Jaargang 29
Nr. 3
mei 2023

Tijdschrift voor Insolventierecht

Special – Richtlijnvoorstel tot Harmonisatie van Bepaalde aspecten van het Insolventierecht

onderneming

financiering

reorganisatie

NP/TSINSRT-MI23003

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Tijdschrift voor insolventierecht

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Redactiesecretariaat
J.M.W. Pool, universitair docent ondernemings- en insolventierecht aan de Universiteit Leiden, j.m.w.pool@law.leidenuniv.nl

Redactieadres
Steenschuur 25
2311ES Leiden

Uitgever
Paul Bänziger, Paul.Banziger@wolterskluwer.com

Citeerwijze
TvI jaartal/publicatienummer, paragraafnummer
Voorbeeld: *TvI* 2023/12, par. 3.4

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Editorial Foreword

TvI 2023/10

In the course of the past years, the European legislature has shown an increased legislative interest in insolvency law as a means to advance the Capital Markets Union. In 2019, the Preventive Restructuring Directive was adopted. This directive covered - inter alia - preventive restructuring frameworks and the discharge of debt of entrepreneurs. On 7 December 2022, the European Commission issued its long-awaited proposal for a directive to harmonise certain aspects of insolvency law (the 'Proposal'). With this Proposal, the Commission promotes harmonisation on various themes with regard to substantial insolvency law. On several topics, the Proposal advocates provisions that potentially require significant changes to the national laws of Member States.

This special issue of *Het Tijdschrift voor Insolventierecht* is dedicated to the Proposal. In seven articles, insolvency law scholars and practitioners reflect on and discuss the Proposal from the perspective of Dutch law. The Special issue includes a general discussion of the background and the purpose of the Proposal, followed by articles pertaining to the themes of Avoidance Actions (title II in the Proposal), Asset Tracing (title III in the Proposal), Pre-Pack Proceedings (title IV in the Proposal), Directors' Duty to File for Insolvency Proceedings (title V in the Proposal), Creditors' Committee (title VII in the Proposal) and Measures Enhancing Transparency of National Insolvency Laws (title VIII in the Proposal). The Winding-Up of Insolvent Microenterprises (title VI in the Proposal) is not covered by this issue.

The Proposal is debated among insolvency experts all over Europe. To contribute to this debate, this special on the Proposal is published in English.

The Board of Editors

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Mr. dr. J.M.W. Pool, mr. drs. J.M.G.J. Boon & prof. R.D. Vriesendorp[1]

Harmonisation of European Insolvency Law: Operation Patchwork has Commenced, but Where Will it Take Us?

TvI 2023/11

1. Introduction

On 7 December 2022, the European Commission published its long-awaited proposal for a directive to harmonise certain aspects of insolvency law (Proposal).[2] This Proposal includes seven distinct topics that the Commission considers fit for harmonisation across the European Union (EU). For a long time, harmonisation in this area was thought to be impossible, primarily because of the large substantive differences between the insolvency regimes of the Member States, but also because of the coherence of national insolvency law with various other areas of (national) law which would make harmonisation very difficult.[3] The EU Restructuring Directive (2019/1023)[4] seems to have changed the thinking in this regard, as the divergences no longer hold the Commission back, in fact, it considers the time ripe for some steps forward.

The Commission has not been idle. Since a legislative initiative on harmonisation of insolvency law was announced in 2020, already two public consultations have taken place on what topics could be harmonised. In addition, there have been stakeholder meetings, three reports have been prepared at the request of the Commission,[5] and there have been regular consultations with an EU-wide group of experts.[6] On several occasions also, Member States have been consulted in preparing the Proposal.[7]

The Proposal is an important step towards more coherent European insolvency laws; however, it comes with several limitations. The Proposal focuses on seven clear-cut topics only – (i) avoidance actions, (ii) asset tracing, (iii) pre-pack proceedings, (iv) duty to file for insolvency, (v) proceedings for micro companies, (vi) creditors' committees and (vii) measures to increase the transparency of national insolvency rules – which are mostly standalone topics with limited coherence. Furthermore, several topics – such as a definition of 'insolvency' and the ranking of creditors – that were initially signalled by the Commission and others for harmonisation, but have been left out from the Proposal. This limits the scope of the Proposal, as well as its coherence.

This contribution focuses on the objectives and background of the Proposal. The seven substantive topics of the Proposal are discussed by other authors in the contributions of this issue. In our analysis, we find that the Proposal may best be considered a patchwork. It is a collection of provisions aimed at converging separate parts of insolvency laws. Whereas there may be good reasons to pursue harmonisation this way, it also raises questions. Is this the right way forward for Europe? Are the proposed topics for harmonisation sufficiently substantiated? Will the Proposal be able to achieve its objectives? We argue that the Proposal is a step in the right direction, although the rationale and effects of the chosen topics require further discussion and justification.

In our contribution, we will critically assess the purpose and need for the proposed harmonisation of insolvency

1 Jessie Pool is assistant professor of Company and Insolvency law at Leiden University, Gert-Jan Boon is researcher and lecturer of Insolvency and Restructuring law at Leiden University and Reinout Vriesendorp is professor of Insolvency Law at Leiden University and partner at De Brauw Blackstone Westbroek in Amsterdam. The quintessence of this contribution is presented at the TvI/NACIIL conference '*Het Richtlijnvoorstel tot Harmonisatie van Bepaalde Aspecten van het Insolventierecht: The Emergence of Convergence?*' organized by the Dutch Insolvency Law Review (*Tijdschrift voor Insolventierecht*; TvI) and the Netherlands Association of Comparative and International Insolvency Law (NACIIL) on 24 May 2023 in Amsterdam (the Netherlands). This paper states the law as at 19 April 2023, all sources have been checked on the same date.

2 Proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 7 December 2022, COM/2022/702 final. References to the Proposal relate to the English language version unless stated otherwise.

3 See, for example, Recital 22 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (EIR 2015), which notes that '[…] as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union. The application without exception of the law of the State of the opening of proceedings would, against this background, frequently lead to difficulties.'

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 (Restructuring Directive).

5 Proposal, pp. 8-9; Deloitte/Grimaldi, Study to support the preparation of an impact assessment on a potential EU initiative increasing convergence of national insolvency laws, draft final report, DG JUST, March 2022, available at: https://commission.europa.eu/system/files/2023-02/Insolvency%20laws_IA%20support%20study_Final%20Report.pdf; Spark/Tipik, 'Study on the issue of abusive forum shopping in insolvency proceedings, DG JUST, February 2022 (JUST/2020/JCOO/FW/CIVI/0160); Spark/Tipik, 'Study on tracing and recovery of debtor's assets by insolvency practitioners', DG JUST, March 2022 (JUST/2020/JCOO/FW/CIVI/0172; available at: https://commission.europa.eu/system/files/2023-02/Final Report – Study on tracing and recovery of debtor's assets by insolvency practitioners – March 2022.pdf).

6 Proposal, pp. 7-9; Group of experts on restructuring and insolvency (European Commission Expert Group) (E03362), available at: https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=3362.

7 Proposal, p. 8.

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laws. We do so by first providing some background on the origins of the Proposal and try to answer the question of what issues the Proposal ought to resolve (Section 2). Subsequently, in Section 3, we discuss the objective and structure of the Proposal in more detail. Next, we will discuss several considerations on the need for the Proposal in Section 4, which is followed by concluding remarks (Section 5).

2. Background of the Proposal

The Proposal has its origins in the Capital Markets Union (CMU).[8] In 2015, the Commission announced its intention to work toward a CMU, through which the EU aims to achieve a *single market* for capital investment and the movement of capital.[9] A stronger and more united capital market would strengthen cross-border investment and make the European economy more resilient.[10] This has instigated the EU legislature to develop several legislative initiatives. Many barriers to cross-border investments have, according to the Commission, their origin in insolvency laws, as well as property laws and national laws regarding securities.[11] In particular, the large differences between national restructuring and insolvency regimes in the EU are unnecessarily restricting cross-border investment.[12] According to the Commission, this involves questions on 'who owns security rights in the event of a default' and 'whose rights take precedence in the event of an insolvency'.[13] Convergence of restructuring and insolvency regimes would make it easier for investors to assess credit risk and therefore facilitate greater legal certainty for cross-border investments.[14]

In 2020, the CMU received a new impetus with the report of the High Level Forum – established by the Commission – with 'A New Vision for Europe's Capital Markets'.[15] This group of experts made recommendations, also touching upon the area of insolvency law. It invited the Commission to adopt a 'legislative proposal for minimum harmonisation of certain targeted areas of core non-bank corporate insolvency laws'.[16] Core elements that could be harmonised include, according to the report, for instance a definition of the trigger for insolvency procedures, rules for the ranking of claims (more specifically the position of secured creditors), and avoidance actions. Furthermore, the Commission is invited to develop a common terminology of key concepts of national insolvency laws.[17]

In 2021, the Commission followed up on this report by announcing in a communication that it 'will take action regarding insolvency proceedings by enhancing convergence and removing discrepancies, aiming to increase efficiency, facilitate cross-border investments and reduce burden'.[18] This was elaborated with the publication of an 'inception impact assessment' and a subsequent public consultation.[19] The inception impact assessment specified several topics were considered that would 'address those aspects of insolvency proceedings that had been identified as barriers to cross-border investment'.[20] The Commission identified a non-limitative list of six topics for a legislative initiative, including: (i) requirements for opening insolvency proceedings (including a definition of 'insolvency' and provisions on who is entitled to file for insolvency), (ii) conditions for invoking transaction avoidance and the effects of clawback rights (bankruptcy *pauliana*), (iii) directors' duties in the event of imminent/actual insolvency, (iv) the position of secured creditors, taking into account the specific needs for the protection of other types of creditors (e.g. employees and suppliers) in insolvency (ranking), (v) court capacity when it comes to expertise and necessary training of

8 For the European political context and background of the Proposal, see also Commission Staff Working Document, Impact Assessment Report, accompanying the document, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 7 December 2022, SWD(2022) 395 final, pp. 5-7 (Impact Assessment). These ideas for harmonisation are not new and find their origin in earlier initiatives, see further Ian Fletcher & Bob Wessels, *Harmonization of Insolvency Law in Europe*, Preadvies 2012 uitgebracht voor de Vereniging voor Burgerlijk Recht, Deventer: Kluwer 2012, para 3; Michael Veder, 'Europese ontwikkelingen in het insolventierecht', *TvI* 2013/32; Gert-Jan Boon & Stephan Madaus, 'Toward a European Business Rescue Culture', in: Jan Adriaanse & Jean-Pierre van der Rest (eds.), Turnaround Management and Bankruptcy. Routledge Advances in Management and Business Studies nr. 69, New York: Routledge 2017, para 13.2.

9 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union, 30 September 2015, COM(2015) 468 final (Action Plan 2015).

10 Action Plan 2015, pp. 4 and 6.

11 Action Plan 2015, pp. 6, 23-24.

12 Completing Europe's Economic and Monetary Union', Report by Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz (so-called Five Presidents'), 22 June 2015, p. 10; Action Plan 2015, pp. 6 and 23-25; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 28 October 2015, COM(2015) 550 final, p. 7; Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, 14 September 2016, COM(2016) 601 final, p. 3; Proposal for a Directive of the Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, 22 November 2016, COM(2016) 723 final, pp. 2, 4 and 8-9. See also: A new Vision for Europe's Capital Markets, Final Report of the High Level Forum on the Capital Markets Union, June 2020, pp. 23, 29 and 58-59 (A new Vision for Europe's Capital Markets 2020); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Capital Markets Union – Delivering one year after the Action Plan, 25 November 2021, COM(2021) 720 final, p. 4.

13 Action Plan 2015, p. 24.

14 Action Plan 2015, p. 24.

15 A new Vision for Europe's Capital Markets 2020.

16 A new Vision for Europe's Capital Markets 2020, pp. 114-115.

17 A new Vision for Europe's Capital Markets 2020, p. 114.

18 Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission work programme 2022, Making Europe stronger together, 19 October 2021, COM(2021) 645 final, p. 6; Annexes to the Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission work programme 2022, Making Europe stronger together, 19 October 2021, COM(2021) 645 final, p. 2.

19 Inception impact assessment, Enhancing the convergence of insolvency laws, 11 November 2020, Ares(2020)6597479 (Inception Impact Assessment 2020).

20 Inception Impact Assessment 2020, p. 2.

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judges, and (vi) asset tracing, in particular in the context of avoidance actions.[21]

At the end of 2021, a second communication was published in which the Commission announced its intention to publish a proposal on a legislative initiative to harmonise targeted aspects of insolvency frameworks by 2022. This legislative initiative would be a directive, possibly complemented by a recommendation, and was aimed at achieving the objective of 'integrating national capital markets into a genuine single market'.[22] On 7 December 2022, the Commission published the Proposal, accompanied by an extensive impact assessment.

In the upcoming legislative process, the Proposal may generate quite some discussion between the European Parliament and the Council, in particular, because it has already raised some controversy in its preparation. The public consultation also showed that ideas about the usefulness and necessity of substantive harmonisation vary widely, both when looking at responses from different Member States, and between different sectors.[23] Notwithstanding a broad support for convergence and harmonisation of insolvency law in general,[24] some Member States have written to the Commission expressing their concerns, especially where it concerns binding legislation.[25] In response to concerns of Member States, the Commission organised two dedicated workshops with governmental experts from Member States in March and October 2022. Member states emphasised that an in-depth problem analysis of the Proposal was necessary.[26] Although it is not clear to what extent changes were made, the Commission has evidently considered it appropriate to publish the Proposal. The reactions to the proposal show broad support for convergence and harmonisation of insolvency law in general, although some critical remarks have been made on certain specific topics.[27]

21 Inception Impact Assessment 2020, p. 3.
22 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Capital Markets Union – Delivering one year after the Action Plan, 25 November 2021, COM(2021) 720 final, pp. 4 and 18.
23 Impact Assessment, paras. 2.1.3, 2.3.4 and Annex 2 showing, among other things, that Dutch respondents were relatively reluctant and that among researchers there is reasonably strong support for harmonisation, but both insolvency practitioners and governments were reluctant. Incidentally, the public consultation suffered from limited representativeness, with 129 respondents from 17 Member States, of which 58 were from Germany, see also pp. 81 and 84-85. The same applies to the reactions to the public consultation of the Proposal, with 49 reactions, of which 15 were from Germany, see https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/feedback_en?p_id=31731599.
24 Proposal, p. 8.
25 Proposal, p. 8; BNC-Fiche 3: *Beoordeling Richtlijn materieel insolventierecht*, 2023Z01871, 3 February 2023 (available at: https://open.overheid.nl/documenten/ronl-5c06013edf7d652555e5354dca75a95259e11999/pdf), p. 11.
26 Proposal, pp. 8-9. Compare also Ben Schuijling, 'Het commissievoorstel voor een nieuwe insolventierichtlijn', *FIP* 2023/2, para 9.
27 See: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment/feedback_en?p_id=31731599.

3. Objectives and structure of the Proposal: partial harmonisation in response to fragmentation among insolvency proceedings

3.1 *Objectives*

The Commission observes two key problems with the current national insolvency regimes: (i) costly and lengthy insolvency proceedings are leading to low recovery values, and (ii) a low predictability of (the outcome of) insolvency proceedings which leads to high information costs and creates barriers to cross-border insolvency.[28] The main drivers for these problems are on the on hand the recurring and extensive differences between national substantive insolvency regimes, and on the other hand that certain jurisdictions are have inadequately designed or are missing certain features.[29] In particular, the cross-border divergences (i) bring different outcomes across Member States, (ii) result in different degrees of efficiency of insolvency proceedings, (iii) amount to legal uncertainty on the outcomes of insolvency proceedings, and (iv) bring about higher 'information and learning costs', especially for cross-border creditors.[30]

In response to that, and in the Commission's policy language,[31] harmonisation of insolvency is considered to be a 'key tool for a more efficient functioning of the capital markets in the European Union, including greater access to corporate finance'.[32] The Proposal has the objective to 'contribute to the more efficient allocation of capital in the single market and enhance market integration under the CMU'.[33] The Proposal should converge insolvency regimes on those topics that inefficiently allocate capital and negatively impact the capital market.[34] More specifically, the Proposal aims to develop more uniform rules in Member States for better value recovery (notably in the fields of transaction avoidance, asset tracing, directors' duties and pre-pack procedures), more efficient insolvency proceedings (notably with respect to Micro- and Small Enterprises (MSEs) procedures, insolvency triggers and transparency) and efficient and fair distribution of recovered values (notably in the field of creditor committees and – although this is not included in the Proposal – the ranking of claims).[35]

Existing EU legislation in the field of insolvency law – in particular formed by the EIR 2015 and the Restructuring

28 Impact Assessment, p. 18 et seq.
29 Recitals 2-3 Proposal; Impact Assessment, p. 26 et seq.
30 Proposal, pp. 1-2. Impact Assessment, p. 18, in which the Commission discusses two main problems with the current fragmented insolvency law in Europe. The problems identified are: (i) costly and lengthy insolvency proceedings lead to low recovery value and (ii) low predictability of insolvency proceedings leads to high information costs and limits cross-border investment.
31 See further: Emilie Ghio, Gert-Jan Boon, David Ehmke, Jennifer Gant, Line Langkjaer & Eugenio Vaccari, 'Harmonising Insolvency Law in the EU: New Thoughts on Old Ideas in the Wake of the COVID-19 Pandemic', *International Insolvency Review*, 2021, 30(3), pp. 427-459.
32 Recital 4 Proposal.
33 Impact Assessment, p. 38.
34 Impact Assessment, p. 34.
35 Impact Assessment, p. 37.

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Directive[36] – provides already for harmonisation of particular cross-border insolvency law, as well as ‘pre’ insolvency and ‘post’ insolvency law, but hardly deals with (core) elements of substantive insolvency law.[37] Therefore, the Commission considers additional legislation necessary.[38]

The Commission has opted for a European directive with minimum standards, as the other legal instruments (a regulation and/or a recommendation) were considered less suitable to achieve the desired results. A regulation, on the one hand, would not offer enough flexibility to introduce common standards, given the variety and diversity in legal cultures and legal systems in the Member States. A recommendation, on the other hand, would be too noncommittal, leading to insufficient convergence.[39] The Proposal has its legal basis in Article 114 of the Treaty on the Functioning of the European Union (TFEU), which gives the European Parliament and the Council the power to adopt legislation aimed at adapting national legislation affecting the establishment and functioning of the internal market.[40] The scope of the Proposal is not restricted to cross-border matters, since the approximation of the various national insolvency regimes also applies to pure domestic situations within the boundaries of Member State. Therefore, and in contrast to the EIR 2015, Article 81 TFEU is not fit to serve as the legal basis in this case.

3.2 *Scope and structure*

The Proposal focuses on non-bank corporate insolvency law and, therefore, excludes insolvency proceedings concerning financial institutions, consumers or public bodies (under national law).[41] The Proposal broadly covers three themes which it considers ‘targeted’ aspects of insolvency law or ‘targeted’ elements of Member States’ insolvency rules. These themes are: (i) recovery of assets from the insolvent estate, (ii) efficiency of insolvency proceedings, and (iii) predictable and fair distribution of recovered value among creditors.[42] The topics within these themes aim to maximise the recovery of value from the insolvent company for creditors, strengthen procedural efficiency and ensure a fair and predictable distribution of values among creditors.[43]

In the Proposal, after a preamble of 63 recitals and an introductory title (I General provisions with a scope of application and definitions), the Commission has divided the targeted aspects of insolvency law – based on the abovementioned themes – into seven titles (II-VIII), followed by a final title (IX with final provisions). The core of the Proposal (Titles II-VIII), which is discussed in more detail in the following contributions by other authors, includes provisions on: (i) transaction avoidance, (ii) asset tracing, (iii) pre-packs, (iv) directors’ obligation to request the opening of insolvency proceedings, (v) simplified resolution of micro enterprises, (vi) the creditors’ committee, and (vii) measures to increase the transparency of national insolvency rules.

4. Some considerations on the need for the Proposal

4.1 *Definitions*

As a starting point, we consider it, least to say, quite remarkable and in some respects certainly problematic that a legislative proposal that deals with the harmonisation of substantive insolvency law does not define the core concept of insolvency. The need for a definition in the process of harmonisation was already identified by the High Level Forum as one of the core elements on which harmonisation should focus.[44] All possible practical and political difficulties aside, the absence of such a definition seems a major limitation in achieving the stated harmonisation goals. Without a definition, it is left to the Member States to interpret this concept as they see fit during the implementation which might impede achieving predictability and uniformity. This is likely to result in definitions which might negatively affect the appetite of investors and creditors for cross-border investment, hamper the single market and thereby infringe on the objectives of the Proposal.

Not only does the Proposal lack a definition of ‘insolvency’, similarly, the Proposal is also missing another core definition, namely ‘insolvency proceeding’.[45] In doing so, it remains unclear when avoidance actions will be justified, as the Proposal links the possibility to declare avoidance actions void to the opening of ‘insolvency proceedings’ (Title II). The same can be said with respect to the directors’ duty to file for the opening of insolvency proceedings (Title V), the establishment of creditors’ committees (Title VII) and the measures for enhancing transparency of national insolvency laws in view of the obligations for the Member States to create national factsheets on certain elements of national law on insolvency proceedings (Title VIII). Therefore, with this approach, core topics are potentially not harmonised.[46]

In this context, reference should be made to the Restructuring Directive in which several key concepts such as

36 For a further introduction to the development of European insolvency law, see Bob Wessels, ‘On the Future of European Insolvency Law’ in Rebecca Parry (ed.), *European Insolvency Law: Prospects for Reform*, Nottingham: INSOL Europe 2014, pp. 131-158; Gert-Jan Boon, Harmonising European Insolvency Law: The Emerging Role of Stakeholders, *IIR* 2018, 27(1303), pp. 162-163.

37 Proposal, p. 3. In contrast, the Restructuring Directive, according to the Commission, provided for ‘pre’ (Title II) and ‘post’ insolvency law (Title III). See also: Impact Assessment, pp. 6, 12-14.

38 Impact Assessment, pp. 35-38.

39 Proposal, p. 6. See also Impact Assessment, p. 46.

40 Proposal, pp. 5-6 and 21.

41 Article 1 Proposal; Impact Assessment, p. 7.

42 Proposal p. 9.

43 Proposal, p. 12 et seq.

44 A new Vision for Europe’s Capital Markets 2020, pp. 23 and 114.

45 With the exception of the liquidation phase in the pre-pack proceedings, which is considered to be an insolvency proceeding as defined in Article 2(4) EIR 2015, according to Article 20(1) Proposal.

46 There have been similar considerations in this regard with the transposition of the Restructuring Directive, see for instance: David C. Ehmke, Jennifer L.L. Gant, Gert-Jan Boon, Line Langkjaer & Emilie Ghio, ‘The EU Preventive Restructuring Framework: a hole in one?’, *International Insolvency Review*, 2019, 28(2), pp. 184-209.

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'likelihood of insolvency' were also left undefined.[47] Consequently, this has not only led to much academic debate but also to a great variety – *i.e.,* limited harmonisation – in the varied national implementations of the Restructuring Directive.

4.2 *Subject matter and (in)coherence*

In addition, and contrary to the genesis of the EIR 2015 and the Restructuring Directive, the Proposal does not consider an all-encompassing and well-defined subject of insolvency and/or restructuring law. Rather, the Proposal is a kaleidoscope comprising several different and quite incoherent topics that are proposed for harmonisation. The Proposal is not only diverse content-wise, but the different provisions also have wide-ranging standards for harmonisation. The provisions of some of the topics seem quite detailed while others are hardly developed. Parts of the Proposal clearly introduce minimum harmonisation standards, as is the case with the 'additional grounds' that Member States may introduce for avoidance actions if it leads to greater protection of the interests of joint creditors,[48] and with the directors' duty to timely request the opening of insolvency proceedings.[49] However, (most of the) other topics are regulated in quite detail with less flexibility for Member States. Consequently, Member States will be restricted in choosing the way how to implement the Proposal upon its adoption. This result is remarkable since, as noted earlier, harmonisation of substantive insolvency law has so far been seen as problematic.[50]

At the same time, it should be noted that the Commission initially, in addition to harmonisation of the aforementioned topics, considered a more ambitious and far-reaching harmonisation of insolvency law.[51] From that perspective, the Commission has taken a cautious approach to the Proposal. The ranking of claims, for example, was considered essential to achieve a CMU in earlier stages,[52] but the option to introduce a comprehensive harmonisation of the ranking of claims was discarded as potentially problematic from a subsidiarity perspective and was also considered politically non-feasible. The disparate starting position of Member States regarding the ranking of claims, also because of its embeddedness with other parts of the national legal regimes and legal traditions would make harmonisation infeasible.[53]

47 Article 2(2)(b) Restructuring Directive.
48 Article 5 Proposal.
49 Article 37(2) Proposal.
50 Impact Assessment, p. 13.
51 For example, the Commission has also considered harmonisation of, inter alia, (i) definitions of key terms (including 'insolvency'), (ii) ranking of claims in insolvency (harmonisation of the treatment of public claims), (iii) procedural aspects of insolvency proceedings, (iv) regulation of insolvency practitioners, (v) enhancing the ability of insolvency practitioners to seize assets in other Member States, (vi) change of fiduciary duties of the directors in the vicinity of insolvency, (vii) harmonisation of liquidity criterion for the latest possible triggering of the procedure, (viii) priority for certain groups of creditors, and (ix) protection of new funding; see Impact Assessment, para. 5.2 and 5.3 (Table 3).
52 Action Plan 2015, p. 24; Inception Impact Assessment 2020.
53 Impact Assessment, p. 46.

4.3 *Subsidiarity and proportionality*

The Commission is treading new territory with the proposal for substantive harmonisation of insolvency law. These proposals need to pass the subsidiarity and proportionality test, also when the envisaged harmonisation is limited to specific aspects only.[54] This follows from the fact that insolvency law is an area where the EU has no exclusive competence.[55] A careful consideration of the feasibility of the Proposal is all the more so important, as several Member States have shown reluctance for EU actions in this area.[56]

The subsidiarity test requires that any action by the EU in an area where it has no exclusive competence, is only allowed 'if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at a regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'[57] The Commission submits that the 'different starting points, legal traditions and policy preferences' in the Member States with regard to their insolvency regimes are unlikely to result in an effective convergence of those insolvency systems.[58] Furthermore, as the Commission states: 'The harmonisation of national insolvency laws can lead to a more homogenous functioning of the EU capital markets, reducing market fragmentation and ensuring better access to corporate financing. Action at the EU level is better placed to substantially reduce the fragmentation of national insolvency regimes and ensure convergence of targeted elements of Member States' insolvency rules to an extent that would facilitate cross-border investment across all Member States. Action at the EU level would also ensure a level playing field and reduce the risk of distortions to cross-border investment decisions caused by actual differences in insolvency regimes and a lack of information about these differences.'[59]

The proportionality test requires that any measure proposed by the EU will not exceed what is necessary to achieve the objective of the Treaty on the European Union (TEU) and the TFEU.[60] The legislative basis is Article 114 TFEU, which also determines the general objective of the Proposal, namely the establishment and functioning of the internal market. The Commission argues that the Proposal is set to contribute to the proper functioning of the internal market, in particular by taking away barriers to the free movement of capital and freedom of establishment. The Proposal is also held to be proportional because it contains only minimum harmonisation requirements and is focused on specific, targeted areas of substantive insolvency law.[61]

54 Article 5(3) and 5(4) TEU.
55 Compare Proposal, p. 6.
56 Proposal, pp. 8-9; see also the response of Member States to the public consultations in: Impact Assessment, p. 81 et seq.
57 Article 5(3) TEU.
58 Proposal, p. 6.
59 Proposal, p. 6.
60 Article 5(4) TEU.
61 Proposal, p. 6.

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Since the Commission has adopted a 'patchwork approach', our view is that an analysis of whether the Proposal is in line with the principles of subsidiarity and proportionality is to be decided for each topic separately. In particular, to what extent is a more homogenous functioning of the capital markets and cross-border investments facilitated by the detailed regulation of the winding-up of microenterprises (Title IV) and creditors' committees (Title VII)? Especially, the requirement of proportionality may be considered at odds with the rather extensive and detailed provisions dealing with avoidance actions (Title II; Article 4-12), but also pre-packs (Title IV; Article 19-35), winding-up of microenterprises (Title VI; Article 38-57) and creditors' committees (Title VII; Article 58-67).

The Dutch Ministry of Justice and Security has prepared a 'Fiche' in preparation for the discussion of the Proposal in the Council.[62] This document entails, in principle, broad support by the Dutch government for strengthening the internal market and the capital market, but shows a certain reluctance[63] – especially concerning the pre-pack, directors' duties to file for the opening of insolvency proceedings, the winding-up of micro-enterprises and the creditors' committee – because of possible damage to the current efficient Dutch insolvency practice, mostly due to the elaborated details of the Proposal and its burdensome effects on the judiciary.[64] As a result, according to the Dutch government, the Proposal in parts '[…] goes further than necessary to achieve this objective'.[65]

4.4 *Justification for harmonisation?*

In the Impact Assessment of some 240 pages, the Commission elaborates on the background and envisaged impact of the Proposal. It draws on economic and legal academic research, multiple studies that were commissioned and the results of (public) consultations with various stakeholders. It provides a foundation for the ambitions laid down by the Commission with the Proposal. Still, the Proposal raises questions.[66] For instance, on its scope (what is and what isn't proposed for harmonisation), but also to what extent the patchwork of topics presented in the Proposal will be able to positively influence cross-border investments. For anyone well-versed in European insolvency laws, it will be clear that harmonisation certainly has the potential to reduce some of the existing divergences and bring more legal certainty. However, both the suggested (negative) impact of the defined problems on cross-border investment as well as the (positive) effects of the Proposal on those investments remain difficult to assess. It is unclear, for example, whether the alleged 'home bias', meaning that large variations in insolvency systems would encourage forum shopping-abuse and therefore negatively impact cross-border investment,[67] is a common problem. In addition, the stated relationship between the elements of the Proposal and cross-border investment is based on assumptions suggested by several survey responses.[68] Surveys alone cannot give insight into the effects of different measures. This methodological caveat is acknowledged in the impact assessment but not addressed.[69]

The patchwork approach itself imposes a significant limitation to achieving the objectives of the Proposal. There is limited coherence between the respective topics covered by the Proposal. Furthermore, achieving the objectives with harmonisation is hampered when key concepts are left outside the scope of the Proposal, such as introducing an EU-wide definition of insolvency or insolvency proceeding and a comprehensive harmonisation of the ranking of claims, even though the latter was considered as highly ambitious.[70]

Due to the lack of coherence in the topics of the Proposal and the difficulties that brings to assess the impact of the Proposal as a whole, it remains unclear whether and to what extent the different topics will contribute to reach the Commission's objectives. Therefore, we encourage Member States to provide further evidence for the (alleged) impact that certain topics of the Proposal have or are expected to have in their jurisdiction. Not only would this make the suggested provisions more effective, it will also provide Member States with a better justification to amend their substantive insolvency laws. It must be noted that this is already the case for some topics proposed for harmonisation, in particular, because they find their origin in a detailed EU-wide study of domestic laws, as is the case with the provisions on avoidance actions.[71] Our suggestion here also builds on prior research arguing for a broader understanding of the concept of harmonisation which should not be perceived merely as a top-down approach. As Ghio et al pointed out (italics in original): 'the EU must *acknowledge* the role played by existing domestic rules and practices in the top-down harmonisation process, for its own sake, as it will result in decreased resistance to the EU measure.'[72]

62 BNC-Fiche 3: *Beoordeling Richtlijn materieel insolventierecht*, 2023Z01871, 3 February 2023 (available at: https://open.overheid.nl/documenten/ronl-5c06013edf7d652555e5354dca75a95259e11999/pdf).

63 Such reluctance from Member States is in general not a surprise, this was witnessed also in consultations leading up to the Restructuring Directive, see: Boon 2017, pp. 3-29.

64 BNC-Fiche 3: *Beoordeling Richtlijn materieel insolventierecht*, 2023Z01871, 3 February 2023, pp. 7-9, 12-14, 16.

65 BNC-Fiche: *Beoordeling Richtlijn materieel insolventierecht*, 2023Z01871, 3 February 2023, p. 12.

66 Although it falls outside the scope of this paper, this also relates to the more general questions of what is harmonisation (and how does it relate to concept such as convergence and approximation also used in the Proposal) and what strategy would most effectively be adopted to achieve harmonisation. For instance, does harmonisation – as the Proposal seems to suggest – involve top-down harmonisation, or might it also – simultaneously – be the result of bottom-up harmonisation, for instance, because of regulatory competition. See further on this: Ghio et al., 2021, pp. 427-459.

