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**PROPOSAL**

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From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	8 December 2022
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2022) 702 final
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL harmonising certain aspects of insolvency law

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Delegations will find attached document COM(2022) 702 final.

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Encl.: COM(2022) 702 final



Brussels, 7.12.2022  
COM(2022) 702 final

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)

{SEC(2022) 434 final} - {SWD(2022) 395 final} - {SWD(2022) 396 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

This initiative, announced in September 2020, is part of the Commission's priority to advance the Capital Markets Union (CMU), a key project to further financial and economic integration in the European Union<sup>1</sup>.

The lack of harmonised insolvency regimes has long been identified as one of the key obstacles to the freedom of capital movement in the EU and to greater integration of the EU's capital markets. In 2015, the European Parliament, the Council, the Commission and the European Central Bank (ECB) jointly identified insolvency law as a key area for achieving a 'true' CMU<sup>2</sup>. This has also been the consistent view of international institutions, such as the International Monetary Fund (IMF) and numerous think tanks. In 2019, the IMF identified insolvency practices as one of 'the three key barriers to greater capital market integration in Europe', alongside transparency and regulatory quality. The ECB has repeatedly stressed the need "to address the major shortcomings and divergence between insolvency frameworks [...] beyond the draft Directive on Insolvency, Restructuring and Second Chance since 'more efficient and harmonised insolvency laws [alongside other measures] can improve certainty for investors, reduce costs and facilitate cross-border investments, while also making risk capital more attractive and accessible to companies<sup>3</sup>."

Insolvency rules are fragmented along national lines. As a result, they deliver different outcomes across Member States, and in particular they have different degrees of efficiency in terms of the time it takes to liquidate a company and the value that can eventually be recovered. In some Member States, this leads to lengthy insolvency procedures and a low average recovery value in liquidation cases. Differences in national regimes also create legal uncertainty as regards the outcomes of insolvency proceedings and lead to higher information and learning costs for cross-border creditors compared to those who only operate domestically.

Outcomes of insolvency procedures differ substantially across Member States, with the average recovery time ranging from 0.6 to 7 years and judicial costs ranging between 0 to above 10%. The average of recovery values of corporate loans in the EU was 40% of the amount outstanding at the time of the default and 34% for small and medium-sized enterprises (SMEs) as of 2018<sup>4</sup>. Low recovery values, long insolvency procedures and high costs for the

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<sup>1</sup> COM/2020/590 final.

<sup>2</sup> Five presidents report ([https://ec.europa.eu/info/publications/five-presidents-report-completing-europes-economic-and-monetary-union\\_en](https://ec.europa.eu/info/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en)), European Parliament resolution of 9 July 2015 on Building a Capital Markets Union (2015/2634(RSP)) and of 8 October 2020 on further development of the Capital Markets Union (CMU) (2020/2036(INI)).

<sup>3</sup> European Central Bank, 'Financial integration in Europe', May 2018, <https://www.ecb.europa.eu/pub/pdf/fie/ecb.financialintegrationineurope201805.en.pdf> and 'Financial Integration and Structure in the Euro Area', April 2022, <https://www.ecb.europa.eu/pub/pdf/fie/ecb.fie202204~4c4f5f572f.en.pdf>.

<sup>4</sup> The data stem from a benchmark exercise conducted by the European Banking Authority. See European Banking Authority, 'Report on the benchmarking of national loan enforcing frameworks', 2020, EBA/REP/2020/29, [https://www.eba.europa.eu/sites/default/documents/files/document\\_library/About%20Us/Missions%20a](https://www.eba.europa.eu/sites/default/documents/files/document_library/About%20Us/Missions%20a)

procedures do not only have an impact on the efficiency of a company's liquidation. They are also a primary consideration for investors or creditors when determining the level of the risk premium they expect to recoup in an investment. The less efficient the insolvency regime is, the higher the premium investors would charge, everything else being constant. A high-risk premium increases the cost of capital for the company and, if the risk is particularly high, dissuades investors from providing credit. This in turn limits the choice of funding available to the company and more generally limits its ability to source affordable funding to expand its operations.

10 to 20 per cent of the 120,000 to 150,000 annual insolvency cases in the EU contained a cross-border provision of credit. Diverging insolvency regimes across the EU represent a particular problem for cross-border investors, who have to potentially consider 27 different insolvency regimes when assessing an investment opportunity outside their home Member State. The playing field is not level, with similar investments in Member States with more efficient insolvency regimes being seen as more attractive than in Member States with less efficient insolvency regimes, thus creating a significant obstacle to the cross-border flow of capital and to the functioning of the single market for capital in the EU. Companies in Member States with more efficient insolvency frameworks are also likely to get access to cheaper funding, putting them at a competitive advantage compared to companies from other Member States. Moreover, divergent insolvency regimes across Member States dissuade investors from considering investments in Member States whose legal systems those investors are less familiar with. This is particularly the case for those investors who lack the resources to assess 27 different insolvency regimes. This reduces the overall potential for cross-border investment in the EU, limiting the depth and breadth of the EU capital markets and undermining the overall success of the CMU project.

The ongoing energy crisis and the limited fiscal space for public subsidies may result in an increase in business exits in the future. More companies may experience conditions where their debt level turns out to be unsustainable. Moreover, the latest economic developments show that the EU economy is still vulnerable to sizeable economic shocks and distress. If the latter were to happen, more efficient and better-aligned insolvency rules in the EU would increase the absorption capacity of such shocks. They would also help limit the negative impact (and costs for investors) of disorderly winding-down operations. In the baseline scenario, insolvency cases will continue to challenge the capacity of judicial systems, but no solutions would be implemented to address the problems of long and inefficient proceedings, lower recovery values and ultimately lower credit provision and structural adjustment in the economy.

The absence of more convergence in insolvency regimes will mean that the level of cross-border investment and cross-border business relationships would not reach its potential.

Action at EU level is needed to substantially reduce the fragmentation of insolvency regimes. It would support the convergence of targeted elements of Member States' insolvency rules

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nd%20tasks/Call%20for%20Advice/2020/Report%20on%20the%20benchmarking%20of%20national%20loan%20enforcement%20frameworks/962022/Report%20on%20the%20benchmarking%20of%20national%20loan%20enforcement%20frameworks.pdf. National insolvency experts, who provided estimates for benchmark scenario used for the World Bank Doing Business insolvency indicators, pointed to a range of 1.5 to 3.5 years for the recovery time and judicial costs between 9 and 15% for EU Member States. Recovery rates in the case of liquidation in an EU Member State varied between 32 and 44 %, with an average for the Member States concerned of 38%.

and create common standards across all Member States, thus facilitating cross-border investment.

Measures at EU level would ensure a level playing field and avoid distortions of cross-border investment decisions caused by lack of information about and differences in the designs of insolvency regimes. This would help to facilitate cross-border investments and competition while protecting the orderly functioning of the single market. Since divergences in insolvency regimes are a key obstacle to cross-border investment, addressing this obstacle is crucial to realising a single market for capital in the EU.

- **Consistency with existing policy provisions in the policy area**

This proposal is fully coherent with other EU pieces of legislation in the policy area, notably the Directive (EU) 2019/1023 of the European Parliament and of the Council<sup>5</sup> and Regulation (EU) 2015/848 of the European Parliament and of the Council<sup>6</sup>, as it addresses problems, which the other existing legislations do not tackle. This EU action therefore addresses a genuine legislative gap.

