatives from various classes (including big and small and domestic and international creditors). Similar to the coordinating committees that are frequently set up pre-insolvency and that also seem to be able to manage a workable solution for the various creditors involved, this may provide a form of efficiency at limited detrimental costs for each of the various creditors within the capital structure.

4.9. Lastly, we also see a possible role for the creditors' committee to take on a mandate from the trustee to dispose of assets considering their knowledge advantage. Again, in many large cases an insolvency is not something that occurs by accident. The decision to put a large company into insolvency is usually the result of various strategic options that have been considered at length by the company, the creditors, and its advisors and it is not uncommon that some form of market sounding (for example via distressed M&A offering) is undertaken. Capitalising on that knowledge may put the creditors in an advantageous position to generate the highest possible value and as a result free up the trustee to focus on guiding, supervising, and directing management during the insolvency phase to 'protect' the value contained with the company or group of companies.

Title VIII Measures enhancing transparency

Ruud Brunninkhuis (BUREN)

1. The Insolvency Proposal includes measures enhancing transparency of national laws on insolvency proceedings. It obliges Member States to produce and regularly update a clearly defined, standard factsheet for the investors that includes practical information on the main features of their domestic laws on insolvency proceedings. This key information factsheet has to be made available on the European e-Justice Portal[1]. In the event that national laws on insolvency proceedings are amended, the relevant Member State must update its key information factsheet within a month after the entry into force of such relevant amendment. As part of the content delivered by the European Judicial Network in civil and commercial matters, there is already some information available on Member States' national insolvency regimes on the e-Justice Portal in accordance with article 86 of the Insolvency Regulation (recast)[2].

2. The European e-Justice Portal provides information on justice systems and thereby aims to improve access to justice throughout the European Union. However, the content of these existing national pages on insolvency proceedings is not aligned in a way that enables investors to easily compare the different regimes. Also, to date, Belgium and the Netherlands do not even have national pages on insolvency proceedings on the European e-Justice Portal.

3. Therefore, article 68 of the Insolvency Proposal sets out requirements for the content and publication of a key information factsheet, which should include essential features of national law on insolvency proceedings. This information must be accurate, clear and not misleading. It must set out the facts in a balanced and fair manner. The key information factsheet will be translated into English, French and German (if needed).

4. The proposed key information factsheet contains four sections. The first section on the conditions for the opening of insolvency proceedings, which contains:

   i. the list of persons that can request the opening of insolvency proceedings;

   ii. the list of conditions that trigger the opening of insolvency proceedings;

   iii. where and how the request for the opening of insolvency proceedings can be submitted;

and

   iv. how and when the debtor is notified of the opening of insolvency proceedings.

1 https://e-justice.europa.eu/home?action=home.

2 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2016 (recast).

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5. The second section on the rules governing the lodging, verification and admission of claims, which section contains:

   i. the list of persons that can lodge a claim;

   ii. the list of conditions to lodge a claim;

   iii. the time limit to lodge a claim;

   iv. where to find the form to lodge a claim, when applicable;

   v. how and where to lodge a claim; and

   vi. how the claim is verified and validated.

6. The third section on the rules governing the ranking of creditors' claims and the distribution of proceeds from the realisation of assets ensuing from the insolvency proceedings, which section contains:

   i. a brief description of how rights and claims of creditors are ranked; and

   ii. a brief description of how proceeds are distributed.

7. The fourth and final section must be included indicating the average reported length of insolvency proceedings.

8. As the Insolvency Proposal only aims to harmonise *certain* aspects of insolvency law, it is not surprising that it intends to enhance transparency on those aspects of insolvency law that are not harmonised. It is my view that this will help investors and businesses to have a better grasp of the (remaining) fragmented insolvency proceedings throughout the European Union.

Dutch Restructuring Association.

Annex

2022/0408 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

harmonising certain aspects of insolvency law

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee[30],

Having regard to the opinion of the Committee of the Regions[31],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) The objective of this Directive is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures in the area of insolvency.

(2) The wide differences in substantive insolvency laws acknowledged by Regulation (EU) 2015/848 of the European Parliament and of the Council[32] create barriers to the internal market by reducing the attractiveness of cross-border investments, thus impacting the cross-border movement of capital within the Union and to and from third countries.

(3) Insolvency proceedings ensure the orderly winding down or restructuring of companies or entrepreneurs in financial and economic distress. These proceedings are key in financial investments, as they determine the final recovery value of such investments. Diverging rules among Member States have contributed to increasing legal uncertainty and unpredictability about insolvency proceedings' outcome, so raising barriers especially for cross-border investments in the internal market. Large divergences in recovery value and time required to complete insolvency proceedings across the Union have negative repercussions on cost predictability for creditors and investors in cross-border situations in the internal market.

(4) The integration of the internal market in the area of insolvency laws pursued by this Directive is a key tool for a more efficient functioning of the capital markets in the

30 OJ C [...], [...], p. [...]

31 OJ C [...], [...], p. [...]

32 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141 5.6.2015, p. 19).

European Union, including greater access to corporate financing. Therefore, it is necessary to set out minimum requirements in targeted areas of national insolvency proceedings, which have a significant impact on the efficiency and length of such proceedings, especially on cross-border insolvency proceedings.

(5) In order to protect the value of the insolvency estate for creditors, national insolvency laws should include effective rules that enable the annulment of legal acts that are detrimental to creditors and have been perfected prior to the opening of insolvency proceedings (avoidance actions). Given that avoidance actions aim at reversing the detrimental effects for the estate of the legal act, it is appropriate to refer to the completion of the cause for this detriment as the relevant point in time, namely to the perfection of the legal act rather than to the execution of the performance. For instance, in the case of electronic money transfer, the relevant point in time should not be when the debtor instructs the financial institution to transfer the money to a creditor (performance of the legal act) but rather when the creditor's account is credited (perfection of the legal act). Avoidance actions rules should also allow for the compensation of the insolvency estate for the detriment caused to creditors by such legal acts.

(6) The scope of the legal acts that could be challenged under the avoidance actions rules should be drawn broadly, in order to cover any human behaviour with legal effects. The principle of equal treatment of creditors implies that legal acts should also include omissions, as it makes no significant difference if creditors suffer a detriment as a consequence of an action or of the passivity of the party concerned. For instance, it makes no difference whether a debtor actively waives a claim against his or her obligor or whether he or she remains passive and accepts the claim to become time-barred. Further examples of omissions that may be subject to avoidance actions include the omission to challenge a disadvantageous judgement or other decisions of courts or public authorities or the omission to register an intellectual property right. For the same reason, avoidance rules should not be restricted to legal acts performed by the debtor, but should also include legal acts performed by the counterparty or by a third party. On the other hand, only legal acts should be subject to avoidance rules which are detrimental to the general body of creditors.

(7) To protect the legitimate expectations of the debtor's counterparty, any interference with the validity or enforceability of a legal act should be proportionate to the circumstances under which that act is perfected. Such circumstances should include the debtor's intent, the knowledge of the counterparty or the time-span between the perfection of the legal act and the commencement of the insolvency proceedings. Therefore, it is necessary to distinguish between a variety of specific avoidance grounds that are based on common and typical fact patterns and that should complement the general prerequisites for avoidance actions. Any interference should also respect the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union.

(8) In the context of avoidance actions, a distinction should be made between legal acts where the claim of the counterparty was due and enforceable and has been satisfied in the owed manner (congruent coverages) and those where performance was not entirely in accordance with the creditor's claim (incongruent coverage). Incongruent coverages include, in particular, premature payments, the satisfaction with unusual means of payments, the subsequent collateralisation of a so far unsecured claim which was not already agreed upon in the original debt agreement, granting an extraordinary termination right or other amendments not provided for in the underlying contract, the

waiver of legal defences or objections or the acknowledgement of disputable debts. In the case of congruent coverages, the avoidance ground of preferences can only be invoked if the creditor of the legal act that can be declared void knew, or should have known, at the time of the transaction that the debtor was insolvent.

(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, 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).

(10) New- or interim financing provided during a restructuring attempt, including in the course of a preventive insolvency procedure under Title II of Directive (EU) 2019/1023 of the European Parliament and of the Council[33], should be protected in subsequent insolvency proceedings. Consequently, avoidance actions on the ground of preferences should not be permitted against payments to or collateralisation in favour of the providers of such new- or interim financing, if those payments or collateralisations are performed in accordance with the claims of the providers. Such payments or collateralisation should be considered, therefore, as legal acts performed directly against fair consideration to the benefit of the insolvency estate.

(11) The main consequence of declaring a legal act void in avoidance proceedings is the obligation for the party benefiting from the legal act that has been declared void to compensate the insolvency estate for the detriment caused by such legal act. Compensation should include emoluments, where relevant, and interest, in accordance with the applicable general civil law. The compensation implies the payment of a sum equivalent to the value of the performance received if it cannot be returned *in natura* to the insolvency estate.

(12) Parties who are closely related to the debtor, such as relatives in case the debtor is a natural person or actors fulfilling decisive roles in relation to a debtor that is a legal entity, usually enjoy an information advantage with regard to the financial situation of the debtor. In order to prevent abusive behaviours, additional safeguards should be established. Consequently, in the context of avoidance actions, legal presumptions about the knowledge of the circumstances on which the conditions for avoidance were based should be introduced when the other party involved in the legal act that can be declared void is a party closely related to the debtor. These presumptions should be

[33] 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 (Directive on restructuring and insolvency) (OJ L 172, 26.6.2019, p. 18).

rebuttable and should aim at reversing the burden of proof to the benefit of the insolvency estate.

(13) Improving the possibilities of insolvency practitioners to identify and trace assets belonging to the insolvency estate is essential for the maximisation of the value of that estate. When performing their duties, insolvency practitioners may, already now, access information held in public data registers, partly set up by Union law and interconnected at European level, such as the Business Registers Interconnection System (BRIS), the system of Insolvency Registers Interconnection (IRI) or the Beneficial Ownership Registers Interconnection System (BORIS). Accessing the information held in public databases, however, is often not satisfactory to identify and trace important assets that are or should be in the perimeter of the insolvency estate. In particular, insolvency practitioners face practical difficulties when they try to access asset registers situated abroad.

(14) It is therefore necessary to lay down provisions to ensure that insolvency practitioners, when performing their duties in insolvency proceedings, can have, either directly or indirectly, access to information held in databases which are not publicly accessible.

(15) Prompt direct access to centralised bank account registries or data retrieval systems is often indispensable for the maximisation of the value of the insolvency estate. Therefore, rules should be laid down granting direct access to information held in centralised bank account registries or data retrieval systems to designated Member States' courts that have jurisdiction in insolvency proceedings. Where a Member State provides access to bank account information through a central electronic data retrieval system, that Member State should ensure that the authority operating the retrieval system reports search results in an immediate and unfiltered way to the designated courts.