67 Impact Assessment, pp. 10 and 23. See also: A new Vision for Europe's Capital Markets 2020, p. 114.

68 Impact Assessment, pp. 47-69, especially table 8 and Annex 3 and 4.

69 Impact Assessment, pp. 111-112.

70 Impact Assessment, p. 46.

71 Reinhard Bork and Michael Veder, 'Proposal for a Harmonised Transaction Avoidance Law for the EU', *Cambridge University Press*, 2022.

72 Ghio et al., 2021, pp. 450.

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5. **Final remarks**

With its Proposal, the Commission commenced a new voyage for harmonisation of European insolvency law. After waves of harmonisation of cross-border insolvency and preventive restructuring and the discharge of entrepreneurs, the focus has now shifted to insolvency itself. In its endeavour to strengthen the European single market and further boost the Capital Markets Union, harmonisation of insolvency law is considered key. The legal uncertainty associated with the great disparity of national insolvency regimes is considered an important impediment to promoting cross-border investments in the EU. This legislative initiative, even when the Proposal involves putting forward minimum harmonisation of targeted aspects of insolvency only, is by and of itself ground-breaking and will – if successful – be a catalyser for transforming our understanding of the room for harmonisation of insolvency law in the broad sense in years to come.

The Proposal is – as usual for legislative texts – a (political) compromise based on many consultations with numerous stakeholders: Member States, sector stakeholders, European community bodies, experts, practitioners, as well as European citizens, etc. The Proposal has now been submitted by the Commission to the European community at large, with an explicit call for comments. At the same time, the EU legislative process has started with the so-called 'trilogue' which involves negotiations to be commenced between the European Parliament and the Council.

The Proposal, as it stands, entails a mere patchwork of selective aspects that are proposed for harmonisation. We've discussed several concerns regarding the lack of definitions and coherence of the Proposal and raised questions regarding the proportionality and justification of the proposal. However, the impact of the Proposal should not be underestimated as it intervenes with certain core topics of insolvency law, requiring Member States to amend the laws on avoidance actions, but also introduce mandatorily (new) proceedings for pre-packs and liquidation of microenterprises, as well as introducing a duty to file for directors and requiring minimum involvement of creditors' committees. In addition, the Proposal extends the possibilities for insolvency practitioners to access various registers, which may prove a valuable asset tracing tool.

Critiques on these and other measures of the Proposal may be based on the fact that it proposes a deviation from the *status quo* in domestic insolvency regimes, and therefore bring a change to the current practice. However, this should not prevent us from considering the upside that a new or amended insolvency regime may provide for the domestic and European markets. Therefore, the debate that is about to unfold, also in this issue, should promote an open, but most of all constructive dialogue of what harmonisation of insolvency laws may bring.

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Mr. drs. N.B. Pannevis[1]

The European harmonisation of avoidance rules, a Dutch perspective on reshaping an age-old instrument

TvI 2023/12

1. Introduction

For a long time substantive insolvency law has been a scarce area of civil law that remained largely untouched by European law. This has changed. Over the last few years, re-shaping substantive insolvency law has caught the attention of the European law-maker. After the Restructuring Directive,[2] the first fundamental harmonisation of insolvency law, the European Commission has taken a big new step in this regard by proposing a directive harmonising certain aspects of insolvency law (hereafter the Proposal).[3] Among the topics chosen for harmonisation is one of the key parts of insolvency law, transaction avoidance provisions. The Dutch government largely supports the avoidance provisions of the Proposal.[4]

This paper aims to discuss the proposed rules for avoidance in insolvency proceedings from a Dutch perspective. Other topics of the Proposal are covered elsewhere in this special edition. Paragraph 2 first sets out the proposed framework for avoidance (par. 2). After that, we can analyse what changes the Proposal would bring to existing Dutch avoidance law (par. 3), and try to predict some of the consequences it would have on existing Dutch legal practice (par. 4). In doing this, this Dutch perspective will also shed light on some of the Proposal's strengths and opportunities for further consideration.

2. Overview of the proposed harmonisation of avoidance

2.1 *Background*

Just as the Restructuring Directive,[5] the Proposal is part of the European Commission's priority to advance the Capital Markets Union.[6] The central notion in this regard is that the lack of a harmonised insolvency regime hinders the freedom of capital movement in the EU, because finance providers are scared away from providing cross-border finance by the prospect of being confronted with different insolvency laws.[7] The European Commission aims to address this by harmonising (aspects of) insolvency law. The qualification as part of the Capital Markets Union program is crucial in this regard, since it provides a legal basis for the European Union to harmonise substantive law without the need for a cross-border context.[8] In contrast, the (recast) Insolvency Regulation builds on the legal basis for judicial cooperation in civil matters,[9] which only supports harmonised rules for cross-border matters.

The Proposal has been prepared in consultation with Member States, relevant stakeholders, and a group of experts on restructuring and insolvency law. The proposed avoidance rules rely heavily on a recent and extensive study on this topic by Bork and Veder, with input from experts from every Member State.[10] The rules on avoidance actions in the Proposal are almost a word-for-word copy of the proposals made by Bork and Veder. Therefore, the work of Bork & Veder is instrumental in gaining a better understanding of the Proposal. Their approach was to first derive the main principles of insolvency and avoidance law from all European Member States, followed by building a harmonised law upon these principles.

2.2 *Minimum harmonisation*

The Proposal aims to set minimum standards for avoidance actions. Member States can set additional rules for avoidance, voidability or unenforceability of legal acts detrimental to the general body of creditors, as long as those rules provide greater protection to the general body of creditors.[11]

This minimum harmonisation is hard to reconcile with the Proposal's stated goal to promote cross-border investments, because cross-border investors (presumably) mostly fear being the possible target of (unknown) avoidance rules.[12] As long as Member States can still adopt rules that offer more protection to the general body of creditors than the minimum norms of the Proposal, cross-border investors may still be confronted with foreign local avoidance actions.

The Insolvency Regulation addresses this matter by determining that any act which is voidable according to the *lex concursus* is not voidable if the counterparty proves the legal act is subject to the law of a different Member State (the *lex causae*),

1 Niels Pannevis is an attorney at RESOR in Amsterdam, senior researcher at the Radboud Business Law Institute, and member of the editorial board of this journal.

2 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 (Restructuring directive).

3 Proposal for a Directive of the European Parliament and of the Council, COM(2022) 702 final. Where referring to the Proposal in this paper, reference is made to title II, the title on avoidance actions, or the overall definitions. Articles, considerations and the Explanatory Memorandum referred to without further specification, are those in the Proposal.

4 Fiche of the 'Werkgroep Beoordeling Nieuwe Commissievoorstellen', available at https://www.rijksoverheid.nl/documenten/richtlijnen/2022/12/07/fiche-3-richtlijn-materieel-insolventierecht, last checked 10 March 2023.

5 Restructuring Directive, consideration 8.

6 Explanatory Memorandum, p. 1 (part of the same document as the Proposed Directive, COM(2022) 702 final).

7 Explanatory Memorandum, p. 1-2, and recital 4 and 5. Whether this notion is factually correct is outside the scope of this paper.

8 Art. 114 TFEU, cf. Explanatory Memorandum, p. 5.

9 Art. 81 TFEU.

10 R. Bork & M. Veder, *Harmonisation of transactions avoidance laws*, Cambridge: Intersentia 2022, doi:10.1017/9781839702464.

11 Art. 5.

12 Cf. Explanatory Memorandum p. 2, 5 and 8.

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and that it cannot be voided according to that *lex causae*.[13] The cross-border investor who fears becoming subject to avoidance proceedings under a foreign *lex concursus* can thus seek protection under his own *lex causae*, but the *Nike/Sportland Oy* case has set the bar very high for such protection.[14] In this regard, the Proposal will mostly benefit the insolvency practitioner planning to start avoidance actions, and thereby the general body of creditors. If the planned avoidance action satisfies the Proposal's requirements for avoidance, then the challenged action should be voidable under any *lex causae* that may apply. The stated goal of promoting cross-border investment through predictability may also be pursued by applying solely the *lex concursus* to avoidance actions, since the *lex concursus* is determined by the centre of main interest, which the European legislator has endeavoured to make foreseeable for the creditors.[15] However, such an approach would also abolish the *lex causae*-exception, that exists to protect legitimate expectations of counterparties entering into transactions with the debtor, including foreign investors.[16]
Further predictability of avoidance rules through harmonisation would require full or maximum harmonisation of avoidance laws, in the sense that European rules would determine the maximum level of protection that the general body of creditors is awarded against detrimental acts. This may not be politically feasible, as it would also require doing away with particular national rules for avoidance.[17]

2.3 *The proposed framework: two common requirements, three avoidance grounds and one set of consequences*

2.3.1 *Introduction*

The system of avoidance actions under the Proposal consists of a common description of the object of all avoidance actions (i.e. legal acts detrimental to the general body of creditors), followed by three different avoidance grounds tailored towards three types of voidable legal acts, and lastly one common set of consequences of avoidance.
The three different avoidance grounds cover (in short):
i) preferences (art. 6),
ii) legal acts against no or manifestly inadequate consideration (art. 7), and

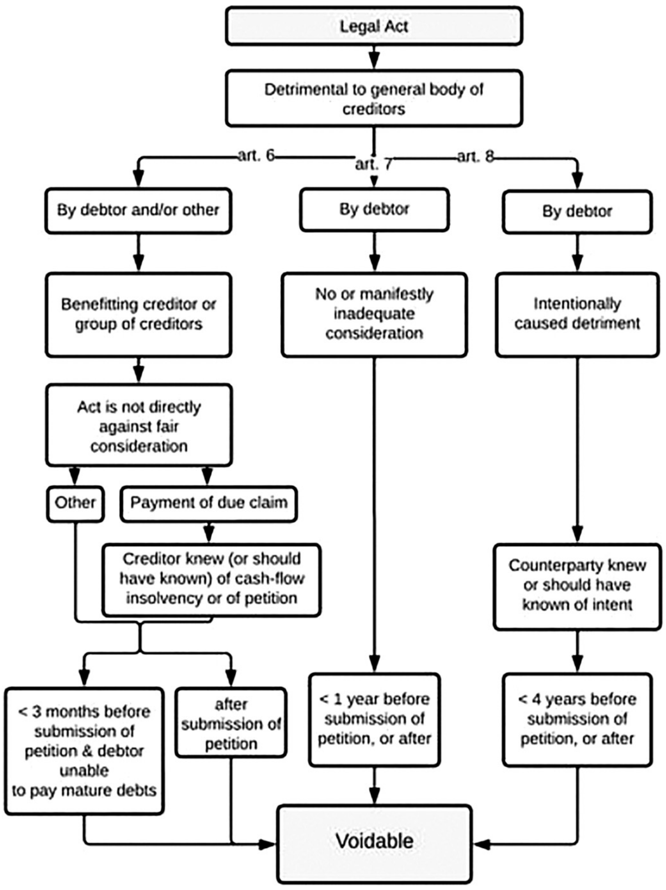

Diagram 1: The proposed harmonised avoidance requirements summarized

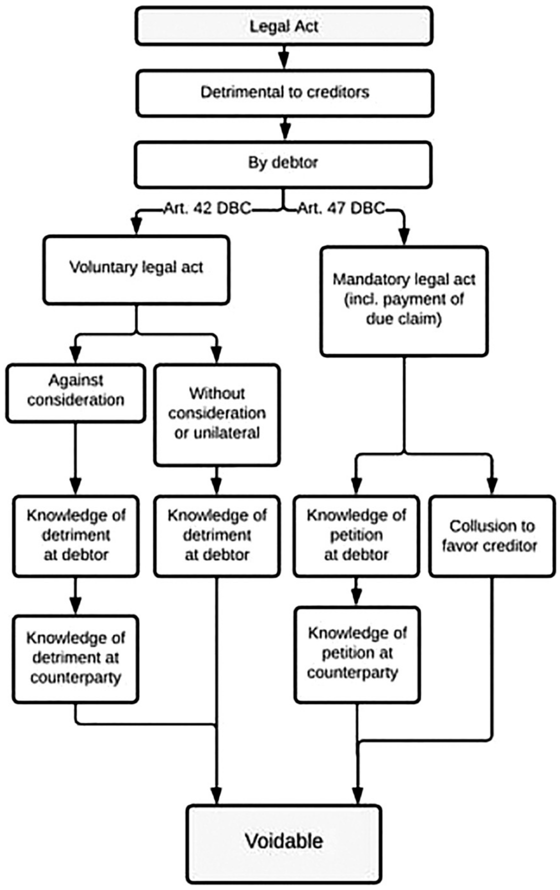

Diagram 2: The existing Dutch avoidance requirements summarized

13 Art. 16 IR.
14 ECJ 15 October 2015, ECLI:EU:C:2015:690, *TvI* 2016/8 (*Nike/Sportland Oy*).
15 Consideration 28 of the Insolvency Regulation, Ringe in R. Bork & K. Van Zwieten (eds), *Commentary on the European Insolvency Regulation*, Oxford: Oxford University Press, 2022, par. 3.21, Virgos Schmit report, par. 75.
16 ECJ 15 October 2015, *JOR* 2016/170 (*Nike/Sportland Oy*), ECJ 16 April 2015, *JOR* 2016/169 (*Lutz/Bäuerle q.q.*), Garcimartín & Virgós in Bork & Van Zwieten 2022, par. 16.10, Virgos Schmit report par. 138.
17 This is one of the reasons that no full harmonisation through a Regulation is proposed, Explanatory Memorandum, p. 6. See also Bork & Veder 2022, par. 1.10, 4.20 and 4.197.

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iii) legal acts intentionally detrimental to creditors (Art. 8). Each avoidance ground is aimed at a common type of transaction (or typical fact patterns[18]) detrimental to creditors, but a specific transaction may be challengeable on more than one avoidance ground.[19]

This architecture of the avoidance provisions differs significantly from the avoidance provisions currently available under Dutch law. The proposed framework is summarised in diagram 1.[20] Current Dutch avoidance provisions are summarised in diagram 2.[21] As the difference in structure shows, considering the Proposal's harmonised system requires the reader accustomed to current Dutch law to leave behind the familiar territory of Art. 42-51 of the Dutch Bankruptcy Code.

2.3.2 *Common requirement: Legal acts*

The object of all three avoidance grounds is the challenged legal act. The Proposal defines legal acts as 'any human behaviour, including an omission, producing a legal effect'.[22] This is to be interpreted broadly.[23] Bork & Veder consider it to include almost any transaction.[24]

Challengeable legal acts include not only acts, but also omissions by the debtor. The Proposal's avoidance actions can target the debtor's inactivity, such as the inactivity that allowed a claim to become time-barred,[25] the omission to challenge a disadvantageous judgement, or not registering an intellectual property right.[26] The underlying notion is that to the creditors it makes no essential difference whether their debtor actively destroys assets (e.g. by waiving a claim), or leaves his assets to deteriorate (e.g. by not preventing a claim from becoming time-barred). The detriment to the creditors of the debtor and the advantage to the debtor of the released claim is the same.[27] However, Bork & Veder stress that avoidance of omissions should be limited to cases where the debtor acted wilfully, i.e. decided to remain passive despite foreseeable legal consequences. From the viewpoint of the counterparty, one may wonder at the avoidance of omissions, as they occur without the involvement of the counterparty.

Bork & Veder also stress that including forbearance, or omissions by the debtor, does not allow the insolvency practitioner to repair commercial opportunities that the debtor did not take before insolvency.[28] The general body of creditors can only expect not to be put in a worse position than they would be without the vulnerable transaction, the creditors cannot expect the insolvency practitioner to void not taking business opportunities and then re-taking those opportunities by way of avoidance actions.

Further, the challengeable legal acts are not restricted to legal acts by the debtor. Acts by counterparties of the debtor, or even third parties can also be challengeable when they create preferences.[29] We will revisit this in par. 3.3.

Lastly for there to be a legal act the Proposal does not require that the legal effects were *intended*.[30] Factual acts that invoke legal consequences can give rise to avoidance actions, such as factual acts that by operation of law result in the creation of security rights that cause detriment to the general body of creditors.[31] In contrast with current Dutch law,[32] this would allow for avoidance actions against a pledgee turning his undisclosed pledge into a possessory pledge.

2.3.3 *Common requirement: Detriment to the creditors*

Regardless of the avoidance ground, only acts due to which the creditors suffered damage or detriment[33] can be avoided.[34] Detriment exists when the creditors participating in the insolvency proceeding are better off (i.e. get higher dividends) without the challenged legal act.[35] Hence, challengeable detriment can exist where assets are sold at an undervalue, when security rights are vested for previously unsecured claims, and when a third party pays off an unsecured claim against the debtor while acquiring a secured claim for reimbursement by the debtor in the process.[36]

Bork & Veder argue that indirect detriment should also be taken into account, as is also the case under current Dutch law.[37] Hence, where a debtor sells assets at a correct price, Bork & Veder still consider that transaction detrimental if the debtor subsequently spends the proceeds to satisfy a creditor, with the consequence that the value of the asset is not part of the estate in a subsequent insolvency proceeding.[38]

2.3.4 *Preferences*

The first of three proposed avoidance grounds is aimed at ways in which a creditor or group of creditors may be satisfied or secured with preference over other creditors,

18 Bork & Veder 2022, par. 4.47.
19 Bork & Veder 2022, par. 4.166.
20 Unavoidably this schematic summary leaves out some nuances, such as that it only regards legal acts conducted before the opening of insolvency proceedings, the exception of payment of bills and cheques from art. 6, the rule on simultaneous petitions for opening of insolvency proceedings (art. 6 (1), art. 7(3) and art. 8 (2)), and that the proposed text of art. 8 does not refer to legal acts by the debtor, but to legal acts by which the debtor has intentionally caused detriment, it is unclear whether this can include legal acts by others.
21 Under Dutch law detrimental acts may also be challenged under other more general provisions such as general tort law or nullities of legal acts challenging public policy, but this diagram is limited to those specific avoidance actions in insolvency which correspond to the proposed harmonized avoidance actions.
22 Art. 2 sub f.
23 Consideration 6.
24 Bork & Veder 2022, par. 4.20-4.31.
25 In Dutch: *een vordering laten verjaren*.
26 Consideration 6.
27 Bork & Veder 2022, par. 4.26 & 4.29.
28 Bork & Veder 2022, par. 4.26.
29 Consideration 6.
30 Cf. consideration 6.
31 Bork & Veder 2022, par. 4.25.
32 Dutch Supreme Court 21 June 2013, *JOR* 2013/320 (*Eringa q.q./ABN Amro*).
33 Bork & Veder consider 'detriment' to have the same meaning as 'disadvantage', but use detriment for consistency with art. 7(2) sub m IR, Bork & Veder 2022, par. 4.40.
34 Art. 4.
35 Bork & Veder 2022, par. 3.22 and 4.41.
36 Bork & Veder 2022, par. 3.23, 3.24 and 4.113 Compare Dutch Supreme Court 16 October 2015, ECLI:NL:HR:2015:3023 (*DLL/Van Logtesteijn q.q.*) and BGH 26.4.2012 – IX ZR 146/11, NZI 2012, 562 para. 25 et seq.
37 See Van der Feltz I, p. 441 and R.J. de Weijs, *Faillissementspauliana, Insolvenzanfechtung & Transaction Avoidance in Insolvencies* (diss. UvA, Series Recht & Praktijk Insolventierecht InsR1), Deventer: Kluwer 2010, par. 4.2.1.2.4.
38 Bork & Veder 2022, par. 3.25.

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thus bypassing the previously existing ranking of claims. Whether that satisfaction or collateralisation of claims was the result of acts by the debtor or by other parties is not relevant.[39] Hence, the insolvency practitioner can also challenge the creation of set-off opportunity under this avoidance ground.[40] Amendments to contracts that benefit individual creditors to the detriment of others are also challengeable.[41] Even satisfaction that is the result of individual enforcement actions can be avoided if the other requirements of this avoidance ground are met. The reasoning is that if those requirements are satisfied, the creditor should not individually enforce its claim, but opt for collective insolvency proceedings to give effect to the ranking of claims.[42] In contrast, the Dutch legislature, when faced with the same choice in 1896, instead chose *not* to allow avoidance of enforcement actions, because a creditor should not be forced to apply for collective insolvency proceedings.[43]

All preferences concern cases in which an existing creditor is preferred over other existing creditors (e.g. through payment or collateralisation). However, in order to protect the trust that a creditor may have that proper satisfaction of his claim will not be avoided, it is important to distinguish between, on the one hand, creditors receiving payment or security at the time when it was owed and in the manner in which satisfaction was owed (so-called 'congruent coverages'), and, on the other hand, other payments, collateralisation or other benefits to creditors, beyond what was due ('incongruent coverage'). In line with many Member States, among which the Netherlands,[44] the Proposal includes separate requirements for congruent coverages, in addition to the requirements for incongruent coverages.[45] Congruent coverages of claims can only be avoided if the creditor knew or should have known that the debtor was unable to pay his debts as they fell due, or that the opening of an insolvency proceeding had already been requested.[46] Payments or collateralisations beyond what was due (incongruent coverages) need not satisfy this requirement for voidability. Hence, as regards the required foreseeability of insolvency, this distinction between congruent and incongruent coverage is crucial, but even for congruent coverage the foreseeability of an insolvency proceeding is not required, only knowledge of cash flow insolvency.

Both for congruent and incongruent coverages, avoidance actions can only be aimed at legal acts that were perfected after submission of the request to open insolvency proceedings, or within three months before the submission of the petition to open insolvency proceedings but in the latter case only if the debtor was unable to pay its mature debts at the time.[47] This avoidance ground thus introduces a mitigated suspect period. Legal acts conducted after submission of the petition to open insolvency proceedings can be challenged without further insolvency test. For legal acts conducted up to three months before the submission of the petition to open insolvency proceedings, the Proposal still requires inability to pay debts at the time of the challenged act[48] (and for congruent coverage also that the creditor knew of that inability). Legal acts conducted more than three months before the petition to open insolvency proceedings need not be challengeable as preferences under the Proposal, although Member States may choose to extend this timeframe,[49] and such acts may be challengeable under other avoidance grounds.

To further protect transactions against which no suspicion is warranted, the Proposal excludes three types of legal acts from the avoidance ground for preferences.[50] These include certain payments of bills of exchange and cheques,[51] and legal acts that cannot be avoided based on the directives on settlement finality in payment and securities settlement systems.[52]

The Proposal also excludes from avoidance based on preference those legal acts performed 'directly against fair consideration to the benefit of the insolvency estate'.[53] This exception is meant to protect day to day transactions necessary to enable individuals to meet daily living expenses, and for businesses to continue day to day operations.[54] Hence, this exception only covers transactions at fair value, including payment of wages and advisors, or creation of security rights at disbursement of the loan.[55] For some of these, one may question whether the exception is necessary because they may not constitute preferences in the first place, since before the challenged transaction the counterparty was not an existing creditor, or in any case not with a claim for the challenged performance by the debtor.[56] The exception does not cover transactions regarding new financing for the company in general.[57] However, in respect of new or interim financing provided during a restructuring attempt,

39 The wording of art. 4 and 6 is not limited to actions by the debtor. See also par. 2.3.2 above, par. 3.3. below, and Bork & Veder 2022, par. 4.75.
40 Bork & Veder 2022, par. 4.68.
41 Bork & Veder 2022, par. 4.70.
42 Bork & Veder 2022, par. 4.65.
43 Van der Feltz I, p. 436.
44 Art. 42 and especially 47 DBC.
45 The distinction as made in the Proposal seems heavily influenced by the German approach of § 130 and § 131 InsolvenzOrdnung. See also Bork & Veder 2022, par. 4.77 and 3.36.
46 Art. 6(2). Consideration 8 seems to inadvertently introduce a definition of insolvency, since it describes the inability to pay debts of art. 6(1) as the debtor being insolvent.
47 The wording of art. 6 (1) sub a leaves room for the interpretation that the requirement of inability to pay debts does not refer to the condition of the debtor at the time, but to the to the opening test for the requested insolvency proceeding. However, this inability to pay debts is to be considered an independent requirement by itself, and not a qualification of the insolvency proceeding that has been requested, Explanatory Memorandum, p. 13 and Bork & Veder 2022, p. 3.
48 Bork & Veder 2022, par. 4.86. This is – in accordance with the UNCITRAL legislative guide – understood to describe non-transient inability to pay debts as they fall due.
49 Art. 5.
50 Art. 6 (3).
51 Art. 6 (3) sub b.
52 Directive 98/26/EC and Directive 2002/47/EC, see art. 6 (3) sub c.
53 Art. 6 (3).
54 Consideration 9.
55 Consideration 9.
56 Although art. 6 does seem to imply as such, the Proposal does not explicitly specify whether voidable preferences can only exist where the favoured creditor was already a creditor before the challenged legal act. English law for example does provide as much: art. 239 of the English Insolvency Act, only applies to pre-existing creditors. See also De Weijs 2010, p. 146.
57 Consideration 9, Bork & Veder 2022, par. 4.116-117.

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the Proposal considers that such financing should be protected from avoidance by classification as legal acts directly against fair consideration to the benefit of the insolvency estate.[58]

2.3.5 *Transactions at an undervalue*

The second ground for avoidance under the Proposal concerns transactions at an undervalue such as gifts and donations, but more generally aims to combat transactions whereby the debtor places assets out of reach of his creditors.[59]

The general requirement, that the avoidance must concern a legal act that was detrimental to the general body of creditors, also apply to these transactions.

The central notion here is that there is little trust that is worthy of protection if a counterparty receives value from the debtor without prior entitlement or adequate consideration.[60] Therefore, the core requirement of this avoidance ground is the undervaluing of the challenged transaction, i.e. the lack of adequate consideration for the challenged legal act. This test is simple where there is no consideration, such as with gifts and donations, albeit that gifts and donations of symbolic value are excluded from avoidance.[61]

There is, however, little guidance as to what 'manifestly inadequate consideration' means. From the viewpoint of party autonomy as a general principle of contract law, parties have the freedom to determine what they consider fair consideration and the bar for avoidance should be set high. Not every good bargain should be voidable. This is expressed by the requirement that the consideration be *manifestly* inadequate.[62]

Transactions at no or manifestly inadequate consideration are voidable if they were perfected less than a year before the submission of the petition to open insolvency proceedings, or after the submission of such petition, regardless of whether the debtor was insolvent at the time of the transaction. Interestingly, the suspect period of one year applies to all counterparties, without distinction as to whether they are closely related to the debtor or not. The reasoning here is that gifts are usually made to closely related parties in any case, but more fundamentally, that presumptions for closely related parties should be restricted to proof of subjective elements, and not for objective elements such as undervalue.[63] The avoidance ground for transactions at an undervalue does not have subjective requirements.

2.3.6 *Intentionally fraudulent transactions*

The Proposal's third avoidance ground covers intentionally fraudulent transactions. Avoidance on this ground also requires the common prerequisites of a legal act that is detrimental, but the key requirement in this case is *the intention* to cause detriment. Avoidance on this ground requires that the debtor had such intent, and the counterparty to the legal act knew or should have known that the debtor had such intent.[64] The subjective requirements are at the core of avoidance on this ground.

The wording of the proposed directive seems to set the bar high for the required intent, describing legal acts 'by which the debtor has intentionally caused a detriment'.[65] This suggests that the debtor must have acted *with the goal* to cause detriment to the creditors. This seems in line with the majority of European jurisdictions.[66] However, Bork & Veder argue that for there to be intent, it can also be sufficient if *contingent intent* exists, that is, if the debtor has considered that detriment to the general body of creditors is possible, and proceeded anyway, taking for granted possible detrimental consequences.[67] It is unclear however if there is sufficient intent in cases where the debtor was not necessarily aware (subjectively), but *should have been* aware of the detriment (objectively).[68]

Because the intent to cause detriment to the creditors is the central notion of this avoidance ground, there is no requirement that the debtor was (materially) insolvent at the time of the disputed legal act. In order to promote legal certainty for the counterparty, only acts which were perfected within four years prior to the submission of the petition to open insolvency proceedings, or after that submission can be avoided. This extends far beyond the chronological scope of other avoidance grounds. Thus, this will likely raise the question of whether actions that would be challengeable under other avoidance grounds except for their timing (such as preferences more than three months before the petition to open insolvency proceedings), can successfully be challenged as intentionally fraudulent transactions.[69] The fulfilment of requirements of other avoidance grounds can assist in establishing the requirements for avoidance on this ground, but avoidance will be tested against these separate (subjective) requirements.

It is unclear whether this avoidance ground for intentionally fraudulent transactions can also cover unilateral legal acts by the debtor. By nature, unilateral acts have no counterparty, thus cannot satisfy the required awareness of the counterparty, but this seems an odd reason to exclude

58 Consideration 10.
59 Explanatory Memorandum, p. 13.
60 See Bork & Veder 2022, par. 4.138: '*The formative factor of this avoidance ground is the gratuitiousness of the transaction: he who has received a performance without any prior entitlement and without any (or with no adequate) consideration is less worthy of protection of trust than a party to a fair and balanced exchange contract.*'
61 Interestingly where Bork & Veder propose to exclude gifts of 'minor value' the Proposed Harmonization Directive excludes gifts of 'symbolic value', see Bork & Veder 2022, par. 4.152 and art. 7 (2). I have not found an explanation for this difference in wording.
62 Bork & Veder 2022, par. 4.143.
63 Bork & Veder 2022, par. 4.146.
64 Art. 8 (1)(b).
65 Art. 8.
66 Bork & Veder 2022, par. 4.161.
67 Bork & Veder 2022, par. 4.162. The Dutch legislator had similar considerations in 1893, see Van der Feltz I, p. 439.
68 The fact that art. 8 does describe it sufficient if the counterparty *should have been* aware of the debtor's intent, but that it does not explicitly address cases where the debtor *should have been* aware of the detriment, suggests that it is not sufficient that the debtor should have known of the detriment to the creditors.
69 De Weijs 2010, par. 2.2.4.3.3 extensively discusses this development for the similar avoidance ground under German law (§ 133 InsO), with further references.

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unilateral legal acts. Unilateral legal acts can be avoided under the avoidance ground for transactions at an undervalue, but that avoidance ground only applies to legal acts within one year before submission of the petition to open insolvency proceedings.

2.3.7 *Consequences of avoidance*

The Proposal contains common rules for the consequences of a successful avoidance action, regardless of which of the three avoidance grounds the action is based upon. The consequences of an avoidance action are two-fold.

First, the counterparty cannot invoke any rights, claims or obligations it has gained from the avoided transaction to receive satisfaction from the insolvency estate.[70] Thus an avoided security right or set-off position cannot be invoked against the insolvency trustee. However, any claim that was satisfied in a voidable manner revives after avoidance.[71]

Second, the party that benefitted from the avoided legal act is obliged to compensate the insolvency estate for the detriment caused to the creditors by the avoided act. This may be by payment of damages. Avoidance actions do not necessarily have *in rem* consequences such as the return of ownership of voidably transferred assets to the estate, albeit the Dutch translation of the Proposal suggests otherwise.[72]

These effects were chosen as a balance between providing for recovery of the detriment and legal certainty in otherwise valid transactions.[73] In the vision of Bork & Veder *erga omnes* effects constitute overreach, while relative nullities hardly solve this issue but mostly complicate the situation.[74] Therefore, the Proposal does not require legal nullities or effects *in rem* as consequences, although there is some nullifying effect where the counterparty cannot exercise voidable rights to obtain satisfaction from the insolvency estate.[75]

This approach is in line with the stated goal of limiting the subjective elements of transaction avoidance requirements and the distinction between various avoidance grounds.[76] De Weijs has argued that, especially when reducing subjective requirements, the consequences of avoidance actions should differ between avoidance grounds, because transactions at an undervalue require a different approach compared to preferences, which mostly disturb the ranking of claims.[77] The Proposal follows this reasoning to some extent. Although in a strict sense, all avoidance grounds may lead to both consequences, in practice the consequence of transactions at an undervalue will be reimbursement of the lost value,[78] whereas preferences will often be remediated by prohibiting the counterparty from invoking the challenged transaction against the estate.