Directive (EU) 2019/1023 is an instrument of targeted harmonisation, which focused on two specific types of procedure: pre-insolvency procedures; and debt discharge procedures for failed entrepreneurs. Both procedures were new and had been absent from the national insolvency frameworks of the majority of the Member States. Preventive restructuring procedures (Title II of Directive (EU) 2019/1023) are schemes which are available for debtors in financial distress before they become insolvent, i.e. when there is only a likelihood of insolvency. They are based on the fact that there is a much greater chance of saving ailing businesses when tools for restructuring their debts are accessible to them at a very early stage, before they become definitively insolvent. The minimum harmonisation standards of Directive (EU) 2019/1023 on the preventive restructuring frameworks only apply to businesses that are not yet insolvent and pursue the very aim of avoiding insolvency proceedings for businesses that can still be returned to viability. They do not address the situation where a business becomes insolvent and has to undergo insolvency proceedings. Similarly, the minimum standards on the second chance for failed entrepreneurs (Title III of Directive (EU) 2019/1023) do not address the way insolvency proceedings are conducted. They instead relate to the discharge of debts for insolvent entrepreneurs as a consequence of insolvency and could be described as a regulation of post-insolvency effects that, however, does not harmonise insolvency law itself.

Regulation (EU) 2015/848 was adopted on the legal basis for judicial cooperation in civil and commercial matters (Article 81 TFEU)<sup>7</sup>. Regulation (EU) 2015/848 introduced uniform rules on international jurisdiction and applicable law that – for cases of cross-border insolvency – determined in which Member State the insolvency proceedings have to be opened and which law is to be applied. In parallel, there were uniform rules that ensured that the judgments taken by the courts having jurisdiction in these cases are recognized, and if needed, enforced

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<sup>5</sup> 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).

<sup>6</sup> 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).

<sup>7</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

in the territory of all Member States. Regulation EU) 2015/848 has no impact on the content of national insolvency law. It determines the applicable law but does not prescribe any features or minimum standards for that law. Therefore, it does not address the divergences across the Member States' insolvency laws (and the resulting problems and costs).

- **Consistency with other Union policies**

This Proposal is fully coherent with the Commission's priority of advancing the CMU and, in particular, with Action 11 of the CMU Action Plan and the subsequent Commission Communication on the CMU. The CMU Action Plan from 2020<sup>8</sup> announced that the Commission would take a legislative or non-legislative initiative for minimum harmonisation or increased convergence in targeted areas of non-bank corporate insolvency law to make the outcomes of insolvency proceedings more predictable. On 15 September 2021, in her letter of intent<sup>9</sup> addressed to the Parliament and the Presidency of the Council, President Von der Leyen announced an initiative on harmonising certain aspects of substantive law on insolvency proceedings, which has been included in the 2022 Commission work programme<sup>10</sup>. The Commission Communication on the CMU, published in November 2021, announced a forthcoming Directive, possibly complemented by a Commission Recommendation, in the area of corporate insolvency<sup>11</sup>.

The proposal is also fully coherent with the targeted country specific recommendations in the European Semester context to improve the efficiency and speed of national insolvency regimes, which have led to insolvency reforms in some Member States.

The proposal is also coherent with Council Directive 2001/23/EC<sup>12</sup>, as it does not interfere with the principle that employees do not keep their rights when the transfer is undertaken as part of insolvency proceedings. Article 5(1) of Directive 2001/23/EC in particular states that, unless Member States provide otherwise, Articles 3 and 4 on the safeguarding of employees' rights in the case of a transfer of ownership of a company shall not apply where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the transferor's assets and are under the supervision of a competent public authority. The proposal is fully coherent with this provision when regulating 'pre-pack proceedings'<sup>13</sup>. In line with the judgement by the Court of Justice of the European Union in the 'Heiploeg' case<sup>14</sup>, this proposal clarifies in particular that the liquidation phase of pre-pack proceedings must be considered as a bankruptcy or insolvency

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<sup>8</sup> COM(2020) 590 final.

<sup>9</sup> See p. 4: [state\\_of\\_the\\_union\\_2021\\_letter\\_of\\_intent\\_en.pdf](#) (europa.eu).

<sup>10</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission work programme 2022 Making Europe stronger together COM (2021) 645 final cwp2022\_en.pdf (europa.eu)).

<sup>11</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Capital Markets Union - Delivering one year after the Action Plan, COM/2021/720 final, available at EUR-Lex - 52021DC0720 - EN - EUR-Lex (europa.eu).

<sup>12</sup> 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).

<sup>13</sup> In pre-pack proceedings, the debtor's business or part thereof is sold as a going concern under a contract that is negotiated confidentially prior to the commencement of an insolvency proceeding under the supervision of a monitor appointed by a court and followed by a brief insolvency proceeding, in which the pre-negotiated sale is formally authorised and executed.

<sup>14</sup> Judgment of the Court of 28 April 2022 in Case C-237/20 (Federatie Nederlandse Vakbeweging v. Heiploeg Seafood International BV), EU:C:2022:321.

proceeding instituted with a view to the liquidation of the assets of the transferor under the supervision of a competent public authority for the purpose of Article 5(1) of Directive 2001/23/EC.

The proposal is also coherent with the Directive 2004/35/EC of the European Parliament and of the Council<sup>15</sup>, which aims to limit the accumulation of environmental liabilities and to ensure compliance with the ‘polluter pays’ principle. Directive 2004/35/EC obliges Member States to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under Directive 2004/35/EC. These mechanisms aim to ensure that claims will be served even in cases where the debtor becomes insolvent. The proposal does not interfere with those measures under Directive 2004/35/EC. On the contrary, a more efficient insolvency framework would support a speedier and more effective recovery of asset value overall and hence would facilitate the compensation for environmental claims against an insolvent company even without having recourse to financial security instruments, in full consistence with the aims of Directive 2004/35/EC.

Finally, this proposal will help more entrepreneurs benefit from debt discharge, as insolvency procedures against microenterprises will be initiated more easily and conducted in a more efficient manner. This is in line with the objective of the SME relief package announced by President Von der Leyen in September 2022 in her State of the Union speech.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**

The proposal is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU), which allows the adoption of measures for the approximation of national provisions having as their object the establishment and functioning of the internal market.

Insolvency laws ensure the orderly winding down of companies in financial and economic distress. They are considered as one of the key factors in determining the cost of financial investments, as they allow to establish the final recovery value of investment in insolvent companies.

Large differences in the efficiency of national insolvency proceedings create barriers to the free movement of capital and the well-functioning of the internal market, by reducing the attractiveness of cross-border investments due to the limited predictability of the outcome of corporate insolvency proceedings across different Member States and ensuing higher cost of information discovery for cross-border investors. Furthermore, these differences result in large divergences in recovery value for investments in insolvent companies across the EU. The playing field is thus not level in the Union, with similar investments in Member States with more efficient insolvency laws being seen as more attractive than in Member States with less efficient insolvency laws. Companies from Member States with more efficient insolvency laws can benefit from a lower cost of capital than companies from other Member States and hence can benefit in general from an easier access to capital.

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<sup>15</sup> Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ L 143, 30.04.2004, p. 56).