(16) In order to respect the right to the protection of personal data and the right to privacy, direct and immediate access to bank account registries should be granted only to courts with jurisdiction in insolvency proceedings that are designated by the Member States for that purpose. Insolvency practitioners should therefore be allowed to access information held in the bank account registries only indirectly by requesting the designated courts in their Member State to access and run the searches.

(17) Directive (EU) YYYY/XX of the European Parliament and of the Council[34] [*OP: Directive which replaces Directive 2015/849*] provides that the centralised automated mechanisms are interconnected via the bank account registers (BAR) single access point, to be developed and operated by the Commission. Considering the growing importance of insolvency cases with cross-border implications and the importance of relevant financial information for the purposes of maximising the value of the insolvency estate in insolvency proceedings, the designated national courts having jurisdiction in insolvency matters should be able to directly access and search the centralised bank account registries of other Member States through the BAR single access point put in place pursuant to Directive (EU) YYYY/XX [*OP: Directive which replaces Directive 2015/849*].

(18) Any personal data obtained under this Directive should only be processed in accordance with the applicable data protection rules by designated courts and insolvency practitioners where it is necessary and proportionate for the purposes of

[34] OJ

identifying and tracing assets belonging to the insolvency estate of the debtor in on-going insolvency proceedings.

(19) Directive (EU) 2015/849 of the European Parliament and the Council[35] ensures that persons who are able to demonstrate a legitimate interest are granted access to beneficial ownership information on trusts and other types of legal arrangements, in accordance with data protection rules. Those persons are granted access to information on the name, month and year of birth and the country of residence and nationality of the beneficial owner, as well as the nature and extent of beneficial interest held. It is essential that insolvency practitioners can quickly and easily access that set of information for performing their tasks to trace assets in the context of ongoing insolvency proceedings. It is therefore necessary to clarify that in such a case access by insolvency practitioners constitutes a legitimate interest. At the same time, the scope of data directly accessible by the insolvency practitioners should not be broader than the scope of data accessible by other parties having a legitimate interest.

(20) To ensure that assets can be efficiently traced in the context of cross-border insolvency proceedings, insolvency practitioners appointed in a Member State should be granted expeditious access to asset registers also when these registers are located in a different Member State. Therefore, the access conditions applying to foreign insolvency practitioners should not be more cumbersome than those applying to domestic insolvency practitioners.

(21) In the context of insolvent liquidation, national insolvency laws should allow for the realisation of the assets of the business to occur through the sale of the business or part thereof as a going concern. Sale as a going concern should mean, in this context, the transfer of the business, in whole or in part, to an acquirer in a way that the business (or part thereof) may continue to operate as an economically productive unit. Sale as a going concern should be understood as opposed to a sale of the assets of the business piece by piece (piecemeal liquidation).

(22) It is generally assumed that more value can be recovered in liquidation by selling the business (or part thereof) as a going concern rather than by piecemeal liquidation. In order to promote going-concern sales in liquidation, national insolvency regimes should include a pre-pack proceeding, where the debtor in financial distress, with the help of a "monitor", seeks possible interested acquirers and prepares the sale of the business as a going concern before the formal opening of insolvency proceedings, so that the assets can be quickly realised shortly after the opening of the formal insolvency proceedings. The pre-pack proceedings should consist of two phases, namely a preparation phase and a liquidation phase.

(23) For the effective management of the pre-pack proceedings, the court before which such proceedings are brought should also have the power to decide on issues closely related to the pre-pack sale of the business or part thereof.

(24) The pre-pack proceedings should ensure that the monitor appointed in the preparation phase might propose the best bid obtained during the sale process for authorisation by the court only if it declares that, in its view, piecemeal liquidation would not recover manifestly more value for creditors than the market price obtained for the business (or

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[35] 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).

part thereof) as a going concern. The going-concern value is, as a rule, higher than the piecemeal liquidation value because it is based on the assumption that the business continues its activity with the minimum of disruption, has the confidence of financial creditors, shareholders and clients and continues to generate revenues. Therefore, the monitor's declaration should not require a valuation being made in every case. The monitor should only reasonably conclude that the sale price is not significantly lower than the proceeds that could be recovered through a piecemeal liquidation. However, an increased scrutiny should be required from the monitor or the insolvency practitioner in cases where the only existing offer is made by a party who is closely related to the debtor. In such situations, the monitor or the insolvency practitioner should reject the offer if it does not satisfy the best-interest-of-creditors test.

(25) In order to guarantee that the business is sold at the best market value during the pre-pack proceedings, Member States should either ensure high standards of competitiveness, transparency and fairness of the sale process conducted in the preparation phase, or provide that the court runs a brief public auction after the opening of the liquidation phase of the proceedings.

(26) If a Member State opts to require high standards in the preparation phase, the monitor (subsequently to be appointed as insolvency practitioner in the liquidation phase) should be responsible for ensuring that the sale process is competitive, transparent, fair and meets market standards. Complying with market standards in this context should require that the process is compatible with the standard rules and practice on mergers and acquisitions in the Member State concerned, which includes an invitation to potentially interested parties to participate in the sale process, disclosing the same information to potential buyers, enabling the exercise of due diligence by interested acquirers, and obtaining the offers from the interested parties through a structured process.

(27) If a Member State opts to provide that the court runs a public auction after the opening of the liquidation phase, the offer selected by the monitor during the preparation phase should be used as an initial bid ('stalking horse bid') during the auction. The debtor should be able to offer incentives to the 'stalking horse bidder' by agreeing, in particular, to expense reimbursements or break-up fees in the case a better offer is selected through the public auction. Member States should, nevertheless, ensure that such incentives given by the debtors to the 'stalking horse bidders' during the preparation phase are commensurate and do not deter other potentially interested bidders from participating in the public auction in the liquidation phase.

(28) The opening of insolvency proceedings should not result in the early termination of contracts under which the parties still have obligations to perform (executory contracts), which are necessary for the continuation of business operations. Such termination would unduly jeopardise the value of the business, or part thereof, to be sold in the pre-pack proceedings. It should, therefore, be ensured that those contracts are assigned to the acquirer of the business of the debtor or part thereof, even without the consent of the counterparty of the debtor to those contracts. Nonetheless, there are situations where the assignment of the executory contracts cannot be reasonably expected, such as when the acquirer is a competitor of the counterparty of the contract. Similarly, the court may come to the conclusion in an individual assessment of an executory contract that its termination would serve the interests of the business of the debtor better than its assignment, such as when the assignment of the contract would result in a disproportionate burden for the business. The court should not be allowed, however, to terminate executory contracts relating to licenses of intellectual and

industrial property rights, as they are usually key components of the operations of the business being sold.

(29) The possibility to enforce pre-emption rights in the course of the sale process would distort competition in the pre-pack proceedings. Potential bidders might abstain from bidding because of rights that would discard their offers at the holder's discretion, irrespective of the time and resources invested and the economic value of the offer. In order to ensure that the winning offer reflects the best available price on the market, pre-emption rights should not be conceded to bidders, nor should such rights be enforced in the course of the bidding process. Holders of pre-emption rights that were granted prior to the commencement of the pre-pack proceedings, instead of invoking their option, should be invited to participate in the bidding.

(30) Member States should allow secured creditors to participate in the bidding process in the pre-pack proceedings by offering the amount of their secured claims as consideration for the purchase of the assets over which they hold a security (credit bidding). Credit bidding should not, however, be used in a way that provides secured creditors with an undue advantage in the bidding process, such as when the amount of their secured claim against the debtor's assets is above the market value of the business.

(31) This Directive should be without prejudice to the application of Union competition law, especially Council Regulation (EC) No 139/2004[36] nor should it prevent Member States from enforcing national merger control systems. When selecting the best offer, the monitor should be allowed to take into account the regulatory risks raised by offers requiring the authorisation of competition authorities and may consult with those authorities if allowed under applicable rules. It should remain the responsibility of the bidders to provide all necessary information to assess those risks and to engage in timely manner with competent competition authorities in order to mitigate those risks. In order to increase the likelihood that procedures are successful, in presence of an offer that raises such risks, the monitor should be required to perform its role in a way that facilitates the presentation of alternative bids.

(32) Directors oversee the management of the affairs of a legal entity and have the best overview of its financial situation. Directors are therefore among the first to realise whether a legal entity is approaching or surpassing the brink of insolvency. A late filing for insolvency by directors may lead to lower recovery values for creditors Member States should therefore introduce an obligation on directors to submit a request for the opening of insolvency proceedings within a specified time-period. Member States should also define to whom the directors' duties should apply taking into account that the notion of "director" should be interpreted broadly, to cover all persons who are in charge of making or do in fact make or ought to make key decisions with respect to the management of a legal entity.

(33) To ensure that directors do not act in their self-interest by delaying the submission of a request for the opening of insolvency proceedings, despite signs of insolvency, Member States should lay down provisions making directors civilly liable for a breach of the duty to submit such a request. In that case directors should compensate creditors for the damages resulting from the deterioration in the recovery value of the legal entity compared to the situation where the request would have been submitted on time. Member States should be able to adopt or maintain national rules on civil liability of

[36] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 024 29.01.2004, p. 1)

directors related to the filing for insolvency that are stricter than those laid down by this Directive.

(34) Microenterprises often take the form of sole proprietorships or small partnerships whose founders, owners or members do not enjoy limited liability protection and thus are exposed to unlimited liability for business debts. Where microenterprises operate as limited liability entities, limited liability protection is usually illusory for microenterprises owners because they are often expected to secure microenterprises business debts using their personal assets as collateral. Moreover, since microenterprises heavily depend on payments from their clients they often face cash-flow problems and higher default risks that follow from the loss of a significant business partner or from late payments by their clients. In addition, microenterprises also face scarcity of working capital, higher interest rates and larger collateral requirements, which make raising finance, especially in situations of financial distress, difficult, if not impossible. As a consequence, they may be prone to insolvency more often than larger enterprises.

(35) National insolvency rules are not always fit to treat insolvent microenterprises properly and in a proportionate manner. Taking into account the unique characteristics of microenterprises and their specific needs in financial distress, in particular the need for faster, simpler, and affordable procedures should be acknowledged, separate insolvency proceedings should be developed at national level in accordance with the provisions of this Directive. Although the provisions of this Directive concerning simplified winding-up proceedings only apply to microenterprises, it should be possible for Member States to extend their application also to small and medium-sized enterprises that are not microenterprises.

(36) It is appropriate to ensure that the conduct and oversight of simplified winding-up proceedings may be entrusted by Member States to a competent authority which is either a court or an administrative body. The choice would depend, among other things, on the administrative and legal systems of the Member States as well as the capacities of courts and the need to ensure cost-efficiency and speed of proceedings.

(37) The cessation of payments test and the balance sheet test are the two usual triggers among Member States for opening of standard insolvency proceedings. The balance sheet test may however be unfeasible for microenterprise debtors, particularly where the debtor is an individual entrepreneur, because of a possible lack of proper record and of a clear distinction between personal assets and liabilities and business assets and liabilities. Therefore, the inability to pay debts as they mature should be the criterion for the opening of simplified winding-up proceedings. Member States should also define the specific conditions under which this criterion is met, as long as these conditions are clear, simple and easily ascertainable by the microenterprise concerned.