The counterparty can never set off his debt against the estate with any claims he may have against the insolvent debtor.[79] If the counterparty disputes liability because what he gained from the voided transaction is no longer available in his property, such defence can under the Proposal only be successful if the counterparty was unaware of the circumstances on which the avoidance action is based.[80] The counterparty can claim repayment of the consideration paid to the debtor as part of the avoided transaction. This claim qualifies as an estate claim inasmuch as the consideration is separately available in the estate or as a general unsecured claim otherwise.[81] Claims which were satisfied by the avoided legal act revive to the extent that the counterparty compensates the insolvency estate for the detriment.[82]

The claim based on avoidance actions has a limitation period of three years after the opening of insolvency proceedings, and the insolvency practitioner may assign such claims to a creditor or a third party.[83] The claims out of this avoidance action do not preclude actions based on general tort law to compensate creditors for the damages suffered.[84]

3. Consequences for Dutch law

3.1 *Introduction*

Having explored the proposed harmonised rules for transaction avoidance, it is time to explore the interaction with existing Dutch law. This will be done in two parts. Firstly, this chapter focuses on the interaction of the Proposal with the existing Dutch legal framework. Without pretending completeness, the focus here lies on the question of which parts of Dutch law will need to change, and to what extent the Proposal's harmonised rules can be fitted into the Dutch legal system. Secondly, the fourth paragraph will explore how the Proposal would play out in the context of Dutch legal practice.

3.2 *Procedural scope*

The Proposal does not specify which insolvency proceedings should provide for the proposed harmonised avoidance rules, nor does it define what an insolvency procedure is. The definition of the insolvency practitioner gives a

70 Art. 9 (1).
71 Art. 10 (1) and the Explanatory Memorandum, p. 10.
72 Given the text of art. 9, I think it most likely that the Dutch translation inadvertently uses Dutch legal terminology for nullities in art. 4 and 9. Avoidance actions are translated as 'vorderingen tot nietigverklaring', for example in the title of Tile II, and the chapters thereunder. This suggests that a successful avoidance action gives rise to legal nullities, i.e. a situation in which the avoided act legally never took place, but art. 9 does not require such an approach.
73 Bork & Veder 2022, par. 4.216.
74 Bork & Veder 2022, par. 4.222.
75 Although Bork & Veder do not consider this to mean the legal position of the counterparty is null and void, the counterparty is just banned from exercising it, Bork & Veder 2022, par. 4.223.
76 We will explore this further in par. 3.6.
77 De Weijs 2010, chapter 5.
78 This also addresses what De Weijs currently considers an overreach in the consequences of avoidance of transactions at an undervalue in Dutch law, see par. 3.7 below.
79 Art. 9 (5).
80 Art. 9 (2).
81 Art. 10 (2), compare art. 51 DBC.
82 Art. 10.
83 Art. 9 (3) & 9 (4).
84 Art. 9 (6).

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hint, by referring to the Directive on Preventive Restructuring.[85] This needs further clarification, which could be provided through a definition of an insolvency proceeding in the Harmonization Directive or simply by referring to (the annexes of) the Insolvency Regulation on this matter.[86]
For Dutch law, this clarification will determine whether implementation would entail introducing avoidance provisions in Dutch restructuring proceedings that currently contain no avoidance provisions.[87] One may wonder who would start the avoidance action during such debtor in possession-procedures, and how avoidance works in procedures that do not require cash-flow insolvency as an entry test whilst some avoidance grounds do require cash flow insolvency,[88] and where detriment can fail to materialise due to the restructuring.[89] Bork & Veder propose to only include avoidance provisions in collective restructuring proceedings that require the debtor's substantive insolvency, i.e. balance-sheet or cash-flow insolvency, including the likely and imminent inability to pay debts as they fall due.[90] It is unclear whether the suspension of payments and WHOA-proceedings would be included in this, since they are based on foreseeable future cash-flow insolvency.[91] The European lawmaker should clarify this.

3.3 ***Voidable acts***

3.3.1 *Acts by others than the debtor*

Under current Dutch law, only legal acts performed by the debtor can be avoided.[92] Therefore, at first sight, enactment of the harmonised provisions would substantially enlarge the scope of Dutch avoidance provisions, in the sense that this would require Dutch law to also make actions by third parties subject to avoidance.[93]
At closer inspection however, the difference may not be that substantial, since many detrimental legal acts by others can already be challenged in different ways under current Dutch law with similar effects as those provided by the Proposal. Acts by creditors may be challengeable under extended set-off requirements,[94] or be required to (or considered to[95]) involve the debtor so that they may be avoided,[96] or challenged under tort law.[97]

3.3.2 *Voluntary vs. mandatory legal acts*

The Proposal would strongly diminish the relevance of the distinction between mandatory legal acts and voluntary legal acts – which distinction is crucial under current Dutch law. Under current Dutch law, voluntary legal acts are much easier to avoid.
The Proposal does apply extra requirements for the avoidance of congruent coverages compared to incongruent coverages, but this only applies to preferences.[98] Also, even with this additional subjective requirement, the bar for avoidance of congruent coverages as preferences under the Proposal is set lower than for the corresponding avoidance of mandatory legal acts under current Dutch law. Under the Proposal, Dutch law will have to expand the currently very narrow possibilities to challenge the vesting of security rights close to the opening of insolvency proceedings.[99]

3.3.3 *Different avoidance grounds*

Where the central distinction under current Dutch law is between voluntary and mandatory acts, the central distinction in the Proposal is between the various avoidance grounds, i.e. between preferences, transactions at an undervalue[100] and intentionally detrimental legal acts. Strictly speaking, the Proposal does not explicitly require Member States to enact this distinction in their statutes, because the Proposal only requires that all acts which meet the Proposal's requirements are voidable. However, given the structure of these requirements, it seems impossible to implement the Proposal without introducing these distinct avoidance grounds in Dutch statutory law. This would have significant impact. It would force Dutch lawyers to examine transactions voluntarily conducted before insolvency either within the scope of preferences, which (presumably, see above par. 2.3.4) only cover transactions with pre-existing creditors within three months before the petition, or through the scope of transactions at an undervalue.[101]
This strict distinction between avoidance grounds would shed new light on transactions against direct payment close

85 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.
86 Ideally, the Directive or the implementing Dutch legislation would also provide clarity on how to view subsequent insolvency proceedings in this regard, in particular what is regarded as a submission to open insolvency proceedings when – as is common in Dutch practice – the debtor requests a suspension of payments procedure, which ends at the request of the administrator, after which the court opens bankruptcy proceedings; art. 242 DBC. See also art. 249 DBC.
87 I.e.the suspension of payments proceeding (*surseance van betaling)* and the proceedings for confirmation of a private plan (*de WHOA*).
88 Art. 214 and 370 DBC.
89 Indirectly of course the size of the estate can influence restructuring proceedings, through application of the best interest of creditors test. Hence possible avoidance actions should be included in the analysis of the liquidation scenario.
90 Bork & Veder 2022, par. 4.16 & 3.6.
91 Moreover, private WHOA plans do not necessarily include all creditors, which begs the question whether they are sufficiently collective proceedings. See further: G. Orbán, 'Dull rerun or successful spin-off?', *FIP* 2022/112.
92 In the sense that they are nullified, actions by others can be challenged as tortious.
93 Cf. B.A. Schuijling, 'Het commissievoorstel voor een nieuwe insolventierichtlijn', *FIP* 2023/2, p. 13.
94 Especially art. 54 DBC.
95 Dutch Supreme Court 8 July 1987, *NJ* 1988/104 (*Loeffen q.q./BMH I*).
96 See Dutch Supreme Court 16 October 2015, ECLI:NL:HR:2015:3023 (*DLL/Van Logtesteijn q.q.*) and compare Bork & Veder 2022, par. 4.28
97 Under current Dutch law tort actions can already, aside from payment of damages, have the consequence that unlawfully obtained positions cannot be invoked to obtain satisfaction from the estate. Dutch Supreme Court 8 November 1991, *NJ* 1992/174 (*Nimox*).
98 See above, par. 2.3.4.
99 See par. 4.2.
100 Or in the language of the Proposal 'Legal acts against no or a manifestly inadequate consideration', the title of art. 7.
101 See further De Weijs 2010, chapter 5. Some legal acts can of course also be scrutinized under both grounds, but these would still need to meet the requirements of either (or both) to be avoided.

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to insolvency.[102] Current Dutch law can complicate the testing of such transactions, since both Art. 42 and 47 DBC do not necessarily contain fitting standards.[103] For example, current Dutch law struggles with payments by the debtor for legal advice in relation to the approaching insolvency. Such payments are, when within reasonable bounds, in case law considered not to be avoidable but no fitting exception exists in the statutory avoidance provisions.[104] Approaching such payments through the Proposal's distinct avoidance grounds naturally shows that they are only voidable either because they constitute a transaction at an undervalue (if the payments are at manifestly inadequate consideration) or because such payments are in fact payments or collateralisation of a pre-existing debt, and therefore constitute a preference.

3.3.4 *Voidable omissions*

The Proposal would also widen the notion of voidable legal acts by the addition of voidable legal acts that consist of detrimental inaction or omissions.[105] Under current Dutch law, a legal act requires a will or intention aimed at legal consequences and an expression of that will or intention. This makes it difficult (but not impossible[106]) to construct legal acts without action from the debtor.[107] Moreover, pursuant to Dutch legislative history, a failure to act cannot be avoided under the current Dutch framework,[108] although literature is divided on the topic.[109] The Dutch government has announced it will seek further information on this matter in the legislative process, since it can hardly imagine avoidance of omissions.[110]

3.3.5 *Voidable enforcement*

Under the harmonised avoidance rules, even payments obtained after individual enforcement actions can be avoided. Under current Dutch law these are generally considered not to be voidable.[111]

3.3.6 *Rescue financing*

Although the Proposal does not contain special protection for new or interim financing during a rescue attempt, the considerations do note that such financing should be protected through the exception made for 'legal acts performed directly against fair consideration to the benefit of the insolvency estate'.[112] This is in line with the protection of such financing under the Preventive Restructuring Directive, but the Proposal widens such protection beyond the procedure for rescue plans. This is hard to reconcile with established case law, as the Dutch Supreme Court has repeatedly considered that no special avoidance regime exists for vesting security rights when providing rescue financing.[113] Such protection would therefore require the Dutch lawmaker to adapt the implementation of that protection for financing in rescue proceedings.[114]

3.4 ***Unilateral legal acts***

From a Dutch perspective, it is noteworthy that the Proposal does not contain any specific rules on unilateral legal acts, even as these are not at all uniquely Dutch.[115] In fact, the avoidance ground for intentionally detrimental legal acts assumes that there is a counterparty to the challengeable legal act. This would, however, not cause major challenges in implementation since the specific Dutch rules for unilateral legal acts can largely be subsumed under the avoidance ground for transactions at an undervalue. Moreover, the Proposal, being minimum harmonisation, does not prevent the Netherlands from maintaining special avoidance provisions for unilateral legal acts.[116]

3.5 ***Detriment to creditors***

Under the Proposal, only legal acts that have caused detriment to the general body of creditors can be avoided, irrespective of the avoidance ground. This requirement is common in nearly all Member States, the Netherlands being no exception.

In comparison, the Proposal does stress more than current Dutch law that the detriment is caused to *the general body* of creditors, but the relevant test shows no difference, i.e. whether the creditors participating in the insolvency proceedings would be better off without the challenged legal

102 In addition, the separate exception for such transactions under the avoidance ground for preferences would of course also fuel the debate, see par. 2.3.4 above.
103 De Weijs 2010, par. 4.2.3.5.
104 See Polak/Pannevis *Insolventierecht* 2022/7.2.4.2, G.H. Gispen, 'Rb. Zwolle 13 mei 1998, nr. 32028/HA ZA 97-765 (hoger beroep) (mr. M./mr. B. q.q.). Betaling aan een advocaat vlak voor het faillissement van zijn cliënt voor werkzaamheden in het kader van het voeren van verweer tegen de faillissementsaanvraag: paulianeus of niet?', *TvI* 1998, p. 222-224, and L.G. Hillen, 'Betaling van juridisch adviseurs met wetenschap van een reeds verrichte faillissementsaanvraag: toegestaan?', *Bb* 2018/68, District Court Rotterdam 26 March 2008, *JOR* 2010/202, District Court Amsterdam (Ktr.) 20 March 2012, *JOR* 2013/251, District Court Midden-Nederland 11 August 2018, ECLI:NL:RBMNE:2018:3031, District Court Rotterdam 13 april 2022, *JOR* 2022/218 (*Curatoren Imtech/De Brauw*).
105 See above, par. 2.3.2.
106 See art. 3:35 DCC.
107 Cf. C. Spierings, *De eenzijdige rechtshandeling* (diss. Nijmegen, Series Onderneming & Recht nr. 89), Deventer: Kluwer 2016, par. 2.2.2.
108 Van der Feltz I, p. 441.
109 In favour: Wessels *Insolventierecht* 2019/3046, De Weijs 2010, p. 227, J.A. Ankum, *De Pauliana buiten faillissement in het Nederlandse Recht sedert de Codificatie*, Zwolle 1962, p. 113, but against: N.E.D. Faber, *Verrekening* (diss. Nijmegen, Serie Onderneming en Recht deel 33), Deventer: Kluwer 2005, p. 308 and T.J. Mellema-Kranenburg, D*e actio Pauliana*, Zwolle: W.E.J. Tjeenk Willink 1996, p. 11. Part of the debate is whether avoidance is appropriate where the absence of action of the debtor may rightfully invoke trust with the counterparty of an avoidance action, e.g. the counterparty of a claim that the debtor has allowed to elapse, but under the Proposal the subjective elements at the counterparty are not always required for avoidance. See above par. 2.3.2. See also Veder & Schuijling in Bork & Veder 2022, p. 433.
110 See the Fiche available at https://www.rijksoverheid.nl/documenten/richtlijnen/2022/12/07/fiche-3-richtlijn-materieel-insolventierecht, last checked 10 March 2023, p. 7-8.
111 Polak/Pannevis *Insolventierecht* 2022/7.2.4.2, Wessels *Insolventierecht* 2019/3206, Van der Feltz I, p. 436 and 449, Faber 2005, p. 320.
112 Consideration 10.
113 Dutch Supreme Court 22 December 2009, *NJ* 2010/273, *JOR* 2011/19 (*Van Dooren q.q./ABN AMRO III*) & Dutch Supreme Court 7 April 2017, *NJ* 2017/177, *JOR* 2017/213 (*Jongepier q.q./Drieakker*).
114 Current art. 42a DBC only applies when the debtor has started WHOA-proceedings, and art. 375 (1) sub i & 384 (2) sub f DBC by themselves do not offer such protection.
115 See for example on German and English law Spierings 2016, chapters 3 and 4.
116 Art. 4, see also par. 2.2 above.

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act.[117] Inasmuch as under Dutch law even detriment to a single (preferred) creditor is sufficient detriment,[118] such would not necessarily be considered detriment under the Proposal, but it would be an allowed extension under the proposed minimum harmonisation approach.[119]

3.6 *Knowledge of detriment to creditors, or the diminishing relevance of subjective elements*

Under Dutch law, the required knowledge of the detriment to creditors is usually the heart of the debate on any specific avoidance action. The requirement under current Dutch law comes in four versions, depending on whether the avoidance action is aimed at a voluntary legal act with or without consideration, or at a mandatory legal act, and which basis the insolvency practitioner opts for in that instance.[120] All these versions of the requirement of knowledge of prejudice contain subjective elements, in that they require a certain mindset or knowledge of one of the subjects involved. Where the statutory presumptions do not apply, this is notoriously difficult to establish, and there have been calls to eliminate subjective elements as much as possible.[121]
However, as transaction avoidance law also has to relate to the protection of legitimate trust of creditors receiving performance, it seems hard to avoid subjective requirements altogether. Subjective requirements are important to distinguish between counterparties with legitimate trust, that deserve protection against avoidance, and counterparties without legitimate trust that merits protection.[122]
Bork & Veder argue that subjective requirements should be met with skepticism.[123] In their principle-based approach, this follows mainly from the desire for legal certainty. Subjective elements are hard to prove, as is shown in Dutch practice which heavily relies on statutory presumptions to prove the satisfaction of subjective requirements.[124] Therefore, subjective requirements are minimalised under the Proposal,[125] and replaced as much as possible by objective circumstances, such as the timing of the challenged act. This seems a big step from current Dutch law, but requires closer inspection per avoidance ground.
As for preferences, under the Proposal there are no subjective requirements for incongruent coverages. Current Dutch law does have such subjective requirements but already contains a statutory presumption that they are met in the instances the Proposal covers.[126] This presumption even has a wider chronological scope, extending to acts performed within a year before insolvency rather than the Proposal's three months before the submission of the petition.
For congruent coverages challenged as preferences, the difference may be more striking. The Proposal does contain some subjective element on the creditor's side, i.e. that the creditor knew or should have known of the cash flow insolvency.[127] This bar is much lower than the current corresponding bar of Art. 47 DBC, which requires collusion by the debtor and the creditor to favour the creditor over others, or the knowledge that a petition for the opening of bankruptcy proceedings has been submitted. Compared to current Dutch law the Proposal is an important relaxation of the requirements for avoidance of congruent coverages.[128] Under the Proposal, the Dutch landmark cases of *Gispen q.q./IFN* and *Meijs q.q./Bank of Tokyo* would have been decided very differently.[129]
Whilst the Proposal thus strongly reduces the subjective requirements for avoidance of preferences, it does introduce the requirement that the debtor was unable to pay its mature debts at the time of the detrimental act, and it limits the avoidance of preferences to legal acts within three months prior to the submission of the petition to open insolvency proceedings, or after that submission. These limitations would be new to Dutch law.
As for the avoidance ground for legal acts against manifestly inadequate consideration, the Proposal would require Dutch law to leave all subjective requirements behind. This is a nuanced change, as in the instances that meet the requirements of this avoidance ground of the Proposal current Dutch law already (rebuttably) presumes that the subjective requirements are fulfilled.[130]
In the avoidance ground for intentionally detrimental acts, the subjective elements may either set the bar much higher than existing Dutch law, or be quite similar, based on whether, as Bork & Veder intended, 'contingent intent' will be sufficient (and of course depending on choices made in implementation).[131]

117 Cf. Bork & Veder 2022, par. 4.41 and for Dutch Law Dutch Supreme Court 19 October 2002, *NJ* 2001/654, *JOR* 2001/269 (*Diepstraten/Gilhuis q.q.*) and Polak/Pannevis *Insolventierecht* 2022/7.2.2.5.

118 Compare District Court Haarlem 4 October 2006, *JOR* 2007/55, and District Court Noord-Nederland 13 March 2015, *JOR* 2016/16.

119 Bork & Veder 2022, par. 4.42.

120 See figure 2 above, and further art. 42 and 47 DBC.

121 See De Weijs 2010, and to a lesser extent, Van der Weijden 2012, chapter 6 and R.J. van Galen, *Ondernemingsrecht* 2000, p. 130.

122 Compare Bork & Veder 2022, par. 2.107 and cf. De Weijs 2010, par. 5.2.2.

123 Bork & Veder 2022, par. 3.39 and 4.108.

124 See art. 43 and 45 DBC.

125 The Dutch government supports the aim to remove subjective requirements, but criticizes the lack of a definition of when 'insolvency' sets in. This criticism seems to be aimed at other parts of the Proposed Harmonization Directive, since the avoidance provisions avoid referring to insolvency in the abstract, but instead refer to a situation where the debtor is unable to pay mature debts. See the Fiche available at https://www.rijksoverheid.nl/documenten/richtlijnen/2022/12/07/fiche-3-richtlijn-materieel-insolventierecht, last checked 10 March 2023, p. 8.

126 Art. 42 (1) sub 2 DBC.

127 Bork & Veder do not discuss whether the expectancy or foreseeability of cash flow insolvency is sufficient.

128 See art. 47 DBC and Schuijling & Veder in Bork & Veder 2022, p. 434.

129 Dutch Supreme Court 24 March 1995, *NJ* 1995/628 (*Gispen q.q./IFN*) and Dutch Supreme Court 29 June 2001, *NJ* 2001/662 (*Meijs q.q./Bank of Tokyo*). The same applies for Dutch Supreme Court 20 November 1998, *NJ* 1999/611 (*Verkerk/Tiethoff q.q.*), also compare Dutch Supreme Court 16 June 2000, *NJ* 2000/578, *JOR* 2000/201 (*Van Dooren q.q./ABN AMRO I*).

130 Art. 43 and 45 DBC. Moreover, the avoidance ground for transactions at an undervalue may subsume two categories that are currently separate under Dutch law, subsuming both transactions at an undervalue in the sense of art. 43 (1)(1) DBC, and transactions at no consideration at all in the sense of art. 42 (1) DBC. These currently have different approaches under Dutch law, since for a transaction without consideration no knowledge of detriment of the counterparty is required. However, Bork & Veder 2022, par. 3.47- 3.50 rightly consider transactions without any consideration simply as a subspecies of transactions at an undervalue. Therefore, in abolishing the subjective requirements for transactions at an undervalue, the difference in requirements between transactions at no consideration and those at an undervalue will also be removed.

131 See above, par. 2.3.6.

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3.7 *Consequences of avoidance*

As to the consequences of avoidance, the Proposal, at first sight, takes a fundamentally different route from current Dutch law.[132] The Proposal's starting point is a monetary claim to reimburse the estate for the caused detriment and the inability to invoke voidably obtained rights to obtain satisfaction from the insolvency estate. Under current Dutch law, however, a successfully challenged legal act is retroactively null and void, the consequences of which can be far-reaching. For example, if the transfer of property at an undervalue is avoided, the transferred good returns to the estate and the counterparty obtains an unsecured, ordinary claim for reimbursement of the purchase price.[133] Under the Proposal, the counterparty only needs to reimburse the undervalue. At second glance however, the differences with current Dutch law may not be as striking as they seem. Foremost, the Proposal contains minimum harmonisation, and Member States are free to opt for stronger effects of avoidance, for example, nullity by force of law.[134] Moreover, although Dutch law does take retroactive and *erga omnes* effect of avoidance actions as a starting point, the nuances and practical considerations that led Bork & Veder to propose more limited consequences of avoidance also apply under Dutch law,[135] and have also under Dutch law led to mitigation of the retroactive and *erga omnes* effect of avoidance. Under current Dutch law the effects of avoidance are already (largely) limited to inability to invoke rights obtained avoidably combined with undoing the detriment to creditors by monetary payment to the estate, because (i) avoidance actions do not reach further than necessary to avoid the detriment,[136] because (ii) rights of third parties that have acted in good faith are respected,[137] and the avoidance only benefits the estate,[138] because (iii) the avoided legal act can sometimes practically not be undone,[139] or because (iv) the insolvency practitioner does not challenge detrimental acts by way of avoidance actions that lead to nullities, but by challenges based on general tort law, that (usually[140]) only require monetary reimbursement of damages suffered.

For transactions at an undervalue, the Proposal seems to seriously limit the risk run by the counterparty, by maximising his exposure to payment of the difference between fair value and the undervalue at which the transaction was executed.[141] Avoidance would lose some teeth and with it some of its deterring effect. The Proposal focuses solely on the detriment, which in the case of transactions at an undervalue is the extent of the undervalue. This may however not be that big of a change compared to current Dutch law that may also only require reimbursement of the difference between fair value and the realised undervalue, depending on the interpretation given to the *Dekker/Lutèce* case, and on one's position in the ongoing debate on the removal of the detriment from a detrimental act by additional payments that repair the undervalue.[142]

The Proposal would force a clear change under Dutch law by (explicitly) making claims out of avoidance actions transferable.[143]

Finally, under the Proposal the party that benefitted from the avoided act can only invoke as a defence that what he obtained in the avoided act is no longer available in his property if he was unaware of the circumstances that make the transaction voidable.[144] Under current Dutch law, a similar defence is only available to counterparties benefiting from unilateral legal acts by the debtor or acts without any consideration.[145] However, as this would only improve the position of the estate, it seems that the Dutch legislator may choose not to allow for this defence at all.[146]

4. Some consequences for Dutch practice

4.1 *Introduction*

Having discussed the most prominent changes required to Dutch law, we now turn to the question of what is the effect in practice of the Proposal's harmonisation rules would be. Some caution is in order here, as it is not easy to predict how the practice will respond to new circumstances, especially since it is yet unknown what other changes the Dutch legislature will make at the same time and what it will do with the room still left to national authorities in the implementation of the Proposal, especially considering that the proposed standards are minimum standards.

4.2 *Daily pledging of claims*

Due to limited possibilities in Dutch law to pledge future claims,[147] Dutch banks and their customers vest rights of pledge in respect of a significant number of claims every

132 The consequences are remarkably similar however to the consequences proposed in the draft for a new insolvency law that was presented by the Committee Kortmann, art. 3.2.7.
133 That is, unless and to the extent that the estate benefitted from the sales price ('*de boedel was gebaat*'), art. 51 DBC and 3:53 DCC.
134 Art. 5, see also Bork & Veder 2022, par. 4.226.
135 Cf. par. 2.3.7 above with further references.
136 Dutch Supreme Court 24 April 2009, *JOR* 2010/22 (*Dekker q.q./Lutèce*), although it is debatable whether this means the counterparty can suffice with offering such reimbursement, see art. 3:45 (4) DCC and on this R.J. van der Weijden, *De Faillissementspauliana* (diss. Nijmegen, series O&R 75), Deventer: Kluwer 2012, par. 6.5, F. Ortiz Aldana, 'De Peeters q.q./Gatzen-vordering in verhouding tot de faillissementspauliana', *TvI* 2022/14, par. 4.2, S. W. van den Berg, *Waarderingsvragen in het ondernemings- en insolventierecht* (diss. Nijmegen, series O&R 107), Deventer: Kluwer 2019, chapter 9, N.E.D. Faber, *Verrekening* (diss. Nijmegen, series O&R 33), Deventer: Kluwer 2005, no. 328, Wessels *Insolventierecht* 2019/3269 (on the one hand) and no. 3287a (on the other hand).
137 Art. 51 (2) DBC.
138 Dutch Supreme Court 24 April 2009, *JOR* 2010/22 (*Dekker q.q./Lutèce*) & Polak/Pannevis *Insolventierecht* 2022/7.2.9.1.
139 Polak/Pannevis *Insolventierecht* 2022/7.2.9.1.
140 Art. 6:103 DCC.
141 This is in line with the work of De Weijs, who has argued that where Dutch law returns ownership of the transferred goods, while the counterparty cannot expect any reimbursement of the sales price, there is an overreach under Dutch law. De Weijs 2010, esp. par. 4.5.3.2.
142 See above footnote 136.
143 Art. 9 (4), as compared to Court of Breda 29 December 2010, *JOR* 2011/267, and compare Dutch Supreme Court 19990, *NJ* 1991/52 (*Den Toom/De Kreek*). See also, for an attempt of creditors to force the insolvency practitioner to transfer from the estate to the creditors a (disputed) claim by the debtor against his bank for wrongful termination of financing, Court of Gelderland 20 December 2017, *JOR* 2019/285.
144 Art. 9 (2).
145 Art. 42 (3) DBC. See also Schuijling & Veder in Bork & Veder 2022, p. 435.
146 Art. 5.
147 Art. 3:239 DCC see also Asser/Van Mierlo & Krzeminski *3-VI* 2020/224, A.S. Steneker, *Pandrecht (Mon. BW nr. B12a)* 2022/3.47.

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day. The system is somewhat cumbersome, but works well in practice. As a consequence, most insolvent debtors (or their banks, by power of attorney) vest security rights until a short time before the opening of the insolvency proceedings. The vesting of such securities is hardly challengeable under current Dutch law, because by vesting those security rights the debtor performs a due obligation to do exactly that[148] and congruent coverage is very hard to challenge.[149] Under the Proposal it would become significantly easier to challenge congruent coverages.[150] Hence, the obligation to provide further security rights will no longer be the safe haven it currently is for the vesting of security rights close to insolvency proceedings,[151] or for the set-off based on those pledges.[152] Should the Dutch legislature wish to the existing positions of pledgees, this would likely require adaptation of the requirements for the vesting of pledges.[153]
Moreover, the definition of closely related parties needs further clarification of whether banks could qualify as such, since they might under the current wording.[154] This would mean that subjective requirements are presumed to be met in avoidance actions against banks, which would further strongly impact the application of avoidance provisions in Dutch practice of daily vesting of pledges.[155]

4.3 *Rescue attempts*

In Dutch practice the provisions for transaction avoidance regularly gain special significance during rescue attempts.[156] Implementation of the Proposal would change the Dutch playing field for rescue attempts.[157]
The subjective requirements for avoidance would change. Where Dutch practitioners amidst a rescue attempt now ask themselves if 'the bankruptcy and the deficit therein are foreseeable with a reasonable degree of probability',[158] they would, after implementation, have to wonder whether the debtor is i) unable to pay his mature debts and ii) a petition to open insolvency proceedings will be filed less than three months after the rescue attempt.[159] Under these new requirements, practitioners could find a relatively simple safe haven for their rescue attempts if they are able to, in the context of a rescue attempt, safeguard that all petitions to open insolvency proceedings submitted within three months after the rescue attempt are rejected. Put sharply, vesting security rights in a rescue attempt would not be challengeable under the new rules as long as the company survives all petitions filed within three months after.
Second, the implementation of the Proposal would likely create a safe haven for rescue financing by considering the transaction a 'legal act performed directly against fair consideration to the benefit of the insolvency estate'. Such acts are exempted from the avoidance ground for preferences under the Proposal.[160]

5. **Conclusion**

Implementation of the provisions on avoidance actions in the Proposal would mean a major step forward in the harmonisation of European insolvency law, bringing (relative) unity to a key part of substantive insolvency law which is currently characterised by considerable differences between jurisdictions. However, the uniformity is limited, since the minimum harmonisation opted for will still allow Member States considerable room for particular policy choices, translating into varying avoidance requirements and consequences within the EU. Moreover, the minimum harmonisation approach is hard to reconcile with the stated goal of taking away impediments to cross-border investments.
For Dutch avoidance law, the Proposal would bring significant changes in some areas, in other areas changes that appear significant at first sight are less so at closer inspection, and some areas suffer from uncertainty. Major changes include the separation into three different avoidance grounds, avoidance of legal acts that consist of omissions, reduction of subjective elements in avoidance, avoidance actions in rescue procedures, and lowering the bar for the avoidance of performance on a due claim. Major changes at first sight – but less so on inspection – include the possible reduction of consequences of avoidance to claims for damages instead of legal nullity of challenged actions, and the limitation of the exposure of the counterparty to the suffered detriment. Uncertainties that should be addressed in the further legislative process include the scope of closely related parties and which insolvency procedures should contain avoidance provisions.

148 The obligation arises from art. 26 of the General Banking Conditions ('*Algemene bankvoorwaarden*'). These can be downloaded – in English – here: https://www.nvb.nl/english/general-banking-conditions-algemene-bankvoorwaarden/.
149 Art. 47 DCC, see also Dutch Supreme Court 1 February 2013, *NJ* 2013/156, *JOR* 2013/155 (*Van Leuveren q.q./ING*).
150 See above, par. 3.6.
151 See above, par. 3.5.
152 Dutch Supreme Court 17 February 1995, *NJ* 1996/471 (*Mulder q.q./CLBN*).
153 Compare A. Steneker, 'Liquiditeit en debiteurenverpanding', *FIP* 2023/45, par. 3, although making it possible to pledge claims out of legal relationships that do not exist when vesting the pledge, as suggested by Steneker, would tip the scale considerably in the other direction.
154 Art. 2 (q) defines a 'party closely related to the debtor' to mean 'persons, including legal persons, with preferential access to non-public information on the affairs of the debtor'. Consideration 12 as well as Bork & Veder 2022, par. 4.200 and further only enumerate family, directors, shareholders etc. as closely related parties but banks – who generally have a much stronger information position than most creditors, even if only for their insight in the payments by the debtor – may fall under the wording of this definition.
155 See art. 6 (3) and 8 (1).
156 See for example R.J. van der Weijden, 'Wetenschap van benadeling in de zin van art. 42 en de voorzienbaarheid van het faillissement van de schuldenaar', *MvV* 201, nr. 10, p. 285-289, R.M. Wibier, 'De pauliana; hard to describe, easy to recognize?', *FIP* 2019/45, N.B. Pannevis, 'Een rationele benadering van kansen en uitkomsten bij reddingspogingen', *TvI* 2017/37 with further references. See also Dutch Supreme Court 22 December 2009, *NJ* 2010/273, *JOR* 2011/19 (*Van Dooren q.q./ABN AMRO III*) & Dutch Supreme Court 7 April 2017, *NJ* 2017/177, *JOR* 2017/213 (*Jongepier q.q./Drieakker*).
157 See also par. 3.3.6 above.
158 Dutch Supreme Court 22 December 2009, *NJ* 2010/273, *JOR* 2011/19 (*Van Dooren q.q./ABN AMRO III*) & Dutch Supreme Court 7 April 2017, *NJ* 2017/177, *JOR* 2017/213 (*Jongepier q.q./Drieakker*).
159 This is assuming the rescue attempt, if challenged, would be challenged under the avoidance ground for preferences.
160 Art. 6 (3) sub a. See above, par. 2.3.4 and 3.3.