The objective of the proposal is to reduce differences in national insolvency laws and hence address the issue of more inefficient insolvency laws in some Member States, increasing the predictability of insolvency proceedings in general and lowering obstacles to the free movement of capital. By harmonising targeted aspects of insolvency laws, the proposal aims, in particular, to reduce information and learning costs for cross-border investors. More uniform insolvency laws should thus expand the choice of funding available to companies across the Union.

This proposal is not based on Article 81 TFEU, as it does not deal exclusively with situations with cross-border implications. While the key objective of the proposal is to remove in particular barriers to cross-border investment, the proposal seeks the approximation of national provisions that would invariably apply to both companies and entrepreneurs operating in one and several Member States. Hence the proposal would also deal with situations without any cross-border dimension and the use of Article 81 as the legal basis would not be justified.

- **Subsidiarity (for non-exclusive competence)**

The obstacles resulting from widely differing national insolvency regimes hamper the realisation of a single market in the EU more generally and the creation of the CMU in particular, and therefore justify a more unified EU insolvency regulatory framework. However, Member States' different starting points, legal traditions and policy preferences mean that reforms at national level in this area are unlikely to lead to fully converging insolvency systems and thus improve their overall efficiency.

The harmonisation of national insolvency laws can lead to a more homogenous functioning of the EU capital markets, reducing market fragmentation and ensuring better access to corporate financing. Action at EU level is better placed to substantially reduce the fragmentation of national insolvency regimes and ensure convergence of targeted elements of Member States' insolvency rules to an extent that would facilitate cross-border investment across all Member States. Action at EU level would also ensure a level playing field and reduce the risk of distortions to cross-border investment decisions caused by actual differences in insolvency regimes and a lack of information about these differences.

- **Proportionality**

The objective of this proposal 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 the freedom of establishment, which result from differences between national laws and procedures in the area of corporate insolvency. To achieve this objective, this proposal sets out only minimum harmonisation requirements and only in targeted areas of substantive insolvency law which are likely to have the most significant impact on the efficiency and the length of such proceedings.

This proposal leaves Member States sufficient flexibility to adopt measures in the areas outside its scope as well as to lay down additional measures within the areas that are harmonised, provided that these measures are in line with the objective of this proposal. Thus, in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on the European Union, this proposal does not go beyond what is necessary in order to achieve its objectives.



- **Choice of the instrument**

Article 114 TFEU allows the adoption of acts in the form of a Regulation or Directive. The integration of the EU internal market in the area of insolvency laws can be best achieved by the approximation of laws through harmonisation via a Directive, since a Directive respects the different legal cultures and legal systems of Member States in the area of insolvency law and provides for sufficient flexibility in the transposition process to implement common minimum standards in a fashion compatible with those different systems.

A Recommendation would not be able to achieve the desired approximation in this policy area where wide differences enshrined in binding legislation of Member States were identified. At the same time, approximation through a Regulation would not leave sufficient flexibility to Member States to adapt to local conditions and to keep the coherence of procedural insolvency rules with the broader national legal system.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Ex-post evaluations/fitness checks of existing legislation**

Not Applicable

- **Stakeholder consultations**

The Commission has consulted stakeholders throughout the process of preparing this proposal. Among other initiatives, the Commission in particular:

- i) carried out a dedicated open public consultation (18 December 2020 - 16 April 2021);
- ii) consulted the public on an inception impact assessment (11 November 2020 – 9 December 2020);
- iii) held dedicated meetings with Member State experts on 22 March 2022 and on [25] October 2022
- iv) held a dedicated meeting with stakeholders on 8 March 2022.

129 contributions from 17 Member States and from the UK were submitted in response to the online public consultation. One third of the replies were made on behalf of practitioners and professionals with an interest in the field of insolvency (this category includes insolvency practitioners as well as lawyers). Approximately 20% of the responses were submitted by stakeholders in the financial sector, about 12% by stakeholders from the business and trade sector, 7% from social and economic interest organisations and 5.5% from the members of the judiciary (judges). In addition, 10 replies (7.75%) were received from the public authorities of 8 Member States, with 7 of these replies originating at central governmental level.

Stakeholders indicated that the problems created for the internal market by differences in Member States' insolvency frameworks are serious, and that differences in national insolvency frameworks deter cross-border investment and lending. According to stakeholders, these differences affect the functioning of the internal market in particular with regard to: 1) avoidance actions; 2) the tracing and recovery of the assets belonging to the insolvency estate;

3) the duties and liability of directors in the vicinity of insolvency; and 4) how insolvency proceedings are triggered. Consequently, the overwhelming majority of stakeholders were in favour of EU action to improve convergence in this policy field, either in form of targeted legislation (37.21%), as a recommendation (23.26%), or as a combination of both (27.13%).

The Commission also organised a dedicated meeting with a group of selected stakeholders. Invitees included representatives from the financial sector and the business and trade sector, representatives of employees, consumers, practitioners and professionals working in insolvency proceedings, as well as academics and members of think-tanks. In the meeting, stakeholders proactively contributed by reporting on practical difficulties resulting from the fragmentation of national insolvency frameworks and their different performance levels. They also expressed support for a greater convergence in the legal landscape of insolvency proceedings in the EU.

The preparation of the initiative was supported by the group of experts on restructuring and insolvency law. This expert group was originally set up by the Commission to prepare the proposal leading to Directive (EU) 2019/1023. The group was then expanded, with 10 individual experts appointed as representatives of a common interest in a particular policy area (the interest groups represented were financial creditors, trade creditors, consumer creditors, employee creditors, insolvent or over-indebted debtors).

As part of its work to prepare the proposal, the Commission requested two external studies dealing with specific areas of insolvency. Both studies were commissioned to a consortium consisting of Tipik and Spark Legal Network. The first study, assessing abusive forum shopping practices in insolvency proceedings after the 2015 amendments to Regulation (EU) 2015/848, also examines the question of the extent to which differences between national insolvency frameworks act as an incentive for abusive forum shopping by stakeholders. The second study analyses the subject of asset tracing and recovery in insolvency proceedings. Both studies include empirical analysis, for which data collection by the contractor involved both public online surveys and structured interviews with a range of stakeholders from all Member States. In addition, the Commission carried out a dedicated study, commissioned to Deloitte/Grimaldi, on the impact of targeted corporate insolvency measures on the value recovery and effectiveness of insolvency procedures. The three studies are available on the Commission's website.

The Commission also consulted Member States in several iterations throughout the preparation of the proposal. The initiative has been discussed on multiple occasions by the finance ministers of the Member States that expressed support for the initiative. The Council Conclusions (ECOFIN) of 3 December 2020 on the CMU Action Plan<sup>16</sup> encouraged the Commission to deliver this initiative. These Conclusions were confirmed by the Euro Summit statement of 11 December 2020<sup>17</sup>. In April 2021, ministers of the Eurogroup area concluded that national reforms of insolvency regimes should progress in coherence with parallel work streams led by EU institutions, which were undertaken in the CMU Action Plan<sup>18</sup>. The statement of the Euro Summit meeting of 25 June 2021 confirmed that ‘structural challenges to the integration and development of capital markets, particularly in targeted areas of

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<sup>16</sup> Council Conclusions on the Commission’s Action Plan, doc. nr.12898/1/20 REV 1.

<sup>17</sup> Doc. nr. EURO 502/20.

