



Council of the
European Union

Brussels, 17 November 2023
(OR. en)

15544/23

LIMITE

JUSTCIV 168
ECOFIN 1190
COMPET 1126
JAI 1493
CODEC 2164

Interinstitutional File:
2022/0408(COD)

NOTE

From:	Presidency
To:	Delegations
No. Cion doc.:	15896/22 + ADD 1 + ADD 2 + ADD 3 + ADD 4
Subject:	Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law - Presidency revised text of Titles I and II

Delegations will find in the Annex a Presidency revised text of Titles I and II of the abovementioned regulation.

Modifications in comparison to the Commission's proposal are indicated in **bold** or ~~striketrough~~.

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 Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

¹ OJ C [...], [...], p. [...]

² OJ C [...], [...], p. [...]

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 Council³ 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. Those 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 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.

³ 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).

- (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~~ **on avoidance actions** legal acts, **including legal transactions**, 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 **insolvency** estate of ~~the a~~ legal act, it is appropriate to ~~refer to the completion of the cause for this~~ **consider that the** detriment ~~as the relevant is caused at the point in time, namely to~~ **of the** perfection of the legal act ~~rather than to~~ **and not at the point in time of** 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).~~ **A legal act should be considered perfected at the latest when it produces its legal effects. On the other hand, where, pursuant to national law, the effects of a legal act are subject to its registration in a public register, it is advisable to consider the legal act to be perfected as soon as the other requirements for the effectiveness of that act have been met, since the registration in a public register is beyond the control of the debtor or of the parties to the legal act concerned.** 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~~ **as broad as possible** to cover any human behaviour with legal effects: **that causes damage or detriment to the insolvency estate from which the claims of creditors could be satisfied in future insolvency proceedings, even if there is no fraudulent purpose, notwithstanding the provisions of other areas of law.** The principle of equal treatment of creditors implies that legal acts ~~should~~ **may** 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. **However, the inclusion of omissions within the scope of avoidance actions is only justified in cases where the debtor deliberately fails to act despite the foreseeable legal consequences of such inaction, and the omission causes a disadvantage to the general body of creditors. Moreover, since the general body of creditors can only expect not to be put in a worse position than it would be in without the detrimental transaction, the decision of the debtor to not enrich the estate by entering into a profitable commercial transaction, cannot be considered as an omission falling within the scope of an avoidance action.**
- (6a) ~~For the same reason~~ **Similarly**, avoidance rules should not be restricted to legal acts performed by the debtor, but should also include legal acts performed by the **debtor's** 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. **Legal acts that pertain to the debtor's personal sphere, such as marriage, adoption of a child, acceptance of an inheritance, should not be subject to avoidance rules.**

(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~~ **may** 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.

(7a)⁴ In the case of due payments made by the debtor, specific circumstances may justify their voidability, such as the creditor's special knowledge of the debtor's situation or the creditor's vicinity to the insolvency, since, as a rule, the principle that whoever collects what is his own does not defraud must be assumed.

Furthermore, in order to facilitate proof of the detrimental nature of a legal act, Member States may provide for presumptions of detriment. Generally, the avoidance action should cover a certain minimum periods prior to the date of the submission of the request for the opening of insolvency proceedings. On principle, the voidability of a legal act should not depend on the time that the court needs to make a decision, pursuant to national law, on the request for opening proceedings, particularly because the period between the submission of the request for opening proceedings and the actual opening requires special legal treatment.

⁴ COMMISSION: We support the Presidency inclusion of Recital 7(a) and understand the need to bring clarity to the operational provisions of the text, while also not being overly prescriptive to how specific processes should be established in national law.

- (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~~ **are voidable or unenforceable** 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~~ **are voidable or unenforceable**. 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 **financing-** 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 Council⁵, 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 **financing-** 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~~ **voidable or unenforceable** in avoidance proceedings is the obligation for the party benefitting from the legal act that has been ~~declared void~~ **voidable or unenforceable** 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.~~ **could be deemed fulfilled by the return of the consideration in kind or, where that is not possible, by the payment of its monetary equivalent. Where the creditor has returned to the insolvency estate what they received under the act that has been deprived of effects, the creditor may have an equal claim on the insolvency estate for compensation. The avoidance actions may be brought against individual successors of the debtor if they acquired the asset while knowing or being supposed to know the circumstances on which the avoidance actions are based.**

⁵ 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).

- (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~~ **voidable or unenforceable** is a party closely related to the debtor. These presumptions should be rebuttable and should aim at reversing the burden of proof to the benefit of the insolvency estate.