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All in all, we should measure the Proposal's avoidance provisions against two standards. First, will they achieve the stated goal of improving the capital markets union by taking away impediments to cross-border investment? The answer must be a nuanced one. Without a doubt, the proposed minimum requirements will promote the foreseeability of insolvency law in other Member States, as the insolvency laws will converge to some degree. But because of the choice for minimum harmonisation, cross-border investors from Member States will still have to take into account that they may face avoidance actions according to foreign laws that differ from their own laws. The harmonisation is mostly helpful for insolvency practitioners, as it gives them a new argument in the discussion with counterparties that invoke the *lex-causae*-exception.

Second, will the proposed avoidance provisions improve existing Dutch insolvency law? This is difficult to answer without first developing a measure for good avoidance provisions, but in any case, the Proposal will give Dutch avoidance law a new impetus, replacing some of the old discussions with new ones, settling existing disputes of interpretations, and reversing some considerations of the Dutch legislator dating back to 1893. And that may already be enough to make things worthwhile. One hundred and thirty years after the Dutch legislature codified the avoidance provisions, after libraries of case law, academic work and fundamental developments in the economy, the Proposal is a fitting incentive for the Dutch legislature to pick up the pen again.

Mr. drs. M. Moeliker[1]

Tracing assets by insolvency practitioners

TvI 2023/13

In the Proposal,[2] tracing of assets belonging to the insolvency estate is one of the focus areas. As a result of globalisation and the creation of a European single market, the number of cross-border insolvencies and insolvencies with cross-border elements is rapidly increasing. The Proposal provides access for European insolvency practitioners to information on bank accounts and beneficial owners and (improved) access to national asset registers in other Member States. This should enable insolvency practitioners to identify (potential) assets of the debtor easier, faster and against lower costs. The Proposal is expected to maximise the value in insolvency estates, particularly in insolvencies with cross-border elements. This should not only benefit creditors in bankruptcies, but also improve the functioning of the European capital market. This article contains several observations and recommendations further to the title on asset tracing in the Proposal.

1. Introduction

A bankrupt estate comprises of the debtor's assets. Therefore, the Dutch Bankruptcy Act provides that directly after its appointment the insolvency practitioner shall make an inventory of the estate.[3] In the first phase of an insolvency proceeding, in many instances not all assets are yet available or even known to the insolvency practitioner. In such situations asset tracing becomes relevant. Asset tracing can be described as the legal process of identifying and locating misappropriated assets or their proceeds. It includes both the preservation (freezing) of the assets identified and the repatriation thereof if the asset is to be found in another Member State.[4]

Title III of the Proposal focuses on tracing assets belonging to the insolvency estate of the debtor. The targeted rules provide for access for insolvency practitioners to various registers that may contain information on assets belonging to the insolvency estate.[5] Some national electronic registers in Member States are already public or even accessible through a single interconnection platform set up by the European Union, such as the insolvency registers interconnection (IRI).[6] Further to the Proposal, insolvency practitioners appointed in another Member State will have the same access to registers as 'local' insolvency practitioners. The targeted rules improve the options for insolvency practitioners for asset tracing through financial investigations. Each bit of information that becomes available to an insolvency practitioner may provide new leads for further investigations. It is envisaged that the targeted rules will lead to improved chances of recovery of misappropriated funds. The rationale behind Title III of the Proposal is that improving the possibilities of insolvency practitioners to identify and trace assets belonging to the insolvency estate will lead to maximisation of the assets in the bankrupt estate available for distribution.[7]

The remainder of this article is structured as follows. In paragraph 2 I will discuss in more detail the set-up and embedding of the Proposal. In paragraph 3 the access of insolvency practitioners to bank account information will be discussed. Paragraph 4 is about the access to beneficial ownership information and paragraph 5 focuses on the access of insolvency practitioners appointed in another Member State to national asset registers. In paragraph 6, I will share my thoughts on the effectiveness of the Proposal and desired other tools for insolvency practitioners. Paragraph 7 contains the conclusion and certain recommendations for consideration in the European legislative process.

2. Set up and embedding of the Proposal

From an insolvency law perspective, the Proposal will be placed next to the Insolvency Regulation[8] and the Restructuring Directive.[9] The Insolvency Regulation provides for a framework of international private law rules regarding jurisdiction, recognition, enforcement and coordination. The Restructuring Directive is aimed at harmonising preventive restructuring regimes and the discharge of debt for entrepreneurs. The Proposal is an initiative to harmonise substantive aspects of insolvency law in the Member States. As will be seen, there are interconnections between these different projects.

From an asset recovery perspective, the initiative by the European Commission with the part of the Proposal that focuses on tracing assets, is developed simultaneously with the proposal by the European Commission for the Asset Recovery Directive.[10] The Asset Recovery Directive focuses on the tracing and identification, freezing, confiscation, and

1 Please refer to this article as: M. Moeliker, 'Tracing assets by insolvency practitioners', *TvI* 2023/13. M. Moeliker is an attorney-at-law at Florent in Amsterdam and is regularly appointed as bankruptcy trustee by the District Court Amsterdam.

2 The proposal for a directive harmonising certain aspects of insolvency law published by the European Commission on 7 December 2022 (COM/2022/702; the "Proposal").

3 Article 94 of the Dutch Bankruptcy Act.

4 See SWD/2022/395, p. 92.

5 See COM/2022/702, p. 14.

6 See https://e-justice.europa.eu/content_interconnected_insolvency_registers_search-246-en.do. To date, the Dutch insolvency register is still not connected to the IRI.

7 See recitals 13-14 of the Proposal.

8 Regulation (EU) 2015/848 (the "Insolvency Regulation").

9 Directive (EU) 2019/1023 (the "Restructuring Directive").

10 Proposal for a directive on asset recovery and confiscation (COM/2022/245; the "Asset Recovery Directive").

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management of property within the framework of proceedings in criminal matters.[11] The Proposal also comes in addition to the European Account Preservation Order, which can be used by creditors to obtain information on bank accounts of creditors.[12]

I note that in respect of asset tracing, the United Nations is also developing frameworks. However, the angle applied by the United Nations is more focused on tracing, freezing, confiscating and returning stolen assets to e.g. the country of origin.[13] One of the sustainable development targets of the United Nations is: "*By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime*".[14] In the most recent sessions, civil asset tracing and recovery was also on the agenda of Working Group V: Insolvency Law of the United Nations Commission on International Trade Law.[15] While the priorities of the European Commission with the Proposal seem to be with the (ever closer) capital markets union,[16] measures leading to an improvement of recovery rates for creditors are of course welcome.

Title III of the Proposal comprises of Articles 13 until and including 18. This makes six articles in total. The title focuses on extended options for insolvency practitioners to trace assets belonging to the insolvency estate, particularly in other Member States of the European Union. As follows from the impact assessment, the online consultation that preceded the Proposal showed broad support by responding stakeholders for full access of insolvency practitioners to property and collateral databases.[17] It furthermore follows from the impact assessment that non-financial businesses and insolvency practitioners had asset tracing options high on their wish lists.[18] In the impact assessment, asset tracing is described as the legal process of identifying and locating misappropriated assets or their proceeds (values) belonging to the debtor's estate, which includes both the preservation (freezing) of the assets identified and the repatriation if the asset is to be found in another Member State.[19] The targeted rules in the Proposal are limited to the process of identifying assets. A more comprehensive harmonisation, which would include further reaching measures on asset seizure and recovery, was to my understanding too controversial and/or costly for the Member States.

In order to examine the effect of Title III of the Proposal, it is important to determine which insolvency practitioners will benefit from the targeted rules. In the Proposal several definitions are used. In Article 2(a) of the Proposal, for the defined term 'insolvency practitioner' reference is made to Article 26 of the Restructuring Directive. This article contains policies and qualifications for the appointment as insolvency practitioner.[20] The reason for this choice is not clear to me, also as Article 26 of the Restructuring Directive does not refer to a fixed group of insolvency practitioners.

In this respect, I note that in recital 87 of the Restructuring Directive reference is made to the Insolvency Regulation. This recital provides that insolvency practitioners as defined in the Insolvency Regulation should be included in the scope of the Restructuring Directive. In the explanatory notes to the Proposal, it is also confirmed that Title III of the Proposal should be put "*in context of Regulation (EU) 2015/848, which stipulates that, in principle, insolvency practitioners may exercise also in other Member States the powers conferred on them by the law of the Member State where the main insolvency proceedings have been opened and they have been appointed*".[21] In my view, for the definition of 'insolvency practitioner' the Proposal could refer to Article 2(5) of the Insolvency Regulation. This article in the Insolvency Regulation refers to Annex B of the Insolvency Regulation. For reasons of legal certainty, in view of access to non-public information, it would be preferable to only provide a fixed group of insolvency practitioners with extended access rights to information.

In view of Annex B to the Insolvency Regulation, in a Dutch context the following insolvency practitioners would be equipped with extended access rights under the Proposal:

(i) a bankruptcy trustee (*curator*) in bankruptcy proceedings (*faillissement*);
(ii) an administrator (*bewindvoerder*) in suspension of payment proceedings (*surseance van betaling*);
(iii) an administrator in debt consolidation proceedings for natural persons (*schuldsanering natuurlijke personen*);
(iv) a restructuring expert (*herstructureringsdeskundige*) in proceedings under the act on the confirmation of private restructuring plans (*Wet homologatie onderhands akkoord*; "ACPRP"); and
(v) an observer (*observator*) under the act on the confirmation of private restructuring plans.

For the Netherlands, there is in my opinion no discrepancy between the insolvency practitioners referred to under Article 26 of the Restructuring Directive and the insolvency practitioners above that are listed in Annex B to the

11 See article 1 paragraph 1 of the Asset Recovery Directive.
12 Regulation (EU) 655/2014 (the "EAPO Regulation").
13 See https://www.unodc.org/unodc/en/corruption/asset-recovery.html.
14 See https://sdgs.un.org/goals/goal16, target 16.4.
15 See https://uncitral.un.org/en/working_groups/5/insolvency_law.
16 See J.M.W. Pool, J.M.G.J. Boon & R. Vriesendorp, 'Harmonisation of European Insolvency Law: Operation Patchwork has Commenced, but Where Will it Take Us?', *TvI* 2023/11, for further information on the background of the Proposal and objectives of the European Commission, also in respect of the capital markets union.
17 See SWD/2022/395, p. 82.
18 See SWD/2022/395, p. 92.
19 See SWD/2022/395, p. 172.
20 Which article in the Restructuring Directive has in the Netherlands led to the Guidelines on the appointment of bankruptcy trustees in bankruptcy and administrators in suspension of payment proceedings (*Richtlijn aanstellen curatoren in faillissementen en benoeming bewindvoerders in surseances van betaling*) and the Guidelines on the appointment of restructuring experts and observers under the ACPRP (*Richtlijn aanwijzen en aanstellen herstructureringsdeskundigen en observatoren in de WHOA*), of which the first versions apply as of 1 January 2023.
21 COM/2022/702, p. 14.

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Insolvency Regulation. However, this could be different in other Member States.

In relation to asset tracing, the term 'insolvency estate' is used in Article 1 paragraph 1 under (b) of the Proposal to determine the subject matter of the Proposal: "*the tracing of assets belonging to the insolvency estate*". In the Proposal, 'insolvency estate' is, however, not a defined term. It is also not a term frequently used in the Restructuring Directive for a preventing restructuring framework. The term is being used in the Insolvency Regulation, where the understanding of the concept focuses on situations of bankruptcy (here understood as liquidation procedures). The choice in the Proposal for the term 'insolvency estate', also in the title name of Title III of the Proposal, confirms in my view that the extended access rights to information are (mainly) introduced for situations where, in a Dutch context, insolvency practitioners are appointed in bankruptcy proceedings or debt consolidation proceedings for natural persons.

In paragraph 6 below, I will in more detail discuss whether all insolvency practitioners in the Netherlands should be equipped with additional rights to information. In the next three paragraphs I will discuss the specific articles in the Proposal.

3. Access to bank account information

Articles 13 until and including 16 of the Proposal provide for access by a specific court designated by a Member State to the national centralised bank account registry in that Member State and in other Member States and the conditions and safeguards that apply. This procedure will make it easier and faster for insolvency practitioners to identify financial products, including bank accounts, administered in the name of the debtor. It is a tool that comes in addition to other potential sources of information for insolvency practitioners, such as the books and records of the debtor and information obtained from e.g. management or creditors of the debtor or third parties.

A common practice in the Netherlands, at least in my experience, is that shortly after being appointed the bankruptcy trustee sends a general notification e-mail to all Dutch banks and other (foreign) financial institutions, including payment service providers, where the debtor has or may have (had) accounts. This e-mail is generally sent in addition to specific e-mails to banks and payment service providers of which the bankruptcy trustee has been informed by the management of the debtor or for which it has derived from the books and records of the debtor that there is or has been a legal relationship. Examples of documents forming part of the books and records of the debtor where such information can be found are the annual accounts or the trial balance (*kolommenbalans*).

The Proposal will enable insolvency practitioners to submit a general request with the designated court that covers the banks and other payment service providers where the debtor has or had a legal relationship with. This may limit the amount of (unnecessary) work for banks and payment service providers, as general mailings by insolvency practitioners may become redundant. However, there are certain important limitations as to the parties included in the register. I will discuss these limitations in the next alinea.

In the Netherlands, the national centralised bank account registry has been implemented through the Act Register Bank Account Information (*Wet verwijzingsportaal bankgegevens*).[22] The obligation for banks and other payment service providers to be linked and provide data to a central electronic system administered by the Minister of Justice and Security (*Verwijzingsportaal bankgegevens*) is limited to:

(i) banks and other payment service providers that offer accounts with an IBAN code with the Dutch country code 'NL';[23] and
(ii) banks offering vault services (*kluizen*) in the Netherlands.

These banks and other payment service providers are required to include in the central electronic system (identifying) data about their customers, persons purporting to act on behalf of the customers, the ultimate beneficiaries of the customers and the opening and closure of accounts with an IBAN code with the Dutch country code 'NL' or a vault.

The Netherlands have not used the option provided in Article 32a paragraph 4 of AMLD4 to require to be included in the central electronic system other information deemed essential for investigative authorities, such as financial intelligence units (FIUs). Based on Article 2:267i paragraph 2 of the Financial Supervision Act (*Wet op het financieel toezicht*), more information should be included in the central electronic system than only IBAN bank accounts or vaults. Information on financial products taken out by customers should be provided. This includes information on bank and securities accounts, credit cards, consumptive credit, business credit, digital wallets and insurance policies. The central electronic system contains information on, *inter alia*, the name, address, products and status of the product (date of opening and, if applicable, closure).[24] In the central electronic system, searches can be performed on unique identification numbers of:

(i) customer-account holders;

22 See *Stb.* 2020/151, p. 2-3. It concerns the implementation of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (*de vierde anti-witwasrichtlijn*; "AMLD4"), which is amended by Directive (EU) 2018/843 (*de vijfde anti-witwasrichtlijn*; "AMLD5"). Article 32a of AMLD4 is laid down in article 3:267i of the Financial Supervision Act (*Wet op het financieel toezicht*).

23 As provided for in Regulation (EU) 2012/260 on single euro payments area (SEPA).

24 See for more detail on the information available for natural persons and legal entities article 2 of the Decree register bank account information (*Besluit verwijzingsportaal bankgegevens*).

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(ii) any person purporting to act on behalf of the customer; or
(iii) the beneficial owners of the customer account holder.

The central electronic system does not contain information on the actual use of the relevant products (e.g. the balance of the account and account statements specifying transactions). For obtaining such information the investigative authorities should rely on other procedures.[25] The obligation to have a national centralised bank account registry is maintained in the proposal for AMLD6,[26] which also introduces the set up of a single access point.

The Proposal does certainly simplify and improves the process of identifying bank accounts and other financial products of debtors in Member States. Therefore, the simple and swift access for insolvency practitioners to bank account information in all Member States is to be welcomed. However, the Proposal does not provide for situations where there is a legal relationship between the debtor and a services provider that offers similar services or accounts without an IBAN code. Examples of such service providers are ICS, Paypal, Klarna and Stripe. Claims vis-à-vis such service providers could also be important assets belonging to the insolvency estate of the debtor. The same applies to crypto-asset service providers, where substantial assets of the debtor could be held or administered.

To my knowledge, there are no central registers based on European legislation that are similar to the central electronic system on bank account information. Therefore, I admit that it will be difficult to include such service providers in the scope of the Proposal. In practice, this will be an important limitation as assets of the debtor located with services providers outside the scope of the Proposal will remain concealed for insolvency practitioners. Still, any information on bank accounts or other potential assets of the debtor that becomes available to the insolvency practitioner can generate new leads for investigations. For example, bank account statements of a bank account in another Member State that are obtained by the insolvency practitioner can show transactions with other accounts, services providers or third parties.

The European Commission recognises the risks of money laundering and terrorist financing in the electronic money issuing, payment services and the crypto-assets service providing industry. This has led to the provision in AMLD6 that Member States can require parties that are active via agents in another Member State to appoint a central point of contact in their territory. The exact scope of this obligation needs to be determined by the anti-money laundering authority (AMLA). AMLA is to be created further to the action plan of the European Commission presented on 7 May 2020 for a comprehensive European Union policy on preventing money laundering and terrorist financing.[27] Specifically for crypto-assets, MiCA[28] will be discussed in the European Parliament in April 2023.[29] MiCA, *inter alia*:
(i) provides for specific powers of national competent authorities, the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA);
(ii) imposes authorisation and operating conditions on crypto-asset service providers;
(iii) regulates offerings and marketing to the public of crypto-assets; and
(iv) puts in place prohibitions and requirements to prevent market abuse involving crypto-assets.

MiCA furthermore provides for a register of crypto-asset service providers to be maintained by ESMA.[30] For crypto-asset service providers authorised for the custody and administration of crypto-assets, MiCA also provides for a register of positions of its clients.[31] However, it seems that such registers will not be interconnected, e.g. with the competent authorities, which would make registers searchable for competent authorities in the way the national centralised bank account registry will be accessible through a single access point.[32] While AMLD4, further to its amendment by AMLD5, applies to custodian wallet providers that safeguard private cryptographic keys on behalf of its customers in order to hold, store and transfer virtual currencies, coherence with anti-money laundering legislation was one of the recommended improvements in the impact assessment of MiCA.[33]

In the Proposal, the actual access to and searches of bank account information is entrusted to designated courts. Pursuant to Article 13 of the Proposal, these will be the courts designated by the Member States to be competent to hear cases related to procedures in restructuring, insolvency or discharge of debt. Therefore, the designated courts will be courts competent in matters under the Restructuring Directive. It is unclear to me why the courts under the Restructuring Directive have been selected. I note that Article 2 under (6) of the Insolvency Regulation also provides for a definition of courts in Member States. Tracing assets will in my expectation be more relevant in traditional insolvency

25 F.E.J. Beekhoven van den Boezem and B. Bierens, red., *Geld in beweging: actualiteiten geld en betalingsverkeer (Onderneming en recht nr. 131)*, Deventer: Wolters Kluwer 2022, par. 7.5.3.
26 Proposal for a directive on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (*de zesde anti-witwasrichtlijn*; COM/2021/423; “AMLD6”). See article 14 of AMLD6 in respect to the national centralised bank account registry.
27 See C/2020/2800, Communication from the Commission on an action plan for a comprehensive Union policy on preventing money laundering and terrorist financing, for the full action plan consisting of six pillars and that is being worked out in multiple regulations and directives, including AMLD6.
28 Proposal for a regulation on markets in crypto-assets (COM/2020/593; “MiCA”).
29 With the caveat that this is the envisaged timing at the moment of finalisation of this article.
30 Article 57 of MiCA.
31 Article 67 of MiCA.
32 The single access point for bank account information will be set up pursuant to article 14 paragraph 5 of AMLD6.
33 See COM/2020/265, p. 7.

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proceedings than it will be in preventive restructuring proceedings, particularly where the debtor is in possession. Therefore, it appears more logical to designate the court authorised to open regular insolvency proceedings as the competent court.

In the Netherlands, this would in practice not make a difference, as the same courts are competent to hear cases for bankruptcy proceedings, suspension of payments, debt consolidation proceedings for natural persons and the ACPRP (the Dutch preventive restructuring procedure). However, this could be different in other Member States. In the Netherlands it would in my view make sense to designate the eleven courts of first instance spread over the Netherlands, also as supervisory judges from these eleven courts are appointed in bankruptcy proceedings, suspension of payments and debt consolidation proceedings for natural persons.

Further to its first reading, the Dutch government suggested that insolvency practitioners should have *direct* access to the central electronic system.[34] Of the insolvency practitioners in the Netherlands listed in paragraph 2 above, the insolvency practitioners appointed in bankruptcy proceedings,[35] suspension of payments proceedings[36] and debt consolidation proceedings for natural persons[37] operate under the supervision of a supervisory judge. This brings along that, in spite of the possibility to have a restructuring expert or observer dismissed by the court,[38] the restructuring expert and observer do not operate under the supervision of a supervisory judge or similar court official. It is in, my view, undesirable to grant insolvency practitioners, which are private practitioners in the Netherlands, direct access to databases such as the central bank account register. This *a fortiori* applies where insolvency practitioners do not operate under the supervision of a supervisory judge. Also in view of data protection laws (including GDPR), it is undesirable to provide insolvency practitioners of all Member States unlimited and unrestricted access to the central electronic systems with bank account information of all Member States. There is only a (theoretical) subsequent verification whether access by the insolvency practitioner was justified. Lastly, also for practical reasons, it will be difficult to grant a varying group of insolvency practitioners direct access to the central electronic system.

Alternatively, if access by designated courts would in view of practical limitations not be feasible,[39] it could be considered by the European legislature that Member States can appoint a (governmental) authority that has access to the central bank account register. In practice, the access to the central electronic system and the provision of information to insolvency practitioners is a rather administrative task. In the Netherlands Dienst Justis, which is part of the Ministry of Justice and Security, could be considered as a suitable authority to have access to the central electronic system. Dienst Justis also carries out the Guarantee settlement for bankruptcy trustees (*Garantstellingsregeling Curatoren*). This would, in my view, provide a feasible solution where it concerns the provision of bank account information concerning the debtor.

The absence of a judicial review is in my view not desirable where it concerns bank account information regarding a third party. In this respect, I note that Article 14 paragraphs 1 and 2 of the Proposal provide that bank account information can also be requested by an insolvency practitioner for the purposes of identifying and tracing assets belonging to the insolvency estate of the debtor where these relate to avoidance actions. The subordinate clause in these paragraphs "*including those subject to avoidance actions*" implicates that an insolvency practitioner cannot only request the designated court to search for and provide information regarding the debtor itself. Bank account information can also be requested for parties that could be targeted by insolvency practitioners as part of potential avoidance actions. In the explanatory memorandum to the Proposal, the following is included: "*This proposal aims to maximise the recovery of value from the insolvent company for creditors. To this end, the provisions on avoidance actions and asset tracing mutually reinforce each other.*"[40] It, therefore, seems a deliberate choice in the Proposal to not limit the access of insolvency practitioners to bank account information to the debtor.

In practice, this would enable insolvency practitioners to identify potential assets for recourse on claims against third parties based on avoidance actions. In view of Articles 42 *et seq.* of the Dutch Bankruptcy Act on transaction avoidance, in a Dutch context this option seems reserved for bankruptcy trustees. There could be situations where the avoidance action targets a bank account of a third party (e.g. where a bank transfer for no consideration (a gift) has been made into the bank account of a third party).[41] However, a substantial part of the matters where avoidance actions

34 See for this view taken by the Dutch government, through the working group assessment of proposals of the European Commission, page 8 of attachment 3 to the letter of the Minister of Foreign Affairs, Mr. W.B. Hoekstra, to the chairperson of the House of Representatives dated 3 February 2023, 22 112, nr. 3598.

35 See article 14, paragraph 1 of the Dutch Bankruptcy Act.

36 See article 223a, paragraph 1 of the Dutch Bankruptcy Act.

37 See article 287, paragraph 3 of the Dutch Bankruptcy Act.

38 See article 371, paragraph 13 of the Dutch Bankruptcy Act in respect of the restructuring expert, which also applies to the observer through article 380, paragraph 4 of the Dutch Bankruptcy Act.

39 See the reservations of the Dutch government in this respect, through the working group assessment of proposals of the European Commission, page 8 of attachment 3 to the letter of the Minister of Foreign Affairs, Mr. W.B. Hoekstra, to the chairperson of the House of Representatives dated 3 February 2023, 22 112, nr. 3598.

40 Explanatory memorandum to the Proposal, under 5. Other Elements, p. 12.

41 The relevant bank account of the third party will then be traceable via the bank account statements. However, the bank account information in the central bank account register can be much broader then solely the bank account into which the relevant payment has been made.

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are instituted will concern the dissipation of assets that were previously in the debtor's possession. The wording of Title III of the Proposal, 'tracing assets belonging to the insolvency estate', does not relate well to the access to information on recourse against third parties for claims based on avoidance actions. For bankruptcy trustees and other insolvency practitioners this would be a helpful tool when instituting claims against third parties in connection with transaction avoidance. For example, when assets of the debtor have been sold against a steep discount or when assets have simply been given away to a third party, the insolvency practitioner can via the central electronic register obtain information on (potential) assets of that third party. This would be in line with the overall objective of the Proposal, being to maximise the recovery of value from the insolvent company for creditors.

The Proposal does not (yet) require insolvency practitioners to substantiate a request for bank account information submitted to the designated court. It is to be seen whether courts, based on the wording "*where necessary*" in Article 14 paragraphs 1 and 2 of the Proposal, will require a substantiation of requests. This would in any case make sense where it concerns bank account information regarding third parties in connection with a (potential) claim based on transaction avoidance. Absent such substantiation requirement, insolvency practitioners could in practice have access to the bank account information of a very substantial number of enterprises and citizens in the European Union, e.g. where these have a legal relationship with the debtor as customer, supplier, landlord, etc. If a different (governmental) authority or other persons would be entrusted with access to the central electronic system, the procedure would lack a judicial review. In my view, a judicial review would, where it concerns bank account information of parties other than the debtor, be desirable.

Also with an additional layer verifying upfront whether access to bank account information is justified, access to the central electronic system with bank account information will in my expectation be a useful tool for insolvency practitioners to quickly identify and chart the assets of the debtor. This particularly applies in situations where a debtor is not willing or able to cooperate. It is in my view likely that in practice, a standard procedure will develop whereby insolvency practitioners will request information from the designated court or (governmental) authority on the debtor. This would increase the burden of work for courts. However, it will become more difficult for debtors (or their beneficiaries) to conceal assets within the European Union. This is of course different for funds or other assets brought outside the European Union, which is an important limitation to the effectiveness of the Proposal. I will discuss this and other limitations in paragraph 6 below.

Lastly, a technical drafting note is that the European legislature may elect to define 'designated courts' in Article 1 of the Proposal instead of introducing a definition in Article 13 paragraph 1 of the Proposal.

4. Access to beneficial ownership information

In Article 17 of the Proposal, provisions are laid down on the access of insolvency practitioners to beneficial ownership information registers. The proposed provision concerns improved access for insolvency practitioners to information on the ultimate beneficial owner registered for the debtor. This should provide insolvency practitioners with a better overview and insights into the group structure and the interests of affiliated parties and persons.

The legal basis for the beneficial ownership information registers is set out in AMLD4.[42] This will be maintained in AMLD6.[43] The national beneficial ownership information registers of the Member States are interconnected based on AMLD4. In the Netherlands, the beneficial ownership information register is implemented in the Trade Register Law 2007 (*Handelsregisterwet 2007*).

An important question is how access for insolvency practitioners to information on beneficial ownership in the Proposal relates to recent case law of the Court of Justice of the European Union (CJEU).[44] The CJEU ordered that the general public's access to information on beneficial ownership constitutes an interference with the rights guaranteed in Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter of Fundamental Rights of the European Union (*Handvest van de grondrechten van de Europese Unie*).

Under AMLD4 persons or organisations capable of demonstrating a 'legitimate interest' had access to the beneficial ownership information register. AMLD5 provides for the general public's access to certain information on beneficial ownership, including personal details of the legal owner and the nature and extent of the beneficial interest held. Article 21 of the Trade Register Law 2007 currently provides that the general public has access to the basic information on beneficial ownership included in the register. According to the CJEU, the broader access to the beneficial ownership information register under AMLD5 does *not* demonstrate a proper balance between either the objective of general interest pursued and the fundamental rights in the abovementioned Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, or the existence of sufficient safeguards enabling data subjects included in the beneficial ownership register to protect their personal data effectively against the risks of abuse.

On 22 November 2022, the date of the CJEU judgment referred to above, the Netherlands ceased all access to its

42 Article 30 paragraph 3 and article 31 paragraph 3a of AMLD4.
43 Article 10 of AMLD6.
44 See the judgment of 22 November 2022 in cases C-37/20 and C-601/20, CJEU 22 November 2022, ECLI:EU:C:2022:912.

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beneficial ownership information register. On 20 January 2023, the Minister of Justice and Security informed the House of Representatives that, although AMLD4 requires minimum harmonisation rules, Article 21 of the Trade Register Law 2007 needs to be amended.[45] The access to the national beneficial ownership information register by the Dutch authorities (including the Dutch Tax Authority) and the FIU has been restored. The access by other parties, including banks and insurers that have to perform anti-money laundering checks, is still being investigated. It is envisaged that objective indicators will be defined for determining a right of access to the national beneficial ownership information register.

In view of the abovementioned judgment of the CJEU, it will be required that access to information that was intended to be publicly accessible further to AMLD5 is specially provided for. Article 17 of the Proposal, to be implemented in the laws of the Member States, will in my view then provide for a legitimate interest when information on beneficial ownership is sought by an insolvency practitioner in view of identifying and tracing assets. The description in Article 17 of the Proposal for which purposes the access by the insolvency practitioner is allowed, is limited to "*necessary for identifying and tracing assets belonging to the insolvency estate of the debtor in ongoing insolvency proceedings*". It is furthermore limited to certain information on, in short, certain (personal) details and the nature and extent of the beneficial interest held. The information listed in Article 17 of the Proposal should, whether or not in conjunction with information from other public and non-public sources, generally be sufficient for insolvency practitioners to be able to trace and contact such persons.

As will be discussed in more detail in paragraph 5 below, in the Netherlands bankruptcy trustees have the possibility to request with Dienst Justis a network diagram (*netwerktekening*) that contains all relationships of legal entities and natural persons that are in some way involved and/or connected with the bankrupt debtor. This network diagram is limited to information known to the Dutch authorities and comes in addition to the information that is publicly available in the Dutch Chamber of Commerce (*Kamer van Koophandel*). The provision on access to beneficial ownership information registers is still a valuable addition as insolvency practitioners appointed in another Member State will likely not have access to information to be collected and combined by Dienst Justis. Also, insolvency practitioners appointed in the Netherlands will in other Member States probably not have the same access to such information as insolvency practitioners appointed in that Member State.

Further to its first reading of the Proposal, the Dutch government announced that it will ask questions why the access to beneficial ownership information registers is included in the Proposal and not in AMLD6.[46] In my view, the intended effect of the proposed article in the Proposal, which is to provide insolvency practitioners with access to beneficial ownership information registers, is broader than only anti-money laundering and counter-terrorism. In the interest of creditors, the Proposal aims to maximise the recovery of value, for which purpose (improved) access to information for tracing assets belonging to the insolvency estate are introduced. Noting the civil and commercial purpose of the Proposal, this is in my view the right place to embed these access rights to information for insolvency practitioners.

5. Access to national asset registers

The improved access of insolvency practitioners to national asset registers in all Member States is provided for in Article 18 of the Proposal. National asset registers are a valuable source of information for insolvency practitioners as they may reveal assets that are (potentially) part of the insolvency estate of the debtor. While some registers do not particularly register ownership,[47] a registry in the name of the debtor is usually an important indication of title to an asset. Currently, access to foreign asset registers and the sale of assets in other Member States usually takes place with the assistance of a lawyer or other advisor in that Member State with local knowledge. This can be time-consuming and costly. In the Netherlands, in view of the Recofa Guidelines for bankruptcies and suspensions of payment (*Recofa Richtlijn voor faillissementen en surseances van betaling*),[48] a bankruptcy trustee is under the obligation to upfront request permission to incur costs for engaging (foreign) experts up front. Such barriers may lead to assets being dissipated further away from the bankrupt estate of the debtor. An overview of all national asset registers for all Member States makes it easier for insolvency practitioners to navigate their way to and access asset registers in other Member States.