<sup>18</sup> See Commission’s note for the discussion at <https://www.consilium.europa.eu/media/49192/20210416-eg-com-note-on-insolvency-frameworks.pdf>. The summing-up letter of the discussion is available at <https://www.consilium.europa.eu/media/49366/20210416-summing-up-letter-eurogroup.pdf>.

corporate insolvency laws, need to be identified and addressed<sup>19</sup>. Similarly, the European Parliament also showed support for more efficient and harmonised insolvency regimes, calling upon the Commission to make a stronger commitment to making real progress in this area, which, according to the Parliament, still represents a major obstacle to the true integration of EU capital markets<sup>20</sup>.

At the same time, given the close link between insolvency laws and other areas of national law (such as property law and labour law), and the differences in the main policy objectives of insolvency law, some Member States have expressed reservations to binding legislation harmonising insolvency law, including in a letter sent to the Commission on 1 April 2021.

On 22 March 2022, the Commission organised a dedicated workshop with governmental experts from Member States. Member States emphasised the need for a deep and detailed problem analysis, as well as the importance of having a clear diagnosis of the scale of the problems, of the stakeholders affected by them and of their actual impact on the internal market. Similarly, regarding the nature of any future action at EU level, some Member States expressed the view that a cautious approach is needed, and suggested that measures should focus on improving the efficiency of insolvency proceedings.

On 25 October 2022, the Commission organised a second workshop with governmental experts from Member States to inform them of the policy options included in the Impact Assessment and of the state of play of the preparation of the proposal.

- **Collection and use of expertise**

The impact assessment accompanying this proposal draws on data available from desktop research and in particular from the following studies and expertise<sup>21</sup>:

- Deloitte/Grimaldi (2022), Study to support the preparation of an impact assessment on a potential EU initiative increasing convergence of national insolvency laws, *Draft Final Report, DG JUST*, March 2022.
- Spark, Tipik, ‘Study on the issue of abusive forum shopping in insolvency proceedings’, *DG JUST*, February 2022 (specific contract nr. JUST/2020/JCOO/FW/CIVI/0160).
- Spark, Tipik, ‘Study on tracing and recovery of debtor’s assets by insolvency practitioners’ *DG JUST*, March 2022 (specific contract nr. JUST/2020/JCOO/FW/CIVI/0172).

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<sup>19</sup> Doc. nr. EURO 502/21.

<sup>20</sup> European Parliament resolution of 8 October 2020 on further development of the Capital Markets Union (CMU): improving access to capital market finance, in particular by SMEs, and further enabling retail investor participation (2020/2036(INI)).

<sup>21</sup> Other studies were prepared on behalf of the Commission in preparation of this initiative: (1) European Commission, ‘Improving the evidence base on transfer of business in Europe: annex C: case study on the cross-border dimension of business transfers,’ Executive Agency for Small and Medium-sized Enterprises, Publications Office, February 2021, available at: , (2) Steffek, F., ‘Analysis of individual and collective loan enforcement laws in the EU Member States’, DG FISMA, November 2019, available at , (3) McCormack, G. et al., ‘Study on a new approach to business failure and insolvency, comparative legal analysis of the Member States’ relevant provisions and practices’, DG JUST, January 2016, available at , (4) EBA Report on the benchmarking of national loan enforcement frameworks, Response to the European Commission’s call for advice on benchmarking on national loan enforcement frameworks (including insolvency frameworks) from a bank creditors perspective, European Banking Authority, November 2020, EBA/Rep/2020/29.

The material gathered and used to inform the impact assessment was generally factual or otherwise came from reputable and well-recognised sources that act as benchmarks and reference points for the topic. Input received from stakeholders during the consultation activities was generally treated as opinions, unless of factual nature.

- **Impact assessment**

The impact assessment analysed 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. These three dimensions cover, in particular, issues related to avoidance actions, asset tracing, directors' duties and liability, the sale of a company as a going concern through 'pre-pack proceedings', the insolvency trigger, a special insolvency regime for micro and small enterprises, the ranking of claims and creditors' committees. The options were identified based on input from a group of experts on restructuring and insolvency law, a dedicated study and exchanges with stakeholders. They were analysed with respect to three objectives, namely whether they: (i) allow a higher recovery value; (ii) lead to a shorter duration of insolvency proceedings; and (iii) reduce legal uncertainty and information costs, particularly for cross-border investors.

The proposal and the revised impact assessment address the comments received from the Regulatory scrutiny board, which concluded in its first opinion on 24 June 2022 that adjustments to the impact assessment were necessary before proceeding further with this initiative. Further evidence was collected on how current insolvency proceedings negatively affect cross-border investment in the single market and how this compares with other factors. More information on cross-country differences in insolvency rules was added to the core text and Annex 5. The differences between Directive (EU) 2019/1023, Regulation (EU) 2015/848 and this proposal were more extensively explained. Additional analysis was undertaken on the impact of the different measures on judicial capacity and on how stakeholders viewed the different measures. The trade-offs between the policy options were more clearly articulated, and stakeholder views were reported in more detail.

The RSB examined the revised impact assessment and issued a positive second opinion on 10 October 2022 without reservations. The board noted that the impact assessment improved significantly, and it gave few suggestions for further improvements.

This proposal has a slightly positive impact on digitalisation, arising notably though higher degree of process automation in the simplified winding-up proceedings for microenterprises and use of digital portal (e-Justice portal) to provide user-friendly information on the key features of insolvency regimes and ranking of claims.

- **Regulatory fitness and simplification**

Increasing the efficiency of insolvency proceedings will help reduce the length of insolvency proceedings and increase the recovery value in insolvency cases, which would translate into lower costs to wind down companies and higher recovery rates for creditors and investors.

This proposal also aims to improve the business environment for SMEs. By increasing expected recovery rates for creditors and investors exposed to SMEs and other companies, the proposal seeks to reduce perceived risk of investing in SMEs, which is expected to be reflected in lower funding costs for SMEs, all else being equal. Meanwhile, the proposal does not impose obligations or compliance costs on SMEs that are economically active and simplifies procedures for those who face insolvency.

This proposal also introduces a special procedure to facilitate and speed up the winding down of microenterprises, allowing for a more cost-efficient insolvency process for those microenterprises. These arrangements also support the orderly winding down of "asset-less" microenterprises, addressing the issue that some Member States reject access to an insolvency proceeding if the projected recovery value is below the judicial costs. By giving all microenterprises the possibility of starting proceedings to address their financial difficulties, this proposal ensures that founding entrepreneurs are able to benefit from debt discharge and start anew, in accordance with the provisions set out in Directive (EU) 2019/1023.

- **Fundamental rights**

The proposal respects the fundamental rights and freedoms as enshrined in the Charter of the Fundamental Rights of the European Union, and must be implemented accordingly. In particular, this proposal respects the rights and freedoms enshrined in Article 7 (respect for privacy and a family life), Article 8 (protection of personal data), Article 15 (freedom to choose an occupation and right to engage in work), Article 16 (freedom to conduct a business), Article 17 (right to property), Article 27 (workers' right to information and consultation) and Article 47(2) (right to a fair trial).

The proposal will provide designated courts with access to national bank account registries and electronic data retrieval systems as well as to the interconnected system of centralised bank account registries, the BAR single access point. The proposal will also provide insolvency practitioners with access to the beneficial ownership register set up in the Member State where the proceeding has been opened, as well as to the system of interconnection of beneficial ownership registers, the BORIS.