[...]

- (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*.

[...]

HAVE ADOPTED THIS DIRECTIVE:

Title I

GENERAL PROVISIONS

Article 1

Subject matter and scope

1. This Directive lays down common rules **in the area of insolvency law** 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. **Titles II to IV and VII of this Directive apply to collective proceedings, including interim proceedings, which are based on national laws relating to insolvency. However, the avoidance action provisions under Title II of this Directive do not apply to proceedings that transpose Title II on preventive restructuring frameworks of Directive 2019/1023.**

3.2. This Directive does not apply to proceedings referred to in paragraph **2** and points (c) and (e) of 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;
- (h) natural persons, **who are not entrepreneurs** ~~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.~~⁶

4. The pre-pack proceedings referred to in paragraph 1, point (c), of this Article apply to debtors who are legal persons. Member States may extend the application of those proceedings to natural persons.

⁶ PRESIDENCY: We cannot include here founders, owners or members of unlimited liability microenterprise debtors who are personally liable for the debts of the debtor, as they are not mentioned in Directive (EU) 2019/1023.

For the discharge of debt, to which this article refers, we must strictly follow the Directive that regulates this discharge of debt. Including these persons affect and introduce new “elements” not included in the Directive. Discharge of debt will apply when possible and according to the conditions laid down in this Directive. We cannot change the definition, scope, or requirements of the mentioned Directive here. We cannot extend the application of this Directive. The term “equity holders” mentioned by the Commission is also mentioned in Directive (EU) 2019/1023 but not regarding the possibility of discharging them of debt.

COMMISSION: We can accept such an amendment of point (h), in order to address the concerns of some MS that this Directive would change Title III of the 2019 Directive on Restructuring and Insolvency. To further clarify the separation between the two instruments, COM would suggest an amendment to the language of Article 56 of this proposal, as follows:

Article 56

Access to discharge

Member States shall ensure that ~~in~~ as a result of the closure of simplified winding-up proceedings entrepreneur debtors, ~~as well as those founders, owners or member equity holders of an unlimited liability microenterprise debtor who are personally liable for the debts of the microenterprise~~ have access to at least one procedure that can lead to a full discharge of debt in accordance ~~are fully discharged from their debts in accordance with Title III of Directive (EU) 2019/1023.~~ Member States shall also ensure that those equity holders of an unlimited liability microenterprise debtor who are personally liable for the debts of the microenterprise shall have access to the same procedures concerning discharge of debt. ~~Add a ft to explain modification on Art 56. To be prepared by COM.~~

5. [Member States may exclude from the scope of this Directive proceedings referred to in paragraph 2 that concern debtors that are financial entities, other than those referred to in paragraph 3, providing financial services that are subject to special arrangements under which the national supervisory or resolution authorities have wide-ranging powers of intervention comparable to those laid down in Union and national law in relation to the financial entities referred to in paragraph 2.]⁷

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 of Directive (EU) 2019/1023;
- (b) ‘court’ means ~~the~~ a 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;

⁷ PRESIDENCY: Introduced at the request of some MS. Clarifications about which kind of financial entities we refer to are needed. We kindly ask MS to clarify it in the written comments.

- (e) ‘beneficial ownership registers’ means national central registers ~~on~~ **holding the** beneficial ownership information referred to in Articles 30(3) and 31(3a) of Directive (EU) 2015/849;
- (f) ‘legal act’ means any human behaviour, ~~including an omission,~~ producing a legal effect;⁸
- (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~~ **under** 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;⁹
- (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;¹⁰

⁸ PRESIDENCY: Following the requests from MS, the Presidency propose to delete “ommissios” in the operative part to provide MS with flexibility, introducing, however, a clarification in the recital 6 so that it is clear that omissions can also be considered legal acts (for avoidance actions) in certain circumstances.

⁹ PRESIDENCY: To be revised once we arrive at this title. The definition must be flexible and consider the specifics of the business environment of each MS. Microenterprises make up more than 90% of all enterprises registered in many MS, as defined in the proposal. Accounting Directive 2013/34/EU might give us an example.

¹⁰ PRESIDENCY: To be revised once we arrive at this title.

- (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;¹¹~~
- ~~(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;¹²~~
- ~~(o m)~~ ‘creditors’ committee’ means a representative body of creditors appointed in accordance with the applicable law on insolvency proceedings **and** with **the** consultative and other powers as ~~specified in~~ **provided for by** that law;
- ~~(p n)~~ ‘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 o)~~ ‘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) for the purposes of Title II, the following persons:**

¹¹ PRESIDENCY: Following the request from MS, the Presidency propose the deletion of this definition. We cannot change the definition, scope, or requirements of the mentioned Directive here. We cannot extend the application of this Directive.

