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Subject:	Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law - Presidency compromise text on Title IV

Delegations will find in Annex the Presidency draft compromise proposal on Title IV of the above mentioned directive.

All changes compared to the Commission proposal are indicated in **bold and underline** or ~~strikethrough~~.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

harmonising certain aspects of insolvency law

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee¹,

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

Acting in accordance with the ordinary legislative procedure,

¹ OJ C [...], [...], p. [...]

² OJ C [...], [...], p. [...]

Whereas:

- (1) The objective of this Directive is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures in the area of insolvency.
- (2) The wide differences in substantive insolvency laws acknowledged by Regulation (EU) 2015/848 of the European Parliament and of the Council³ create barriers to the internal market by reducing the attractiveness of cross-border investments, thus impacting the cross-border movement of capital within the Union and to and from third countries.
- (3) Insolvency proceedings ensure the orderly winding down or restructuring of companies or entrepreneurs in financial and economic distress. These proceedings are key in financial investments, as they determine the final recovery value of such investments. Diverging rules among Member States have contributed to increasing legal uncertainty and unpredictability about insolvency proceedings' outcome, so raising barriers especially for cross-border investments in the internal market. Large divergences in recovery value and time required to complete insolvency proceedings across the Union have negative repercussions on cost predictability for creditors and investors in cross-border situations in the internal market.
- (4) The integration of the internal market in the area of insolvency laws pursued by this Directive is a key tool for a more efficient functioning of the capital markets in the European Union, including greater access to corporate financing. Therefore, it is necessary to set out minimum requirements in targeted areas of national insolvency proceedings, which have a significant impact on the efficiency and length of such proceedings, especially on cross-border insolvency proceedings.

³ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141 5.6.2015, p. 19).

- (5) In order to protect the value of the insolvency estate for creditors, national insolvency laws should include effective rules that enable the annulment of 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 Council⁴, should be protected in subsequent insolvency proceedings. Consequently, avoidance actions on the ground of preferences should not be permitted against payments to or collateralisation in favour of the providers of such new- or interim financing, if those payments or collateralisations are performed in accordance with the claims of the providers. Such payments or collateralisation should be considered, therefore, as legal acts performed directly against fair consideration to the benefit of the insolvency estate.
- (11) The main consequence of declaring a legal act void in avoidance proceedings is the obligation for the party benefiting from the legal act that has been declared void to compensate the insolvency estate for the detriment caused by such legal act. Compensation should include emoluments, where relevant, and interest, in accordance with the applicable general civil law. The compensation implies the payment of a sum equivalent to the value of the performance received if it cannot be returned *in natura* to the insolvency estate.

⁴ Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (OJ L 172, 26.6.2019, p. 18).

- (12) Parties who are closely related to the debtor, such as relatives in case the debtor is a natural person or actors fulfilling decisive roles in relation to a debtor that is a legal entity, usually enjoy an information advantage with regard to the financial situation of the debtor. In order to prevent abusive behaviours, additional safeguards should be established. Consequently, in the context of avoidance actions, legal presumptions about the knowledge of the circumstances on which the conditions for avoidance were based should be introduced when the other party involved in the legal act that can be declared void 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 Council⁵ [*OP: Directive which replaces Directive 2015/849*] provides that the centralised automated mechanisms are interconnected via the bank account registers (BAR) single access point, to be developed and operated by the Commission. Considering the growing importance of insolvency cases with cross-border implications and the importance of relevant financial information for the purposes of maximising the value of the insolvency estate in insolvency proceedings, the designated national courts having jurisdiction in insolvency matters should be able to directly access and search the centralised bank account registries of other Member States through the BAR single access point put in place pursuant to Directive (EU) YYYY/XX [*OP: Directive which replaces Directive 2015/849*].

⁵ OJ

- (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 on-going insolvency proceedings.
- (19) Directive (EU) 2015/849 of the European Parliament and the Council⁶ 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.

⁶ 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).

- (20) To ensure that assets can be efficiently traced in the context of cross-border insolvency proceedings, insolvency practitioners appointed in a Member State should be granted expeditious access to asset registers also when these registers are located in a different Member State. Therefore, the access conditions applying to foreign insolvency practitioners should not be more cumbersome than those applying to domestic insolvency practitioners.
- (21) In the context of insolvent liquidation, national insolvency laws should allow for the realisation of the assets of the business to occur through the sale of the business or part thereof as a going concern. Sale as a going concern should mean, in this context, the transfer of the business, in whole or in part, to an acquirer in a way that the business (or part thereof) may continue to operate as an economically productive unit. Sale as a going concern should be understood as opposed to a sale of the assets of the business piece by piece (piecemeal liquidation).