As Schuijling has rightly pointed out, the improved access to national asset registers is not particularly a harmonisation of national insolvency laws of the Member States.[49] Nonetheless this provision will be welcomed by insolvency practitioners in all Member States as it will make identifying assets easier and more efficient.

Article 18 of the Proposal provides that regardless of the Member State where the insolvency practitioner is appointed, the insolvency practitioner should have direct and expeditious access to the national asset registers to be

45 See the letter of the Minister of Justice and Security, Ms S.A.M. Kaag, to the chairperson of the House of Representatives dated 20 January 2023, 31 477, nr. 85.

46 See the view taken by the Dutch government, through the working group assessment of proposals of the European Commission, page 8 of attachment 3 to the letter of the Minister of Foreign Affairs, Mr W.B. Hoekstra, to the chairperson of the House of Representatives dated 3 February 2023, 22 112, nr. 3598.

47 E.g. the Netherlands Vehicle Authority does not register ownership of vehicles, but merely the holder of a vehicle.

48 To be specific, article 6.7 under d. of the Recofa Guidelines of 15 April 2021.

49 B.A. Schuijling, '2. Het commissievoorstel voor een nieuwe insolventierichtlijn', *FIP* 2023/1, p. 14.

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included in the annex to the Proposal. This access should be under *de jure* and *de facto* the same conditions as insolvency practitioners appointed in the Member State where the national asset register is kept. The following national asset registers are included in the annex to the Proposal:
(1) Cadastral registers;
(2) Land registers;
(3) Movable property registers including registers of vehicles, ships and aircrafts and registers of weapons;
(4) Register of donations;
(5) Mortgage registers;
(6) Other security registers, including securities depository registers and book-entry registers;
(7) Registers of pledges including lease agreements and sale-purchase agreements with retention of title;
(8) Registers containing property seizure acts;
(9) Probate registers;
(10) Registers of intellectual property rights, including patent and trademark registers;
(11) Registers of internet domains; and
(12) Register of General Terms and Conditions.

For the Netherlands, the registers that could be considered for placement on the list in the annex to the Proposal in my view include:
(1) the immovable property and vessel registers, including mortgage rights and seizures/attachments, kept by the Netherlands' Cadastre, Land Registry and Mapping Agency (*Kadaster*);
(2) the aircraft register, including mortgage rights and seizures/attachments, kept by the Human Environment and Transport Inspectorate (*Inspectie Leefomgeving en Transport*);
(3) the vehicle register kept by the Netherlands Vehicle Authority (*Dienst Wegverkeer*; *RDW*);
(4) the internet domains register kept by Stichting Internet Domeinregistratie Nederland;
(5) the intellectual property registers for trademarks and designs kept by Benelux Office for Intellectual Property (*Benelux-Bureau voor de Intellectuele Eigendom*; *BOIP*);
(6) the patent register kept by the Netherlands Patent Office (*Octrooicentrum Nederland*);
(7) the plant varieties register kept by the Board for Plant Varieties (*Raad voor plantenrassen*);
(8) the register for weapons kept by the chief of police (*korpschef*);
(9) the register for general terms and conditions kept by the Judicial system Netherlands (*De Rechtspraak*);
(10) the central register of wills (*Centraal Testamentenregister*) kept by the Royal Dutch Association of Civil-law Notaries (*Koninkelijke Notariële Beroepsorganisatie*); and
(11) the securities depository register kept by Nederlands Centraal Instituut voor Giraal Effectenverkeer B.V. (Euroclear Nederland).

In the list, above I have included the Benelux Office for Intellectual Property, which may technically not be seen as a national asset register as the office has been incorporated further to the Benelux-treaty on trademarks (*Benelux-Verdrag inzake de warenmerken*) concluded by and between the Netherlands, Belgium and the Netherlands, which treaty was in 2006 replaced by the Benelux-treaty on intellectual property (*Benelux-verdrag inzake de intellectuele eigendom*) between the same countries. As a shared national asset register for intellectual property, insolvency practitioners from other Member States should in my view have direct and expeditious access to the registers kept by the Benelux Office for Intellectual Property. In addition, the Benelux Office for Intellectual Property has its offices in The Hague, the Netherlands, which brings along that it could be argued that the registers of the Benelux Office for Intellectual Property are located in the territory of the Netherlands. In practice, the accessibility of this register for foreign insolvency practitioners will not be a problem as the register is publicly accessible.

The provision in Article 18 paragraph 2 of the Proposal that access conditions for insolvency practitioners appointed in another Member State should *de jure* or *de facto* not be less favourable than the conditions granted to insolvency practitioners in the Member State where the register is kept, should in my view not be interpreted that access to national asset registers should under all circumstances be without limitations or costs, but that a level playing field applies in all Member States of the European Union. In the Netherlands, some registers can be accessed without incurring costs (e.g. the intellectual property registers for trademarks and designs kept by Benelux Office for Intellectual Property) while other registers do charge costs for providing extracts (e.g. the immovable property and vessel registers, including mortgage rights and seizures/attachments, kept by the Netherlands' Cadastre, Land Registry and Mapping Agency). For registers without an access portal, such as the register for weapons, it will be both Dutch insolvency practitioners and insolvency practitioners appointed in another Member State that will be required to send a request for access and/or information.

Also, in view of the list of potential Dutch national asset registers compiled by me, I am not aware of access conditions in respect of these registers that would currently be less favourable for insolvency practitioners in other Member States compared to insolvency practitioners appointed in the Netherlands. However, the Proposal may provide insolvency practitioners with additional rights in other Member States. This may e.g. apply in Member States where insolvency practitioners are government officials and have access, or more comprehensive access or access on different terms (such as free of charges[50]), to certain asset registers. Based on the implementation of the Proposal, I expect that

50 See by way of example A/CN.9/WG.V/WP.182/Add.1 – Inventory of civil asset tracing and recovery tools used in insolvency proceedings, p. 14, where it is mentioned that access to public registers in Hungary is free of charge.

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it will become easier for insolvency practitioners to request and receive access to registers in other Member States.

Based on the current list in the Annex referred to in Article 18 of the Proposal, insolvency practitioners appointed in other Member States will in my view not have access to information commonly provided to Dutch bankruptcy trustees by Dienst Justis and the Dutch Tax Authorities (*Belastingdienst*). As briefly mentioned in paragraph 4 above, a network drawing (*netwerktekening*) can be requested by a Dutch bankruptcy trustee with Dienst Justis based on the Act on the check of legal entities (*Wet controle op rechtspersonen*).[51] Such network drawing shows all relationships of legal entities and natural persons that are in some way involved and/or connected with the bankrupt debtor. The network diagram is limited to information known to the Dutch authorities. This is however not a central register which can be accessed by bankruptcy trustees and investigating agencies, but information that is to be collected and combined upon the request of an applicant (in this case the bankruptcy trustee).

Based on the Guidelines Recovery (*Leidraad Invordering*) for the Dutch Tax Authorities, if and insofar there is a fiscal claim a bankruptcy trustee may request information from the Dutch Tax Authorities on the assets of directors and supervisory members of a bankrupt entity in view of (potential) liability claims.[52] In my opinion, for this request the same applies as for a request for a network drawing with Dienst Justis. It would be justified to hold this information outside the scope of the Proposal, as this information is (primarily) useful for insolvency practitioners for identifying (potential) assets for recourse on claims against directors, supervisory members or other third parties. Hence, the Proposal is aimed at gathering information on (potential) assets that belong or should belong to the bankrupt estate.

6. Reflection on Title III of the Proposal and other desired tools for insolvency practitioners

In my expectation, the Proposal will particularly be of importance in bankruptcies and debt consolidation proceedings for natural persons where the debtor (or its representative) cannot be located or is unwilling or unable to cooperate. If debtors (or their representatives) are cooperating well, it will normally not be an issue for the insolvency practitioner to locate (potential) assets such as bank or securities accounts. In most bankruptcies, such accounts can be quite easily derived from the books and records of the debtor. I do not expect that in such situations the provisions in the Proposal will materially speed up the process of locating or tracing assets by the insolvency practitioner.

If the debtor (or its representative) cannot be located or is unwilling or unable to cooperate, the additional tools in the toolbox of the insolvency practitioner can be useful if (potential) assets are located in the European Union. In bankruptcies with fraud elements, in my experience more advanced fraudsters tend to (also) use jurisdictions outside the European Union. Also, after implementation of the Proposal this may lead to a dead end in the investigations of the insolvency practitioner. In view of the territorial jurisdiction of the European Union this is not a limitation that can be addressed, but it is something to keep in mind.

Another important limitation is that service providers that do not offer accounts with an IBAN code or vaults fall outside the scope of the Proposal. Insolvency practitioners will, therefore, not have access to information on the accounts of the debtor with service providers such as ICS, Paypal, Klarna and Stripe. I admit that there does not seem to be an easy way to bring these types of assets under the scope of the Proposal. Such limitations do, however, undermine the beneficial effect of the Proposal as mainly the 'new economy' assets will not be covered by the scope of the Proposal.

Still, any additional information obtained as a result of the additional access rights to information under the Proposal may provide insolvency practitioners with new leads for further investigations. In the Dutch bankruptcy practice, also in situations where new clues are found, Articles 105 *et seq.* of the Dutch Bankruptcy Act are of major importance. These articles provide for an obligation on debtors, including current and former directors and supervisory board members, to on its own initiative and at the request of the bankruptcy trustee provide all information that is relevant for the settlement of the Dutch bankruptcy. All books and records of the debtor should be forthwith handed over to the bankruptcy trustee. In the absence of cooperation, judicial assistance can be requested. The bankruptcy trustee furthermore has the possibility to, based on Article 105b of the Dutch Bankruptcy Act, demand from third parties, including auditors and software as service providers, the delivery of all documents that are part of the books and records of the debtor. Such third parties may not invoke a right of retention vis-à-vis the bankruptcy trustee. This is a powerful tool to obtain information on (potential) assets of the debtor where a debtor is not cooperating. It may be worthwhile to investigate whether harmonisation within the European Union of such obligations on debtors, their (former) directors and supervisory board members and third parties would be feasible.

Now, I will address the question which insolvency practitioners should be equipped with additional access rights to information. There is in my view no specific need to also provide (i) the administrator in suspension of payment proceedings (where a plan should be presented by the debtor) and (ii) the restructuring expert under the ACPRP (as debtor in possession proceeding) with additional rights to information on potential assets belonging to the insolvency

51 See article 6 under d. of the Decree on the check of legal entities (*Besluit controle op rechtspersonen*).

52 See article 36.2 of the Guidelines Recovery (*Leidraad Invordering*).

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estate. If e.g. the debtor that is subject to proceedings under the ACPRP is not willing or able to provide sufficient information on (potential) assets to the restructuring expert, there will likely be a confidence gap resulting in the restructuring expert informing the court that a restructuring plan that can be confirmed by the court is no longer an option.[53] An argument to include the administrator and restructuring expert as insolvency practitioners eligible to have or request access to registers will be that they can check registers for any 'concealed' assets and report about their findings to stakeholders of the debtor, such as creditors. Also, in view of the limitations regarding the information that can be obtained (see e.g. paragraph 3 above on the access to bank account information), I expect that for these types of proceedings, the importance of these additional tools will be marginal. As set out in paragraph 2 above, the terminology used in the Proposal (e.g. 'insolvency estate') also seems to indicate that it is written for situations where bankruptcy has been declared.

The position of the observer under the ACPRP is in my view a bit different. The observer is specifically entrusted with the interests of the joint creditors of the debtor that is subject to proceedings under the ACPRP.[54] In order to fulfil its tasks as observer, it could be necessary to have access to information on (potential) assets other than via the debtor itself.[55] In spite of the limitations regarding the information that can be obtained, with this additional rights the observer could e.g. follow up on signals or information received from creditors or other third parties.

Where these observations on which insolvency practitioners should fall under the scope of the Proposal are limited to a Dutch context, the same questions could apply in other Member States. This question requires a thorough review by the European legislator.

7. Conclusion and recommendations

The Proposal equips insolvency practitioners with additional rights to information and access to registers. While from a Dutch perspective this will likely aid certain insolvency practitioners (e.g. a bankruptcy trustee in bankruptcy proceedings) more than others and the scope of the Proposal as to which insolvency practitioners benefit from the additional access rights to information should be further reviewed, the initiative by the European legislature is to be welcomed.

As regards the access to bank account information, there are considerable limitations to the information that can be obtained as service providers not offering accounts with an IBAN code or vaults fall outside the scope of the Proposal. This excludes e.g. certain payment service providers and crypto service providers. While entrusting designated courts with access to the central electronic system is a logical choice, it is to be seen whether this is practically feasible for courts. In view of the administrative character of retrieving information from the central electronic system, other (governmental) authorities such as the Netherlands Dienst Justis could also be considered. It also is to be seen in which way and how thoroughly requests for information will be judged, particularly where it concerns bank account information of parties other than the debtor. In the latter case, a judicial review would in my view be desirable. Guidance on the conditions for access to bank account information where it does not concern the debtor itself, e.g. for the purpose of claims based on avoidance actions, is desirable.

For access to beneficial ownership information, the Proposal in my view provides for a legitimate interest for insolvency practitioners to access information in beneficial ownership information registers. In view of recent case law of the CJEU, a specific right for insolvency practitioners to access information could be considered by the European legislature.

The access to national asset registers, besides creating a useful overview of asset registers in all Member States, is expected to improve and facilitate access of insolvency practitioners to these registers. The Proposal also facilitates access to asset registers that were previously not accessible for insolvency practitioners appointed in another Member State.

To conclude, while the Proposal improves the access to information for insolvency practitioners in Member States, it is limited to access rights to information for tracing assets and does not provide insolvency practitioners with new instruments to recover assets belonging to the insolvency estate. Potentially this was too controversial for the Member States. In terms of further improvements on the subject of asset tracing, harmonising the right to receive information and documents from (former) directors and supervisory board members and from third parties (including auditors and software as service providers) could be considered. In any case, the Proposal equips insolvency practitioners with new tools to trace assets, which is positive news for both creditors and the fight against (organised) crime.

This article was completed on 13 March 2023.

53 Article 371, paragraph 12 of the Dutch Bankruptcy Act.
54 Article 380, paragraph 1 of the Dutch Bankruptcy Act.
55 Via article 371, paragraph 7 of the Dutch Bankruptcy Act, which also applies to the observer through article 380, paragraph 4 of the Dutch Bankruptcy Act.

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Mr. M.R. van Zanten[1]

Proposal for European rules on pre-pack proceedings should be supported

TvI 2023/14

1. Introduction

On 7 December 2022, the European Commission published the Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (hereinafter "the Proposal").[2] The Proposal is intended to harmonise the insolvency laws of the Member States in order to make insolvency proceedings more predictable and efficient. The Proposal also includes a number of principles the pre-pack proceedings in each Member State must meet.

The Proposal defines pre-pack proceedings as follows:

> "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."[3]

The explanatory memorandum to the Proposal states the following about pre-pack proceedings:

> "In a pre-pack proceeding, the sale of the debtor's business (or part of it) is prepared and negotiated before the formal opening of the insolvency proceedings. This makes it possible to execute the sale and obtain the proceeds shortly after opening the formal insolvency proceedings intended to liquidate a company."[4]

This part of the Proposal is of great importance for insolvency practice, because it provides for the introduction of pre-pack proceedings in all Member States. For a careful settlement of bankruptcies in the Member States, it is important that debtors in every Member State have access to these proceedings. This prevents forum shopping and contributes to legal equality. In addition, it is important that the Proposal sets a number of minimum requirements for pre-pack proceedings at the European level, which increases the quality of the national statutory regulations.

CJEU case law has created uncertainty regarding the feasibility of pre-pack proceedings because there is a risk of a transfer of business or undertaking within the meaning of Directive 2001/23/EC. If that is the case, the party purchasing the business will take on all employees of the transferring party by operation of law.[5] This may affect the conclusion of the transfer or the purchase price.

With the Proposal, the European Commission is taking an important step forward in the development of the pre-pack proceedings as a method to limit the harm or loss of parties involved in bankruptcies, such as debtors, employees and customers. The Netherlands was one of the front-runners in the development of legislation on pre-pack proceedings. On 21 June 2016, the Dutch House of Representatives passed the Continuity of Enterprises Act I (*Wet continuïteit ondernemingen I*).[6] The Continuity of Enterprises Act I provides a legal basis for the pre-pack practice developed in the Dutch legal practice. However, the CJEU's judgment in *Smallsteps*[7] has brought the pre-pack practice in the Netherlands, including the debate on the Continuity of Enterprises Act I in the Dutch Senate, to a standstill. In its judgment in *Smallsteps*, the CJEU held that the exception to the employment protection of Articles 3 and 4 of Directive 2001/23 included in Article 5(1) of Directive 2001/23 may apply only when the main objective of the insolvency or similar proceedings is the liquidation of the assets of the transferor and not the preservation of the business. According to the CJEU, if the transfer of the business is prepared in pre-pack proceedings down to its every last detail in order to enable a swift relaunch of the business's viable units after the declaration of insolvency, the requirement that the proceedings are initiated with a view to liquidation is not met. The CJEU also held that in the Dutch context, the requirement that these proceedings are under the supervision of a public authority is not met either.

In its judgment in *Heiploeg*,[8] the CJEU once again had to answer the question of to what extent the pre-pack proceedings, as described in the judgment of the Supreme Court of

1 Marc van Zanten is a partner and insolvency practitioner at CMS. He is working on a doctoral thesis about the pre-pack.
This contribution was closed on 6 April 2023. Developments that took place after this date were not taken into account.

2 Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law dated 7 December 2022, COM(2022) 702 final ("*Proposal*").

3 Article 2(p) of the Proposal.

4 Explanatory Memorandum to the Proposal, p. 15.

5 See Article 3 of the 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 ("Directive 2001/23").

6 EK 34.218, A.

7 CJEU 22 June 2017, ECLI:EU:C:2017:489 (*FNV et al. v Smallsteps BV*). For the sake of brevity, for the many publications that appeared further to this judgment I refer to footnote 3 of N.W.A. Tollenaar, '*De implicaties van Estro voor de pre-pack en WCO I*', *TvI* 2018/6 and furthermore to, among others: J. van der Pijl, *Arbeidsrecht en insolventie* (*Monografieën Sociaal Recht* no. 75), Deventer: Kluwer 2019, pp. 181-188 and M.R. van Zanten, '*It takes Smallsteps to pre-pack, een analyse*', in: E.J.R. Verwey, P.W. Schreurs, M.A. Broeders (ed.), *De Curator en het Personeel (INSOLAD Jaarboek 2018)*, Deventer: Wolters Kluwer 2018, pp. 40-47.

8 CJEU 28 April 2022, ECLI:EU:C:2022:321 (*FNV v Heiploeg*). For a discussion of the judgment see, among others: J. van der Pijl, '*Het Heiploeg-arrest*', *TAC*, 2022/4, pp. 165-170 and R.J. van Galen, '*Overgang van een onderneming in faillissement: de stand van zaken na Heiploeg*', *Ondernemingsrecht* 2022/55, *pp. 339-346*.

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the Netherlands referring that case to the CJEU for a preliminary ruling,[9] meet the exception requirements of Article 5(1) of Directive 2001/23.[10] In this judgment, the CJEU repeated that the application of the exception provision of Article 5(1) of Directive 2001/23 depends on whether the situation involves bankruptcy proceedings that were initiated with a view to the liquidation of the assets of the transferor or with a view to the continuation of the activities. The CJEU held that it is an established fact that in this case, the transfer of the business concerned took place in the context of bankruptcy proceedings intended to liquidate all the assets, i.e. of the business of the transferor.[11] The wording of Article 5(1) of Directive 2001/23 shows that the exceptional situation does not apply only to businesses whose activities definitively ended before or after the transfer. This exception is intended to rule out the serious risk of a general decrease in the value of the transferred business or general deterioration of the living and working conditions of the employees. For this reason, it should be possible to transfer a business subject to the deviation laid down in the aforementioned provision.[12] Because Article 5(1) of Directive 2001/23 does not pertain to the period prior to bankruptcy or insolvency proceedings, it is irrelevant to the application of this criterion whether the transfer was prepared before the initiation of the bankruptcy proceedings.[13] According to the CJEU, when the primary objective of pre-pack proceedings, followed by bankruptcy proceedings, is to obtain the highest possible payment for its joint creditors after the declaration of insolvency and after liquidation, these proceedings jointly in principle meet the second condition set out in Article 5(1) of Directive 2001/23.[14] It must be established not only that the primary objective of these proceedings is to achieve the highest possible payment to the joint creditors, but also that the implementation of the liquidation through a transfer of the business or a part thereof as a going concern, as prepared in the pre-pack proceedings and implemented following the bankruptcy proceedings, makes it possible to achieve this primary objective. Finally, the CJEU ruled that the conditions of Article 5(1) of Directive 2001/23 can certainly be satisfied when bankruptcy proceedings are prepared in pre-pack proceedings, provided that the pre-pack proceedings are governed by statutory or regulatory provisions.[15]

9 Supreme Court 7 April 2002, ECLI:NL:HR:2020:753 and Supreme Court 29 May 2020, ECLI:NL:2020:954 (*FNV v Heiploeg*).

10 Article 3 and 4 of Directive 2001/23 include a number of rights the employees have in case of a transfer of business. Article 5(1) of Directive 2001/23 provides that, unless Member States provide otherwise, Articles 3 and 4 of Directive 2001/23 shall not apply to any transfer of a business, where the transferor is the subject of bankruptcy proceedings or any similar proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be a insolvency practitioner authorised by a competent public authority).

11 Paras. 47.

12 Paras. 49-50.

13 Paras. 51.

14 Paras. 52.

15 Paras. 55 and 66.

The judgment in *Heiploeg* demonstrated that pre-pack proceedings, once they are provided for by law, most certainly can fall under the scope of the exception of Article 5(1) of Directive 2001/23. From the perspective of the parties involved in the bankruptcy, who benefit from having the harm or loss limited as much as possible and seeing the highest possible proceeds, it is good to see that EU law is looking to reinstate the pre-pack practice through the Proposal, after the same EU law saw it unseated earlier.

The provisions of Title IV of the Proposal are discussed and commented on below, where I also give a number of suggestions for additional provisions.

2. Title IV Proposal (pre-pack proceedings)

2.1 *Definition*

Based on Article 2, opening words and (p) of the Proposal, the pre-pack proceedings are 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. This definition, in line with the CJEU case law, shows that the objective of the pre-pack proceedings is to liquidate the assets and that these proceedings pertain to an insolvent debtor. This means that a declaration of insolvency is no longer a choice to be made by the debtor but has become a certainty. It is for this situation, which is bad for many of the parties involved, that the pre-pack proceedings offer a procedure that minimises the harm or loss incurred by the creditors as a result of the bankruptcy.

2.2 *Pre-pack proceedings*

Article 19(1) of the Proposal stipulates that the Member States have to lay down legislation with regard to such pre-pack proceedings. The Member States must 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.

The elaboration of the pre-pack proceedings into two consecutive phases is the correct approach. The article-by-article explanation regarding Title IV indicates that the preparation phase is usually confidential.[16] In my opinion, pre-pack proceedings have added value over ordinary insolvency proceedings primarily because of the former's confidential nature. If the preparation phase were not, by its nature, in principle confidential, then one might be left to wonder as to the justification and added value of this part of the pre-pack proceedings compared to ordinary insolvency proceedings, prepared or otherwise. I believe it is

16 See Explanatory Memorandum, p. 17.

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appropriate to also state the fact that the preparation phase is in principle confidential in Article 19(1)(a) of the Proposal.

2.3 *Relation to other juridical acts of the EU*

Article 20(1) of the Proposal provides that the liquidation phase must be considered to be an insolvency proceeding as defined in Article 2, point (4), of Regulation (EU) 2015/848.[17] Pursuant to the provisions in Article 20(2) of the Proposal, the liquidation phase must be considered to be insolvency proceedings instituted with a view to the liquidation of the assets of the transferor under the supervision of a competent public authority within the meaning of Article 5(1) of Directive 2001/23.

In this provision, the European Commission explains the relationship between the Proposal and Directive 2001/23.[18] This codifies the judgment in *Heiploeg* and is a clear attempt to remove any doubt as to whether the bankruptcy exception applies in the event of pre-pack proceedings that meet the definition of Article 2, opening words and (p) of the Proposal.[19]

The EU legislature thereby determines in a general sense that in the case of pre-pack proceedings as defined in the Proposal, comprising, among other things, a liquidation phase which based on Article 19(1)(b) is aimed at the sale of the business and the distribution of the proceeds among the creditors, these proceedings meet the exception provision of Article 5(1) of Directive 2001/23. However, the *Heiploeg* judgment shows that it is not sufficient for the proceedings, in a general sense, to have the primary objective of achieving the highest possible payment to the joint creditors. Specifically, it is the transfer of a going concern that must make it possible to achieve this objective and must be an appropriate means to that end in the case in question.[20] However, as Verstijlen notes:

> "it would be very strange for a court to rule that the transfer of a business going concern is not suitable to realise the highest possible proceeds from the estate; should this nevertheless occur, the insolvency practitioner and supervisory judge would not cooperate with the transfer."[21]

In practice, this provision would therefore most likely not result in much uncertainty. As a result of the clarity provided by the judgment in *Heiploeg* and the provision of Article 20(1) of the Proposal, such disputes about the objective of pre-pack proceedings designed in this way will probably be limited in practice. Furthermore, the monitor/insolvency practitioner and the court are involved in the initiation and follow-up of the process, which ensures that the application of pre-pack proceedings can be monitored in practice.

2.4 *Jurisdiction in pre-pack proceedings*

Article 21 of the Proposal provides that the court having jurisdiction in pre-pack proceedings will have exclusive jurisdiction in matters relating to the scope and effects of the sale of the debtor's business.

This provision is addressed below at 2.12 in the discussion of Article 29 of the Proposal that provides for, among other things, the possibility of an appeal against the proposed sale.

2.5 *The monitor*

Article 22 of the Proposal includes rules for the "monitor", the European equivalent of the Dutch *beoogd curator (*"prospective insolvency practitioner"). The Member States must ensure that the court will appoint a monitor at the request of the debtor, which is the start of the preparation phase. Article 22(2) of the Proposal contains a number of duties of the monitor, including:

a) documents and reports each step of the sale process;
b) justifies why it considers that the sale process is competitive, transparent, fair and meets market standards;
c) recommends the best bidder as the pre-pack acquirer;
d) states whether it considers that the best bid does not constitute a manifest breach of the best-interest-of-creditors test.

The statement of the monitor need not be accompanied by a valuation in every case. The monitor must reasonably conclude that the sale price is not significantly lower than the proceeds that could be obtained through gradual liquidation. If the business is sold to a party closely related to the debtor, the monitor or insolvency practitioner will have to reject the offer if it fails the best-interest-of-creditors test.[22] This formulation appears to imply that the monitor or insolvency practitioner need not reject an offer if the offer fails the best-interest-of-creditors test in case of a sale to a third party, but it seems to me that this cannot be the intention.

In my view, the duty assigned to the monitor of recommending the highest bidder is too limited. It leaves insufficient room for choosing the best offer. Other interests such as, for example, job retention, could also be considered when assessing which offer is the best. Article 30 of the Proposal stipulates that the criteria to select the best offer in the pre-pack proceedings are the same as the criteria used to select between competing offers in winding-up proceedings. According to Dutch law, the insolvency practitioner must also take into account public interests,[23] but it is recommended to expressly include the provision that the monitor must

17 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).
18 Explanatory Memorandum to the Proposal, p. 15.
19 See also: B.A. Schuijling, '*Het commissievoorstel voor een nieuwe insolventierichtlijn*', *FIP* 2023/2, p. 15.
20 Paras. 53.
21 F.M.J. Verstijlen, *NJ* 2022/272, par. 6 and the further opinion of AG Drijber dated 31 March 2023 in Heiploeg, ECLI:NL:PHR:2023:368, at 3.16.
22 Proposal, p. 26, at (24).
23 See: Supreme Court 24 February 1995, ECLI:NL:HR:1995:ZC1643 (*Sigmacom II*); Supreme Court 19 April 1996, ECLI:NL:HR:1996:ZC2047 (*Maclou*); Supreme Court 19 December 2003, ECLI:NL:HR:2003:AN7817 (*Mobell v Interplan*).

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choose the best offer, which pursuant to Article 30 of the Proposal must be chosen on the basis of the selection criteria developed in national law.

In order for a person to qualify for appointment as monitor, they must meet the criteria applicable to insolvency practitioners and they must actually be appointable as insolvency practitioner in the following liquation phase.[24]

The debtor will continue to have the power of disposition during the preparation phase.[25] The costs of the monitor are paid by the debtor in case there is no subsequent liquidation phase, or by the estate as "preferential administrative expenses" in case there is a liquidation phase.[26] I assume that this order of priority corresponds with that of the insolvency practitioner's salary in Dutch bankruptcy law, namely the highest rank within the estate debts.

In my opinion, EU legislation should only contain general provisions on the monitor. I believe the current provisions are in line with this criterion. In addition, it could be stipulated that the monitor should not be regarded as an advisor of the debtor or its director. The monitor will ensure that the interests of the joint creditors are not harmed during the preparation phase. The strength, and added value, of the monitor's involvement lies in the fact that they will be appointed as insolvency practitioners in the liquidation phase and will have to request the court's approval for the sale they prepared together with the board in the preparation phase. The debtor is therefore dependent on the monitor and their opinion regarding the proposed sale. This means that the monitor has a crucial role in the preparation phase, in which they can monitor a careful sale that serves the interests of the joint creditors.

EU legislation must indeed stipulate that the monitor is paid by the debtor. If a claim of the monitor remains after the declaration of insolvency, this claim must be regarded as falling under general bankruptcy costs. This claim should be paid first from the estate assets and has the same order of priority as the claim relating to the insolvency practitioner's salary.

2.6 *Stay of individual enforcement actions*

Based on Article 23 of the Proposal, the Member States must ensure that during the preparation phase, where the debtor is in a situation of imminent insolvency or is insolvent in accordance with national law, the debtor can benefit from a stay of enforcement actions in accordance with Articles 6 and 7 of Directive (EU) 2019/1023, where it facilitates the seamless and effective roll-out of the pre-pack proceedings. The monitor will be heard prior to the decision on the stay of enforcement actions.

Careful preparation can limit the harm or loss for the parties involved in a bankruptcy and help preserve as many jobs as possible by allowing a restart to take place. The pre-pack proceedings, consisting of a preparation phase and a liquidation phase, is when the sale is prepared and implemented. The preparation and implementation of such a sale, which has the important positive effects mentioned above, are disrupted if enforcement measures are taken that jeopardise the continuity of business operations during the preparation and liquidation phase. This could result in a sale no longer being possible after bankruptcy because the business was or will not remain going concern after the date of the declaration of insolvency.

Additional measures are required in order for the objective of the proposed rules to be realised. These may involve changes in the current system of the Member States. One of those changes is the stay of individual enforcement actions as early as in the preparation phase proposed in Article 23 of the Proposal. This measure has the effect of a cooling-off period, as the rights of creditors cannot be enforced during such period either. Except the measures provided for in the Proposal are taken in an earlier phase than the stay of enforcement measures or cooling-off period as a result of bankruptcy (the liquidation phase) provided for by Dutch law.[27] The stay of enforcement measures set out in Directive 2019/1023 for the negotiation of a restructuring plan in the context of a preventive restructuring is thus also introduced in the preparation phase of pre-pack proceedings, on the condition that there is a probability of insolvency or declaration of insolvency. The debtor must therefore be heading for bankruptcy.

This choice is in the interest of part of the parties involved and serves the objective of the proposed scheme, but is of course not in the interest of the creditor who wanted to initiate or had already initiated enforcement measures. This creditor might have been able to recover their claim just before bankruptcy through enforcement measures. By providing for a stay of enforcement measures or a cooling-off period in this way, a conscious choice is made to support the preparation of the sale as much as possible during a period when bankruptcy is already inevitable and imminent. After all, the preparation phase will soon be followed by the liquidation phase.

The result is that the enforcing creditor will become aware of the confidential preparation phase of the pre-pack proceedings. This could be overcome by imposing a court order on the creditor to refrain from public communications about the pre-pack proceedings. In that event, the court should be able to stipulate, in its judgment ordering a stay of individual enforcement measures at the request of the debtor or monitor, that the creditor will incur an immediately payable penalty at the moment it can be demonstrated that they violated the confidentiality of the preparation phase.