¹² PRESIDENCY: The notion is not used in the text. It is a leftover from an earlier draft version.

- (1) the spouse or partner of the debtor;
- (2) ascendants, descendants, and siblings of the debtor, or of the spouse or partner **of the debtor**, and the spouses or partners of ~~these~~ persons;
- (3) persons living in the household of the debtor;
- (4) persons who ~~are working~~ **work** 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 **external** advisers, accountants or ~~notaries~~ **auditors for whom it is possible to control the debtor's operations or to benefit from the debtor's financial position**;
- (5) legal entities in which the debtor or one of the persons referred to in points ~~(i1)~~ to ~~(iv 4)~~ **(i1)** 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:~~

- ~~(i6)~~ any member of the administrative, management or supervisory bodies of the debtor;
- ~~(ii7)~~ equity holders with a controlling interest in the debtor;
- ~~(iii8)~~ **persons who** perform functions similar to those performed by persons under point ~~(i6)~~;

(iv9) persons ~~which~~ **who** are closely related in accordance with ~~the second~~
~~subparagraph~~ **points (1) to (5)** to the persons listed in points (i 6), (ii 7), and (iii8)
of this subparagraph.

- (ii) **For the purposes of Title IV, the persons listed under point (a) and any other personss, including legal persons, with preferential access to non-public information on the affairs of the debtor.**

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~~ **commencement** 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~~ **are voidable or unenforceable**¹³ under the conditions laid down in Chapter 2 ~~of this Title~~.

Article 5

Relationship to national ~~law provisions~~

This Directive shall not prevent Member States from adopting or maintaining ~~provisions~~ **laws** 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~~ **laws** provide a greater protection ~~of~~ **for** the general body of creditors than those ~~set out~~ **provided for** in Chapters 2 **and 3** ~~of this Title~~.

¹³ PRESIDENCY: Following the discussion in the WP and the written comments, the words “declared void” created problems for many. We propose as an alternative “voidable or unenforceable.”

Chapter 2

Specific conditions for avoidance actions

Article 6

Preferences

1. Member States shall ensure that **detrimental** legal acts benefitting a creditor or a group of creditors by satisfaction, collateralisation, or in any other way ~~can be declared void, are~~ **voidable or unenforceable** if they were perfected:¹⁴
 - (a) within ~~three~~**[x months]** prior¹⁵ to the ~~submission date~~ of the request for the opening of insolvency proceedings, under the condition that the debtor was **[generally]** unable to pay its ~~mature~~ debts **as they fall due**; or
 - (b) after the submission of the request for the opening of insolvency proceedings **and before the opening of the insolvency proceedings.**

Where ~~several persons have~~ **more than one person has** 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), shall commence [x months] prior to the date of the submission of the first admissible request.~~

¹⁴ PRESIDENCY: In this provision, given the comments of some Member States, it is important that, on the one hand, we insist that the act that may be rescinded must be detrimental. On the other hand, given the minimum harmonization intended and that the retroaction period differs from one Member State to another we propose MS to have further discussions on this before decide a specific period. For this debate, we invite MS, when submitting written comments, to provide information about the existing periods in the national legal systems in this regard.

¹⁵ COMMISSION: Given the purpose is to harmonise insolvency preceedings across the EU, and taking account of the principle of minimum harmonisation, the Commission is strongly supportive of including specific numbers in the legal text. A lack of minimum harmonsied periods would be a missed opportunity. The exact numbers can be determined following discussions in Council and the Commision supports an approach to reach compromise numbers in this way, and for the other instances of time periods in this legal text.

2. If a due claim of a creditor was satisfied or secured ~~in the as owed manner~~, Member States shall ensure that ~~the a detrimental legal act can be declared void~~ **is voidable or unenforceable** 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~~ **their** mature debts or that a request for the opening of insolvency proceedings ~~has~~ **had** 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~~ **are not voidable or unenforceable**:

- (a) legal acts performed **[in the normal course of business]** directly against fair consideration to the benefit of the ~~insolvency estate~~ **debtor's assets**;
- (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~~ **they refuse** 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 **or, where relevant, national laws on netting arrangements on financial markets, including close-out netting**.