(22) It is generally assumed that more value can be recovered in liquidation by selling the business (or part thereof) as a going concern rather than by piecemeal liquidation. In order to promote going-concern sales in liquidation, national insolvency regimes should include a **so called “pre-pack- **mechanism**” 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. **This mechanism should comply with the common standards on “pre-pack proceedings” laid down in this Directive, while allowing in implementation for a certain degree of flexibility for Member States to adapt these standards to the existing national insolvency laws.** The “pre-pack proceedings” should consist of two phases, namely a preparation phase and a liquidation phase. **The preparation phase aims at finding an appropriate buyer for the debtor’s business or part thereof and is silent. The liquidation phase aims at approving and executing the sale of the debtor’s business or part thereof and at distributing the proceeds to the creditors, according to national law. The liquidation phase should begin with the decision of a judicial body or any other competent body to formally open insolvency proceedings under national law leading to the termination (winding up) of the debtor. The insolvency proceedings used in the liquidation phase should be one of the proceedings included in Annex A of Regulation (EU) 2015/848 of the European Parliament and of the Council.**⁷

⁷ 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).

- (22a) The pre-pack mechanism should respect the rights of employees in insolvency proceedings as granted under EU law. Specifically, the pre-pack proceedings should be governed by statutory or regulatory provisions and should be construed in a way where the transfer of all or part of an undertaking is prepared by a monitor under the supervision of the court, prior to the institution of formal insolvency proceedings that are instituted with a view to the liquidation of the assets of the debtor. The primary aim of the pre-pack proceedings is to enable, in the insolvency proceedings, a liquidation of the undertaking as a going concern which satisfies to the greatest extent possible the claims of all the creditors and preserves employment as far as possible. Consequently, the liquidation phase of the pre-pack proceedings in this Directive is an eligible procedure for the purposes of article 5(1) of Council Directive 2001/23/EC⁸.**
- (22b) The pre-pack proceedings under this Directive is a mechanism for asset realisation that does not replace national substantive rules on insolvency which should, therefore, continue to apply, as relevant. This is the case, in particular, in relation to the rules on the ranking of creditors' claims or on the distribution of proceeds from asset realisation. In the event that the court does not authorise the sale of the business (or part thereof) as proposed by the monitor, insolvency proceedings opened for that purpose should proceed according to the applicable national insolvency law.**
- (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.

⁸ 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).

- (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. **The monitor can also take into account elements other than the (highest) price, e.g. public interest.** 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. **However, it is important to ensure that such a bid does not benefit from disproportionate advantages that may interfere with effective competition among bidders in the auction after the opening of insolvency proceedings and thus result in a worse outcome for creditors. In particular, Member States should ensure that incentives provided by the debtor to the stalking horse bidder** ~~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.~~ **Such incentives could be expense reimbursements or so-called 'break-up fees' that, where a better offer is selected through the public auction, the initial bidder is entitled to receive for the costs incurred to study the business, prepare a bid and commit to it.**

(28) **To avoid the situation where the mere fact of a business being in insolvency depreciates its value, it is important to ensure that operational counterparties, such as suppliers or customers of the debtor that is being wound up, are taken over by the acquirer and are hence not affected by insolvency proceedings.** The opening of insolvency proceedings, **therefore,** should not result in the early termination of contracts under which the parties still have obligations to perform (executory contracts) **and** 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, **or when the contract was entered into on the basis of personal attributes of one or both of its counterparties (“intuitu personae”).** 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.