National bank account registries and electronic data retrieval systems as well as the beneficial ownership registers centralise personal data. Expanding access to these registries and systems and to the single access points will therefore have an impact on the fundamental rights of the data subjects, in particular on the right to privacy and the right to the protection of personal data. Any resulting limitations to the exercise of the rights and freedoms recognised by the Charter shall comply with the requirements set out by the Charter, in particular in Article 52(1).

The limitation is provided for by the law and is justified by the need to effectively strengthen asset traceability in the context of ongoing insolvency proceedings, including in a cross-border setting, for the purpose of maximising for creditors the recovery of value from the insolvent company. Furthermore, the essence of the rights and freedoms in question are respected and the limitations are proportionate to the objective pursued. The impact will be relatively limited, as the accessible and searchable data covers only a set of data, determined in this proposal as well as in the EU instruments establishing those systems, which is strictly necessary to trace the assets belonging to the insolvency estate. This proposal ensures that the processing of those data will respect the applicable EU data protection rules. Regulation (EU) 2018/1725<sup>22</sup> applies to the processing of personal data by the Union institutions and bodies for the purposes of this proposal.

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<sup>22</sup> 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).

The proposal in particular specifies the purposes for processing personal data and requires Member States to designate the insolvency courts entitled to request information directly from national bank account registries and electronic data retrieval systems. The proposal also obliges Member States to ensure that the staff of the designated courts maintain high professional standards of data protections, that technical and organisational measures are in place to protect 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 and that the authorities operating the centralised bank account registries keep records for each time a designated court accesses and searches bank account information.

Furthermore, the proposal clearly identifies the scope of information held in the beneficial ownership registers accessible by insolvency practitioners.

Finally, the proposal specifies that the Commission would not be storing personal data in respect of the interconnection of the national electronic auction systems and contains provisions on controllership of data by the Commission.

#### **4. BUDGETARY IMPLICATIONS**

This proposal has implications in terms of costs and administrative burden for the Commission. These costs and burden stem from the obligation set out in Article 51 of this proposal to create a system interconnecting national electronic auction systems via the European e-Justice Portal. Based on experience with other e-Justice Portal interconnection projects, the implementation costs for the Commission are estimated to be EUR 1.75 million for the current long-term budget (Multiannual Financial Framework)<sup>23</sup>. The additional costs will be covered through redeployment within the Justice programme.

The financial and budgetary impact of this proposal are explained in detail in the legislative financial statement annexed to this proposal.

#### **5. OTHER ELEMENTS**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

An evaluation is expected 5 years after implementing the measures and according to the Commission's Better Regulation guidelines. The objective of the evaluation will include assessing how effective and efficient the Directive has been in achieving the policy objectives and deciding whether new measures or amendments are needed. Member States must provide the Commission with the necessary information for the preparation of that evaluation.

- **Detailed explanation of the specific provisions of the proposal**

This proposal targets the three key dimensions of insolvency law: (i) the recovery of assets from the liquidated insolvency estate; (ii) the efficiency of proceedings; and (iii) the predictable and fair distribution of recovered value among creditors. Its building blocks have been carefully selected based on the experience from negotiating the Restructuring and Insolvency Directive, the deliberations and final recommendations of the expert group, the

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<sup>23</sup> These costs should be complemented by another EUR 1.6 million implementation cost for the budgetary year of 2028. The estimated annual maintenance costs of the interconnection system in the European e-Justice Portal are EUR 600 000 as of 2029.

results from the public consultation, a study by an external consultant and extensive interaction with stakeholders.

This proposal aims to maximise the recovery of value from the insolvent company for creditors. To this end, the provisions on avoidance actions and asset tracing mutually reinforce each other. They do this by introducing a minimum set of harmonised conditions for exercising avoidance actions and by strengthening asset traceability through improving insolvency practitioners' access to bank account information, beneficial ownership information and certain national asset registers, including those from other Member States. These provisions are combined with the possibility of maximising the recovery value of the business at an early stage through pre-pack proceedings and an obligation of the directors to promptly submit a request for the opening of insolvency proceedings to avoid potential asset value losses for creditors.

This proposal also aims to strengthen procedural efficiency, in particular for liquidating insolvent microenterprises. It is important to ensure that the new rules also work well for microenterprises in the EU. The cost of ordinary insolvency procedures for these companies is prohibitively high and the possibility to benefit from a debt discharge would enable them to unblock entrepreneurship capital for new projects. This is complemented by greater transparency for creditors on the key features of national law on insolvency proceedings, including the insolvency trigger.

Lastly, to ensure a fair and predictable distribution of recovered values among creditors, the proposal introduces requirements for improving the representation of creditors' interests in the proceedings through creditors' committees. This is complemented by greater transparency for creditors in relation to the rules governing the ranking of claims.

The proposed Directive is divided into nine titles.

Title I contains general provisions on the scope of application and the definitions.

Title II on avoidance actions provides minimum harmonisation rules aiming to protect the insolvency estate against the illegitimate removal of assets conducted prior to the opening of insolvency proceedings. The objective is to ensure that Member States' laws on insolvency proceedings provide for a minimum standard of protection relating to the voidness, voidability or unenforceability of legal acts that are detrimental to the general body of creditors. At the same time, Member States may introduce or maintain rules that ensure a higher level of protection of creditors, for instance, by providing for more avoidance grounds. The provisions included in this Title set out the general prerequisites for a legal act to be declared void, the avoidance grounds and the legal consequences of avoidance actions.

Article 4 sets out the general prerequisites for avoidance actions, stating that all legal acts – including omissions – may be subject to avoidance actions, provided that they were detrimental to the general body of creditors and that any of the avoidance grounds identified in the subsequent Articles is met.

Article 5 clarifies that the provisions on avoidance actions are minimum harmonisation rules and that, therefore, Member States may maintain or adopt provisions that provide for a greater level of creditors' protection.

Article 6 sets out the first specific avoidance ground ('preferences'). These are legal acts that benefited a creditor (or a group of creditors) and were carried out within 3 months before the

filing for insolvency proceedings or after the filing ('suspect period'). Since this avoidance ground is triggered by the mere perfection of the legal act, the suspect period is the shortest compared to the suspect periods of the other avoidance grounds. Furthermore, for 'congruent coverages' (i.e. performances that were entirely in line with the creditor's claim, such as the satisfaction of a due claim with usual means of payment), legal acts may only be declared void on this ground if the creditor knew or should have known that the debtor was unable to pay its debts or that a request for the opening of insolvency proceedings has been submitted. Finally, the provision lists certain types of legal acts that cannot be declared void on this ground.

Article 7 sets out the second specific avoidance ground: legal acts at an undervalue. This ground covers not only gifts or other donations but also legal acts against an unusually low consideration. It plays a significant role in avoidance actions law since it is (among other things) an efficient remedy against the debtor's possible efforts to place assets out of the creditors' reach by transferring them to third parties, such as family members or asset holding entities, while also continuing to have the possibility to use these assets.

Article 8 sets out the third and final avoidance ground, intentionally fraudulent actions, i.e. legal acts defrauding creditors.

Article 9 determines the general consequences of avoidance actions. These include the unenforceability of the claims resulting from a legal act that has been declared void, as well as the obligation of the party benefitting from that legal act to fully compensate the insolvency estate for the detriment caused. The Article clarifies that the obligation to compensate the insolvency estate cannot be set off against claims of the other party of the legal act that has been voided.

Article 10 lays down provisions on the rights of the other party of the legal act that has been declared void. In particular, claims that are satisfied with the legal act that has been declared void are revived to the extent the party compensates the insolvency estate.