(38) In order to establish cost-effective and expeditious simplified winding-up proceedings for microenterprises, short deadlines should be introduced. Similarly, formalities for all procedural steps, including for the opening of the proceedings, the lodgement and the admission of claims, the establishment of the insolvency estate and the realisation of the assets should be minimised. A standard form should be used for submitting a request to open simplified winding-up proceedings and electronic means should be used for all communications between the competent authority, and where relevant, the insolvency practitioner, and the parties to the proceedings.

(39) All microenterprises should be able to commence proceedings to address their financial difficulties and obtain a discharge. Access to simplified winding-up

proceedings should not depend on the microenterprise's ability to cover the administrative costs of such proceedings. The laws of the Member States should introduce rules for covering the costs of administering simplified winding-up proceedings where assets and sources of revenue of the debtor are insufficient to cover those costs.

(40) In simplified winding-up proceedings, the appointment of an insolvency practitioner is usually unnecessary given the simple business operations carried out by the microenterprises that make their supervision by the competent authority possible and sufficient. Therefore, the debtor should remain in control of its assets and day-to-day operation of the business. At the same time, to ensure that simplified winding-up proceedings can be conducted effectively and efficiently, the debtor should, upon commencement of and throughout the proceedings, provide accurate, reliable and complete information relating to its financial position and business affairs.

(41) A microenterprise debtor should be able to benefit from a temporary stay of individual enforcement actions, in order to be able to preserve the value of the insolvency estate and ensure a fair and orderly conduct of the proceedings. Member States, however, may allow competent authorities to exclude certain claims from the scope of the stay, in well-defined circumstances.

(42) Disputed claims should be dealt with in a way that does not unnecessarily complicate the conduct of simplified winding-up proceedings for microenterprises. If disputed claims cannot be quickly dealt with, the ability to dispute a claim may be used to create unnecessary delays. In deciding on the treatment of a disputed claim, the competent authority should be empowered to allow the continuation of the simplified winding-up proceedings with respect to undisputed claims only.

(43) In the context of simplified winding-up proceedings, avoidance actions should only be brought by a creditor or, where appointed, by the insolvency practitioner. In taking the decision to convert the simplified winding-up proceedings to standard insolvency proceedings for the purpose of the conduct of avoidance proceedings, the competent authority should weigh various considerations, including the anticipated cost, duration and complexity of avoidance proceedings, the likelihood of the successful recovery of assets and expected benefits to all creditors.

(44) Member States should ensure that the assets of the insolvency estate in simplified winding-up proceedings can be realised through public on-line judicial auction, if the competent authority considers this means of realisation of assets as appropriate. For this reason, Member States should ensure that one or more electronic auction systems are maintained in their territory for that purposes. This obligation should be without prejudice to the multiple platforms that exist in some Member States for on-line judicial auctions of specific types of assets.

(45) The auction systems operated for the purposes of realising the assets of debtors in simplified winding-up proceedings should be interconnected via the European e-Justice Portal. The e-Justice Portal should serve as a central electronic access point to the on-line judicial auction processes run in the national system or systems, provide a search functionality for users and guide them to the relevant national on-line platforms if they intend to participate in the bidding. When determining the technical specifications of that interconnection system by way of implementing act, the

Commission should, in accordance with the Commission's "Dual Pillar Approach"[37], present the result of the analysis of existing solutions already provided by the Commission with the potential for their reuse or should carry out a market screening for potential off-the shelf commercial solutions to use as such or with little customisation.

(46) In the case of insolvency of an unlimited liability microenterprise debtor, individuals who are personally liable for the debtor's debts should not be personally liable for unsatisfied claims following liquidation of the insolvency estate of the debtor. Therefore, Member States should ensure that in simplified winding-up proceedings entrepreneur debtors, as well as those founders, owners or members of an unlimited liability microenterprise debtor who are personally liable for the debts of the microenterprise subject to simplified winding-up proceedings, are fully discharged from their debts. For the purpose of granting such discharge, Member States should apply Title III of Directive (EU) 2019/1023 *mutatis mutandis*.

(47) It is important to ensure a fair balance between the interests of the debtor and creditors in insolvency proceedings. Creditors' committees allow for better involvement of creditors in insolvency proceedings, in particular when creditors would otherwise be inhibited from doing so individually, due to limited resources, economic significance of their claims or the lack of geographic proximity. Creditors' committees can especially help cross-border creditors better exercise their rights and ensure their fair treatment. Member States should allow the establishment of a creditors' committee once proceedings are opened. A creditors' committee should be established only provided that creditors agree. Member States may also allow to establish it before proceedings are opened and after the filing for insolvency. In this case, however, Member States should provide that creditors agree to its continuation and composition at the general meeting. If creditors disagree with the composition, they may also establish a new creditors' committee.

(48) The cost of setting up and operating a creditors' committee should be commensurate to the value it generates. The establishment of the creditors' committee should not be justified in those instances where the cost of its set-up and operations is significantly higher than the economic relevance of the decisions it may take. This may be the case where there are too few creditors, where the large majority of creditors has a small share in the claim against the debtor or where the expected recovery from the insolvency estate in insolvency proceedings is significantly lower than the cost of the set-up and operation of the creditors' committee. This occurs in particular in insolvency cases of microenterprises.

(49) Member States should clarify the requirements, duties and procedures for the appointment of members of the creditors' committee, as well as the functions attributed to the creditors' committee. Member States should be given the option to decide whether the appointment should be done by the general meeting of creditors or by the court. To avoid undue delays in the set-up of the creditors' committee, the members should be appointed expeditiously. Member States should cater for a fair representation of creditors in the committee and ensure that the participation in the

[37] For digital solutions, the dual pillar approach is about reusing existing solutions, including corporate building blocks, before considering ready-made market solutions. Customised development is the last option. See European Commission digital strategy Next generation digital Commission, C(2022) 4388 final, p. 13.

creditors' committee is not precluded to creditors whose claim is not yet admitted or to creditors that are resident in another Member State.

(50) Fair representation of creditors in the creditors' committee is particularly important in relation to unsecured creditors that are micro, small or medium-sized enterprises, which in the case of insolvency of a debtor which is a large enterprise, if not paid promptly, are also exposed to insolvency (domino effect). Proper representation in the creditors' committee of such creditors could ensure that in the course of the distribution of the recovered proceeds they receive their parts more expeditiously.

(51) An important task of the creditors' committee should be to verify that insolvency proceedings are conducted in a way that protects creditors' interests. The committee's role in the monitoring of the fairness and integrity of the proceedings can only be performed effectively if the creditors' committee and its members act independently from the insolvency practitioner and are accountable only to the creditors who established it.

(52) The number of members in the creditors' committee should, on the one hand, be sufficiently large to ensure diversity of views and interests in the committee and, on the other hand, remain relatively limited to deliver on its tasks effectively and timely. Member States should clarify when and how the composition of the committee needs to be altered, which could happen if representatives are no longer able to act, including in the creditors' best interests, or wish to withdraw. They should also clarify the conditions for the removal of members that acted relentlessly against creditors' interest.

(53) Members of the creditors' committee retain discretion in the organisation of the work, as long as the working methods are lawful, transparent and effective. Member States should therefore require that the creditors' committee set out the working methods, specifying how meetings should be run, who could attend and vote, and how the impartiality and the confidentiality of the work of the committee is ensured. These working methods should be allowed to also set out a role for employers' representatives or transparency towards other creditors. Creditors should be able to participate and vote electronically or delegate the voting right to a third person, provided this person is duly authorised. This possibility would be particularly beneficial for creditors resident in other Member States.

(54) Member States should ensure that the court has the power to determine the working methods for the creditors' committee, if they are not established expeditiously. The Commission should establish standard working methods that should facilitate the task of the creditors' committee and reduce the need for courts to intervene in the case of missing working methods.

(55) The creditors' committee should be granted sufficient rights to perform its functions efficiently and effectively. Member States should ensure that the creditors' committee can interact with insolvency practitioners, courts, the debtor, external advisors and the creditors whom it represents, as necessary, to enable the committee to form and communicate a view on matters of direct interest and relevance to creditors, and for this view to be duly considered in proceedings. Member States could also empower the creditors' committee to make decisions..

(56) Since the operation of the creditors' committee incurs expenses, Member States should determine upfront who pays for them. Member States should also establish safeguards

to prevent that the costs of the creditors' committee reduce the recovery value of the insolvency estate in a disproportionate manner.

(57) To encourage creditors to become members of the creditors' committee, Member States should limit their individual civil liability when they carry out functions in accordance with this Directive. Nonetheless, members of the creditors' committee acting fraudulently or negligently, when carrying out those functions, can be removed and held liable for their actions. In those cases, Member States should provide that the members are held individually liable for the detriment caused by their misconduct.

(58) To ensure an enhanced transparency of the key features of national insolvency proceedings and help especially cross-border creditors to estimate what would happen if their investments got involved in insolvency proceedings, investors and potential investors should be granted easy access to that information in a pre-defined, comparable and user-friendly format. A standardised key information factsheet should be prepared and made available to the public by Member States. This document would be key for potential investors to make a "glance-through" assessment of the insolvency proceedings rules in a given Member State. It should contain sufficient explanations to allow the reader to understand the information therein without having to resort to other documents. The key information factsheet should in particular include practical information on the insolvency trigger as well as on the steps to take to request the opening of insolvency proceedings or to lodge a claim.

(59) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council.

(60) Since the objectives of this Directive cannot be sufficiently achieved by the Member States because differences between national insolvency frameworks would continue to raise obstacles to the free movement of capital and the freedom of establishment, but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(61) This Directive respects the fundamental rights and observes the principles recognised by the Charter of the Fundamental Rights of the European Union, in particular the right to respect for private and family life (Article 7 of the Charter), the right to the protection of personal data (Article 8 of the Charter), the freedom to choose an occupation and right to engage in work (Article 15 of the Charter), the freedom to conduct a business (Article 16 of the Charter), the right to property (Article 17 of the Charter), workers' right to information and consultation (Article 27 of the Charter) as well as the right to a fair trial (Article 47(2) of the Charter).

(62) Regulation (EU) 2016/679 of the European Parliament and of the Council[38] applies to the processing of personal data for the purposes of this Directive. Regulation (EU)

[38] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

2018/1725 of the European Parliament and of the Council[39] applies to the processing of personal data by the Union institutions and bodies for the purposes of this Directive.

(63) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council and delivered an opinion on [*OP: add data of publication*],

HAVE ADOPTED THIS DIRECTIVE:

Title I
GENERAL PROVISIONS

Article 1

Subject matter and scope

1. This Directive lays down common rules on:

   (a) avoidance actions;

   (b) the tracing of assets belonging to the insolvency estate;

   (c) pre-pack proceedings;

   (d) the duty of directors to submit a request for the opening of insolvency proceedings;

   (e) simplified winding-up proceedings for microenterprises;

   (f) creditors' committees;

   (g) the drawing-up of a key information factsheet by Member States on certain elements of their national law on insolvency proceedings.