- (28a) In order to increase the attractiveness of the asset deal for potential buyers and, thereby, to achieve a higher purchase price, the purchaser should, as a rule, acquire the debtor's business free and clear of debts, liabilities or of any encumbrances. That implies that creditors should be able to seek satisfaction of their claims from the proceeds of the sale and should not assert their claims directly against the buyer of the business. However, executory contracts which are necessary for the continuation of the debtor's business and the liability associated with them should be transferred to the acquirer.**
- (28b) The release of security interests over assets belonging to the debtor's business sold without the consent of the holder of such interest should be allowed, in accordance with the law of the Member State concerned. Furthermore, even where the law of the Member State requires the express consent of the holder of the security interest for the release of such interest, the Member States may provide for a derogation from that requirement, unless a holder of secured claims objects to that release on the justifiable grounds that the transfer in bankruptcy proceedings proposed in the pre-pack does not meet the best-interest-of-creditors test or that that holder of secured claims has made a purchase offer in auction that is more advantageous than the pre-pack option.**

(28c) The best offer should not be disqualified from the bidding process just because it comes from an insider to a debtor. Closely related parties to the debtor should be, therefore, set on an equal footing with any other bidders and allowed to participate in the pre-pack proceedings and benefit from the “free and clear” acquisition of the business. Their eligibility to the bidding process should be, nevertheless, balanced with enhanced scrutiny of the bidding process which by providing equal opportunities for non-insiders bidders, particularly in relation to access to information, ensuring information symmetry, and a deadline for submitting an offer that simultaneously allows the procedure to be quick and efficient and allows non-insider bidders to prepare their bids.

(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 **debtor's** business. **That is in order to avoid that the secured creditor bid the whole amount of his/her claim for the debtor's business that is worth less than that amount, and therefore deterring potential competitors from participating in the auction. Therefore, this Directive should restrict the amount that the creditor can bid in cases where there are undersecured or undercollateralised claims. In those cases, the secured creditor should only be allowed to bid an amount significantly lower than the estimated market value of the debtor's business over which the creditor's security interest was provided.**
- (30a) The restriction on the creditors ability to bid at the value of his/her secured claim does not mean that the claim loses the security interest in respect of the portion of the claim that cannot be used in the bid.**

- (31) This Directive should be without prejudice to the application of Union competition law, especially Council Regulation (EC) No 139/2004⁹ nor should it prevent Member States from enforcing national merger control systems. When selecting the best offer, the monitor should be allowed to take into account the regulatory risks raised by offers requiring the authorisation of competition authorities and may consult with those authorities if allowed under applicable rules. It should remain the responsibility of the bidders to provide all necessary information to assess those risks and to engage in timely manner with competent competition authorities in order to mitigate those risks. In order to increase the likelihood that procedures are successful, in presence of an offer that raises such risks, the monitor should be required to perform its role in a way that facilitates the presentation of alternative bids.
- (32) Directors oversee the management of the affairs of a legal entity and have the best overview of its financial situation. Directors are therefore among the first to realise whether a legal entity is approaching or surpassing the brink of insolvency. A late filing for insolvency by directors may lead to lower recovery values for creditors Member States should therefore introduce an obligation on directors to submit a request for the opening of insolvency proceedings within a specified time-period. Member States should also define to whom the directors' duties should apply taking into account that the notion of "director" should be interpreted broadly, to cover all persons who are in charge of making or do in fact make or ought to make key decisions with respect to the management of a legal entity.

⁹ 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)

- (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"¹⁰, 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*.

¹⁰ 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.

- (47) It is important to ensure a fair balance between the interests of the debtor and creditors in insolvency proceedings. Creditors' committees allow for better involvement of creditors in insolvency proceedings, in particular when creditors would otherwise be inhibited from doing so individually, due to limited resources, economic significance of their claims or the lack of geographic proximity. Creditors' committees can especially help cross-border creditors better exercise their rights and ensure their fair treatment. Member States should allow the establishment of a creditors' committee once proceedings are opened. A creditors' committee should be established only provided that creditors agree. Member States may also allow to establish it before proceedings are opened and after the filing for insolvency. In this case, however, Member States should provide that creditors agree to its continuation and composition at the general meeting. If creditors disagree with the composition, they may also establish a new creditors' committee.
- (48) The cost of setting up and operating a creditors' committee should be commensurate to the value it generates. The establishment of the creditors' committee should not be justified in those instances where the cost of its set-up and operations is significantly higher than the economic relevance of the decisions it may take. This may be the case where there are too few creditors, where the large majority of creditors has a small share in the claim against the debtor or where the expected recovery from the insolvency estate in insolvency proceedings is significantly lower than the cost of the set-up and operation of the creditors' committee. This occurs in particular in insolvency cases of microenterprises.