Article 11 deals with the liability of third parties: any heir or universal successor to the other party of the legal act that has been declared void succeeds in the position of that party, also with respect to the legal consequences of avoidance actions. Individual successors are liable only if they acquired the asset at an undervalue or if they knew or should have known the circumstances on which the avoidance actions is based.

Article 12 confirms the restructuring privilege introduced by Articles 17 and 18 of Directive (EU) 2019/1023. It states that the rules on avoidance actions in this Title do not affect the application of Articles 17 and 18 of Directive (EU) 2019/1023.

Title III on tracing assets belonging to the insolvency estate is a targeted intervention, which should be put in context of the Regulation (EU) 2015/848, which stipulates that, in principle, insolvency practitioners may exercise also in other Member States the powers conferred on them by the law of the Member State where the main insolvency proceedings have been opened and they have been appointed. The focus of the targeted rules in that Title is on the access by insolvency practitioners to various registries containing relevant information on assets that belong or should belong to the insolvency estate. Some national electronic registers are public or even accessible through single interconnection platforms set up by the EU, such as the insolvency registers interconnection (IRI)<sup>24</sup>. The provisions in the proposed Directive

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<sup>24</sup> [https://e-justice.europa.eu/content\\_interconnected\\_insolvency\\_registers\\_search-246-en.do](https://e-justice.europa.eu/content_interconnected_insolvency_registers_search-246-en.do).



extend the scope of registers accessible by insolvency practitioners to some registers that are not publicly available, such as those originally established under the EU's anti-money laundering framework (national central bank account registers or information on trusts in the beneficial ownership registers of Member States). Title III also obliges Member States to provide non-domestic insolvency practitioners with direct and swift access to the registers listed in the Annex (as long as they are already available in the Member State).

Article 13 requires Member States to designate the insolvency courts in their territory that will have direct access to the national centralised automated mechanisms, such as centralised bank account registers or electronic data retrieval systems, established under Article 32a of Directive (EU) 2015/849<sup>25</sup>. Directive (EU) 2015/849 obliged Member States to set up centralised automated mechanisms, which can identify any natural or legal persons holding or controlling payments accounts and bank accounts identified by an IBAN and safe deposit boxes held by a credit institution. The Anti-Money Laundering Directive also provides Member States' Financial Intelligence units with immediate and unfiltered access to these registers. Directive 2019/1153<sup>26</sup> grants direct and immediate access to the national bank account registers to law enforcement authorities, designated by Member States for this purpose, when such access is necessary to perform their tasks in the fight against serious crimes. Asset recovery officers are also to be granted direct access under Directive 2019/1153. Article 12 will ensure that only insolvency courts that have been duly designated and notified to the Commission will have direct access to the bank account registers or electronic data retrieval systems.

Articles 14 and 15 clarify the specific conditions for the designated courts' access to the bank account registers. The designated courts will have access to the national central bank account registers of their Member State and other Member States, through the bank account registers (BAR) single access point, when the interconnection system of Member States' central registers is established and operational<sup>27</sup>.

Article 16 deals with logging searches in bank account registers.

Article 17 lays down provisions on insolvency practitioners' access to beneficial ownership information registers. This includes both the access to the national beneficial ownership register(s) set up in the Member State where the proceedings have been opened and to the beneficial ownership registers interconnection system. The legal basis for these registers is set out in Article 30(3) and Article 31(3a) of Directive (EU) 2015/849. The legal basis for the interconnection of these registers is set out in Article 30(10) and Article 31(9) of Directive (EU) 2015/849. A minimum set of information in the beneficial ownership registers is publicly accessible for corporate and other legal entities. For trusts and similar legal

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<sup>25</sup> 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) 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 0849, 09.07.2018, p.1.

<sup>26</sup> Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA (OJ L 186, 11.7.2019, p. 122).

<sup>27</sup> The EU-wide interconnection of the national central bank account registries (CBAR) has been proposed by the European Commission in its proposal for the 6th Anti-Money Laundering Directive. See Articles 14 and 15 of the proposal (COM/2021/423 final of 20.7.2021). The proposal is currently being negotiated in the European Parliament and the Council.

arrangements access to this minimum set of information is not public but conditional on demonstrating a legitimate interest. Article 17 clarifies that there is a legitimate interest whenever the information on trusts and similar legal arrangements is sought by an insolvency practitioner to identify and trace assets for the insolvency proceedings in which he or she is appointed and the access is limited to a pre identified scope of information.

Article 18 sets out rules on the direct and swift access by insolvency practitioners to national registers containing information on assets. The asset registers in this context should include the registers listed in the Annex to the proposed Directive, provided that such registers are available in the Member State concerned. The provision also requires that insolvency practitioners appointed in other Member States must have the same access conditions than insolvency practitioners appointed in the Member States where the asset register is located.

Title IV on pre-pack proceedings aims to ensure that these proceedings, generally considered effective for value recovery for creditors, are available in a structured manner in the insolvency regimes of all Member States. In a pre-pack proceeding, the sale of the debtor's business (or part of it) is prepared and negotiated before the formal opening of the insolvency proceedings. This makes it possible to execute the sale and obtain the proceeds shortly after opening the formal insolvency proceedings intended to liquidate a company. This proposal includes a number of safeguards to ensure that potential buyers are reached out to and that the best possible market value is achieved as a result of a competitive sale process. These safeguards are framed in a way that gives Member States the choice between ensuring the competitiveness, transparency and fairness of the sale process conducted in the (usually confidential) 'preparation phase' and running a fast public auction after the opening of the formal proceedings in the 'liquidation phase'.

Article 19 obliges Member State to include in their insolvency regime a pre-pack proceeding composed of two subsequent phases (the 'preparation phase' and the 'liquidation phase').

Article 20 deals with the relationship between the proposed Directive and other Union instruments. It set out that the liquidation phase shall be considered to be an insolvency proceedings as defined in Article 2, point (4), of Regulation (EU) 2015/848. It also leaves Member States the option to consider monitors as insolvency practitioners as defined in Article 2, point (5), of Regulation (EU) 2015/848. The last paragraph of the provision clarifies the relationship between the proposed Directive and Council Directive 2001/23/EC in line with the ruling of the Court of Justice of the European Union in the Heiploeg case. The provision states that, for the purpose of applying Article 5(1) of Directive 2001/23/EC, the liquidation phase of the pre-pack proceedings shall be considered to be an insolvency proceeding that has been instituted to liquidate the assets of the transferor under the supervision of a competent authority.

Article 21 lays down jurisdiction rules on the pre-pack proceedings. This Article clarifies that the court having international jurisdiction over the main insolvency proceedings of the debtor has jurisdiction over the pre-pack proceedings as well.

Article 22 sets out rules on the 'monitor' who is the main actor in the 'preparation phase' of the pre-pack proceedings. The Article lists the tasks that the monitor has to carry out to steer the sale process and find potential buyers. As a 'prospective insolvency practitioner', the monitor has to meet all eligibility criteria that the insolvency law in the Member State where the pre-pack proceedings are opened requires for appointing an insolvency practitioner,

thereby ensuring that the same person carries out the two roles in the two subsequent stages of the pre-pack proceedings.

Article 23 extends (with the necessary modifications) the application of the rules on stay of individual enforcement actions against the debtor, set out in Articles 6 and 7 of Directive (EU) 2019/1023, to the preparation phase of the pre-pack proceedings, provided that the condition of the likelihood of insolvency or declaration of insolvency of the debtor is met.