24 Article 22(3) of the Proposal.
25 Article 22(4) of the Proposal.
26 Article 22(5) of the Proposal.
27 Articles 33, 34 and 63a of the Bankruptcy Act (*Faillissementswet*).

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The pre-pack proceedings may also be in the interest of the creditor itself, because it may be possible to generate higher estate proceeds in the event of a sale going concern. In my view, there remains a risk that the imminent insolvency and the preparation phase will become known, which may jeopardise the objective of pre-pack proceedings. The question is therefore whether this provision can be properly performed in practice and whether it will be put to use often.

One could also wonder whether the cooling-off period should apply to secured creditors as well. The Proposal includes no exception for secured creditors in terms of the applicability of this provision. The cooling-off period thus applies to this party as well. The question is whether the existing rights of secured creditors are in fact affected in an unacceptable manner. Assuming that the secured creditor acquired security interests in goods that are part of the sale, and part of the purchase price is paid to the secured creditors in accordance with the national statutory provisions, the interests of the secured creditors are not unreasonably prejudiced by this provision in my opinion. In the Netherlands, this arrangement is already being applied in bankruptcies when the supervisory judge orders a cooling-off period pursuant to Article 63a of the Bankruptcy Act. The extension compared to current Dutch law lies in the possibility of a stay in the preparation phase, in the period in which there is an imminent insolvency or insolvency. Since 1 January 2021, Article 376(1) of the Dutch Bankruptcy Act has provided the option for the court to impose a cooling-off period based on the act on the confirmation of out-of-court restructuring plans (*Wet homologatie onderhands akkoord, WHOA*), i.e. outside of bankruptcy proceedings or suspension of payments proceedings. In my opinion, it is precisely this preparation phase in which it is important for the monitor and the debtor to be able to prepare the sale with ample time. If enforcement measures are taken, this preparation phase may be put at risk, as a result of which it may not be possible to realise the most value for the joint creditors because the sale going concern cannot proceed.

I believe the stay should not take place by operation of law. The debtor must be able to make a deliberate choice between requesting a stay (with the risk that the preparation phase will no longer be confidential) or finding funds to ensure a stay of execution (in which case the preparation phase will remain confidential). In that case, it is up to the debtor whether or not it will use this option.

2.7 *Principles applicable to the sale process*

Based on Article 24(1) of the Proposal, the Member States must ensure that the sale process carried out during the preparation phase is competitive, transparent, fair and meets market standards. Where the sale process only produces one binding offer, that offer will be deemed to reflect the business market price.[28] Member States may depart from the provisions of Article 24(1) of the Proposal only where the court runs a public auction in accordance with Article 26 of the Proposal.[29]

This provision would sufficiently protect the interests of the joint creditors in the pre-pack proceedings. The requirements that are set in respect of the sale process are important precisely because the sale is prepared in the confidential preparation phase. Sale by public auction, which the court provides as an alternative in case the requirements are not met, is a workable solution in practice. In this way, a market price will still be realised through a fair procedure.

2.8 *Appointment of the insolvency practitioner*

Article 25 of the Proposal stipulates that the Member States must ensure that, when the liquidation phase is opened, the court appoints the monitor referred to in Article 22 as insolvency practitioner.

This is a sound provision. The knowledge and experience of the monitor and their role in the preparation of the sale justify their appointment, in principle, as insolvency practitioners in the liquidation phase. If the monitor is not appointed as insolvency practitioner, the advantage achieved through the involvement of the monitor in the preparation phase would be lost because their activities will end once the liquidation phase starts. In that case, a quick sale after the start of the liquidation phase may be jeopardised because the new insolvency practitioner must first study the case and form an opinion on the sale proposed by the former monitor.

2.9 *Authorisation of the sale of the debtor's business or a part thereof*

Based on Article 26(1) of the Proposal, the Member States must ensure that, when the liquidation phase is opened, the court authorises the sale 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) (see 2.5, above), and Article 24(1) and (2) of the Proposal (see 2.7, above). The court may not authorise the sale if these requirements are not met and the Member States must ensure that, in the latter case, the court continues with the insolvency proceedings.

In order for these requirements to be met, the sale process must be consistent with the standard rules and standard practice regarding mergers and acquisitions in the Member State concerned. This means, among other things, that potentially interested parties will be invited to participate in the sale process, that the same information will be disclosed to potential acquirers, that interested acquirers will be given the opportunity to conduct a due diligence investigation and that the offers of the interested parties can be obtained through a structured process.[30] The aforementio-

28 Article 24(2) of the Proposal.

29 Article 24(3) of the Proposal.

30 Proposal, pp. 30-31, at (26).

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ned parts of the sale process correspond with the parts of a customary sale process after a declaration of insolvency and are workable in practice.

When the court orders a public auction, that public auction may not last longer than four weeks and must be initiated within two weeks of the opening of the liquidation phase. The offer received in the preparation phase will serve as the 'stalking horse bid' (the initial bid) in the auction. The debtor must have an opportunity during the preparation phase to offer an incentive to the 'stalking horse bidder', perhaps by agreeing to reimbursement of expenses or break-up fees if a better bid is chosen through the public auction.[31]

This provision would contribute to a careful sale process. However, with regard to the latter provision, it is important to take into account the risk that the bidder will not make the highest bid in the preparation phase, because the bidder must expect that there will be a public auction in which their bid will serve as the minimum price.

2.10 *Assignment or termination of executory contracts*

Article 27(1) of the Proposal provides that the acquirer of the debtor's business or part thereof is assigned the executory contracts which are necessary for the continuation of the debtor's business if the suspension of those contracts would lead to a business standstill. The assignment does not require the consent of the counterparty to those contracts. Moreover, Article 27(2) of the Proposal provides that Member States must ensure that the court may decide to terminate the executory contracts if the termination is in the interest of the debtor's business and/or 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. This provision in Article 27(2)(a) of the Proposal does not apply to executory contracts relating to licences of intellectual and industrial property rights.

For a sale of a going concern immediately after a declaration of insolvency to succeed so that the loss can be limited and as many jobs as possible can be retained, it is important to include a provision regarding the acquirer's assumption of necessary reciprocal agreements. This provision infringes on the parties' freedom to contract in the sense that after the declaration of insolvency, the debtor's counterparty remains bound by an agreement concluded with the debtor prior to the declaration of insolvency and thus, after the bankruptcy, the debtor's counterparty is tied, through that agreement, to a contract partner that the debtor's counterparty did not choose for itself. However, if an agreement is concluded with the debtor and the purchaser of the business wishes to continue that business unchanged, the option of forcing the debtor's counterparty to do this may be a factor in the success of the restart. That may be the case, for example, in connection with leases for retail space or leases relating to necessary means of production. Naturally, the usually agreed provisions will remain in effect between the contracting parties after the continuation, which means that the agreement could be dissolved, for example, in the event of an attributable failure to perform. A poor financial position on the part of the acquirer and an ensuing attributable failure to perform the agreement continued with the acquirer can also quickly lead to the counterparty having the option to dissolve the agreement.

In my view, there is sufficient justification for the infringement on party autonomy. This measure serves the objective of pre-pack proceedings. After all, there would be little point to a sale if the agreements relevant to the continuation did not remain in effect. The justification for this infringement on party autonomy lies in the fact that the forced assumption of contract has no negative impact on the contracting party. That party had an agreement with the debtor, who is struggling financially and will be declared insolvent. Normally, that would spell the end of the agreement. The sale will allow the activities to be continued and in turn allow the contracting party to continue doing business, now with the acquirer. This forced assumption of contract actually has no effect on the contracting party other than allowing it to continue the agreement for a period of time subject to the previously agreed terms and conditions; in essence, that party is presented with an opportunity to limit the loss it may incur as a consequence of the bankruptcy. The infringement of the contracting party's freedom to contract inherent in this provision is less egregious than it seems. Although it introduces a new contracting party, the contract will effectively be performed by the same business.[32] An exception will be possible if, on the basis of a special circumstance, the counterparty cannot be required to continue an agreement with the restarting party.

The provision that permits the court to terminate executory reciprocal agreements is a practical one for the finalisation of the sale. This provision prevents uncertainty from arising regarding whether or not a given executory reciprocal agreement will be continued.

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

Article 28 of the Proposal provides that Member States must ensure that the purchaser acquires the debtor's business or part thereof free of debts and liabilities unless the purchaser expressly consents to assuming such debts and liabilities. That consent to the assumption is necessary for the continuation of the necessary reciprocal agreements provided for in Article 27 of the Proposal. Those agreements aside, the acquisition – as is usual in bankruptcy cases – will be made free of debts and liabilities.

31 Proposal, p. 31, at (27) and Article 26(2) of the Proposal.

32 See: T.T. van Zanten, *De overeenkomst in het insolventierecht* (doctoral thesis), Deventer: Kluwer 2012, p. 362.

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This provision also implies that the exception provision in Article 5 of Directive 2001/23 *must* apply to pre-pack proceedings. After all, the labour-law protection afforded to employees upon the transfer of a business within the meaning of Directive 2001/23 conflicts with Article 28 of the Proposal. National legislation, to which the exception provision of Article 5 of Directive 2001/23 does not apply, will also conflict with this provision upon an acquisition after bankruptcy.

2.12 *Specific rules on the suspensive effect of appeals*

Article 29(1) of the Proposal provides that the Member States must ensure that their legislation offers the possibility to appeal court decisions relating to the authorisation or execution of the sale of the debtor's business. The court with jurisdiction to hear those appeals is the court that has jurisdiction over the pre-pack proceedings. These decisions may only have a suspensive effect if the appellant furnishes security that is sufficient to cover any loss or harm that may be caused by suspending the execution of the sale. The court has full discretion to exempt an appellant from the obligation to furnish security if the appellant is a natural person, if an exemption were considered to be suitable given the circumstances.[33]

From my perspective, the Proposal falls short of the mark in this respect. In my view, in accordance with current Dutch bankruptcy law, there should be no option to appeal a court decision authorising a sale. First, because the monitor's – and the court's – supervision of the sale process already ensures an external review of the sale desired by the debtor. Second, the authorisation given by the court ensures a second judicial review immediately after the preparation phase transitions into the liquidation phase. The initiation of an appeal would create uncertainty that would not be compensated for by the furnishing of security proposed in the Proposal. Specifically, this uncertainty might mean that a given sale will never come about at all. The option of appeal or of hearing certain parties obviates the entire advantage achieved by the preparation phase, which after all makes it possible to proceed to effectuating the sale immediately after the insolvency is declared.

2.13 *Criteria to select the best offer*

Article 30 of the Proposal provides that Member States must ensure that the criteria to select the best bid in the pre-pack proceedings are the same as the criteria used to select between competing offers in winding-up proceedings.

It would be desirable to have the selection criteria for bids in the pre-pack proceedings harmonised with the selection criteria in the standard insolvency proceedings. In the Netherlands, the insolvency practitioner finalising a bankruptcy must also take societal interests, such as job retention, into account.[34] In the Netherlands, the number of employees who will be offered an employment contract also plays a role in choosing a purchaser. It would be undesirable for the Proposal to require that choice to be made based solely on who submitted the highest bid. Sometimes, the best bid also depends on the purchaser's plans, for example, for the most effective measures to mitigate losses or the continuation of certain social amenities. It would therefore be desirable for the monitor to have to make that choice based on national law.

2.14 *Civil liability of the monitor and of the insolvency practitioner*

Pursuant to Article 31 of the Proposal, Member States must ensure that the monitor and the insolvency practitioner are liable for the harm or loss incurred by creditors and third parties as a result of their failure to comply with their obligations under Title IV.

This provision is undesirable and may beg the question of whether such a liability standard would actually fall within the scope of the insolvency practitioners' customary professional liability insurance. This stringent standard also begs the question of whether there would be any animus for seeking appointment as a monitor or insolvency practitioner in pre-pack proceedings. In my view, a separate liability scheme should apply to the monitor and insolvency practitioner. This could be done by following up on the *Maclou* standard[35] developed by the Supreme Court of the Netherlands and the standard for the *beoogd curator* which the Supreme Court formulated based on that standard.[36] The monitor and the insolvency practitioner must be guided by the interests of the joint creditors and, in this respect, they must also take into account societal interests, such as the importance of job retention.[37] The monitor must act as may reasonably be expected from a monitor who possesses sufficient insight and experience and who performs their duties accurately and diligently.[38] According to the Supreme Court, the insolvency practitioner's personal liability must always be assessed based on the *Maclou* standard, even if that person acted as the debtor's *beoogd curator* prior to the declaration of insolvency. When applied correctly, the *Maclou* standard takes into account the insolvency practitioner's actions and omissions as a *beoogd curator* prior to the bankruptcy as well as the knowledge they acquired while acting in that capacity.[39]

33 Article 29(2) of the Proposal.

34 See: Supreme Court 24 February 1995, ECLI:NL:HR:1995:ZC1643 (*Sigmacom II*); Supreme Court 19 April 1996, ECLI:NL:HR:1996:ZC2047 (*Maclou*); Supreme Court 19 December 2003, ECLI:NL:HR:2003:AN7817 (*Mobell v Interplan*).

35 Supreme Court 19 April 1996, ECLI:NL:HR:1996:ZC2047 (*Maclou*).

36 Supreme Court 4 October 2019, ECLI:NL:HR:2019:1492 (*Ruwaard van Puttenziekenhuis*).

37 Cf. Supreme Court 4 October 2019, ECLI:NL:HR:2019:1492 (*Ruwaard van Puttenziekenhuis*), para. 3.2.1.

38 Cf. Supreme Court 4 October 2019, ECLI:NL:HR:2019:1492 (*Ruwaard van Puttenziekenhuis*), para. 3.2.3.

39 Cf. Supreme Court 4 October 2019, ECLI:NL:HR:2019:1492 (*Ruwaard van Puttenziekenhuis*), para. 3.2.4.

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Based on the foregoing, it would be desirable for the Proposal to include a provision requiring a monitor and insolvency practitioner to act properly, as may reasonably be expected from an insolvency practitioner who possesses sufficient insight and experience and who performs their duties accurately and diligently. Personal liability may arise if the monitor or insolvency practitioner acts contrary to this standard.

2.15 *Parties closely related to the debtor in the sale process*

Pursuant to Article 32 of the Proposal, Member States must ensure that parties closely related to the debtor are also eligible to acquire the debtor's business or part thereof, provided that all of the following conditions are met:

a) they disclose their relationship to the debtor in a timely manner to the monitor and to the court;
b) other parties to the sale process receive adequate information on the existence of parties closely related to the debtor and their relationship to the debtor;
c) parties not closely related to the debtor are granted sufficient time to make an offer.

If the offer made by a party closely related to the debtor is the only existing offer, Member States must introduce additional safeguards for the authorisation and execution of the sale. These safeguards must at least include the duty for the monitor and the insolvency practitioner to reject the offer from the party closely related to the debtor if the offer does not satisfy the best-interest-of-creditors test.[40]

It is important to the due care to be exercised during the sale process that a provision be included for a purchaser that is closely related to the debtor. This provision would allow for the prevention of abuse. In my view, it would be wise not to prohibit a sale to a party that is closely related to the debtor. Sometimes a sale to such a party is the only and the best option. The safeguards included in this provision are adequate and counterbalance the fact that the preparation phase was confidential, and parties who are closely related to the debtor can usually submit bids much more quickly than third parties. The advantage of parties closely related to the debtor entails risks regarding the amount of the purchase price, because third parties are often unable to submit adequate bids as quickly. This provision would mitigate those risks.

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

Article 33 of the Proposal contains various provisions that are intended to maximise the value of the debtor's business. If interim financing is needed, the monitor must ensure that this is obtained at the lowest possible cost. Providers of interim financing are entitled to receive payment with priority in insolvency proceedings and they may be granted security interests in the sale proceeds. 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 in respect of which they have been furnished security ("credit-bidding"), but only when the amount of their secured claim against the debtor's assets is significantly lower than the market value of the business so that they are not unfairly advantaged in the bidding process.[41]

This provision ensures the possibility of providing financing and the furnishing of security. This provision merits further attention. Given that this provision also regards the monitor, and thus the preparation phase, one might wonder how this provision stands in relation to the fact that the debtor retains the power of disposition. Can monitors themselves procure credit and establish security? How can the legislature now ensure that this is done at the lowest possible costs? Must Article 33(1)(c) be understood as prescribing that creditors of secured claims must be subordinated when the proceeds are allocated? That strikes me as undesirable and would meet fierce resistance from banks and other financiers. The furnishing of security during liquidation proceedings must not result in the erosion of security interests that have already been established. If security is furnished in the liquidation phase, such security may only comprise security interests that existing financiers were unable to acquire because national law prohibited them from acquiring additional security interests in that property after the declaration of insolvency.

2.17 *Protection of the interests of the creditors*

Article 34(1) of the Proposal provides that creditors and shareholders have the right to be heard by the court before the authorisation and execution of the sale. This provision excludes creditors or shareholders who are "out of the money".

The provision in Article 34(1) of the Proposal would only be desirable if the hearing could be held in the short term. This means that the provision must be worked out in more detail, in the sense that the hearing must be held in the shortest term possible.

The exclusion of creditors or shareholders who are out of the money strikes me as undesirable. It is precisely when these parties are out of the money that they wish to be heard because they might have another feasible transaction in mind that could put them "in the money".

Article 34(3) of the Proposal also provides that Member States must ensure that security interests are released in pre-pack proceedings under the same requirements that would apply in winding-up proceedings.

Article 34(4) of the Proposal provides that Member States in which consent from holders of secured claims is required in

40 Article 32(2) of the Proposal.

41 Article 33(3) of the Proposal, and Proposal, p. 32, at (30).

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winding-up proceedings for the release of security interests may depart from requiring such consent, provided that the security interests relate to assets that are necessary for the continuation of the day-to-day operations of the debtor's business or part thereof and one of the following two conditions is fulfilled:

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

This provision restricts the rights of secured creditors. Article 57(1) of the Bankruptcy Act provides that pledgees and mortgagees may exercise their rights as though no bankruptcy has occurred. This provision would negate this right and at first blush would seem to entail a comprehensive change, at least in terms of Dutch practice. This provision would entail a farther-reaching erosion of secured creditors' rights than would a cooling-off period requiring the secured creditor to wait before proceeding with enforcement. The provision currently being proposed gives no indication of whether the secured creditors also lose their rights to the proceeds of the sale of the goods to which their security interests pertain. My view, in any case, is that this should not be so because of the enormous impact this would have on financiers' provision of credit and would effectively make the security interests illusory. I also assume that this provision exclusively regards the authorisation of the sale and release of security interests, in which respect a right to all or part of the sales proceeds is simultaneously acquired (or retained). This could still be clarified in this provision. If that is not the purport of this provision, then it must be scrapped.

To the extent that the provision "only" entails that secured creditors must cooperate with releasing their security in the event of a sale in the context of pre-pack proceedings, but must do so based on their national-law rights to the proceeds of the sale, the secured creditors' rights do not actually seem to be subject to erosion. The relevant sale must serve the creditors' interests, based on which, as a result of the sale effectuated by the monitor and insolvency practitioner, secured creditors are to receive payment of their part of the claim through the best procedure.

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

Article 35 of the Proposal contains desired provisions that are intended to mitigate competition-law implications as much as possible.

What follows are several suggestions for supplementing Title IV of the Proposal. These provisions would ensure even more due care in pre-pack proceedings.

3. Suggestions for supplementing the proposal

3.1 *Position of the Works Council*

Articles 3 and 4 of Directive 2001/23 do not apply during the liquidation phase of pre-pack proceedings,[42] but it is important that the legislation in the Member States do contain rules about the involvement, during both the preparation and liquidation phases, of any Works Council which the debtor may have established. This ensures the Works Council is kept apprised of developments that may affect the business and – in particular – jobs. It also allows the Works Council to better utilise the arrangements included in national legislation, such as opposition to a declaration of insolvency, if, in the Works Council's view, the latter involves an abuse of law. Citing the Supreme Court's findings in the *DA* judgment,[43] one option could be to include a provision to the effect, which would entail that if the debtor has established a Works Council, the insolvency practitioner must, immediately after the declaration of insolvency, afford that Works Council the opportunity to issue a written, substantiated formal opinion regarding the insolvency practitioner's proposed resolution to sell the business. In connection with the special nature of bankruptcy proceedings and the need for rapid but careful decision-making, the Member States' legislation could include exceptions to the usual procedure for obtaining a formal opinion from the Works Council.[44]

For the preparation phase, during which no resolutions can be passed, it would be sufficient to inform the Works Council – thoroughly, in a timely fashion and subject to a duty of confidentiality – of the most important developments occurring in the preparation phase.

Incidentally, it is my view that, in the Netherlands, account must also be taken of all the provisions of labour law that continue to apply during bankruptcy even after the declaration of insolvency, such as the provisions in Article 3 of the Collective Redundancy Notification Act (*Wet melding collectief ontslag*) that applies if a case involves the dismissal of 20 or more employees. In that context, the insolvency practitioner is required to notify the trade unions of the termination.[45] The same goes for the provisions in Article 7 of Directive 2001/23, which includes a duty to notify the trade unions upon the transfer of a business.

42 Article 20(2) of the Proposal.
43 Supreme Court 2 June 2017, *JAR* 2017/172 (*OR v DA Retailgroep*).
44 In the Netherlands, for example, the four-week deferment period pursuant to Article 25(6) of the Works Councils Act (*Wet op de ondernemingsraden*; "WOR") that applies if a negative opinion is issued and the possibility that Article 26 of the Works Councils Act offers to appeal a business owner's decision to the Enterprise Court, would not mesh well with pre-pack proceedings.
45 For more on this topic, see, among others: J. van der Pijl, *Arbeidsrecht en insolventie* (*Monografieën Sociaal Recht* no. 75), Deventer: Kluwer 2019, pp. 307-311.

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3.2 *Impossibility of terminating certain reciprocal agreements*

It is necessary, as a continuation of Article 27(1) of the Proposal, to include a provision to the effect that an application to initiate pre-pack proceedings will not constitute a ground for changing the rights and obligations held by or in respect of the debtor under the law of obligations, for suspending performance of an obligation in respect of the debtor, or for dissolving an agreement concluded with the debtor. The initiation of pre-pack proceedings cannot constitute a reason for dissolving a reciprocal agreement. Such a provision is important to prevent a situation in which the contact between the debtor and the banks/suppliers which is necessary for the success of pre-pack proceedings results in continuity problems because these parties go on to seek dissolutions or suspensions.

Naturally, a reciprocal agreement can be terminated even during pre-pack proceedings if there is a ground for dissolution, such as an attributable failure to perform, This ground for dissolution must have arisen after the acquisition, because otherwise, this arrangement would not achieve the desired objective. The mere fact that it concerns pre-pack proceedings cannot constitute a reason for dissolution during the pre-pack proceedings.

Since 1 January 2021, when the act on the confirmation of out-of-court restructuring plans (WHOA) entered into effect, Dutch bankruptcy law has provided that *ipso facto* clauses[46] cannot be used against the debtor.[47] Since this act entered into effect, the preparation or offer of a private composition could no longer serve either to alter or suspend the obligations and commitments under an agreement or to dissolve the agreement. It would also be desirable to include such a provision in the European rules on pre-pack proceedings.

3.3 *Post-proceedings disclosure via reporting*

The preparation process is accomplished in a confidential preparation phase. The liquidation phase is open to the public. In order to compensate for the lack of transparency in the preparation phase, the insolvency practitioner must release public reports soon after the liquidation phase is opened. This will allow interested parties to rapidly familiarise themselves with the monitor's supervision and still allow them the opportunity to oppose the liquidation phase if, for example, they believe that bankruptcy laws have been abused. It would be desirable for the Proposal to call on Member States to include a provision on this point in their legislation.

46 An *ipso facto* clause allows a party to an agreement to unilaterally terminate the agreement, or terminates the agreement by operation of law, in the event of bankruptcy, any other insolvency-related situation, or due to the counterparty's poor financial situation.

47 Article 373(3) of the Bankruptcy Act.

3.4 *Directors and officers liability*

The success of pre-pack proceedings largely depends on the cooperation of the debtor's board of directors. It is extremely important for all necessary information to be provided to ensure the proper and careful course of the pre-pack proceedings. It would be desirable for the Proposal to direct the Member States to ensure that their legislation contains a provision enabling the debtor's directors and officers to be held personally liable in the liquidation phase if they failed to properly perform their duty to inform the monitor. This also prevents abuse.

3.5 *Appointing a supervisory insolvency judge*

When a monitor is appointed, the court must also appoint a member of that court to supervise the manner in which the monitor performs their work. This will promote a careful preparation of the sale and the bankruptcy proceedings. This member will then be appointed to serve as the supervisory bankruptcy judge in the liquidation phase, depending on the arrangements the Member State has made in this respect.

3.6 *Pre-pack proceedings as the statutorily prescribed introduction to insolvency proceedings*

Consideration may be given to including a provision that pre-pack proceedings are the prescribed manner of opening insolvency proceedings for several specific businesses that serve the public interest, such as hospitals, educational institutions, and energy suppliers. Societal interests play a major role in those cases and a quiet preparation phase could limit societal unrest and harm or loss for large groups of people. Upon receiving a substantiated application from the debtor, the court may hold that pre-pack proceedings represent no added value in a given case and proceed immediately to issuing a declaration of insolvency.

4. **Conclusion**

In the wake of *Smallsteps*, some authors asserted that this judgment did not necessarily spell the end for pre-pack practice and that the judgment did not apply to ordinary post-bankruptcy restart practice.[48] Other authors asserted that the judgment would not only spell the end for pre-pack practice, but also for post-bankruptcy restarts that had been

48 See, *inter alia*: N.W.A. Tollenaar, '*De implicaties van Estro voor de pre-pack en WCO I*', *TvI* 2018/6 and *TRA* 2018/15; I. Spinath, '*De beperkte reikwijdte van het Smallsteps-arrest*', *MvO* 2017, nos. 10 & 11, pp. 253-256; S.C.J.J. Kortmann/L.P. Kortmann, '*Doorstarten post-Estro; smallsteps vooruit of een giant leap achteruit?*', in C.J.H. Jansen, M.M.C. van Moosdijk, R.W.E. van Leuken (eds.), *Nijmeegs Europees Privaatrecht (Liber amicorum prof Sieburgh)*, Deventer: Wolters Kluwer 2018, pp. 31-46; L.G. Verburg, '*Smallsteps: over de vraag of de gewone doorstart uit faillissement nog toekomst heeft*', *FIP* 2017/334; M.R. van Zanten, 'It takes Smallsteps to pre-pack, een analyse', in: E.J.R. Verwey, P.W. Schreurs, M.A. Broeders (eds.), *De Curator en het Personeel (INSOLAD Jaarboek 2018)*, Deventer: Wolters Kluwer 2018, pp. 54-60.

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prepared before bankruptcy.[49] Since *Heiploeg*, pre-pack proceedings have been taking centre stage in both the Netherlands and in Brussels, and this time in a positive sense. The Dutch legislature must now decide on several legislative proposals that have not yet been passed into law.[50]

The Proposal discussed in this contribution represents significant support for the continuation (rebirth) of pre-pack practice in the European Union. In his more recent supplementary opinion in *Heiploeg*, Dutch Supreme Court Advocate General Drijber asserted that the pre-pack, which seemed dead in the water after the judgment in *Smallsteps*, seems to have just been slumbering, but only proper statutory rules can truly unlock its full potential.[51]

The substantive judicial objections asserted against the pre-pack proceedings in *Heiploeg* were insufficient to secure a ruling that the exception provided for in Article 5(1) of Directive 2001/23 applies in every situation. Although an assessment must be made on a case-by-case basis as to whether the purpose of an individual case is liquidation, it seems that, in the wake of the judgment in *Heiploeg*, that is not a genuine obstacle to applying the exception provision. What remains is a procedural matter that currently stands in the way of the pre-pack practice: specifically, the absence of statutory or regulatory rules. If the Proposal is passed, the Member States will be charged with implementing such statutory rules. Although this process will take several years, it is important for practice. Pre-pack practice cannot be awakened without such provisions.

For the pre-pack practice to be resumed in anticipation of European legislation, it would be desirable for the Dutch Senate to pass the Continuity of Enterprises Act I as soon as possible. The introduction of the Proposal, in combination with the judgment in *Heiploeg*, is a solid impetus for this. In this respect, the Legislative Proposal on the Transfer of Bankrupt Businesses Act and the Amended Continuity of Enterprises Act I need not be introduced, given the clarity that has since been provided by the CJEU. Furthermore, it seems as though the Legislative Proposal on the Transfer of Bankrupt Businesses Act conflicts with the provisions in Article 28 of the Proposal and with the rationale underlying the proposed European rules on pre-pack proceedings. Specifically, these rules are premised on the exception provision regarding employee protection upon the transfer of a business, while it is precisely the exception provision from which the Legislative Proposal on the Transfer of Bankrupt Businesses Act will deviate. The benefit of enacting the Continuity of Enterprises Act I in anticipation of the passage of the Proposal is that pre-pack proceedings can again be used in practice.

The Proposal contains provisions for the Member States' legislation on pre-pack proceedings which are desirable and necessary for practice. One provision, as mentioned in this contribution, can be scrapped. The Proposal offers sufficient safeguards for a careful sale process with the objective of realising the highest possible proceeds for the joint creditors. This would limit the loss as much as possible for everyone involved when the debtor is insolvent and a declaration of insolvency is imminent. This contribution contains suggestions for several additional provisions. European insolvency practice would benefit from the rapid passage of the Proposal that would allow for the rapid yet careful preparation and execution of the sale of a business immediately after a declaration of insolvency.

49 See, *inter alia*: J. van der Pijl, '*Het Smallsteps-arrest van het Hof van Justitie van de Europese Unie ECLI:EU:C:2017:489*', *Tijdschrift voor Arbeid & Onderneming* 2017, no. 3, p. 125; J.R. Hurenkamp, '*Ondergang van onderneming door de pre-pack?*', *TvI* 2017/21; F.M.J. Verstijlen, '*De dubbele natuur van de doorstart', TvI* 2017/20; J.F. Fliek/F.M.J. Verstijlen, '*De eerste stappen voorbij Estro*', *TvI* 2018/7; P.R.W. Schaink, '*Het arrest van het Hof van Justitie inzake FNV c.s./Smallsteps*', *TvI* 2017/22.

50 The Continuity of Enterprises Act I, the Legislative Proposal on the Transfer of Bankrupt Businesses Act (*Wetsvoorstel overgang van onderneming in faillissement*), which was issued for consultation on 29 May 2019 and the Amended Continuity of Enterprises Act I (*Novelle WCO I*) which was issued for consultation on 25 May 2021.

51 Supplementary opinion of AG Drijber dated 31 March 2023 in *Heiploeg*, ECLI:NL:PHR:2023:368, at 3.1.

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Dr. A. Karapetian & prof. dr. L. Lennarts[1]

The Director's Duty to File for Insolvency Proceedings in the European Commission's Proposal for Harmonising Insolvency Law: the Dutch Perspective

TvI 2023/15

1. Introduction

In the course of the past years, the EU has shown an increased legislative interest in insolvency law as a means to advance the Capital Markets Union (CMU). In 2015, the Commission stated, in its first Action Plan on building a CMU, that 'convergence of insolvency and restructuring proceedings would facilitate greater legal certainty for cross-border investors'.[2] In the same year, the European Parliament adopted a resolution in which it called to facilitate cross-border investment and indicated that insolvency laws must work better in a cross-border context in order for the CMU to function better.[3] In 2019 the Preventive Restructuring Directive was adopted, which (inter alia) aims at harmonisation in the specific areas of preventive restructuring measures and debt-discharge procedures.[4] In the CMU Action Plan launched in 2020, the Commission announced that it would take a legislative and non-legislative initiative with the aim of increasing convergence in targeted areas of non-bank corporate insolvency law.[5] According to the subsequent CMU communication of 25 November 2021, the overall objective is to make the outcome of cross-border investment more predictable with regard to insolvency proceedings.[6]

On 7 December 2022, the European Commission delivered on its announced initiative and issued the proposal for an EU Directive harmonising certain aspects of insolvency law (hereafter: 'Proposal').[7] The Proposal contains seven titles of various subject matters regarding insolvency law where harmonisation is promoted. Title V pertains to directors' duties and introduces a duty to file for the opening of insolvency proceedings. In the above-mentioned CMU Communication of 25 November 2021, reference was already made to harmonisation efforts concerning director duties during crisis time. The nature of the duties, however, was not yet substantiated. The promoted duty to file for insolvency proceedings, therefore, somewhat came as a surprise. This is, in particular, true for a minority of Member States that do not have a provision obliging directors to submit a request for the commencement of insolvency proceedings (or similar rules).[8] The Netherlands belongs to this minority. In this article, the proposed duty to file will be analysed from the perspective of Dutch law. As stated, Dutch law does not contain a duty to file, but has a more or less sophisticated set of rules mainly developed in case law that addresses director duties during (pre-)insolvency. Therefore, the research question to be answered in this article, is what use such a duty to file has in light of the stipulated policy objectives in the Proposal, and in that regard, if such a duty is necessary and desirable given the state of Dutch law concerning director duties.