- (49) Member States should clarify the requirements, duties and procedures for the appointment of members of the creditors' committee, as well as the functions attributed to the creditors' committee. Member States should be given the option to decide whether the appointment should be done by the general meeting of creditors or by the court. To avoid undue delays in the set-up of the creditors' committee, the members should be appointed expeditiously. Member States should cater for a fair representation of creditors in the committee and ensure that the participation in the 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 Council¹¹ applies to the processing of personal data for the purposes of this Directive. Regulation (EU) 2018/1725 of the European Parliament and of the Council¹² 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*],

¹¹ 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).

¹² 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).

HAVE ADOPTED THIS DIRECTIVE:

Title I
GENERAL PROVISIONS

Article 1

Subject matter and scope

1. This Directive lays down common rules on:
 - (a) avoidance actions;
 - (b) the tracing of assets belonging to the insolvency estate;
 - (c) pre-pack proceedings;
 - (d) the duty of directors to submit a request for the opening of insolvency proceedings;
 - (e) simplified winding-up proceedings for microenterprises;
 - (f) creditors' committees;
 - (g) the drawing-up of a key information factsheet by Member States on certain elements of their national law on insolvency proceedings.

2. This Directive does not apply to proceedings referred to in paragraph 1 of this Article that concern debtors that are:
 - (a) insurance undertakings or reinsurance undertakings as defined in Article 13 points (1) and (4), of Directive 2009/138/EC of the European Parliament and of the Council;

- (b) credit institutions as defined in Article 4(1), point (1), of Regulation (EU) No 575/2013 of the European Parliament and of the Council;
- (c) investment firms or collective investment undertakings as defined in Article 4(1), points (2) and (7), of Regulation (EU) No 575/2013;
- (d) central counterparties as defined in Article 2, point (1), of Regulation (EU) No 648/2012 of the European Parliament and of the Council;
- (e) central securities depositories as defined in Article 2(1), point (1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council;
- (f) other financial institutions and entities listed in Article 1(1), first subparagraph of Directive 2014/59/EU of the European Parliament and of the Council;
- (g) public bodies under national law;
- (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) **one of** 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 benefitted from that legal act ('lapse of enrichment') can only be invoked if that party was neither aware, nor should have been aware, of the circumstances on which the avoidance action is based.

3. Member States shall ensure that the limitation period for all claims resulting from the legal act that can be declared void 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. **Pre-pack proceedings are mechanisms that enable the preparation of a quick realisation of the assets of the debtor, in the form of the sale of the business as a going concern at the moment or shortly after the opening of national liquidation proceedings. The preparation phase of pre-pack proceedings shall be followed by a liquidation phase that shall be conducted in accordance with national law.**

Member States shall ensure that debtors that access pre-pack proceedings remain, at least partially, in control of their assets and the day-to-day operation of their business.

~~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~~ **and the participation of creditors**, Member States shall apply national provisions on ~~winding-up~~ **liquidation** proceedings, provided that they are compatible with Union law, including the rules laid down in this Title.

2a. Member States shall ensure that disputes resulting from pre-pack proceedings are dealt with in a timely manner.

Article 20

Relationship with other Union legal acts

1. The liquidation phase referred to in Article [19](#), paragraph 1, shall be **carried out by means of** ~~considered to be an~~ insolvency proceedings as **set out in Annex A** ~~defined in Article 2, point (4), of~~ **to** Regulation (EU) 2015/848.

Monitors referred to in Article [22](#) may be considered to be insolvency practitioners as ~~defined~~ **set out** in Article 2, point (5), **Annex B** ~~of~~ **to** Regulation (EU) 2015/848.

2. For the purposes of Article 5(1) of Council Directive 2001/23/EC¹³, the liquidation phase shall be considered to be bankruptcy **proceedings** or **any analogous** insolvency proceedings instituted with a view to the liquidation of the assets of the transferor under the supervision of a competent public authority.

¹³ 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).

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](#).

Chapter 2
Preparation Phase

Article 22

MThe monitor

1. Member States shall **ensure that where the debtor starts the preparation phase of the pre-pack proceeding, a monitor is appointed in accordance with national law.** 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 **preparation of 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, **based on the monitor's assessment**, the best bid does not constitute a manifest breach of the best-interest-of-creditors test.