Article 24 deals with the principles applicable to the debtor's business sale process. The monitor has to ensure that the sales process run in the preparation phase, usually in a confidential manner, is competitive, transparent fair and meets market standards. These principles can only be disregarded if a Member State opts to introduce an obligation on the court to run a fast public auction after the opening of the liquidation phase.

Article 25 ensures that the monitor is appointed as an insolvency practitioner when the liquidation phase of the pre-pack proceedings is opened.

Article 26 deals with the authorisation process for the sale of the debtor's business by the insolvency court in the liquidation phase. Under paragraph 1, the court has to assess whether the sale process run in the preparation phase complied with the applicable principles and conditions. If the court does not confirm the sale of the business to the acquirer proposed by the monitor, the insolvency proceedings opened at the beginning of the liquidation phase continue without concluding the pre-pack sale. Paragraph 2 instructs those Member States that choose to mandate that a public auction is conducted at the beginning of the liquidation phase to use the best offer received in the preparation phase as a 'stalking horse' bid, i.e. as initial bid acting as a purchase price floor so that other bidders can not underbid the purchase price. It also requires that the protections afforded to the stalking horse bidder are commensurate and applied to the extent that they do not stifle real competition.

Article 27 lays down provisions on the assignment of executory contracts, i.e. contracts between the debtor and a counterparty under which the parties still have obligations to perform when the insolvency proceedings are opened. Such contracts should be, as a rule, assigned to the acquirer of the business, even without the consent of the counterparty.

Article 28 states that through the pre-pack sale the business or part of it is acquired free of debts and liabilities.

Article 29 ensures that appeals against the authorised pre-pack sales do not delay the execution of the sale arrangement and thereby the realisation of the assets. According to the provision, such appeals may have a suspensive effect on the realisation of the sale, only if the appellant provides adequate security covering potential damages suffered as a consequence of such suspension. At the same time, Article 29 gives discretion to the court hearing the appeal to exempt a natural person appellant, totally or partially, from the provision of a security if it deems such exemption appropriate in light of the circumstances of the given case.

Article 30 clarifies that the criteria to select the best offer should correspond to the criteria used to select between competing offers in standard insolvency proceedings.

Article 31 makes the monitor and insolvency practitioner of the pre-pack proceedings personally liable for any damages caused by not respecting their obligations.

Article 32 sets out additional safeguards for cases where the prospective buyer is a party closely related to the debtor. The additional safeguards include an obligation for the insolvency practitioner to assess, in situations where the only offer comes from a closely related party, if the offer satisfies the best-interest-of-creditors test. If the assessment results in a negative conclusion, the offer should be rejected by the insolvency practitioner.

Article 33 comprises various provisions aiming to maximise the value of the business being sold. This ensures that interim financing is sought at the lowest possible cost and that providers of interim financing benefit from certain safeguards. This Article also prohibits granting pre-emption rights to bidders, as the possibility to exercise such rights would harm competition in the context of the sale process. Another provision limits the possibility of credit-bidding to a portion of the amount of the secured claim against the debtor.

Article 34 protects the interests of the creditors during the pre-pack proceedings. This includes the right to be heard during the procedure and the alignment, as a rule, of the requirements to release security interests with those that would apply in insolvency proceedings under national law.

Article 35 deals with situations where the acquisition of the business through the pre-pack proceedings is subject to a decision of a competition authority.

Title V on the duties of the directors' forms part of the measures aiming to maximise the value of the insolvency estate. While the proposed Directive does not provide a harmonised definition of directors, when transposing the provisions contained in this Title, Member States should take into account that the term director should be understood broadly. This is in line with the suggestion of the Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law (UNCITRAL)<sup>28</sup>, according to which, "as a general guide [...] a person might be regarded as a director when they are charged with making or do in fact make or ought to make key decisions with respect to the management of a company". Directors are typically among the first to realise whether a company is approaching or has passed the brink of insolvency. They should be, therefore, under a duty to file in a timely manner for opening insolvency proceedings. The proposed Directive puts in place a time limit to fulfil this obligation, coupled with civil liability. The provisions in this Title are minimum harmonisation rules, so Member States may maintain or introduce stricter obligations for directors of companies close to insolvency.

Title VI contains rules on simplified winding-up proceedings for microenterprises. National insolvency frameworks are not always fit to treat insolvent microenterprises properly and proportionately. Microenterprises rarely file to commence standard insolvency proceedings, and when they do, it is often too late to preserve their value. In many Member States, no orderly liquidation of such businesses takes place as standard insolvency proceedings are not accessible or the opening of such proceedings is rejected. This happens if there are no assets in the insolvency estate or if the value of the assets does not cover the administrative costs of the proceedings. The objective of the proposed Directive is, therefore, to ensure that microenterprises, even those with no assets, are wound up in an orderly manner, using a swift and cost-effective proceeding. The main aim of the provisions in Title VI is to simplify the procedure and lower the associated administrative costs. For example, as a rule, no insolvency practitioner should be appointed to the proceedings as the intervention of the insolvency practitioner is the main cost factor in insolvency proceedings and these companies' business is

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<sup>28</sup> UNCITRAL Legislative Guide on Insolvency Law, Part four: Directors' obligations in the period approaching insolvency (including in enterprise groups), p. 19 (mn. 15).

usually not so complex as to require an insolvency practitioner. Similarly, the proposed Directive states that, as a rule, the debtor should remain in possession of the business' assets and affairs throughout the proceedings. Another cost-mitigating factor is the possibility for the court to proceed with the realisation of the assets through an electronic auction system, which each Member State should set up as part of their simplified proceedings for microenterprises.

Article 38 obliges Member States to include rules in their national laws on insolvency proceedings that enable liquidating microenterprises using a simplified proceeding that complies with the standards set out in Title VI. This provision also addresses the condition of insolvency for the purpose of opening simplified winding-up proceedings and the treatment of 'asset-less' cases.

Article 39 clarifies that appointing an insolvency practitioner in the simplified winding-up proceedings should be the exception.

Article 40 requires Member States to enable the use of electronic means of communication for all communications between the competent authority and, where relevant, the insolvency practitioner, and the parties to the proceedings.

Article 41 lays down that simplified winding-up proceedings may be started on the request of the microenterprise or on the request of a creditor. To simplify the filing procedure, a standard form will be created under an implementing act of the Commission.

Article 42 deals with the decision on the opening of simplified winding-up proceedings, including the grounds on the basis of which the competent authority may refuse the opening.

Article 43 states that, as a rule, the debtor should remain in control of their assets and affairs throughout the proceedings.

Article 44 sets out that the debtor should have access to a stay of individual enforcement actions. The competent authority can, however, exempt certain claims on a case-by-case basis under predefined circumstances.

Article 45 ensures the publicity of the opening of simplified winding-up proceedings.

Article 46 addresses the lodging and admission of claims by creditors in a simplified winding-up proceeding. The provision assumes that the majority of claims are lodged on the basis of a written statement submitted by the debtor. In addition to the claims included in that statement, creditors may lodge further claims. To simplify the admission procedure, claims listed in the statement of the debtor are considered as admitted, unless the creditor specifically objects to them.

Article 47 contains specific provisions on the start and conduct of avoidance actions as part of the simplified winding-up proceedings for microenterprises.