First, the duty to file as promoted in the Proposal will be outlined. We will explore its policy aims and rationale as these can be inferred from the explanatory notes and the recitals of the Proposal as well as the impact assessment that preceded the Proposal. Second, we will highlight the uncertainties, ambiguities and omissions in the articles concerning the duty to file. Third, we will assess to what extent it is beneficial and necessary to introduce this duty and analyse the consequences of the introduction of a directors' duty to file for insolvency in Dutch law. We will conclude this article by answering the research question.

2. Duty to file for insolvency proceedings and liability for non-compliance

With the Proposal, the Commission aims to accomplish harmonisation in three key dimensions of corporate (non-bank) insolvency law.[9] These are: (i) ensuring that creditors can recover the maximum value from the liquidated company, (ii) the efficiency of insolvency procedures and (iii) the predictable and fair distribution of recovered value among creditors. All proposed measures should be considered in light of these policy objectives.

Title V of the Proposal concerns the 'directors' duty to request the opening of insolvency proceedings and civil liability'. Article 36 obliges Member States to ensure that, when a legal entity becomes insolvent, its directors are subject to the duty to request the opening of insolvency proceedings no later than 3 months after they become aware or

1 Arpi Karapetian is assistant professor of private law at the University of Groningen and editor of this journal. Loes Lennarts holds the chair in Comparative Company Law at the University of Groningen and is editor of this journal.
2 COM/2015/0468 final.
3 European Parliament resolution of 9 July 2015 on Building a Capital Markets Union (2015/2634(RSP)).
4 Directive (EU) 2019/1023.
5 COM(2020) 590 final.
6 COM/2021/720 final.
7 COM(2022) 702 final.
8 See Gerard McCormack, Andrew Keay, Sarah Brown and Judith Dalgreen, *Study on a new approach to business failure and insolvency ' Comparative legal analysis of the Member States' relevant provision and practices*, Tender No. JUST/2014/JCOO/PR/CIVI/0075, available at https://op.europa.eu/en/publication-detail/-/publication/3eb2f832-47f3-11e6-9c64-01aa75ed71a1/language-en This study, published in 2016, was commissioned by the European Commission in the preparatory phase leading to the adoption of the Restructuring Directive. According to the table on p. 49-50 of the report, only Cyprus, Denmark, Hungary, Ireland, Italy, Malta, The Netherlands, Sweden and the UK (no longer a Member State) do not provide for a directors' duty to file for insolvency in their laws.
9 https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_7349?idp=LegalIntelligence

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can reasonably be expected to have been aware that the legal entity is insolvent. Pursuant to Article 37, Member States shall ensure that the directors are liable for damages incurred by creditors as a result of their failure to comply with the above-mentioned duty. Paragraph 2 of Article 37 stipulates that Member States are allowed to implement or maintain national rules on directors' duties that are stricter towards directors.

Recitals 32 and 33 of the Proposal provide commentary on the proposed directors' duty to file for insolvency proceedings and the corresponding liability provision. The commentary on the specific purpose and rationale of the duty to file and the attached liability is not particularly extensive. According to recital 32, the Commission considers directors as the first involved to realise whether a legal entity is approaching or surpassing insolvency (without defining the concept of insolvency, as we will discuss in section 3 of this paper). Directors oversee the management of the affairs of a legal entity and have the best overview of its financial situation, according to the Commission. This brings it to the finding that "a late filing for insolvency by directors may lead to lower recovery values for creditors". In the explanatory memorandum, reference is made to "the obligation on company directors to file for insolvency without undue delay to avoid potential asset value losses for creditors".[10] Consequently, we may infer that in the view of the Commission, a duty for directors to file for insolvency proceedings will enhance the recovery value of creditors. The corresponding liability provision as proposed in Article 37 should, according to the Commission, ensure that directors do not act in their self-interest by delaying the submission of a request for the commencement of insolvency proceedings despite indications of insolvency. Article 37 concerns the obligation of Member States to implement a rule on the civil liability of directors who do not comply with the duty to file such a request. With regard to the nature of the compensation, it refers to damages resulting from the deterioration of the recovery value of the debtor compared to the situation where the request was made on time[11] (the so-called 'Quotenschaden' (rate reduction loss)).

Based on the remarks in the recitals and as already mentioned, the Commission assumes that a duty to file for insolvency proceedings and an attached liability provision will lead to greater recovery values for creditors during liquidation.[12] In the impact assessment that is attached to the Proposal, the role of directors and managers in the vicinity of insolvency is emphasised with regard to asset recovery proceedings.[13] It is argued that recovery value is undermined if there are no rules or ineffective rules on '(i) when directors have to file for insolvency, (ii) whether their goal should shift to the creditors' interest, or (iii) whether they are liable if it is found that they acted, prior to the advent of formal insolvency proceedings, with intent to defraud creditors'.[14] The answer to the question as to how a duty to file will lead to higher recovery values can be found in the comments referring to the desired early action that a duty to file with a corresponding liability will trigger, according to the policy makers.[15] For instance, on page 28 of the impact assessment, it is stated that procrastination in the start of the process, "including of attempts to engineer restructuring solutions early on" tends to reduce the recovery value. It becomes clear that, with the proposed duty to file and related liability, the Commission seeks to trigger early action from directors, which it expects to result in the preservation – or at least, preventing the depletion – of the value of the debtor's assets. This reasoning pertaining to the need for early action is repeatedly mentioned throughout the impact assessment. For instance on page 40, where the different measures that have been considered in the preparation of the Proposal are discussed, it is mentioned that the duty to file aims to introduce "more discipline on timely filing of insolvency to avoid unnecessary value destruction in case of delayed filings".[16] Further on in the document, under the heading 'Benefits and costs of a targeted regime' it is noted that the requirement for directors to file timely and the associated liability "would further limit value destruction in the vicinity of insolvency".[17] In this regard, the impact assessment refers to the results of the public consultation which indicate that there is widespread support for minimum harmonisation at EU level of the duties and obligations of directors in the event of vicinity of insolvency or when the company is insolvent.[18] In particular, 71% of the respondents have pointed out that the most beneficial aspect of harmonisation would be to subject directors to a duty to file for insolvency proceedings once the company is insolvent.[19] Interestingly, footnote 138, which relates to the aforementioned result of the public consultation, mentions that "two thirds of the respondents supported a clarification that in the vicinity of insolvency directors should formulate plans to take preventive action", thus not explicitly referring to a duty to file for insolvency.

The impact assessment discusses several policy options considered by the Commission. With respect to directors' duties of care, in addition to the insolvency filing requirement, it mentions a second option. This concerns the stipulation of a general principle that would indicate the shift of fiduciary duties of directors in the vicinity of insolvency.[20] Accordingly, directors would be required to consider the interests of the creditors alongside the interest of shareholders. This would entail duties that go beyond a mere obligation to file for insolvency proceedings. It seems that this option ultimately did not end up in the Proposal

10 COM(2022) 702 final, p. 12.
11 See recital 33.
12 It should be noted that the Commission does not bring forward empirical data to support this assumption. Member States that already have such a duty would be well suited for such research.
13 P. 28 impact assessment.
14 P. 28 impact assessment.
15 P. 28 impact assessment
16 P. 40 impact assessment. See also p. 41.
17 P. 47 impact assessment.
18 P. 41 impact assessment.
19 P. 41 impact assessment.
20 P. 43 impact assessment.

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because it was considered too intrusive to national laws. Such a principle would necessitate changes in other areas of national laws (i.e. company law) and would, accordingly, require additional legal clarity or adjustments of these issues, which the Commission, apparently, seeks to limit.[21] A similar consideration seems to have been made in the Preventive Restructuring Directive.[22] Article 19 of that Directive obliges Member States to implement rules that ensure that in case of likelihood of insolvency, directors have due regard to (among other) the interests of creditors (equity holders and other stakeholders). However, the issue from which moment on the directors must act primarily in the interest of the company's creditors was not touched upon in the context of this Directive. Apparently, the Commission still does not want to burn its fingers by touching such a shift in directors' duties.

At first glance, the introduced duty to file is less vague than the duties introduced in Article 19 of the Preventive Restructuring Directive and provides a more or less comprehensive policy objective, leaving aside whether or not the duty to file is fit to achieve that objective, as we will discuss later on in this paper. However, upon closer inspection, the proposed duty to file raises questions about the nature of the directors' obligation and, more fundamentally, its scope of application. The main reason for these questions is the lack of clarity in respect of key concepts used in Articles 36 and 37.

3. Uncertainties, ambiguities and omissions in articles 36 and 37 of the Proposal

Article 2 of the Proposal contains a list of definitions clarifying concepts referred to in various articles of the Proposal. This list does, however, not contain definitions of three important concepts referred to in Article 36: 'director', 'insolvency' and 'insolvency proceedings'. Only limited guidance on the interpretation of these concepts is offered by the Explanatory Memorandum and the recitals. It is not clear who has a duty to file, when the duty is triggered and which proceedings may be filed for in order to comply. Moreover, it is not clear from the Proposal who exactly Articles 36 and 37 aim to protect and who has standing to bring a liability claim in the event of non-compliance. All these issues will be discussed in the next paragraphs.

3.1 *Who has a duty to file?*

In respect of the term 'director', it is clear from the Explanatory Memorandum[23] as well as recital 32 that this term encompasses 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. We observe that this description is considerably broader than the concept 'feitelijk bestuurder' (de facto director), in Dutch law, which refers to all (legal) persons who have defined the policy of the company as if they were a director.[24] In Dutch literature there is a debate between those advocating a stricter and those defending a broader interpretation of this definition. This debate is reflected in the case law of lower courts. The stricter interpretation requires that the formally appointed directors were actually set aside by the person(s) acting as de facto director. According to the broader interpretation it is sufficient that the formal directors accept that a de facto director also defines the day-to-day management, leading to the situation that both the formal directors and the facto director function alongside one another.[25] In a recent decision, the Supreme Court rejected the strict interpretation.[26] It is not necessary that the formal directors were – completely – sidelined by the de facto director. What is required is that the de facto director has usurped at least part of the formal directors' authority, thus (co-)determining the policy as if (s)he were a director. Where it may be doubtful whether this includes persons who 'are in charge of making' key decisions with respect to the management of a company, it is clear that this does not include persons who 'ought to make' such decisions. We believe that the 'definition' of 'director' suggested in the Explanatory Memorandum is too ambiguous. It increases the legal uncertainty that is inherent in the existing concept of 'feitelijk bestuurder' in Dutch law, because – as confirmed by the Supreme Court in its recent judgment – the qualification depends on all circumstances of the case. The concept referred to in recital 32 of the Proposal will be even more difficult for courts to apply in a uniform way than the current concept.

3.2 *When is the duty to file triggered?*

A more serious problem is that the Proposal leaves it to the Member States to define the concept of 'insolvency'.[27] This is especially problematic in respect of Articles 36 and 37, because 'insolvency' is what triggers the directors' duty to file. Where some Member States' laws define insolvency on the basis of a cash flow test ('inability to pay debts as they fall due') other Member States – additionally – apply a balance sheet test of insolvency ('debts exceed the assets' or 'Überschuldung'). Examples of Member States in which the duty to file for insolvency proceedings is also triggered in case of balance sheet insolvency are Germany and Austria. § 15a of the German Insolvenzordnung provides for a duty for directors of a legal person to file without culpable delay and at the latest 1) within three weeks after the legal person has become cash flow insolvent[28] or 2) eight weeks[29] after the legal person has become balance sheet insolvent.[30] Similarly, § 69 of the Austrian Insolvenzordnung provides for a

21 P. 49 impact assessment.
22 Directive (EU) 2019/1023.
23 P. 17 Proposal.

24 Dutch law does not distinguish between 'de facto' and 'shadow' directors; the concept 'feitelijk bestuurder' includes persons who pull the strings behind the scenes.
25 *Asser/Maeijer/Van Solinge & Nieuwe Weme 2-IIb* 2019/194.
26 HR 24 March 2023, ECLI:NL:HR:2023:445.
27 See par. 4.1 of the contribution to this special issue by Jessie Pool and Reinout Vriesendorp.
28 For the definition of cash flow insolvent see § 17 (2) InsO.
29 This period is temporarily in force until 1 January 2024, due to a recent amendment of the InsO discussed below. Before the amendment, the period was six weeks.
30 For the definition of balance sheet insolvent, see § 19 (2) InsO.

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duty to file for a legal person's directors without delay after the legal person has become cash flow or balance sheet insolvent, however ultimately within sixty days after the legal person has become cash flow insolvent

Article 36 does not only leave the choice of the insolvency test(s) to be applied to the Member States. It also leaves considerable scope for differentiation by merely providing that filing should *ultimately* take place three months after the directors became aware or can reasonably be expected to have been aware that the legal entity is insolvent, without specifying what directors should do within this maximum period. This hands-off approach is all the more striking, having regard to the fact that many Member States' laws already provide for directors' duty to file for insolvency proceedings and the fact that Article 37 (2) expressly allows Member States to have stricter rules in place. We have shown that both Germany and Austria currently provide for – considerably – shorter maximum filing periods, but note that they have chosen different periods. We add that, under both German and Austrian law, directors may only rely on the maximum period to the extent that they engage in serious restructuring efforts. This is the area where the duty regulated in Article 36 and 37 of the Proposal connects to Article 19 of the Preventive Restructuring Directive. This connection deserves more attention in the next steps of the legislative process.

It is evident that the hands-off approach reflected in the superficial nature of Articles 36 and 37 may lead to considerable differences in the application of the duty to file among Member States, thus calling into question the justification of the harmonisation objective of Articles 36 and 37.

3.3 *Insolvency: a slippery concept*

We suspect that the Commission has – again[31] – shied away from defining 'insolvency' because insolvency is – to put it mildly – a slippery concept. As aptly phrased by Mokal in a recent article: "Insolvency is a scalar attribute, that is, it is a matter of degree". He rightly points out that what the law requires of a debtor's decision makers – in particular: to attempt to trade the debtor out of its difficulties and/or to propose a restructuring or to seek to wind up the debtor – may depend on the degree of insolvency.[32] We agree with this observation and we also agree with the second point that Mokal raises in respect of the concept 'insolvency': it is also "epistemically vague". Although the criteria applied to determine insolvency may – in principle – be made precise, it will in practice often be difficult to establish on the basis of the chosen criteria whether or not the debtor is actually insolvent at a given time.[33] As Mokal observes, "debtors may move along the solvency/insolvency spectrum in a continuous rather than quantized matter".[34]

The scalar and vague nature of insolvency is reflected in the ongoing debate among legal scholars across Member States about the way the various insolvency tests should be applied in practice. This is perhaps best illustrated by the ongoing debate in Germany, in spite of attempts of both the legislature and the Bundesgerichtshof to achieve a certain degree of precision in the two tests that are used to determine insolvency. The application of the balance sheet test has been the subject of heated debate ever since it was introduced.[35] Without going into detail, we mention that the German balance sheet test of insolvency is more than a balance sheet test: apart from a balance sheet test bases on liquidation values it also involves carrying out a going concern forecast over a period of twelve months starting from the date when a balance sheet based on liquidation values shows an excess of liabilities over assets.[36] The debtor is only balance sheet insolvent in case of a negative balance sheet test *and* a negative going concern forecast. Drafting the going concern forecast, which in practice involves a cash flow-based prognosis of the probability of the company becoming illiquid within 12 months, is not an easy exercise, especially in a world that is affected by one major crisis after another, negatively impacting many (otherwise viable) businesses. In this respect, we mention that the German legislature recently shortened the going concern forecast to four months for the period starting on 9 November 2022 and ending on 31 December 2023, months. The maximum period for filing after Überschuldung was extended from six to eight weeks. These changes were adopted in view of the repercussions of the Russian war against Ukraine on the German economy.[37] The amendments reflect the fluid nature of the concept 'insolvency' determined on the basis of a balance sheet test, tempting legislatures to intervene when they realise that economic circumstances create difficulties for those in charge of businesses to assess their solvency in the longer term.[38]

The fluid nature of insolvency determined on the basis of a cash flow test can be illustrated by the ongoing debate about the guidance given by the German Bundesgerichtshof on the application of this test in practice. The BGH clarified in older case law that cash flow insolvency exists when the debtor does not have sufficient funds to pay at least 90% of its mature debts over the next three weeks. This does leave the question of how

31 See art. 2 (2) Preventive Restructuring Directive, which leaves it to the Member States to define both 'insolvency' and 'likelihood of insolvency'.

32 Riz Mokal, 'What is an insolvency proceeding? *Gategroup* lands in a gated community', *International Insolvency Review* 2022, p. 421.

33 Mokal, *loc. cit.*

34 Mokal, *op. cit.*, p. 422.

35 For recent criticism of the current balance sheet test, see Marcus Oehlrich, 'Die Insolvenzantragspflicht bei Überschuldung – eine ökonomische Analyse', *NZI* 2022, 593 et seq. His criticism concerns the fact that German law requires the balance sheet must be drawn up on the basis of liquidation value instead of market values. This means that many businesses that are still viable would be under a duty to file, in the absence of a corrective mechanism. This mechanism has taken the form of the going concern prognosis. All in all, this leads to a very complex mechanism. Oehlrich submits that the two-step test can be abolished. It is sufficient to assess the solvency on the basis of a balance sheet based on market values. This involves a degree of subjectivity, but the going concern prognosis is equally subjective.

36 See § 19 Insolvenzordnung.

37 Gesetz zur Abschaffung des Güterrechtsregisters und zur Änderung des COVID-19-Insolvenzaussetzungsgesetzes, *BGBl*. I S. 1966, which entered into force on 9 November 2022. Article 9 of this Act contains amendments to the COVID-19-Insolvenzaussetzungsgesetz, that was introduced in 2020 in order to mitigate effects of the Covid-19 crisis.

38 Whether the German legislature's intervention really helps debtors and their directors can be questioned because four months can still be a very long period for directors who have to factor in many uncertainties.

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exactly this is to be established. In 2022, the Bundesgerichtshof rendered a judgment in which it held that the determination of inability to pay does not require the drafting of a so-called Liquiditätsbilanz, but can also be determined by other means, notably by liquidity statements showing that on four different moments within the three week period the debtor was illiquid without the prospect of closing the liquidity gap.[39] Even after this latest judgment of the Bundesgerichtshof, the debate on the cash flow test is still going on.[40] This shows how hard it is to develop a cash flow test that offers legal certainty in practice and does not suffer from too much complexity.

It is disappointing that the Commission has refrained from touching on the issue of how to determine insolvency in practice. We recommend the commissioning of a study of the application in practice of the various insolvency tests (and corresponding directors' filing duties) applied in the Member States before a final version of the Insolvency Directive is adopted. Such a study also seems necessary having regard to Article 38 of the Proposal, which obliges Member States to 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 microenterprises concerned.[41]

On the concept of insolvency, finally, we wish to draw attention to the fact that whatever the definition will be and how much precision the Commission or the national legislators seek in the process of defining, it is likely that the application in practice will lead to litigation. It does not take much imagination to envision that directors against whom a liability claim has been brought based on non-compliance with their duty to file, will take the position that the company's 'insolvency' had not yet occurred.

3.4 *What is an 'insolvency proceeding' for the purpose of articles 36 and 37?*

Given the fact that the Commission has shied away from defining insolvency, it is hardly surprising that the Commission also leaves it to the Member States to define which national proceedings qualify as 'insolvency proceedings' for the purpose of Articles 36 and 37. However, the fact that the Commission's choice is hardly surprising does not make it any less problematic, given the range of proceedings existing in EU Member States that may be opened in respect of debtors that are sliding down the (in)solvency scale. The Explanatory Memorandum offers only limited guidance in respect of what is an 'insolvency proceeding' for the purpose of Article 36 and 37. The statement that the minimum harmonisation standards of the Preventive Restructuring Directive "only apply to businesses that are not yet insolvent and pursue the very aim of avoiding insolvency for businesses that can still be returned to viability" and "do not address the situation where a business becomes insolvent and has to undergo insolvency proceedings" could be understood as implying that 'insolvency' proceedings are to be distinguished from '*pre*-insolvency' proceedings.[42] This would mean that the Proposal is not about *pre*-insolvency, but about insolvency proceedings. However, this still leaves us with the question of what defines an insolvency proceeding in the sense of the Proposal. The Proposal targets the three key dimensions of insolvency law: "(i) the recovery of assets from the liquidated insolvency estate; (ii) the efficiency of proceedings; and (iii) the predictable and fair distribution of recovered value among creditors".[43] This could be understood as implying that only proceedings aimed at *liquidation* of the insolvent debtor's assets are covered by the Proposal. However, the first sentence of recital 3 acknowledges that insolvency proceedings can also be proceedings aimed at *restructuring* rather than liquidation: "Insolvency proceedings ensure the orderly winding down or restructuring of companies or entrepreneurs in financial and economic distress". Assuming that *pre*-insolvency proceedings aimed at restructuring are – exclusively – covered by the Preventive Restructuring Directive, it would be logical to assume that only those reorganisation proceedings that are opened after the court has established that the debtor *is actually* insolvent are covered by Article 36. But this assumption ignores that certain insolvency proceedings aimed at reorganisation, such as the Dutch suspension of payments proceedings, may be opened when the debtor *foresees that it will become insolvent*.[44] Such proceedings may therefore also be characterised as pre-insolvency proceedings because they are opened (at least in theory) before the debtor becomes insolvent. Perhaps the most pragmatic way – from a Dutch perspective – to interpret the concept of 'insolvency proceedings' used in Article 36, would be to assume that, as long as the debtor company is not yet unable to pay its debts as they fall due, its directors can use all 'pre-insolvency' options available, ranging from trying to reach an out-of-court settlement with (certain) creditors (which may – if necessary – be made binding on non-consenting creditors and shareholders by court confirmation of a restructuring plan in so-called WHOA-proceedings[45]) to filing

39 BGH 28 June 2022, *NZI* 2022, 787.
40 See the casenote by Gutmann, *NZI* 2022, 789-790.
41 The concept of cash flow insolvency is also central to article 6 of the Proposal on preferences, see the contribution to this issue by Niels Pannevis.
42 P. 3 Proposal.
43 P. 12 Proposal.
44 Article 214 Dutch Bankruptcy Act.
45 The nature of the Dutch WHOA-proceedings is rather complicated. It has been argued that the WHOA-proceedings are to be characterized as 'insolvency proceedings'. See N.W.A. Tollenaar, 'Het Wetsvoorstel Homologatie Onderhands Akkoord onder de loep genomen', *TvI* 2019/32. Tollenaar's reasoning is not based on the entry requirements of the proceedings, but on the fact that the scheme of arrangement in the WHOA-proceedings essentially entails recourse against the assets of the debtor by the finance providers. He refers to the Explanatory Memorandum of the WHOA, where the proceedings are rendered 'insolvency proceedings'. See *Kamerstukken II* 2018/2019, 35 249, nr. 3, p. 6, 31 and 71. Aside from this, it should be noted that WHOA-proceedings may be used to reach a plan by court confirmation that is aimed at liquidating the assets of the debtor. This raises the rather fundamental question whether it is possible to draw a meaningful distinction between 'pre-insolvency' and 'insolvency'- proceedings. If 'pre-insolvency' – proceedings are to be understood as aiming at the restructuring of the debtor while 'insolvency'- proceedings provide for its liquidation, then most proceedings are likely to qualify as hybrids comprising restructuring as well as liquidation components. We will not address this question here, but wish to point out that the distinction between 'pre-insolvency' and 'insolvency'-proceedings requires attention on a principle level.

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for suspension of payments. However, once it is clear that the company has stopped paying its debts as they fall due, the directors will be under a duty to file for 'faillissement', which is aimed at liquidation of the assets (which may take the form of a going concern asset sale with or without a preparatory phase (pre-pack)). The problem inherent in this pragmatic approach is that the options available to directors that wish to comply with their filing duty under Article 36 will be defined – and limited – by 'insolvency', which – as we have argued is a scalar and vague concept.

The Proposal also contains provisions obliging Member States to ensure the availability of so-called pre-pack proceedings (Articles 19-35 Proposal)[46] as well as simplified winding-up proceedings for microenterprises (Articles 41-45).[47] The Proposal does not clarify whether these proceedings qualify as insolvency proceedings for the purpose of Article 36 and 37. In respect of pre-pack proceedings, the fact that these are split up into two phases – a preparatory and a liquidation phase – could cast doubt, especially in view of Article 20, which provides that the *liquidation* phase qualifies as an insolvency proceeding as defined in Article 2 point 4 EIR. We believe, however, that this does not imply that directors cannot comply with the duty to file prescribed by Article 36 by requesting the opening of the preparatory phase. This request is ultimately aimed at the opening of insolvency proceedings involving a liquidation phase. Therefore, directors can comply with their duty to file by filing for a pre-pack. In respect of the simplified winding-up proceedings, there can be little doubt that these qualify as 'insolvency proceedings' for the purpose of Article 36 and 37, given that Article 38 expressly provides that these proceedings must be available to microenterprises that are *insolvent*, which must – pursuant to Article 38 – be assessed exclusively on the basis of a cash flow test.

3.5 *What is the nature of the duty to file and who should have standing to bring a liability claim in the event of non-compliance?*

A final issue that we wish to address in this section is: who has standing to bring the claim for violation of the duty to file: the insolvency practitioner (IP) and/or individual creditors? This question is related to the nature of the duty to file, which is not clear from the Proposal. Should the duty to file be qualified as a duty owed to the body of creditors as a whole or is it – also – a duty owed to individual creditors, in particular those who entered into a contract with the company after it became insolvent? Recital 33 offers a clue, where it is stated: "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". This sentence exclusively refers to the damage suffered by creditors who were already on board. It does not refer to the damage suffered by creditors in respect of whom the company incurred contractual obligations after it became insolvent. These so-called 'new' creditors will wish to be placed in the situation that would have existed if the company had refrained from entering into the contract. This means that they will claim to be compensated for reliance loss, not just the difference in recovery compared to the situation of timely filing (so-called 'Quotenschaden'). We believe that the exclusive focus of the Proposal on a claim for Quotenschaden is not justified. New creditors should be compensated for the reliance loss they suffered. Moreover, the prospect of recovery of reliance loss (to the extent that the defendant offers recourse) can be a real incentive for new creditors to bring a claim. In comparison, there will be little incentive for individual creditors to bring a claim for Quotenschaden, because they will only be able to recover part of what is owed to them. There is also little incentive for the IP to bring this claim because a considerable amount of time and effort may be involved in showing what the recovery rates would have been in case of timely filing. That this can be a daunting task[48] seems to have been overlooked by the drafters of the Proposal.

4. Benefits of, need for and consequences of the introduction of a director's duty to file for insolvency?

The Netherlands is one of a minority of Member States lacking a statutory duty for directors of legal persons to file for insolvency proceedings when the legal person has become insolvent. Nor does Dutch law contain a specific provision aimed at preventing wrongful trading. Dutch directors' liability law regarding (pre-)insolvency predominantly consists of what could be viewed as open norms that have their origin in either statutory rules or case law. Although case law – to a greater or lesser degree – provides guidance for directors as to how to act, the liability standard remains open, in the sense that ultimately the specific circumstances of the case will decide whether or not the director is liable. Given the fact that directors have an interest in clear standards for their behaviour during (pre-)insolvency, and open norms by their very nature leave room for different considerations (and discretion to courts), it can be argued that a duty to file comprising a straightforward obligation to act in a certain way will alleviate a director's burden when the company is insolvent. In our view, this reasoning is unconvincing for two reasons.

4.1 *The proposed duty does not lead to increased legal certainty and may harm the creditors' interests*

First, as we discussed above in paragraph 3, the proposed duty to file is not so clear-cut at all. It is left to the Member

46 See the contribution to his issue by Van Zanten.

47 See the articles 41-45 in the Proposal.

48 Klöhn, MünchKomm InsO 15a, Rn. 184, referring to "extreme difficulties" involved in the calculation of Quotenschaden. Therefore, German IP's choose to bring claims based on § 15b InsO instead. This provision allows the IP to recover all non-ordinary course of business payments made by directors after the legal person became cash flow or balance sheet insolvent. It is upon the director(s) to prove that payments after the critical date were made in the ordinary course of business.

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States to define the core components of the duty to file, which are the moment that a duty to file is triggered ('insolvency') and the type of proceeding that qualifies as 'insolvency proceeding'. We have argued that with regard to the moment that the duty is activated, the ongoing discussion in Germany,[49] where a duty to file has been part of the law for a long time, illustrates that it is a difficult task to formulate a definition of insolvency that on the one hand encourages early intervention for the sake of creditor's interests and on the other hand must guard against directors giving up to too early, which can be harming to creditors' interests as well. In fact, we believe that, given that a company's state of financial affairs is rather a continuum with fluctuations than a quantified matter of static calculations,[50] a likely consequence of a hard and fast rule to file will be that directors will file too early in order to avoid a perceived risk of personal liability, thus leaving unexploited promising opportunities for restructuring. Especially, if we juxtapose the rather vaguely defined director duties laid down in Article 19 of the Preventive Restructuring Directive against a hard and fast rule like the proposed duty to file, there is a likelihood that directors will opt for the safe route by complying with the duty to file. In this way, the desired early intervention can turn out to be detrimental to creditors' interests. This will particularly be the case if no escape options, in the form of justification or exculpation grounds in case of non-compliance, are provided in respect of the duty to file. In the absence of such grounds, a duty to file has the potential to harm creditors' interests, and will run counter to the policy objectives of the Preventive Restructuring Directive.

4.2 *Is a duty to file necessary from the perspective of Dutch law?*

Second, Dutch law already provides for different rules that aim to restrain directors' behaviour in case of (deepening) insolvency. As we observed above, most of these rules entail open norms which leave room for a differentiated assessment of directors' course of conduct. However, these norms have been substantiated in a significant volume of case law. Moreover, if the proposed duty to file is to take effect exclusively when the debtor is insolvent (which, as we argued above, is particularly difficult to determine), Dutch law regarding directors' liability provides for rules that activate duties to consider creditors' interests already before the moment of insolvency (regardless of how this is defined). In light of the stipulated purpose of the proposed duty to file – which is, as we discussed in paragraph 2, to stimulate early action – the Dutch rules for directors' liability seem more fit to serve that purpose. We just mention the main grounds of liability that may be invoked against directors of insolvent companies.[51] These concerns in the first place claims for the full deficit brought by the liquidator, typically based on a number of provisions simultaneously (Article 9 Book 2, Article 138/248 Book 2 and Article 162 Book 6 of the Dutch Civil Code). The essence of these claims is that the company has been mismanaged. Secondly, there is the so-called *Beklamel*-claim for reliance loss brought by 'new creditors' on the basis of tort law.[52] These are creditors who entered into agreements with the debtor after the director knew or should have known that the debtor would not be able to perform and would not offer recourse for damages arising from non-performance. Next to these grounds of liability, we mention a third category, tort claims brought by the liquidator or by individual creditors against directors for making 'selective payments' on behalf of the company. The latter pertains to preferential payments of debts by the director which may qualify as unlawful and give rise to the directors' personal liability to pay damages if certain requirements are met. It is particularly this ground of liability that can activate a duty for the director to consider creditors' interests before insolvency – understood either as cash flow insolvency or balance-sheet insolvency – has occurred. For instance, in cases where selective payments were made to creditors related to the debtor, Dutch courts have held directors liable when at the time of the payment the directors had to seriously consider the possibility of insolvency or liquidation proceedings ('faillissement').[53]

In addition to these general rules that may lead to director liability in insolvency, we do not want to leave unmentioned a (fourth) specific liability rule that contains a notification duty for the director as well. Article 36 of the Tax Collection Act (TCA) enables the tax collector to bring a specific liability claim against de jure and de facto directors in respect of unpaid tax debts owed by the company. Directors are jointly and severally liable if non-payment of taxes owed by the company is due to 'manifestly improper management', with the possibility of individual exculpation. The 'manifestly improper management' must have occurred in the period of 3 years preceding the notice of inability to pay taxes ('melding betalingsonmacht') or, if they have not given such notice, 3 years before the company's first default in payment. In case directors have failed to timely and correctly notify the tax collector of the company's inability to pay, directors are presumed to be liable, unless they prove that they cannot be blamed for the failure to give notice and for the failure to pay the taxes that were due.[54] Although

49 Discussion is also ongoing in Austria, where a directors' duty to file in case of both balance sheet and cash flow insolvency also exists. For a critical comparison of the Austrian system to the UK wrongful trading rule, see Georg Wabl, 'To File or not to File: That is the Question. Directors' Duties in the Company Crisis', *Business Law Review*, Volume 40, Issue 2 (2019), p. 49-55.