2. This Directive does not apply to proceedings referred to in paragraph 1 of this Article that concern debtors that are:

   (a) insurance undertakings or reinsurance undertakings as defined in Article 13 points (1) and (4), of Directive 2009/138/EC of the European Parliament and of the Council;

   (b) credit institutions as defined in Article 4(1), point (1), of Regulation (EU) No 575/2013 of the European Parliament and of the Council;

   (c) investment firms or collective investment undertakings as defined in Article 4(1), points (2) and (7), of Regulation (EU) No 575/2013;

   (d) central counterparties as defined in Article 2, point (1), of Regulation (EU) No 648/2012 of the European Parliament and of the Council;

   (e) central securities depositories as defined in Article 2(1), point (1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council;

   (f) other financial institutions and entities listed in Article 1(1), first subparagraph of Directive 2014/59/EU of the European Parliament and of the Council;

   (g) public bodies under national law;

[39] 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).

(h) natural persons, except for entrepreneurs and, with regard to debt discharge procedures, those founders, owners or members of unlimited liability microenterprise debtors who are personally liable for the debts of the debtor.

Article 2

Definitions

For the purposes of this Directive, the following definitions apply:

(a) 'insolvency practitioner' means 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;

(b) 'court' means the judicial body of a Member State;

(c) 'competent authority' means a judicial or administrative authority of a Member State that is responsible for conduct or oversight, or both, of simplified winding-up proceedings, in accordance with Title VI of this Directive;

(d) '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;

(e) 'beneficial ownership register' means national central registers on beneficial ownership information referred to in Articles 30 and 31 of Directive (EU) 2015/849;

(f) 'legal act' means any human behaviour, including an omission, producing a legal effect;

(g) 'executory contract' means a contract between a debtor and one or more counterparties under which the parties still have obligations to perform at the time of the opening of insolvency proceedings in the liquidation phase in Title IV;

(h) 'best-interest-of-creditors test' means the test whereby no creditor would be worse off under a liquidation in pre-pack proceedings than such a creditor would be if the normal ranking of liquidation priorities were applied in the event of a piecemeal liquidation;

(i) 'interim financing' means any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during pre-pack proceedings, and that is reasonable and immediately necessary for the debtor's business or part thereof to continue operating, or to preserve or enhance the value of that business;

(j) 'microenterprise' means a microenterprise within the meaning of the Annex to Commission Recommendation 2003/361/EC;

(k) 'unlimited liability microenterprise' means a microenterprise with or without separate legal personality and without limited liability protection of any of its founders, owners or members;

(l) 'entrepreneur' means an entrepreneur as defined in Article 2(1), point (9) of Directive (EU) 2019/1023;

(m) ‘full discharge of debt’ means the situation in which either i) the enforcement of outstanding dischargeable debts against entrepreneurs or against those individuals who are founders, owners or members of an unlimited liability microenterprise and are personally liable for the debts of the microenterprise is precluded or ii) outstanding dischargeable debts as such are cancelled, as part of simplified winding-up proceedings;

(n) ‘repayment plan’ means a programme of payments of specified amounts on specified dates to creditors by a natural person benefiting from a full discharge of debt, or a plan setting out periodic transfers to creditors of a certain part of the disposable income of the natural person concerned during the discharge period;

(o) ‘creditors’ committee’ means a representative body of creditors appointed in accordance with the applicable law on insolvency proceedings with consultative and other powers as specified in that law;

(p) ‘pre-pack proceedings’ means expedited liquidation proceedings that allow for the sale of the business of the debtor, in whole or in part, as a going-concern to the best bidder, with a view to the liquidation of the assets of the debtor as a result of the established insolvency of the debtor;

(q) ‘party closely related to the debtor’ means persons, including legal persons, with preferential access to non-public information on the affairs of the debtor.

Where the debtor is a natural person, closely related parties shall include in particular:

(i) the spouse or partner of the debtor;

(ii) ascendants, descendants, and siblings of the debtor, or of the spouse or partner, and the spouses or partners of these persons;

(iii) persons living in the household of the debtor;

(iv) persons who are working for the debtor under a contract of employment with access to non-public information on the affairs of the debtor, or otherwise performing tasks through which they have access to non-public information on the affairs of the debtor, including advisers, accountants or notaries;

(v) legal entities in which the debtor or one of the persons referred to in points (i) to (iv) of this subparagraph is a member of the administrative, management or supervisory bodies or performs duties which provide for access to non-public information on the affairs of the debtor.

Where the debtor is a legal entity, closely related parties shall include in particular:

(i) any member of the administrative, management or supervisory bodies of the debtor;

(ii) equity holders with a controlling interest in the debtor;

(iii) persons which perform functions similar to those performed by persons under point (i);

(iv) persons which are closely related in accordance with the second subparagraph to the persons listed in points (i), (ii) and (iii) of this subparagraph.

Article 3

Relevant point in time in relation to close relatedness

The point in time for determining whether a party is closely related to the debtor shall be:

(a) for the purposes of Title II, the day when the legal act subject to an avoidance action was perfected or three months prior to the perfection of the legal act;

(b) for the purposes of Title IV, the day when the preparation phase starts or three months prior to the start of the preparation phase.

Title II
AVOIDANCE ACTIONS

Chapter 1
General provisions regarding avoidance actions

Article 4

General prerequisites for avoidance actions

Member States shall ensure that legal acts which have been perfected prior to the opening of insolvency proceedings to the detriment of the general body of creditors can be declared void under the conditions laid down in Chapter 2 of this Title.

Article 5

Relationship to national provisions

This Directive shall not prevent Member States from adopting or maintaining provisions relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors in the context of insolvency proceedings where such provisions provide a greater protection of the general body of creditors than those set out in Chapter 2 of this Title.

Chapter 2
Specific conditions for avoidance actions

Article 6

Preferences

1. Member States shall ensure that legal acts benefitting a creditor or a group of creditors by satisfaction, collateralisation or in any other way can be declared void if they were perfected:

(a) within three months prior to the submission of the request for the opening of insolvency proceedings, under the condition that the debtor was unable to pay its mature debts; or

(b) after the submission of the request for the opening of insolvency proceedings.

Where several persons have submitted a request for the opening of insolvency proceedings against the same debtor, the point in time when the first admissible request is submitted shall be considered the beginning of the three-month period referred to in the first subparagraph, point (a).

2. If a due claim of a creditor was satisfied or secured in the owed manner, Member States shall ensure that the legal act can be declared void only if:

(a) the conditions laid down in paragraph 1 are met; and

(b) that creditor knew, or should have known, that the debtor was unable to pay its mature debts or that a request for the opening of insolvency proceedings has been submitted.

The creditor's knowledge referred to in the first subparagraph, point (b), shall be presumed if the creditor was a party closely related to the debtor.

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

(a) legal acts performed directly against fair consideration to the benefit of the insolvency estate;

(b) payments on bills of exchange or cheques where the law that governs bills of exchange or cheques bars the recipient's claims arising from the bill or cheque against other bill or cheque debtors such as endorsers, the drawer, or drawee if it refuses the debtor's payment;

(c) legal acts that are not subject to avoidance actions in accordance with Directive 98/26/EC and Directive 2002/47/EC.

Member States shall ensure that where payments on bills of exchange or cheques are concerned as referred to in the first subparagraph, point (b), the amount paid on the bill or cheque shall be restituted by the last endorser or, if the latter endorsed the bill on account of a third party, by such party if the last endorser or the third party knew or should have known that the debtor was unable to pay its mature debts or that a request for the opening of insolvency proceedings has been submitted at the moment of endorsing the bill or having it endorsed. This knowledge is presumed if the last endorser or the third party was a party closely related to the debtor.

Article 7

Legal acts against no or a manifestly inadequate consideration

1. Member States shall ensure that legal acts of the debtor against no or a manifestly inadequate consideration can be declared void where they were perfected within a time period of one year prior to the submission of the request for the opening of insolvency proceedings or after the submission of such request.

2. Paragraph 1 shall not apply to gifts and donations of symbolic value.

3. Where several persons have submitted a request for the opening of insolvency proceedings against the same debtor, the point in time when the first admissible request is submitted shall be considered the beginning of the one-year period referred to in paragraph 1.

Article 8

Legal acts intentionally detrimental to creditors

1. Member States shall ensure that legal acts by which the debtor has intentionally caused a detriment to the general body of creditors can be declared void where both of the following conditions are met:

   (a) those acts were perfected either within a time period of four years prior to the submission of the request for the opening of insolvency proceedings or after the submission of such request;

   (b) the other party to the legal act knew or should have known of the debtor's intent to cause a detriment to the general body of creditors.

   The knowledge referred to in the first subparagraph, point (b), shall be presumed if the other party to the legal act was a party closely related to the debtor.

2. Where several persons have submitted a request for the opening of insolvency proceedings against the same debtor, the point in time when the first admissible request is submitted shall be considered the beginning of the four-year period referred to in paragraph 1, first subparagraph, point (a).

Chapter 3
Consequences of avoidance actions

Article 9

General consequences

1. Member State shall ensure that the claims, rights or obligations resulting from legal acts that have been declared void pursuant to Chapter 2 of this Title may not be invoked to obtain satisfaction from the insolvency estate concerned.

2. Member States shall ensure that the party which benefitted from the legal act that has been declared void is obliged to compensate in full the insolvency estate concerned for the detriment caused to creditors by that legal act.

   The fact that the enrichment resulting from the legal act that has been declared void is not available anymore in the property of the party which benefited from that legal act ('lapse of enrichment') can only be invoked if that party was neither aware, nor should have been aware, of the circumstances on which the avoidance action is based.

3. Member States shall ensure that the limitation period for all claims resulting from the legal act that can be declared void against the other party is three years from the date of the opening of insolvency proceedings.

4. Member States shall ensure that a claim to obtain full compensation pursuant to paragraph 2, first subparagraph, may be assigned to a creditor or a third party.

5. Member States shall ensure that the party that has been obliged to compensate the insolvency estate pursuant to paragraph 2, first subparagraph, cannot set-off this obligation with its claims against the insolvency estate.

6. This Article is without prejudice to actions based on general civil and commercial law for compensation of damages suffered by creditors as a result of a legal act that can be declared void.

Article 10

Consequences for the party which benefitted from the legal act that has been declared void

1. Member States shall ensure that if and to the extent that the party which benefitted from the legal act that has been declared void compensates the insolvency estate for the detriment caused by that legal act, any claim of that party which was satisfied with that legal act revives.

2. Member States shall ensure that any counter-performance of the party which benefitted from the legal act that has been declared void performed after or in an instant exchange for the performance of the debtor under that legal act shall be refunded from the insolvency estate to the extent that the counter-performance is still available in the estate in a form that can be distinguished from the rest of the insolvency estate or the insolvency estate is still enriched by its value.