Article 48 deals with the establishment of the insolvency estate by determining which assets are included and ensuring that competent authorities clearly identify which assets are excluded from the insolvency estate and can therefore be retained by the debtor when the debtor is an entrepreneur.

Article 49 states that after the establishment of the insolvency estate, the competent authority decides if a) it proceeds with the realisation of the assets, or b) it immediately closes the

simplified winding-up proceedings because the value of the assets make the realisation unreasonable. The provision also sets out that the assets of the debtor should be realised through an electronic public auction, unless the competent authority deems that the use of other means to sale the assets is more appropriate in light of the nature of the assets or the circumstances of the proceedings.

Article 50 obliges Member States to establish and operate one or more electronic auction platforms for the realisation of the assets of the insolvency estate in insolvency proceedings. The provision also allows Member States to provide that users of such platforms may also place bids for the purchase of debtor's business as a going concern. The platform(s) should be available in simplified winding-up proceedings, even though Member States may decide to extend the use to other insolvency proceedings. The provision obliges Member States to make the platform(s) accessible for all residents or those that have their registered seat in the territory of the EU.

Article 51, following the example of other EU projects interconnecting decentralised electronic registers (e.g. Business Registers Interconnection System (BRIS), Insolvency registers' interconnection (IRI)), requires the Commission to establish a system interconnecting the national electronic auction systems via the European e-Justice Portal, which should serve as a central electronic access point. The added value of such a system of interconnection is the accessibility of all auctions through a single platform which is available in all official languages of the EU. The technical specifications of that interconnection system will be determined by way of implementing act(s). IT development and procurement choices will be subject to pre-approval by the European Commission Information Technology and Cybersecurity Board.

Article 52 deals with the costs of establishing and interconnecting electronic auctions systems, while Article 53 sets out the responsibilities of the Commission in relation to the processing of personal data in the system of interconnection of electronic auction platforms.

Article 54 lays down the rules on the sales of assets of the insolvency estate by electronic auction in simplified winding-up proceedings.

Article 55 regulates the decision on the closure of simplified winding-up proceedings and sets out that such a decision should specify the time period leading to the debt discharge.

Article 56 lays down the principle that not only entrepreneur debtors but also the founders, owners or members of an unlimited liability microenterprise, who are personally liable for the debts of the debtor, should have effective access to full debt discharge as a consequence of the closure of simplified winding-up proceedings. The conditions, grounds, time period and other circumstances of the procedure leading to the debt discharge are to be set out in line with the rules of Title III of Directive (EU) 2019/1023.

Article 57 clarifies that proceedings over the personal guarantees provided for the business needs of microenterprises should be coordinated or consolidated with the relevant simplified winding-up proceedings of the same microenterprise.

Title VII sets out provisions on the creditors' committee. The creditors' committee is a key tool to ensure that insolvency proceedings are conducted in a way that protects creditors' interests and ensures the involvement of individual creditors who might otherwise not participate in the proceedings due to limited resources or lack of geographic proximity. The objective of the provisions in that Title is therefore to strengthen the position of the creditors

in the procedure. This is done by ensuring that a creditors' committee is established if the general meeting of creditors agrees and providing for minimum harmonisation rules in relation to key aspects, such as the appointment of the members and the composition of the committee, the working methods, the function of the committee as well as the personal liability of its members.

Article 58 deals with the requirements for the establishment of the creditors' committee by laying down the principle that the decision on whether to establish a creditors' committee should be made at the general meeting of the creditors. This Article also allows Member States to enable creditors to establish a creditors' committee as of the filing for insolvency (and before the opening of the proceedings), while ensuring that the first general meeting of creditors is called to decide on its continuation and composition. Furthermore, Member States are given discretion in national law to exclude the possibility to establish a creditors' committee in insolvency proceedings when the cost of setting up and operating such committee is not commensurate to the value it generates.

Article 59 sets out the procedure for appointing the members of the creditors' committee and requirements for the fair representation of creditors in the committee.

Article 60 lays down the principle that the creditors' committee represents solely the interests of the whole body of creditors and acts independently of the insolvency practitioner. This Article also lets Member States retain national provisions that allow setting-up more than one creditors' committee representing different groups of creditors. Article 61 and Article 62 set out the number of members and requirements for removing and replacing a member of the creditors' committee.

Article 63 identifies the minimum working arrangements for the creditors' committee, including voting procedures.

Article 64 sets out the function as well as 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.

Article 65 defines requirements for the expenses incurred by the creditors' committee in exercising its rights and performing its functions and the remuneration of the members.

The members of the creditors committee are also subject to specific liability provisions under Article 66.

Lastly, Article 67 grants a right of appeal against the creditors' committee decisions, where the creditors' committee is entrusted with the power to approve decisions under national law.

Title VIII deals with measures strengthening transparency of national laws on insolvency proceedings. It obliges Member States to produce and regularly update for investors a clearly defined, standard factsheet with practical information on the main features of their domestic laws on insolvency proceedings. This factsheet has to be made available on the e-Justice Portal. As part of the content delivered by the European Judicial Network in civil and commercial matters<sup>29</sup>, there is already some information available on Member States' national

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<sup>29</sup> Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (2001/470/EC). The information on national insolvency laws produced in the context of the

insolvency regimes on the e-Justice Portal. However, the content of these existing national pages is not aligned in a way that lets investors easily compare the different regimes.

Article 68 sets out requirements for the content and publication of a key information factsheet, which should include essential features of national law on insolvency proceedings.

Title IX sets out the final provision of the proposed Directive. Article 69 introduces requirements for the role of the Committee on Restructuring and Insolvency, as referred to in Article 30 of Directive (EU) 2019/1023. Article 70 introduces a review clause and Article 71 sets out the terms for transposing the proposed Directive. Article 72 sets out the date when the proposed Directive enters into force, and Article 73 identifies to whom the proposed Directive is addressed.



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<sup>30</sup>,

Having regard to the opinion of the Committee of the Regions<sup>31</sup>,

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<sup>32</sup> 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

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<sup>30</sup> OJ C [...], [...], p. [...]

<sup>31</sup> OJ C [...], [...], p. [...]

<sup>32</sup> 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).

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.
- (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<sup>33</sup>, 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

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<sup>33</sup> 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).

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 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<sup>34</sup> [*OP: Directive which replaces Directive 2015/849*] provides that the centralised automated

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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 identifying and tracing assets belonging to the insolvency estate of the debtor in ongoing insolvency proceedings.
- (19) Directive (EU) 2015/849 of the European Parliament and the Council<sup>35</sup> 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

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<sup>35</sup> 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).

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 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<sup>36</sup> 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

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<sup>36</sup> 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)

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 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"<sup>37</sup>, 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

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<sup>37</sup> 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.

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 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<sup>38</sup> applies to the processing of personal data for the purposes of this Directive. Regulation (EU) 2018/1725 of the European Parliament and of the Council<sup>39</sup> 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;

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<sup>38</sup> 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).

<sup>39</sup> 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).

- (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;
- (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<sup>40</sup>, 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](#)

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<sup>40</sup> 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<sup>41</sup>

## 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 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

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<sup>41</sup> 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).

- 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<sup>42</sup>,
  - (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.

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<sup>42</sup> 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<sup>43</sup>.
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;
  - (b) the list of conditions to lodge a claim;
  - (c) the time limit to lodge a claim;

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<sup>43</sup> 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

- (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*  
*The President*  
[...]

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