Tasks under the first subparagraph shall be carried out, if necessary, with the assistance of the debtor and Actions by the monitor listed in the first subparagraph shall be ~~done~~ **documented** in writing, **as well as** be made available in digital format and in a timely manner to all parties involved in the preparation phase, **according to national law**.

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~~ **remunerated**:-
- ~~(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.~~
- 5a. Member States shall ensure that the monitor is liable for the damages caused to creditors and third parties by its failure to comply with the obligations set out in paragraph 2.**

Article 23

Stay of individual enforcement actions

Member States ~~shall~~ **may provide** 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~~ **that stay** 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 preparation phase~~the sale process~~

1. Member States shall ensure that the **preparation of the** sale ~~process carried out during the preparation phase~~ is competitive, transparent, fair and meets market standards.
2. Where ~~the sale process only produces~~ **only** one binding offer **is submitted in the preparation of the sale**, 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, in accordance with national law, the monitor referred to in Article 22 as insolvency practitioner.

Article 26

~~Authorisation of the sale of the debtor's business or part thereof~~ Principles applicable to the liquidation phase

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).
2. The court shall not authorise the sale referred to in paragraph 1 of this Article 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.~~

When the court runs a public auction, Member States may depart from article 24(1). In this case, Article 22 (2), point (b) shall not apply.

~~In case Member States apply Article 24(3),~~ **The public auction referred to in that provision shall last no longer than two months** ~~four weeks and shall be initiated within two weeks~~ **one month** ~~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~~ **that** 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

- (i) if the acquirer of ~~the debtor's business or part thereof~~ is a competitor to the debtor's counterparty or counterparties **or**
- (ii) **for contracts that where entered into on the basis of personal attributes of one or both of their counterparties ("intuitu personae").**

1a. Member States may provide that paragraph 1, first subparagraph, does not apply to the following types of contracts: -

(i) employment contracts,

(ii) [particular leases] or

(iii) ...¹⁴

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.

¹⁴ Member states are invited to provide their comments during the discussion of this article so that this article can possibly be adjusted in the light thereof.

Article 28

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

Without prejudice to article 27 and 34 (4), 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 ~~shall~~ **may** 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, **in accordance with national law** ~~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 **set out in national law and are** the same as the criteria used to **be applied to** select between competing offers in ~~winding-up~~ **liquidation** 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) **parties closely related to the debtor** they disclose **in the bid** in a timely manner to the monitor ~~and to the court~~ their relation to the debtor;
 - (aa) parties not closely related to the debtor are granted time to make an offer;**

- (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~~ **Those** safeguards shall at least include the duty for the monitor **or the court** ~~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~~ **can** 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.

Article 33a

Pre-emption rights

- ~~12.~~ Member States shall ensure that no pre-emption rights are conceded to bidders.
- ~~23.~~ 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 ~~may~~**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~~ **the liquidations** proceedings.
4. Member States **whose law requires the** ~~in which~~ consent ~~from~~ **of** holders of secured claims ~~is required in~~ **the liquidation** ~~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 **none** 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 **that which would be obtained** 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~~ to the bidder concerned would result in ~~a damage for~~ to 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 910/2014¹⁵

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.

¹⁵ 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).

2. The Commission shall lay down by means of implementing acts technical specifications and procedures necessary to provide for the interconnection of Member States' national electronic auction systems, setting out:
- (a) the technical specification or specifications defining the methods of communication and information exchange by electronic means on the basis of the established interface specification for the system of interconnection of the electronic auction systems;
 - (b) the technical measures ensuring the minimum information technology security standards for communication and distribution of information within the system of interconnection of electronic auction systems;
 - (c) the minimum set of information that shall be made accessible through the central platform;
 - (d) the minimum criteria for the presentation of announced auction processes via the European e-Justice Portal;
 - (e) the minimum criteria for the search of announced auction processes via the European e-Justice Portal;
 - (f) minimum criteria for guiding the users to the platform of the national auction system of the Member State where they may submit their offers directly in the announced auction processes;
 - (g) the means and the technical conditions of availability of services provided by the system of interconnection;

- (h) the use of the European unique identifier referred to in Article 16(1) of Directive (EU) 2017/1132¹⁶,
- (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.

¹⁶ 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) 2019/1023¹⁷.

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;
- (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.

¹⁷ 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

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

[...]