   In all cases not covered by the first subparagraph, the party which benefitted from the legal act that has been declared void may file claims for the compensation of the counter-performance. For the purposes of the ranking of claims in insolvency proceedings, this claim shall be deemed to have arisen before the opening of insolvency proceedings

Article 11

Liability of third parties

1. Member States shall ensure that the rights laid down in Article 9 are enforceable against an heir or another universal successor of the party which benefitted from the legal act that has been declared void.

2. Member States shall ensure that the rights laid down in Article 9 are also enforceable against any individual successor of the other party to the legal act that has been declared void if one of the following conditions is fulfilled:

   (a) the successor acquired the asset against no or a manifestly inadequate consideration;

   (b) the successor knew or should have known the circumstances on which the avoidance action is based.

   The knowledge referred to in the first subparagraph, point (b), shall be presumed if the individual successor is a party closely related to the party which benefitted from the legal act that has been declared void.

Article 12

Relation to other instruments

1. The provisions of this Title shall not affect Articles 17 and 18 of Directive (EU) 2019/1023.

Title III
TRACING ASSETS BELONGING TO THE INSOLVENCY ESTATE

Chapter 1
Access to bank account information by designated courts

Article 13

Designated courts

1. Each Member State shall designate, among its courts that are competent to hear cases related to procedures in restructuring, insolvency or discharge of debt, the courts empowered to access and search its national centralised bank account registry established pursuant to Article 32a of Directive (EU) 2015/849 ('designated courts').

2. Each Member State shall notify the Commission of its designated courts by [*6 months from transposition date*], and shall notify the Commission of any amendment thereto. The Commission shall publish the notifications in the Official Journal of the European Union.

Article 14

Access to and searches of bank account information by designated courts

1. Member States shall ensure that, upon request of the insolvency practitioner appointed in ongoing insolvency proceedings, the designated courts have the power to access and search, directly and immediately, bank account information listed in Article 32a(3) of Directive (EU) 2015/849, 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.

2. Member States shall ensure that, upon request of the insolvency practitioner appointed in ongoing insolvency proceedings, the designated courts have the power to access and search, directly and immediately, bank account information in other Member States available through the bank account registers (BAR) single access point set up pursuant to Article XX of Directive (EU) YYYY/XX [*OP: the new Anti-Money Laundering Directive*] 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.

3. The additional information that Member States consider essential and include in the centralised bank account registries pursuant to Article 32a(4) of Directive (EU) 2015/849 shall not be accessible and searchable by designated courts.

4. For the purpose of paragraphs 1 and 2, access and searches shall be considered to be direct and immediate, inter alia, where the national authorities operating the central bank account registries transmit the bank account information expeditiously by an automated mechanism to the designated courts, provided that no intermediary institution is able to interfere with the requested data or the information to be provided.

Article 15

Conditions for access and for searches by designated courts

1. Access to and searches of bank account information in accordance with Article 14 shall be performed only on a case-by-case basis by the staff of each designated court that have been specifically appointed and authorised to perform those tasks.

2. Member States shall ensure that:

   (a) the staff of the designated courts maintain high professional standards of confidentiality and data protection, and that they are of high integrity and are appropriately skilled;

   (b) technical and organisational measures are in place to ensure the security of the data to high technological standards for the purposes of the exercise by designated courts of the power to access and search bank account information in accordance with Article 14.

Article 16

Monitoring access and searches by designated courts

1. Member States shall provide that the authorities operating the centralised bank account registries ensure that logs are kept for each time a designated court accesses and searches bank account information. The logs shall include, in particular, the following:

   (a) the case reference number;

   (b) the date and time of the query or search;

   (c) the type of data used to launch the query or search;

   (d) the unique identifier of the results;

   (e) the name of the designated court consulting the registry;

   (f) the unique user identifier of the staff member of the designated court who made the query or performed the search and, where applicable, of the judge who ordered the query or search and, as far as possible, the unique user identifier of the recipient of the results of the query or search.

2. The authorities operating the centralised bank account registries shall check the logs referred to in paragraph 1 regularly.

3. The logs referred to in paragraph 1 shall be used only for the monitoring of compliance with this Directive and obligations stemming from the applicable Union legal instruments on data protection. The monitoring shall include verifying the admissibility of a request and the lawfulness of personal data processing, and whether the integrity and confidentiality of personal data is ensured. The logs shall be protected by appropriate measures against unauthorised access and shall be erased five years after their creation, unless they are required for monitoring procedures that are ongoing.

Chapter 2
Access by insolvency practitioners to beneficial ownership information

Article 17

Access by insolvency practitioners to beneficial ownership information

1. Member States shall ensure that insolvency practitioners, when identifying and tracing assets relevant for the insolvency proceedings for which they are appointed, have timely access to the information referred to in Article 30(5), second subparagraph, and in Article 31(4), second subparagraph, of Directive (EU) 2015/849 which is held in the beneficial ownership registers set up in the Member States and is accessible through the system of interconnection of beneficial ownership registers set up in accordance with Article 30(10) and Article 31(9) of Directive (EU) 2015/849.

2. Access to the information by the insolvency practitioners in accordance with paragraph 1 of this Article shall constitute a legitimate interest, whenever it is necessary for identifying and tracing assets belonging to the insolvency estate of the debtor in ongoing insolvency proceedings and is limited to the following information:

   (a) the name, the month, the year of birth, the country of residence and the nationality of the legal owner;

   (b) the nature and the extent of the beneficial interest held.

Chapter 3
Access by insolvency practitioners to national asset registers

Article 18

Access by insolvency practitioners to national asset registers

1. Member States shall ensure that insolvency practitioners, regardless of the Member State where they have been appointed, have direct and expeditious access to the national asset registers listed in the Annex located in their territory, where available.

2. With respect to access to the national asset registers listed in the Annex, every Member State shall ensure that the insolvency practitioners appointed in another Member State are not subject to access conditions that are *de jure* or *de facto* less favourable than the conditions granted to the insolvency practitioners appointed in that Member State.

Title IV
PRE-PACK PROCEEDINGS

Chapter 1
General provisions

Article 19

Pre-pack proceedings

1. Member States shall ensure that pre-pack proceedings are composed of the following two consecutive phases

   (a) the preparation phase, which aims at finding an appropriate buyer for the debtor's business or part thereof;

   (b) the liquidation phase, which aims at approving and executing the sale of the debtor's business or part thereof and at distributing the proceeds to the creditors.

2. Pre-pack proceedings shall comply with the conditions set out in this Title. As regards all other matters, including the ranking of claims and the rules on distribution of proceeds, Member States shall apply national provisions on winding-up proceedings, provided that they are compatible with Union law, including the rules laid down in this Title.

Article 20

Relationship with other Union legal acts

1. The liquidation phase referred to in Article 19, paragraph 1, shall be considered to be an insolvency proceeding as defined in Article 2, point (4), of Regulation (EU) 2015/848.

   Monitors referred to in Article 22 may be considered to be insolvency practitioners as defined in Article 2, point (5), of Regulation (EU) 2015/848.

2. For the purposes of Article 5(1) of Council Directive 2001/23/EC[40], 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.

Article 21

Jurisdiction in pre-pack proceedings

The court having jurisdiction in pre-pack proceedings shall have exclusive jurisdiction in matters relating to the scope and effects of the sale of the debtor's business or a part thereof in pre-pack proceedings on the debts and liabilities, as referred to in Article 28

[40] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

Chapter 2
Preparation Phase

Article 22

The monitor

1. Member States shall provide that, upon request of the debtor, the court appoints a monitor.

   The appointment of the monitor shall start the preparation phase referred to in Article 19, paragraph 1.

2. Member States shall ensure that the monitor:

   (a) documents and reports each step of the sale process;

   (b) justifies why it considers that the sale process is competitive, transparent, fair and meets market standards;

   (c) recommends the best bidder as the pre-pack acquirer, in accordance with Article 30;

   (d) states whether it considers that the best bid does not constitute a manifest breach of the best-interest-of-creditors test.

   Actions by the monitor listed in the first subparagraph shall be done in writing, be made available in digital format and in a timely manner to all parties involved in the preparation phase.

3. Member States shall ensure that only those persons who fulfil both of the following conditions can be appointed as monitor:

   (a) they satisfy the eligibility criteria applicable to insolvency practitioners in the Member State where the pre-pack proceedings are opened;

   (b) they may be actually appointed as insolvency practitioners in the subsequent liquidation phase.

4. Member States shall ensure that, in the course of the preparation phase, the debtor remains in control of its assets and the day-to-day operation of the business.

5. Member States shall ensure that the remuneration of the monitor is paid:

   (a) by the debtor where no subsequent liquidation phase ensues;

   (b) by the insolvency estate as a preferential administrative expense where the liquidation phase ensues.

Article 23

Stay of individual enforcement actions

Member States shall ensure that during the preparation phase, where the debtor is in a situation of likelihood of insolvency or is insolvent in accordance with national law, the debtor can benefit from a stay of individual enforcement actions in accordance with Articles 6 and 7 of Directive (EU) 2019/1023, where it facilitates the seamless and effective roll-out of the pre-pack proceedings. The monitor shall be heard prior to the decision on the stay of individual enforcement actions.

Article 24

Principles applicable to the sale process

1. Member States shall ensure that the sale process carried out during the preparation phase is competitive, transparent, fair and meets market standards.

2. Where the sale process only produces one binding offer, that offer shall be deemed to reflect the business market price.

3. Member States may depart from paragraph 1 only where the court runs a public auction in the liquidation phase in accordance with Article 26. In this case, Article 22(2), point (b) shall not apply.

Chapter 3
Liquidation Phase

Article 25

Appointment of the insolvency practitioner

Member States shall ensure that, when the liquidation phase is opened, the court appoints the monitor referred to in Article 22 as insolvency practitioner.

Article 26

Authorisation of the sale of the debtor's business or part thereof

1. Member States shall ensure that, when the liquidation phase is opened, the court authorises the sale of the debtor's business or part thereof to the acquirer proposed by the monitor, provided that the latter has issued an opinion confirming that the sale process run during the preparation phase complied with the requirements laid down in Article 22(2) and (3), and Article 24(1) and (2).

   The court shall not authorise the sale where the requirements laid down in Article 22(2) and (3) and Article 24(1) and (2) are not met. Member States shall ensure that, in the latter case, the court continues with the insolvency proceedings.

2. In case Member States apply Article 24(3), the public auction referred to in that provision shall last no longer than four weeks and shall be initiated within two weeks as of the opening of the liquidation phase. The offer selected by the monitor shall be used as the initial bid in the public auction. Member States shall ensure that the protections granted to the initial bidder in the preparation phase, such as expense reimbursement or break-up fees, are commensurate and proportionate, and do not deter potentially interested parties from bidding in the liquidation phase.