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~~ **had** been submitted at the moment of endorsing the bill or having it endorsed. ~~This~~ **That** 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 **consideration** or **against** a manifestly inadequate consideration can be ~~declared void~~ **voidable or unenforceable** where they were perfected within ~~a time period of one year~~ **[x months/years]**¹⁶ prior to the submission of the request for the opening of insolvency proceedings or after the submission of such request **and before the opening of the insolvency proceedings**.
2. Paragraph 1 shall not apply to gifts and donations of symbolic value.
3. Where ~~several persons have~~ **more than one person has** 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 **shall start running [x months/years] prior to the date of submission of the first admissible request**.

¹⁶ PRESIDENCY: We propose MS to have further discussions on this before decide a specific period. For this debate, we invite MS, when submitting written comments, to provide information about the existing periods in the national legal systems in this regard.

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~~ **are voidable or unenforceable** where both of the following conditions are met:
 - (a) those acts were perfected either within a ~~time~~**[x months/years]**¹⁷ ~~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 more than one~~ persons ~~have~~ **has** 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),~~ **shall start running from [x years] prior to the date of submission of the first admissible request.**

¹⁷ PRESIDENCY: We propose MS to have further discussions on this before decide a specific period. For this debate, we invite MS, when submitting written comments, to provide information about the existing periods in the national legal systems in this regard.

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~~ **which were voided or deemed unenforceable** pursuant to Chapter 2 ~~of this Title may not~~ **cannot** 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~~ **was voidable or unenforceable is obliged to return the benefits obtained.**

~~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 benefitted 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~~ **are voidable or unenforceable under this Title** against the other party is ~~three years~~ **[x months]**¹⁸ from the date of the opening of insolvency proceedings.

¹⁸ PRESIDENCY: We propose MS to have further discussions on this before decide a specific period. For this debate, we invite MS, when submitting written comments, to provide information about the existing periods in the national legal systems in this regard.

4. Member States shall ensure that a claim to ~~obtain full compensation~~ **the return of the benefits obtained** pursuant to paragraph 2, ~~first subparagraph, may~~ **can** be assigned to a creditor or a third party **within the rules governing the management of the insolvency debtor's estate**.¹⁹
5. Member States shall ensure that the party that has been obliged to ~~compensate~~ **return** the ~~insolvency estate~~ **benefits obtained** pursuant to paragraph 2, first subparagraph, ~~cannot set-off this offset that~~ 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~~ **are voidable or unenforceable**.

Article 10

Consequences for the party ~~which~~ **that** benefitted from the legal act that ~~has been declared void~~ **is voidable or unenforceable**

1. Member States shall ensure that if, and to the extent that, the party ~~which~~ **that** benefitted from the legal act that ~~has been declared void~~ **is voidable or unenforceable** compensates the insolvency estate for the detriment caused by that legal act, any claim of that party ~~which~~ **that** was satisfied with that legal act revives.²⁰

¹⁹ PRESIDENCY: Following MS suggestions we introduce this clarification so that it cannot be interpreted that this represents an exception to the general rules on the disposition of assets of the active estate (we understand that the intention is not to introduce an exception).

²⁰ PRESIDENCY: In line with article 9.2 which states the general, broad consequence of avoidance actions: the return of benefits obtained to ensure that the insolvency estate is not harmed by the legal act. In this regard, the Directive refers only to the general/broad consequence of the avoidance actions; the aim is to be achieved with avoidance actions, leaving to MS all possible options to achieve this objective.

~~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 Articles 9 and 10~~ are enforceable against an **applicable to any** heir or another universal successor of the party ~~which that~~ benefitted from the legal act that ~~has been declared void~~ **voidable or unenforceable**.²¹
2. Member States shall ensure that ~~the rights laid down in Article 9~~ **are** is also enforceable against **applicable to** any individual successor of the other party to the legal act that ~~has been declared void~~ **is voidable or unenforceable** if one of the following conditions is fulfilled:
 - (a) ~~the successor acquired the asset against no or a manifestly inadequate consideration;~~²²

²¹ PRESIDENCY: Amendments introduced to make the text more clear.

²² PRESIDENCY: To make it more proportional because otherwise we are saying that any third acquired/successor can be affected by the avoidance action even when in cases of good faith.

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

~~The~~ **This** 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~~ **that** benefitted from the legal act that ~~has been declared void~~ **is voidable or unenforceable or acquired the asset against no consideration**.²³

Article 12

Relation to other instruments

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

[...]

²³ PRESIDENCY: We focus joint liability on proof of *consilium fraudis*, presuming it in the case of related persons or gratuitous acquisitions. We leave out sales at an undervalued price, which may serve as evidence to prove the *consilium fraudis*. Still, it avoids the insecurity of considering it a reason for liability.