Article 27

Assignment or termination of executory contracts

1. Member States shall ensure that the acquirer of the debtor's business or part thereof is assigned the executory contracts which are necessary for the continuation of the debtor's business and the suspension of which would lead to a business standstill. The assignment shall not require the consent of the debtor's counterparty or counterparties.

The first subparagraph shall not apply if the acquirer of the debtor's business or part thereof is a competitor to the debtor's counterparty or counterparties.

2. Member States shall ensure that the court may decide to terminate the executory contracts referred to in paragraph 1, first subparagraph, provided that one of the following conditions applies:

(a) the termination is in the interest of the debtor's business or part thereof;

(b) the executory contract contains public service obligations for which the counterparty is a public authority and the acquirer of the debtor's business or part thereof does not meet the technical and legal obligations to carry out the services provided for in such contract.

Point (a) of the first subparagraph shall not apply to executory contracts relating to licenses of intellectual and industrial property rights.

3. The law applicable to the assignment or to the termination of executory contracts shall be the law of the Member State where the liquidation phase has been opened.

Article 28

Debts and liabilities of the business acquired via the pre-pack proceedings

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.

Article 29

Specific rules on the suspensive effects of appeals

1. Member States shall ensure that appeals against decisions of the court relating to the authorisation or execution of the sale of the debtor's business or part thereof may have suspensive effects only subject to the provision by the appellant of a security that is adequate to cover the potential damages caused by the stay of the realisation of the sale.

2. Member States shall ensure that the court hearing the appeal has discretion to exempt a natural person appellant, totally or partially, from the provision of a security if it considers such exemption appropriate in light of the circumstances of the given case.

Chapter 4
Provisions relevant to both phases of the pre-pack proceedings

Article 30

Criteria to select the best offer

Member States shall ensure that the criteria to select the best bid in the pre-pack proceedings are the same as the criteria used to select between competing offers in winding-up proceedings.

Article 31

Civil liability of the monitor and of the insolvency practitioner

Member States shall ensure that the monitor and the insolvency practitioner are liable for the damages that their failure to comply with their obligations under this Title causes to creditors and third parties affected by the pre-pack proceedings.

Article 32

Parties closely related to the debtor in the sale process

1. Member States shall ensure that parties closely related to the debtor are eligible to acquire the debtor's business or part thereof, provided that all of the following conditions are met:

   (a) they disclose in a timely manner to the monitor and to the court their relation to the debtor;

   (b) other parties to the sale process receive adequate information on the existence of parties closely related to the debtor and their relation to the latter;

   (c) parties not closely related to the debtor are granted sufficient time to make an offer.

   Member States may provide that where it is proved that the disclosure duty referred to in the first subparagraph, point (a), was breached, the court revokes the benefits referred to in Article 28.

2. Where the offer made by a party closely related to the debtor is the only existing offer, Member States shall introduce additional safeguards for the authorisation and execution of the sale of the debtor's business or part thereof. These safeguards shall at least include the duty for the monitor and the insolvency practitioner to reject the offer from the party closely related to the debtor if the offer does not satisfy the best-interest-of-creditors test.

Article 33

Measures to maximize the value of the debtor's business or part thereof

1. Where interim financing is needed, Member States shall ensure that:

   (a) the monitor or the insolvency practitioner takes the necessary steps to obtain interim financing at the lowest possible cost;

   (b) grantors of interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims;

   (c) security interests over the sale proceeds may be granted to providers of interim financing in order to secure reimbursement;

   (d) interim financing is eligible to be set-off against the price to be disbursed under the adjudicated offer, when provided by interested bidders.

2. Member States shall ensure that no pre-emption rights are conceded to bidders.

3. Member States shall ensure that, where security interests encumber the business subject to the pre-pack proceedings, creditors who are the beneficiaries of those security interests may offset their claims in their bid only provided that the value of those claims is significantly below market value of the business.

Article 34

Protection of the interests of the creditors

1. Member States shall ensure that creditors as well as holders of equity of the debtor's business have the right to be heard by the court before the authorisation or the execution of the sale of the debtor's business or part thereof.

   Member States shall lay down detailed rules in order to ensure the effectiveness of the right to be heard under the first subparagraph.

2. By way of derogation from paragraph 1, Member States may by law not grant the right to be heard to:

   (a) the creditors or holders of equity who would not receive any payment or keep any interest according to the normal ranking of liquidation priorities under national law;

   (b) the creditors of executory contracts whose claims against the debtor arose before the authorisation of the sale of the debtor's business or part thereof and are supposed to be paid in full under the terms of the pre-pack offer.

3. Member States shall ensure that security interests are released in pre-pack proceedings under the same requirements that would apply in winding-up proceedings.

4. Member States in which consent from holders of secured claims is required in winding-up proceedings for the release of security interests may depart from requiring such consent, provided that the security interests relate to assets that are necessary for the continuation of the day-to-day operations of the debtor's business or part thereof and one of the following conditions is fulfilled:

   (a) creditors of secured claims fail to prove that the pre-pack offer does not satisfy the best-interest-of-creditors test;

   (b) creditors of secured claims have not filed (directly or through a third party) an alternative binding acquisition offer that allows the insolvency estate to obtain a better recovery than with the proposed pre-pack offer.

Article 35

Impact of competition law procedures on the timing or the successful outcome of the bid

1. Member States shall ensure that, where there is an appreciable risk of a delay ensuing from a procedure based on competition law or of a negative decision by a competition authority in relation to an offer made in the course of the preparation phase, the monitor shall facilitate the presentation of alternative bids.

2. Member States shall ensure that the monitor may receive information on the applicable competition law procedures and their outcomes that may affect the timing or the successful outcome of the bid, in particular through the disclosure of information by the bidders or the provision of a waiver to exchange information with competition authorities, where applicable. In that regard, the monitor shall be made subject to a duty of full confidentiality.

3. Member States shall ensure that, where an offer entails an appreciable risk of a delay as referred to in paragraph 1, that offer may be disregarded, provided that both of the following conditions apply:

(a) such offer is not the only existing offer;

(b) the delay in the conclusion of the pre-pack business sale with the bidder concerned would result in a damage for the debtor's business or part thereof.

Title V
DIRECTORS' DUTY TO REQUEST THE OPENING OF INSOLVENCY PROCEEDINGS AND CIVIL LIABILITY

Article 36

Duty to request the opening of insolvency proceedings

Member States shall ensure that, where a legal entity becomes insolvent, its directors are obliged to submit a request for the opening of insolvency proceedings with the court no later than 3 months after the directors became aware or can reasonably be expected to have been aware that the legal entity is insolvent.

Article 37

Directors' civil liability

1. Member States shall ensure that the insolvent legal entity's directors are liable for damages incurred by creditors as a result of their failure to comply with the obligation laid down in Article 36.

2. Paragraph 1 shall be without prejudice to national rules on civil liability for the breach of the duty of directors to submit a request for the opening of insolvency proceedings as set out in Article 36 that are stricter towards directors.

Title VI
WINDING-UP OF INSOLVENT MICROENTERPRISES

Chapter 1
General rules

Article 38

Rules on winding-up of microenterprises

1. Member States shall ensure that microenterprises, when insolvent, have access to simplified winding-up proceedings that comply with the provisions laid down in this Title.

2. A microenterprise shall be deemed insolvent for the purposes of simplified winding-up proceedings when it is generally unable to pay its debts as they mature. Member States shall set out the conditions under which a microenterprise is deemed to be generally unable to pay its debts as they mature and ensure that these conditions are clear, simple and easily ascertainable by the microenterprise concerned.

3. The opening and conduct of simplified winding-up proceedings may not be denied on the ground that the debtor has no assets or its assets are not sufficient to cover the costs of the simplified winding-up proceedings.

4. Member States shall ensure that the costs of the simplified winding-up proceedings are covered in the situations set out in paragraph 3.

Article 39

Insolvency practitioner

Member States shall ensure that in simplified winding-up proceedings an insolvency practitioner may only be appointed if both of the following conditions are met:

(a) the debtor, a creditor or a group of creditors requests such an appointment;

(b) the costs of the intervention of the insolvency practitioner can be funded by the insolvency estate or by the party that requested the appointment.

Article 40

Means of communication

Member States shall ensure that in simplified winding-up proceedings 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.

Chapter 2
Opening of simplified winding-up proceedings

Article 41

Request for the opening of simplified winding-up proceedings

1. Member States shall ensure that insolvent microenterprises can submit a request for the opening of simplified winding-up proceedings to a competent authority.

2. Member States shall ensure that any creditor of an insolvent microenterprise can submit a request for the opening of simplified winding-up proceedings against the microenterprise to a competent authority. The microenterprise concerned shall be given the opportunity to respond to the request, by contesting or consenting to it.

3. Member States shall ensure that microenterprises can submit a request for the opening of simplified winding-up proceedings using a standard form.

4. The standard form referred to in paragraph 3 shall allow for the inclusion, among others, of the following information:

(a) if the microenterprise is a legal person, the debtor’s name, registration number, registered office or, if different, postal address;

(b) if the microenterprise is an entrepreneur, the debtor’s name, registration number, if any, and postal address or, where the address is protected, the debtor's place and date of birth;

(c) a list of the assets of the microenterprise;

(d) name, address or other contact details of creditors of the microenterprise, as known to the microenterprise at the time of the submission of the request,

(e) the list of the claims against the microenterprise and, for each claim, its amount specifying the principal and, where applicable, interest and the date on which it arose and the date on which it became due, if different;

(f) if security in rem or a reservation of title is alleged in respect of a certain claim and, if so, what assets are covered by the security interest.

5. The Commission shall establish the standard form referred to in paragraph 3 by way of implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 69(2)

6. Member States shall ensure that when the request for opening simplified winding-up proceedings is submitted by a creditor, and the microenterprise expressed its consent to the opening of the proceedings, the microenterprise is required to submit the information listed in paragraph 4 together with the response referred to in paragraph 2 of this Article, where available.

7. Member States shall ensure that when the request for opening simplified winding-up proceedings is submitted by a creditor and the competent authority opens such proceedings despite the microenterprise contesting or not responding to the request the microenterprise is required to submit the information listed in paragraph 4 of this Article no later than two weeks following the receipt of the notice of opening.

Article 42

Decision on the request for the opening of simplified winding-up proceedings

1. Member States shall ensure that the competent authority takes a decision on the request for the opening of simplified winding-up proceedings no later than two weeks after receiving the request.

2. The opening of simplified winding-up proceedings may be refused only if one or more of the following conditions is fulfilled:

(a) the debtor is not a microenterprise;

(b) the debtor is not insolvent pursuant to Article 38(2) of this Directive;

(c) the competent authority where the request was submitted has no jurisdiction over the case;

(d) the Member State where the request was submitted has no international jurisdiction over the case.

3. Member States shall ensure that the microenterprise or any creditor of the microenterprise may challenge before a court the decision on the request for the opening of simplified winding-up proceedings. The challenge has no suspensive effect on the opening of simplified winding-up proceedings and shall be dealt with promptly by the court.

Article 43

Debtor in possession

1. Member States shall ensure that, subject to the conditions laid down in paragraphs 2, 3 and 4, debtors accessing simplified winding-up proceedings remain in control of their assets and the day-to-day operation of the business.

2. Member States shall ensure that, where an insolvency practitioner is appointed, the competent authority specifies in the decision on the appointment whether the rights and duties to manage and dispose of the debtor's assets are transferred to the insolvency practitioner.

3. Member States shall specify the circumstances in which the competent authority may, exceptionally, decide to remove the debtor's right to manage and dispose of its assets. Such a decision must be based on a case-by-case assessment in view of all relevant elements of law and facts.

4. Member States shall ensure that, where the debtor no longer holds the right to manage and dispose of its assets and no insolvency practitioner is appointed, one of the following applies:

   (a) any decision of the debtor to that effect becomes subject to the approval of the competent authority, or

   (b) the competent authority entrusts the right to manage and dispose of the assets of the debtor to a creditor.

Article 44

Stay of individual enforcement actions

1. Member States shall ensure that debtors benefit from a stay of individual enforcement actions upon the decision of the competent authority to open simplified winding-up proceedings and until the closure of that proceedings.

2. Member States may provide that the competent authority excludes, upon request by the debtor or a creditor, a claim from the scope of the stay of individual enforcement actions where both of the following conditions are fulfilled:

   (a) the enforcement is not likely to jeopardise the legitimate expectations of the general body of creditors and;

   (b) the stay would unfairly prejudice the creditor of that claim.

Article 45

Publicity of the opening of simplified winding-up proceedings

1. Member States shall ensure that the information on the opening of simplified winding-up proceedings is published in the insolvency register referred to in Article 24 of Regulation (EU) 2015/848, as soon as possible after the opening.

2. Member States shall ensure that the competent authority immediately informs the debtor and all known creditors, by individual notices, of the opening of simplified winding-up proceedings.

   The notice shall include, in particular:

   (a) the list of claims against the debtor as indicated by the debtor;

   (b) an invitation to the creditor to lodge any claims not included in the list referred to in point (a) or to rectify any incorrect statement on those claims no later than 30 days upon the receipt of the notice;

(c) a statement to the effect that, without further action by the creditor, the claims included in the list referred to in point (a) will be considered as lodged by the creditor concerned.

Chapter 3
List of claims and establishment of the insolvency estate

Article 46

Lodgement and admission of claims

1. Member States shall ensure that the claims against the debtor are considered as lodged without any further action from the creditors concerned, where those claims are indicated by the debtor in one of the following submissions:

   (a) in its request for the opening of simplified winding-up proceedings;

   (b) in its response to the request for the opening of such proceedings submitted by a creditor;

   (c) in its submission pursuant to Article 41(7).

2. Member States shall ensure that any creditor may lodge claims not contained in the submissions referred to in paragraph 1 or make statements of objection or raise concern on claims included in one of that submissions, within 30 days from the publication of the date of the opening of simplified winding-up proceedings in the insolvency register or, in case of a known creditor, of the receipt of the individual notice referred to in Article 45 whichever is the latest.

3. Member States shall ensure that, in the absence of any objection or concern communicated by a creditor within the time period indicated in paragraph 2, a claim included in the submissions referred to in paragraph 1 is deemed to be undisputed and shall be definitively admitted as stated therein.

4. Member States shall ensure that the competent authority or, where appointed, the insolvency practitioner may admit or deny admission of claims lodged by a creditor, in addition to the claims referred to in paragraph 1, in accordance with paragraph 2 and the appropriate criteria defined by national law.

5. Member States shall ensure that the disputed claims are dealt with promptly either by the competent authority or by a court. The competent authority may decide to continue the simplified winding-up proceedings with respect to undisputed claims.

Article 47

Avoidance actions

Member States shall ensure that the rules on avoidance actions apply as follows in simplified winding-up proceedings:

(a) the pursuit and enforcement of avoidance actions shall not be mandatory, but shall be left to the discretion of creditors or, when applicable, of the insolvency practitioner;

(b) any decision by creditors not to commence avoidance actions shall not affect the liability of the debtor under civil or criminal law, where it is later

discovered that the information communicated by the debtor about assets or liabilities was concealed or forged;

(c) the competent authority may convert simplified winding-up proceedings into standard insolvency proceedings, where the conduct of avoidance proceedings under simplified winding-up proceedings would not be possible due to the significance of the claims subject to avoidance proceedings in relation to the value of the insolvency estate, and due to the anticipated length of avoidance proceedings.

Article 48

Establishment of the insolvency estate

1. Member States shall ensure that the competent authority or, where appointed, the insolvency practitioner, determines the final list of assets that constitute the insolvency estate, on the basis of the list of assets submitted by the debtor as referred to Article 41(4), point (c) and of the relevant additional information received thereafter.

2. The assets of the insolvency estate shall include assets in the possession of the debtor at the time of the opening of simplified winding-up proceedings, assets acquired after the submission of the request for opening of such proceedings and assets recovered through avoidance actions or other actions.

3. Member States shall ensure that, where the debtor is an entrepreneur, the competent authority or, if appointed, the insolvency practitioner specifies which assets are excluded from the insolvency estate and can therefore be retained by the debtor.

Chapter 4
Realisation of the assets and distribution of the proceeds

Article 49

Decision on the procedure to be used

1. Member States shall ensure that in simplified winding-up proceedings once the insolvency estate has been established and the list of claims against the debtor has been determined, the competent authority:

(a) proceeds with the realisation of the assets and the distribution of the proceeds; or

(b) takes a decision on the closure of the simplified winding-up proceedings without any realisation of the assets, in accordance with paragraph 2.

2. Member States shall ensure that the competent authority can take a decision on the immediate closure of the simplified winding-up proceedings without any realisation of the assets, only if any of the following conditions is fulfilled:

(a) there are no assets in the insolvency estate;

(b) the assets of the insolvency estate are of such a low value that it would not justify the costs or time of their sale and of the distribution of proceeds;

(c) the apparent value of encumbered assets is lower than the amount owed to the secured creditor(s) and the competent authority considers it justified to allow those secured creditor(s) to take over the asset(s).

3. Member States shall ensure that, where the competent authority proceeds with the realisation of the debtor's assets as referred to in paragraph 1, point (a), the competent authority also specifies the means of realisation of the assets. Other means than the sale of the debtor's assets through an electronic public auction may only be selected, if their use is deemed more appropriate in light of the nature of the assets or the circumstances of the proceedings.

Article 50

Electronic auction systems for the sale of the assets of the debtor

1. Member States shall ensure that one or several electronic auction platforms are established and maintained in their territory for the purpose of the sale of the assets of the insolvency estate in simplified winding-up proceedings.

   Member States may set out that for the purpose of the sale of the debtor's assets users may also place bids for the purchase of the debtor's business as a going concern.

2. Member States shall ensure that the electronic auction platforms, as referred to in paragraph 1, are used whenever the debtor's business or assets subject to simplified winding-up proceedings are realised through auction.

3. Member States may extend the use of the electronic auction systems, as referred to in paragraph 1, to the sale of the debtor's business or assets that are subject to other types of insolvency proceedings opened in their territory.

4. Member States shall ensure that the electronic auction platforms, as referred to in paragraph 1, are accessible by all natural and legal persons with domicile or place of registration in their territory or in the territory of another Member State. Access to the auction system may be subject to electronic identification of the user, in which case persons with domicile or place of registration in another Member State shall be able to use their national electronic identification schemes, in accordance with Regulation (EU) No 910/2014[41]

Article 51

Interconnection of the electronic auction systems

1. The Commission shall establish a system for the interconnection of the national electronic auction systems as referred to in Article 50 by means of implementing acts. The system shall be composed of national electronic auction systems interconnected via the European e-Justice Portal, which shall serve as a central electronic access point in the system. The system shall contain in all the official languages of the Union information on all auction processes announced in national electronic auction platforms, enable the search among these auction processes and

[41] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73).

provide hyperlinks leading to the pages of the national systems where offers may be directly submitted.

2. The Commission shall lay down by means of implementing acts technical specifications and procedures necessary to provide for the interconnection of Member States' national electronic auction systems, setting out:

(a) the technical specification or specifications defining the methods of communication and information exchange by electronic means on the basis of the established interface specification for the system of interconnection of the electronic auction systems;

(b) the technical measures ensuring the minimum information technology security standards for communication and distribution of information within the system of interconnection of electronic auction systems;

(c) the minimum set of information that shall be made accessible through the central platform;

(d) the minimum criteria for the presentation of announced auction processes via the European e-Justice Portal;

(e) the minimum criteria for the search of announced auction processes via the European e-Justice Portal;

(f) minimum criteria for guiding the users to the platform of the national auction system of the Member State where they may submit their offers directly in the announced auction processes;

(g) the means and the technical conditions of availability of services provided by the system of interconnection;

(h) the use of the European unique identifier referred to in Article 16(1) of Directive (EU) 2017/1132[42],

(i) specification of which personal data can be accessed;

(j) data protection safeguards.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 69(2), by [*one year after the transposition deadline*].

Article 52

Costs of establishing and interconnecting electronic auction systems

1. The establishment, maintenance and future development of the system of interconnection of electronic auction systems as referred to in Article 50 shall be financed from the general budget of the Union.

2. Each Member State shall bear the costs of establishing and adjusting its national electronic auction systems to make them interoperable with the European e-Justice Portal, as well as the costs of administering, operating and maintaining those systems. This shall be without prejudice to the possibility to apply for grants to support such activities under the Union's financial programmes.

[42] Article 16(1) of Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law

Article 53

Responsibilities of the Commission in connection with the processing of personal data in the system of interconnection of electronic auction platforms

1. The Commission shall exercise the responsibilities of controller pursuant to Article 3(8) of Regulation (EU) 2018/1725 in accordance with its respective responsibilities defined in this Article.

2. The Commission shall define the necessary policies and apply the necessary technical solutions to fulfil its responsibilities within the scope of the function of controller.

3. The Commission shall implement the technical measures required to ensure the security of personal data while in transit, in particular the confidentiality and integrity of any transmission to and from the European e-Justice Portal.

4. With regard to the information from the interconnected national auction systems, no personal data relating to data subjects shall be stored in the European e-Justice Portal. All such data shall be stored in the national auction systems operated by the Member States or other bodies.

Article 54

Sale of the assets by electronic auction

1. Member States shall ensure that the electronic auction of assets of the insolvency estate in simplified winding-up proceedings is announced in due time in advance on the electronic auction platform referred to in Article 50.

2. Member States shall ensure that the competent authority or, where relevant, the insolvency practitioner, informs through individual notices all known creditors on the object, time and date of the electronic auction, as well as on the requirements to participate therein.

3. Member States shall ensure that any interested person, including the existing shareholders or directors of the debtor, are allowed to participate in the electronic auction and bid.

4. If there are bids both on the acquisition of the debtor's business as a going concern and on the individual assets of the insolvency estate, creditors shall decide which of the alternatives they prefer.

Article 55

Decision on the closure of the simplified winding-up proceedings

1. Member States shall ensure that after the distribution of proceeds of the sale of the debtor's business or assets, the competent authority takes a decision on the closure of the simplified winding-up proceedings no later than two weeks after the distribution of proceeds has been completed.

2. Member States shall ensure that the decision on the closure of the simplified winding-up proceedings includes a specification of the time period leading to the discharge of the entrepreneur debtor or of those founders, owners or members of an unlimited liability microenterprise debtor who are personally liable for the debts of the debtor.

Chapter 5
Discharge of entrepreneurs in simplified winding-up proceedings

Article 56

Access to discharge

Member States shall ensure that in simplified winding-up proceedings entrepreneur debtors, as well as those founders, owners or members of an unlimited liability microenterprise debtor who are personally liable for the debts of the microenterprise are fully discharged from their debts in accordance with Title III of Directive (EU) 2019/1023.

Article 57

Treatment of personal guarantees provided for business-related debts

Member States shall ensure that where insolvency proceedings or individual enforcement proceedings have been brought over the personal guarantee provided for the business needs of a microenterprise that is debtor in simplified winding-up proceedings against a guarantor who, in case the microenterprise concerned is a legal person, is a founder, owner or member of that legal person, or, in case the microenterprise concerned is an entrepreneur, a family member of that entrepreneur, the proceedings on the personal guarantee are either coordinated or consolidated with the simplified winding-up proceedings.

Title VII
CREDITORS' COMMITTEE

Chapter 1
Establishment and members of the creditors’ committee

Article 58

Establishment of the creditors' committee

1. Member States shall ensure that a creditors’ committee is established only if the general meeting of creditors so decides.

2. By way of derogation from paragraph (1) Member States may provide that, before the opening of insolvency proceedings, the creditors’ committee can be established as of the submission of a request for the opening of insolvency proceedings where one or more creditors submit a request to the court for the establishment of such committee.

   Member States shall ensure that the first general meeting of creditors decides on the continuation and the composition of the creditors’ committee established in accordance with subparagraph 1.

3. Member States may exclude in national law the possibility to establish a creditors’ committee in insolvency proceedings, when the overall costs of the involvement of such a committee are not justified in view of the low economic relevance of the insolvency estate, of the low number of creditors or the circumstance that the debtor is a microenterprise.

Article 59

Appointment of the members of the creditors' committee

1. Member States shall ensure that the members of the creditors' committee are appointed either at the general meeting of creditors or by decision of the court, within 30 days from the date of the opening of the proceedings as referred to in Article 24(2), point (a) of Regulation (EU) 2015/848.

2. Where the members of the creditors' committee are appointed at the general meeting of creditors, Member States shall ensure that the court certifies the appointment within 5 days from the date of the communication of the appointment to the court.

3. Member States shall ensure that the appointed members of the creditors' committee fairly reflect the different interests of creditors or groups thereof.

4. Member States shall ensure that creditors whose claims have only been provisionally admitted and cross-border creditors are also eligible for the appointment to the creditors' committee.

5. Member States shall ensure that any interested party may challenge before the court the appointment of one or more members of the creditors' committee on the ground that the appointment was not done in accordance with applicable law.

Article 60

Duty of creditors as members of the creditors' committee

1. Member States shall ensure that members of the creditors' committee represent solely the interests of the whole body of creditors and act independently of the insolvency practitioner.

   By way of derogation from the previous subparagraph, Member States may maintain national provisions that allow to set up more than one creditors' committee representing different groups of creditors in the same insolvency proceedings. In this case, the members of the creditors' committee represent solely the interests of the creditors who appointed them.

2. The creditors' committee owes the duties to all creditors it represents.

Article 61

Number of members

Member States shall ensure that the number of members composing the creditors' committee is at least 3 and does not exceed 7.

Article 62

Removal of a member and replacement

1. Member States shall lay down rules specifying both the grounds for removal and replacement of members of the creditors' committee and the related procedures. Those rules shall also cater for the situation where members of the creditors' committee resign or are unable to perform the required functions, such as in cases of serious illness or death.

2. Grounds for removal shall at least include fraudulent or grossly negligent conduct, wilful misconduct, or breach of fiduciary duties with respect to the creditors' interests.

Chapter 2
Working methods and function of the creditors' committee

Article 63

Working method of the creditors' committee

1. Member States shall ensure that a creditors' committee lays down a protocol of working methods within 15 working days following the appointment of the members. If the creditors' committee fails to comply with this obligation, the court shall be empowered to lay down the protocol on behalf of the creditors' committee within 15 working days following the expiry of the first 15 working day period. In the first meeting of the creditors' committee, its members shall approve the working methods by simple majority of the present members.

2. That protocol referred to in paragraph (1) shall at least address the following matters:

   (a) eligibility to attend and participate in the creditors' committee's meetings;;

   (b) eligibility to vote and the necessary quorum;

   (c) conflict of interests;

   (d) confidentiality of information.

3. Member States shall ensure that the protocol referred to in paragraph (1) is available to all creditors, the court and the insolvency practitioner.

4. Member States shall ensure that the members of the creditors' committee are given the possibility to participate and vote either in person or via electronic means.

5. Member States shall ensure that members of the creditors' committee may be represented by a party supplied with a power of attorney.

6. The Commission shall establish a standard protocol by way of implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 69(2).

Article 64

Function, rights, duties and powers of the creditors' committee

1. Member States shall ensure that the creditors' committee's function is to ensure that in the conduct of the insolvency proceedings the creditors' interests are protected and individual creditors are involved.

   To that end, Member States shall ensure that the creditors' committee has at least the following rights, duties and powers:

   (a) the right to hear the insolvency practitioner at any time;

   (b) the right to appear and to be heard in insolvency proceedings;

(c) the duty to supervise the insolvency practitioner, including by consulting with the insolvency practitioner and informing the insolvency practitioner of the wishes of creditors;

(d) the power to request relevant and necessary information from the debtor, the court or the insolvency practitioner at any time during insolvency proceedings;

(e) the duty to provide information to the creditors represented by the creditors' committee and the right to receive information from those creditors;

(f) the right to receive notice of and be consulted on matters in which the creditors represented by the creditors' committee have an interest, including the sale of assets outside the ordinary course of business;

(g) the power to request external advice on matters in which the creditors represented by the creditors' committee have an interest.

2. Where Member States entrust the creditors' committee with the power to approve certain decisions or legal acts, they shall clearly specify the matters on which such approval is required.

Article 65

Expenses and remuneration

1. Member States shall specify who bears the expenses incurred by the creditors' committee in exercising its function referred to in Article 64.

2. Where the expenses referred to in paragraph 1 are borne by the insolvency estate, Member States shall ensure that the creditors' committee keeps record of such expenses and the court has the authority to limit unjustified and disproportionate expenses.

3. Where Member States allow members of the creditors' committee to be remunerated and such remuneration is borne by the insolvency estate, they shall ensure that the remuneration is proportionate to the function performed by the members and that the creditors' committee keeps record of it.

Article 66

Liability

Members of a creditors' committee are exempt from individual liability for their actions in their capacity as members of the committee unless they have committed grossly negligent or fraudulent conduct, wilful misconduct, or have breached a fiduciary duty to the creditors they represent.

Article 67

Appeal

1. Where Member States entrust the creditors' committee with the power to approve certain decisions or transactions, they shall also provide for a right to appeal against such an approval.

2. Member States shall ensure that the appeal procedure is efficient and expeditious.

Title VIII
MEASURES ENHANCING TRANSPARENCY OF NATIONAL INSOLVENCY LAWS

Article 68

Key information factsheet

1. Member States shall provide, within the framework of the European e-Justice Portal, a key information factsheet on certain elements of national law on insolvency proceedings.

2. The content of the key information factsheet referred to in paragraph (1) shall be accurate, clear and not misleading and set out the facts in a balanced and fair manner. It shall be consistent with other information on insolvency or bankruptcy law provided within the framework of the European e-Justice Portal in accordance with Article 86 of Regulation (EU) 2015/848.

3. The key information factsheet shall:

   (a) be drawn up and submitted to the Commission in an official language of the Union by [*6 months after the deadline for transposition of this Directive*];

   (b) have a maximum length of five sides of A4-sized paper when printed, using characters of readable size;

   (c) be written in a clear, non-technical and comprehensible language.

4. The key information factsheet shall contain the following sections in the following order:

   (a) the conditions for the opening of insolvency proceedings;

   (b) the rules governing the lodging, verification and admission of claims;

   (c) the rules governing the ranking of creditors' claims and the distribution of proceeds from the realisation of assets ensuing from the insolvency proceedings;

   (d) the average reported length of insolvency proceedings, as referred to in Article 29(1), point (b) of Directive (EU) 2019/1023[43].

5. The section referred to in paragraph (4), point (a)shall contain:

   (a) the list of persons that can request the opening of insolvency proceedings;

   (b) the list of conditions that trigger the opening of insolvency proceedings;

   (c) where and how the request for the opening of insolvency proceedings can be submitted;

   (d) how and when the debtor is notified of the opening of insolvency proceedings.

6. The section referred to in paragraph (4), point (b) shall contain:

   (a) the list of persons that can lodge a claim;

[43] 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

(b) the list of conditions to lodge a claim;

(c) the time limit to lodge a claim;

(d) where to find the form to lodge a claim, when applicable;

(e) how and where to lodge a claim;

(f) how the claim is verified and validated.

7. The section referred to in paragraph (4), point (c) shall contain:

(a) a brief description of how rights and claims of creditors are ranked;

(b) a brief description of how proceeds are distributed.

8. Member States shall update the information referred to in paragraph 4 within a month after the entry into force of the relevant amendments to national law. The key information factsheet shall contain the following statement: 'This key information factsheet is accurate as at [*the date of submission of the information to the Commission or the date of the update*]'.

The Commission shall arrange for that key information factsheet to be translated into English, French and German or, if the key information factsheet is drawn up in one of those languages, into the other two of them, and make it accessible to the public on the European e-Justice Portal under the insolvency/bankruptcy section for each Member State.

9. The Commission shall be empowered to modify the format of the key information factsheet or to extend or reduce the scope of the technical information provided therein by way of implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 69(2)

Title IX
FINAL PROVISIONS

Article 69

Committee

1. The Commission shall be assisted by the Committee on Restructuring and Insolvency (the 'Committee') as referred to in Article 30 of Directive (EU) 2019/1023 of the European Parliament and of the Council. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply

Article 70

Review

By [*5 years after the deadline for transposition of this Directive*], the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application and impact of this Directive.

Article 71

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*2 years from entry into force*] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 72

Entry into force

This Directive shall enter into force on the [...] day following that of its publication in the *Official Journal of the European Union*.

Article 73

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*
[...]	*[...]*

Dutch Restructuring Association.

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