50 We refer to the following quote by Mokal that we mentioned above: "debtors may move along the solvency/insolvency spectrum in a continuous rather than quantized matter" (Riz Mokal, 'What is an insolvency proceeding? *Gategroup* lands in a gated community', *International Insolvency Review* 2022, p. 422).

51 For a comprehensive overview see: Loes Lennarts, 'Preventive restructuring and Directors' Duties and Liabilities in the Twilight Zone: The Dutch Perspective', *NVRII Report 2017 – Directors in the Twilight Zone*, available at: https://naciil.org/2021/08/19/reports-2017-directors-liability-in-the-twilight-zone/.

52 Dutch Supreme Court 6 October 1989, *NJ* 1990, 286 (*Beklamel*).

53 See the case law mentioned in A. Karapetian, *Bestuurdersaansprakelijkheid uit onrechtmatige daad* (diss. Groningen), Deventer: Wolters Kluwer 2019, p. 360-362.

54 A similar liability regime applies in respect of unpaid social security premiums and pension premiums payable to pension funds covering an entire industry.

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the notification duty is directed towards a specific creditor – the tax authorities – and thus does not entail the filing of formal proceedings, Article 36 of the Tax Collection Act shows that Dutch law already contains an obligation for the directors to notify a third party about the debtor's distress, and by doing that de facto disclose the debtor's inability to pay to the outside world.

The mentioned liability rules aim to ensure that directors do not carelessly continue trading when insolvency has occurred or is imminent. The rules contain to a greater or lesser degree specified duties for directors to take into account creditors' interests in case of deepening insolvency. They do not force directors to file for the opening of (specific) insolvency proceedings but leave room for out-of-court workouts, thus offering more flexibility. Although most duties are more or less specified, the open character of the norms enables directors to bring forward facts and circumstances that can justify their course of conduct or exculpate them. This allows courts to achieve a judgement that takes into account all circumstances of the case. This seems particularly reasonable regarding the issue we are dealing with, where 'the moment of truth' is difficult to determine and if it is determined, it is akin to a rather arbitrary fixation on the state of affairs of the debtor.

4.3 *What are the consequences of a duty to file for Dutch law?*

Based on the foregoing analysis, we argue that a duty to file as proposed in the Proposal is not beneficial for Dutch law, and we believe that Dutch law does not require such a rule to reach the policy objectives set forth in the Explanatory Memorandum of the Proposal and the attached impact assessment. However, if a duty to file as proposed is to be implemented in Dutch law, aside from what we already have noted, we foresee the following issues that the Dutch legislature should take into account.

- Article 136 respectively 246 Book 2 Dutch Civil Code provide that, unless otherwise provided in the articles of association,[55] the board of directors of a public respectively private limited company does not have the authority to file for insolvent liquidation proceedings ('faillissement') without being so instructed by the general meeting. The Proposal does not give any guidance in respect to the question of how the interests of creditors and shareholders are to be balanced when Member States implement Articles 36 and 37.[56]
- It is not clear how a duty to file relates to case law concerning Article 19 section 4 Book 2 Dutch Civil Code, which deals with the dissolution of a legal person without subsequent liquidation proceedings in the event that the legal person does not have any assets while there are still unpaid debts (the so-called 'turbo' liquidation). In 2015, the Dutch Supreme Court held that if a company has no or almost no assets left, the company is required to use the route that is enabled by Article 19 section 4 Book 2 Dutch Civil Code. In this case, filing for liquidation proceedings ('faillissement') can constitute abuse of power.[57]
- It is not clear how a duty to file relates to the Supreme Court's judgement in the *Geocopter* case.[58] It has been argued that in this case, the Dutch Supreme Court has left room for the judgement that filing for liquidation proceedings ('faillissement') under certain conditions can amount to 'mismanagement causing the company's liquidation', which may lead to the director(s)' personal liability for the full deficit on the basis of Article 248 Book 2 Dutch Civil Code. The conditions would be that the director(s) knew or ought to know that filing for liquidation proceedings ('faillissement') would harm creditors' interests.[59] Along this line of reasoning, it is possible that the filing of liquidation proceedings itself may – in certain circumstances – be contrary to the interests of the creditors.

5. Conclusion

Twenty years ago, the EU Commission endorsed the introduction of a European framework rule on wrongful trading in its Communication 'Modernising Company Law and Enhancing Corporate Governance in the European Union – a Plan to Move Forward'.[60] The Commission was inspired by the High Level Group of Company Law Experts, who had recommended the development of a wrongful trading rule, whereby directors would be personally accountable for the consequences of the company's failure, if it is foreseeable that the company cannot continue to pay its debts and they do not decide either to rescue the company and ensure payment or to put it into liquidation.[61]

It is hard to fathom whether the Commission intends to move away from this more flexible approach with the directors' duty to file for insolvency proceedings that it currently proposes. It *is* possible to read into Article 36 and 37 a – in comparison with the wrongful trading rule – more strictly defined duty, that aims to incentivise directors to file for insolvency proceedings that may lead to liquidation once the legal person has become insolvent. But it is not clear whether this is a correct interpretation of the Commission's intentions, because the concept of 'insolvency proceeding' is not clarified. Equally, an explanation is missing of whether and to what extent insolvency proceedings

55 Clauses deviating from the default rule of article 2:136/246 Dutch Civil Code are extremely rare in practice.

56 This issue is also noted by the interdepartmental working group on the 'Beoordeling van Nieuwe Commissievoorstellen' (Assessment of new Commission Proposals) at p. 6 of BNC-fiche 3: *Beoordeling Richtlijn materieel insolventierecht*, 2023Z01871, 3 February 2023, available at https://open.overheid.nl/documenten/ronl-5c06013edf7d652555e5354dca75a95259e11999/pdf.

57 Dutch Supreme Court 18 December 2015, ECLI:NL:HR:2015:3636.

58 Dutch Supreme Court 21 December 2018, ECLI:NL:HR:2018:2370.

59 For an extensive analysis see M.L. Lennarts, '(Waar) hoort voorzienbaarheid van benadeling van schuldeisers thuis in het toetsingskader van article 2:138/248 BW?', *TvI* 2021/9.

60 COM (2003) 284 final, 21 May 2003.

61 *Op. cit.*, p. 16

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as referred to in Article 36 fundamentally differ from the *pre*-insolvency proceedings that are the subject of the Preventive Restructuring Directive that was adopted only four years ago.

It would be regrettable if the Commission indeed aims to move away from a more flexible approach, by mandating a duty to file for insolvency proceedings that may lead to liquidation once the company is insolvent. The options available to directors of debtors that are in financial crisis should not be defined – and limited – by 'insolvency', which is a scalar and vague concept (which explains the Commission's reluctance to define it in the Proposal). A likely effect of a (seemingly) hard and fast rule to file for insolvency proceedings will be that directors – in order to avoid the risk of personal liability for non-compliance with the filing duty – will choose to file instead of making a justified attempt at restructuring. This would run counter to the objectives of the Preventive Restructuring Directive and would lead to a suboptimal outcome for the creditors.

The lack of a definition of the key concepts of 'insolvency' and 'insolvency proceedings' challenges the suitability of Articles 36 and 37 as a basis for achieving (even a minimum level of) harmonisation of directors' duties in insolvency. The articles are so vague that it is most likely that the considerable number of Member States that already have – widely differing – filing duties in place can simply maintain these – including provisions that are stricter than mandated by the Proposal. Therefore, the harmonising effect will be negligible.

Finally, there can be doubts about the creditor protection that can be achieved by the introduction of a duty to file, if the directors' liability for non-compliance is limited to the damage suffered by creditors that were already 'on board' when the duty to file was triggered. Director liability for the reliance loss of those creditors with whom the legal person entered into agreements after the triggering date may be more effective in protecting creditors. Such liability already exists in the Netherlands.

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Mr. R.J. van Galen[1]

The creditors' committee under the Proposal

TvI 2023/16

1. Introduction

In Dutch bankruptcy proceedings the appointment of a creditors' committee is somewhat exceptional.[2] Article 75 of the Dutch Bankruptcy Act ("DBA") provides that the supervisory judge consults the creditors at the verification meeting[3] whether they desire the establishment of a creditors' committee. If they do, the supervisory judge must appoint a creditors' committee. The DBA does not provide for any power of the creditors to decide on the establishment of a creditors' committee prior to the verification meeting. They do have the right to ask the court to establish a temporary creditors' committee, but on the fairly rare occasions that they do submit such a request, it is regularly denied.[4] The Dutch Supreme Court held that the creditors do not have a right to have a temporary creditors' committee established.[5] As in practice the verification meeting does not take place at all or only at a very late stage in the bankruptcy proceedings, the truth is that the creditors do not have an effective right to get a creditors' committee established. In suspension of payments proceedings, in debt reorganisation proceedings for individuals and under the WHOA proceedings, there are no provisions for the establishment of a creditors' committee at all.

The scope of the creditors' committee's task is usually construed narrowly. Pursuant to Articles 74, 77 and 78 DBA the creditors' committee advises the bankruptcy trustee. However, in addition thereto Article 76 provides the creditors' committee with powers to supervise the bankruptcy trustee and the administration of the estate. The creditors' committee may at any time demand the inspection of the books and records, documents and other data-storage media pertaining to the bankruptcy and the bankruptcy trustee is under the obligation to provide the creditors' committee with all information asked for by the creditors' committee. Moreover, the creditors' committee has the power to request for the dismissal of the bankruptcy trustee (Article 73 DBA) and can demand information from the debtor and its management (Article 105 DBA). If the bankruptcy trustee is not prepared to follow the advice of the creditors' committee, there often is some right of appeal on the supervisory judge. The explanatory memorandum on Article 69 DBA notes that this provision places the bankruptcy trustee under the permanent supervision of those in whose interest he has been appointed[6] (Article 69 DBA provides inter alia the creditors' committee with the right to request an order), but in the explanation of Articles 76-78 DBA it is stated (in Dutch): "*The task of the committee is defined in these Articles. It consists of providing advice, not in the exercise of control, which belongs to the powers of the supervisory judge.*"[7]

Some case law expresses the view that the main purpose of the creditors' committee would be to assist the bankruptcy trustee in technical matters[8] rather than to assiduously supervise the bankruptcy trustee, which is seen as the exclusive power of the supervisory judge. In that vein the supervisory judge in the Fokker bankruptcy considered: *"Again, it is the design that such committee acts to serve the bankruptcy trustee in order to further the liquidation of the estate and not to serve as an additional watchdog, to copy the work of the bankruptcy trustee or to retroactively supervise his actions.*[9]*"* Therefore, the creditors' committee usually cannot expect much help from the supervisory judge when it is dissatisfied with the obtained information and considers Article 69 DBA proceedings in order to get better information. In a number of cases, the courts even refused to appoint a temporary creditors' committee if the request was not based on the ability of the creditors' committee to provide specific technical knowledge, but rather on the desire to obtain more influence on the decisions.[10] The Dutch Supreme Court considered with a similar attitude in its judgment of 6 June 2014, ECLI:NL:HR:2014:1338 (bankruptcy of Eurocommerce), in which the Supreme Court considered that the refusal to deny a request for the appointment of a temporary creditors' committee was justified, because creditors in an informal creditors' committee could attain the same result as they could in a formal creditors' committee. That may be true for the advisory role of the creditors' committee, but it is not so with respect to supervision and the powers that a formal creditors' committee holds in that respect. In legal literature the pervasive opinion is that the view expressed in this case law does not sufficiently take into account the supervisory role of the creditors' committee which is manifestly fixed in the DBA. Molengraaff[11] wrote that the task of the creditors' committee was not limited in the sense that it only should advise. Wessels[12] is of the opinion that

1 Mr. R.J. (Robert) van Galen is lawyer in Amsterdam.
2 According to Wessels, Insolventierecht, Bestuur en beheer na faillietverklaring 2020, # 4267 "very rare". The same under # 4273.
3 A creditors' meeting held in order to determine which claims can be recognised and which claims need to be determined in court proceedings.
4 W. Terhaerdt, De schuldeiserscommissie: van een papieren tijger naar een tijger in de praktijk, *TvI* 2022/19.
5 DSC 6 June 2014, ECLI:NL:HR:2014:1338 (bankruptcy of Eurocommerce).
6 Van der Feltz, Geschiedenis van de Faillissementswet II, p. 8-9.
7 Explanatory memorandum (memorie van toelichting), Van der Feltz, *op. cit*. II, p. 29.
8 Wessels *op. cit*. 4269. See e.g. court of first instance Zutphen 4 March 2005, ECLI:NL:RBZUT:2005:AT0253.
9 Court report of the creditors meeting in the bankruptcy of Fokker, p. 5, which can be found in R.J. van Galen, 'De crediteurencommissie in faillissement', *TvI* 2000, p. 19 et seq.
10 Wessels, op. Cit # 4269 mentions court of first instance Zutphen 4 March 2005, ECLI:NL:RBZUT:2005:AT0253, court of first instance Amsterdam 25 March 2003, *JOR* 2003/154, court of first instance Rotterdam 21 June 2007, ECLI:NL:RBROT:2007:BA7839) and court of first instance 's-Hertogenbosch 1 August 2007, *JOR* 2007/256.
11 Molengraaff, De Faillissementswet, 1898, p. 334.
12 *Op.cit.* # 4272.

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the powers provided by the statute do not serve only to advise the bankruptcy trustee, but also to supervise him.[13] See about the importance of the supervisory role also W.J.M. van Andel & T.T. van Zanten, 'Informatieverschaffing door de curator in faillissement', De curator en informatie, *Insolad jaarboek* 2013, p. 49-51 and B.P.A. Santen en S.E. Castaño Ortiz, 'Na HR 6 juni 2014: Een hernieuwd pleidooi voor rechterlijke facilitering van de voorlopige crediteurencommissie', *TvI* 2015/8.

In connection herewith I furthermore mention Article 77 DBA, which reads: *"In order to obtain the advice of the creditors' committee, the bankruptcy trustee meets with the creditors' committee as often as he deems necessary. He chairs these meetings and holds the pen."* This provision is often considered to mean that the bankruptcy trustee is present at all meetings of the creditors' committee (and that he chairs and reports on the meetings). In my opinion that is not what the provision means. Only when the creditors' committee is asked to render advice, the bankruptcy trustee participates in the meetings of the creditors' committee. If the creditors' committee exercises its supervisory powers or meets in order to consider doing so, it is free to meet without participation by the bankruptcy trustee.

Creditors' influence differs substantially from one jurisdiction to the other. In Germany, the creditors' meeting disposes over considerable powers and, if a creditors' committee is appointed those powers transfer to the creditors' committee. Also in the United States, a large influence is attributed to the creditors' committee. In France, the influence of the creditors is much more limited, although in France the court appoints representatives of the various stakeholders, such as the representative of the creditors,[14] which can provide influence on the insolvency proceedings.

2. **The Proposal**

Title VII of the Proposal contains rules on the appointment of the creditors' committee. It remains to be seen whether the Proposal reaches the finish unharmed, but it seems to me that the proposals with respect to a creditors' committee are less controversial than many other topics. However, it is quite possible that the final directive will show significant changes as compared to the present Proposal. Under that reservation, I will now discuss Title VII.

3. **Appointment under Title VII**

The explanation to the Proposal states that the purpose of Title VII is to strengthen the position of the creditors in the procedure.[15] First it is interesting to assess whether, contrary to the rules under the DBA, the Proposal provides the creditors with an effective right to get a creditors' committee established. In this respect Article 59 para 1 is of importance as it provides that the "*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 (…).*" Consequently, the starting point is that a decision about the establishment of a creditors' committee and the appointment of its members must take place within 30 days after the opening of the insolvency proceedings (however see below for an important exception to this rule).

Article 58 concerns the question of *whether* a creditors' committee should be established. Paragraph 1 thereof provides that the Member States shall ensure that a creditors' committee is established only if the general meeting of creditors so decides. The Dutch version of the Proposal leaves room for the interpretation that the supervisory judge can decide not to establish a creditors' committee, even if the general meeting of creditors votes in favour of the establishment and that he is only prevented from establishing a creditors' committee if the general meeting of creditors decides that no creditors' committee is needed. However the English, French and German versions show more clearly that if the general meeting of creditors decides that a creditors' committee should be established, the establishment must take place.

The important exception to the rule that a creditors' meeting must be held in order to decide on a creditors' committee can be found in Article 58 paragraph 3. Pursuant to this provision Member States in their legislation may exclude the establishment of a creditors' committee "*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*." This is a fairly strictly redacted exception.

My conclusion therefore is that, unless the exception of Article 58 paragraph 3 applies, the general meeting of creditors has to be convened within 30 days of the opening of the insolvency proceedings in order to take a decision as to whether a creditors' committee should be established and that if the general meeting of creditors votes in favour of such establishment, the supervisory judge must appoint the creditors' committee, also within 30 days of the opening of the insolvency proceedings.
The Proposal is not clear about the insolvency proceedings to which it applies. The chapeau of Article 1 para 2 provides that the Proposal does not apply to the proceedings referred to in Article 1 paragraph 1 regarding certain debtors such as banks. However, Article 1 paragraph 1 does not refer to any proceedings. Apparently the chapeau of paragraph 2 has been copied from Article 1 paragraph 2 of the European Insolvency Regulation. That provision defines the insolvency proceedings that fall within the scope of the European Insolvency Regulation. Probably the Proposal is intended to apply to all insolvency proceedings of the

13 Up to a point in the same vein Vriesendorp, *Insolventierecht* 2021, p. 155.
14 Aldo Rizzi, La protection des créanciers à travers l'évolution des procédures collectives, 2007, p.353 et seq.
15 Page 19 of the Proposal.

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European Insolvency Regulation, which are listed in Annex A thereto. This means that creditors' committees shall be established in all insolvency proceedings which fall within the scope of the European Insolvency Regulation, which for the Netherlands are bankruptcy proceedings, suspension of payment proceedings, debt reorganisation proceedings for individuals and public WHOA proceedings. Under the European Insolvency Regulation, the time at which the suspension of payments is provisionally granted is considered to be the time of opening of the proceedings. With respect to WHOA-proceedings, the time of the first decision by the court will have to be fixed as the time of opening of the proceedings because that is the moment at which the debtor has to state whether it chooses the WHOA-proceedings to be public.[16] This means that the court must convene a creditors meeting within thirty days after its first decision, if the WHOA proceedings are public.

Additionally, Article 58 paragraph 2 provides for the establishment of a temporary creditors' committee after the filing of a request for the opening of insolvency proceedings, but before the actual opening thereof, if one or more creditors ask for such a creditors' committee. If such temporary creditors' committee is established, the first general meeting of creditors, which will have to take place within 30 days after the opening of the insolvency proceedings, will decide about the continuation and possibly the composition of the creditors' committee. Such temporary creditors' committee differs from the present temporary creditors' committee under Dutch law, in that the present temporary creditors'' committee can be established after the opening of the insolvency proceedings and continues to function until the verification meeting, which may not be held at all or only at a very late stage of the bankruptcy proceedings.

National law has to determine whether the members of the creditors' committee are appointed at the general meeting of creditors or by decision of the court.[17] However Article 59 paragraph 3 provides that the appointed members of the creditors' committee must fairly reflect the different interests of creditors or groups thereof. There is no requirement that the members are creditors themselves. If the creditors meeting appoints the members of the creditors' committee, the Member States should ensure that the court certifies the appointment within 5 days from the date of the communication of the appointment to the court (Article 59 paragraph 2). Apparently, this means that the court should review whether the appointed members constitute a fair representation of the different interests of the creditors or groups thereof. Subsequently, 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 59 paragraph 5). Creditors whose claims have only been provisionally admitted are also eligible for appointment to the creditors' committee. In the Netherlands the supervisory judge can decide to provisionally admit creditors which are disputed by the bankruptcy trustee or other creditors in the verification meeting.[18]

The creditors' committee has at least 3 members and at most 7.[19]

In my view, the rules on the establishment of the creditors' committee constitute an amelioration if compared to the present rules in the DBA, because, contrary to the present rules, the creditors under the Proposal will have an effective right to have a creditors' committee established. Consequently, more creditors' influence in relevant bankruptcies is secured. However, I do note at this stage, that it would be desirable if the Proposal would also provide stronger rights to participate in the proceedings of the general meeting of creditors, in case no creditors' committee is established.[20] Such rights should not exactly mirror the rights of a creditors' committee as a creditors' meeting is not always fit for the exercise of such rights. Moreover, the general meeting of creditors should not only have the right to decide on the establishment of a creditors' committee at the commencement of the insolvency proceedings, but should also have the right to decide at a later stage that such creditors' committee should be established after all. This can be important e.g. if new questions arise in relation to the administration of the estate, but also if there is reason to investigate the activities undertaken by the insolvency practitioner.[21] Also the insolvency practitioner or the supervisory judge may find reason at such later stage to ask the general meeting of creditors to reconsider its earlier decision not to establish a creditors' committee.

Article 60 clarifies that the members of the creditors' committee are not appointed in order to look after their own individual interests. Paragraph 1 provides that the Member States shall ensure that members of the creditors' committee solely represent the interests of the whole body of creditors. An exception applies if more than one creditors' committee is established and those creditors' committees represent different groups of creditors. In that case, a creditors' committee does not have to represent the interests of the whole body of creditors, but it may limit itself to represent the interests of its constituency. Furthermore, the Member State must ensure that the members of the creditors' committee act independently from the insolvency practitioner.

Paragraph 2 provides that the creditors' committee owes the duties to all creditors it represents. It is not quite clear

16 See Explanatory Memorandum (MvT) to the WHOA, parliamentary documents 35249, no. 3, pp. 32 and 37. At the latter place the Explanatory Memorandum notes (in Dutch): "*The first decision which the court takes in this context, marks the opening of the public plan proceedings outside bankruptcy*."

17 Article 59 paragraph 1 of the Proposal.

18 Article 125 DBA.

19 Article 61 of the Proposal.

20 I will discuss that desirability below.

21 The bankruptcy trustee or administrator in suspension of payments.

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what is meant by the expression "owes the duties". Probably it means that if the creditors' committee does not fulfill its tasks adequately, its members may be liable vis-à-vis the creditors who suffered damages as a result thereof (see below).

4. Task en powers of the creditors' committee

The Proposal does not explicitly lay down the participatory rights of the creditors' committee. The DBA lists a number of specific topics on which the creditors' committee should advise. Moreover, it provides that the bankruptcy trustee should seek the advice of the creditors' committee "*in general about the administration and liquidation of the estate.*"[22] Article 64 paragraph 1 sub f of the Proposal provides that the creditors' committee has "*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.*" Moreover, pursuant to Article 64 paragraph 1 sub g the creditors' committee has "*the power to request external advice on matters in which the creditors represented by the creditors' committee have an interest.*" It is left to the member states to decide whether the creditors' committee only should have the right to advise on these topics or that it also has the right to co-decide. There also is no provision in the Proposal as to the rights of the creditors' committee in case the insolvency practitioner does not wish to follow the advice of the creditors' committee. However, the chapeau of Article 64 paragraph 1 provides that the Member States should ensure that the creditors' committee's role is to ensure that in the conduct of the insolvency proceedings the creditors' interests are protected and individual creditors are involved. It is not explained how individual creditors should be involved. It is conceivable that the creditors' committee should consult the creditors, if appropriate by convening creditors' meetings, but it is also conceivable that the creditors' committee may require that the insolvency practitioner convenes a creditors meeting for consultation about certain topics.

Article 64 paragraph 1 under c makes clear that the task of the creditors' committee includes supervision of the insolvency practitioner. Furthermore, the creditors' committee should at least have the following rights: (i) the right to hear the insolvency practitioner at any time, (ii) the right to appear and to be heard in the insolvency proceedings and (iii) the power to request relevant and necessary information from the debtor, the court or the insolvency practitioner at any time during insolvency proceedings. Of course some of these rights can be used also in the context of the creditors' committee's advisory task. It is noticeable that Article 64 does not provide that the creditors' committee may demand the inspection of data-storage media, like Article 76 DBA does. The minimum right to obtain relevant and necessary information as provided for by the Proposal seems to be weaker than the bankruptcy trustee's duty to provide all requested information as provided for in Article 76 DBA. Article 64 of the Proposal leaves open the possibility that it is not the creditors' committee which determines what information is relevant and necessary for the fulfilment of its task, but that this is decided by the insolvency practitioner, the supervisory judge or the court, whereas Article 76 DBA attributes to the creditors' committee the power to decide what information should be provided.

The chapeau of Article 64 paragraph 1 second section explicitly provides that the powers and rights included in the subsequent list constitute a minimum. Apparently, the Proposal provides for minimum harmonisation.[23] Consequently, it is mandatorily provided that the creditors' committee has advisory rights and, as explained in the preceding paragraph, that it has supervisory powers, but that it is up to the Member States to provide whether the creditors' committee has any power to take decisions. The right to advise is broadly defined in Article 64 paragraph 1 sub 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*;" I understand the words "the right to be consulted on" to mean that – at least – the insolvency practitioner is under the obligation to ask for advice in virtually all matters, therefore e.g. about the question whether proceedings should be instituted against a managing director for mismanagement, an agreement with secured creditors (which may have consequences for other creditors), continuation of the business of the debtor, settlements and termination of leases. The obligation is phrased in the passive tense which means that it does not only apply to acts or decisions of the insolvency practitioner which affect the creditors, but also e.g. to cases in which acts or decisions by the supervisory judge or the court are at stake. Examples are:

- A request of a stakeholder to the supervisory judge (Article 63a DBA) or the court (Articles 241a and 376 DBA) to order a moratorium;
- A request to the supervisory judge to approve a private sale (Article 176 DBA);
- The decision by the supervisory judge to order a simplified distribution (Article 137a DBA);
- The decision by the court to terminate the suspension of payment proceedings (Article 242 and 247 DBA) or debt reorganisation proceedings for individuals (Article 350 DBA);
- The request to the court to confirm a reorganisation plan (Articles 150, 271, 335, 383 DBA); and
- The request to the court in public WHOA-proceedings to take a so-called aspects decision (Article 378 DBA).

The limitation to "creditors represented by the creditors' committee" should be interpreted in the context of Article 60 which provides for the possibility to establish more than one creditors'' committee for different groups of creditors.

22 Article 78 paragraph 1 DBA.

23 See also the explanation of the Proposal, p. 19.

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If there is only one creditors'' committee, then the members represent the interests of the whole body of creditors.

As has been mentioned above, the question as to whether the creditors'' committee has the power to take decisions with respect to the administration of the estate is left with the national legislator. However, Article 67 paragraph 1 provides that "*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*." The question arises whether the appellate body (for simplicity's sake referred to as "the court" here) must conduct a full review of the creditors' committee's decision. In Germany, the court limits its review of decisions taken in insolvency proceedings to a legality test (rechtmatigheidstoetsing) and it does not review their functionality (doelmatigheidstoetsing).[24] With such limited review it is very well conceivable that an appeal on the court cannot be successful, if the creditors' committee on the basis of commercial considerations does refuse to agree to a proposed course of action by the insolvency practitioner, provided the creditors' committee's refusal does not cross the boundaries of legality. It seems to me that the provision of Article 67 paragraph 1 does not prohibit such limitation of the court's review.

Article 64 paragraph 1 does not only concern the rights and powers of the creditors' committee, but also its duties. As was already mentioned above, the non-exclusive list refers under (e) to "*the duty to provide information to the creditors represented by the creditors' committee and the right to receive information from those creditors*." Observation of this duty will enhance the transparency of the insolvency proceedings. The creditors' committee will have to converse actively with the creditors. As the circumstances may require it may e.g. have to convene a creditors meeting or consult with the creditors through the Internet. Article 63 provides that the creditors' committee should lay down a protocol of working methods (see below), which will address amongst others issues of confidentiality of information. The Proposal however seems to impose a limit to the possibility to agree confidentiality, in the sense that confidentiality provisions which restrict the possibility to provide information too much, will be irreconcilable with the implementation of Article 64 paragraph 1 sub e.
Furthermore, Article 64 paragraph 1 sub c lays down the **obligation** of the creditors' committee to supervise the insolvency practitioner. Therefore this supervision is not optional. Pursuant to Article 60 paragraph 2 it constitutes a duty which the creditors' committee owes to all creditors it represents. In connection herewith Article 66, which deals with liability of the members of the creditors' committee, is remarkable. This Article provides that the members are exempt from individual liability, unless (i) they have committed grossly negligent or fraudulent conduct or wilful misconduct, or (ii) have breached a fiduciary duty to the creditors they represent. Consequently, their liability for the failure to observe their fiduciary duties is not limited to grossly negligent conduct and so on. It seems to me that the duty to supervise the insolvency practitioner constitutes such fiduciary duty and that probably the same holds for the duty to inform the creditors which the creditors' committee represents. It seems advisable that the members of the creditors' committee obtain adequate insurance coverage.

I mentioned already the protocol. Article 63 provides that the creditors' committee lays down a protocol of working methods within 15 working days following the appointment of the members. If it does not do so, the court shall be empowered to establish the protocol. The working protocol has to address at least the following topics: the right to participate in the creditors' committee's meetings, eligibility to vote and the necessary quorum, conflicts of interest and confidentiality of information. Moreover, Article 63 paragraph 6 provides that the European Commission shall establish a standard protocol, which the creditors' committee may choose to adopt. As of 1 January 2019, the DBA provides that at the appointment of the creditors' committee, the court or the supervisory judge, as the case may be, may establish a regulation concerning the working methods of the creditors' committee.[25] The protocol under the Proposal addresses the same matters, but it means a change in the sense that it is primarily established by the creditors' committee itself. That seems to me to be an improvement as it better secures the independence of the creditors' committee,[26] albeit that the duty of transparency as provided for in Article 64 paragraph 1 sub e constitutes a much more important guarantee thereof.

Article 65 leaves the question as to who bears the costs of the creditors' committee to the Member States. In my view, it is preferable that the present system in which the members bear their own costs remains unchanged. The situation in the United States may serve as an example of the undesirable consequences which occur if all these costs are borne by the debtor and therefore indirectly diminish the distribution of proceeds. As a result, Chapter 11 proceedings may turn into a bonanza of various creditors' committees with numerous lawyers who constantly appear in many proceedings at the bankruptcy court and augment the costs to levels which constitute an impediment to the reorganisation of smaller and medium-sized companies with this tool. We should prevent a situation in which dancing in the mortuary occurs. The self-discipline that may be expected if the members of the creditors'' committee have to bear the costs

24 H.C.P. Gottwald, *Insolvenzrechts-Handbuch*, 5th edition, 2015, § 22:6; U. Keller, *Insolvenzrecht*, 2020, § 93, discussed by R.J. van Galen, 'Waarheen met de rechter-commissaris', *TvI/Ondernemingsrecht* 2021/119.

25 Act of 27 June 2018, *Stb.* 2018, 299.

26 In particular this may prevent that the task of the creditors' committee is restricted, because the supervisory judge or the court is concerned that the creditors'' committee will attach excessive importance to supervising the insolvency practitioner, See about this tendency which is often encouraged by the insolvency practitioner, Wessels *op. cit.*# 4272 and G.H. Gispen, 'Enkele praktische beschouwingen over crediteurencommissies' in: *Curator en crediteuren, Insolad Jaarboek 2009*, p. 53 e.v.

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themselves may help in this respect. An exception may be appropriate in very large and complicated insolvency proceedings, but even then the budget should be watched over.

Finally, Article 62 contains provisions for the dismissal and replacement of members of the creditors' committee. The provisions about the dismissal of the members are very succinct and it is primarily left to the Member States to regulate this issue. 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. Furthermore, the national law should provide for the consequences of resignation, the death of members and so on. I agree with Wessels that the creditors' committee itself should take decisions about the dismissal of members of the creditors' committee.[27] Paragraph 51 of the recitals stresses that the members of the creditors' committee "*are accountable only to the creditors who established it*." The present Article 75a DBA also contains a provision for dismissal of members of the creditors' committee, however pursuant to that rule they can be dismissed by the supervisory judge or the court.

5. Further considerations regarding creditor influence and the implementation of Title VII

In the above, I already commented on parts of the title. In general, it should be concluded that the provisions constitute a considerable expansion of the use of the creditors' committee in some respects. They do not only apply in bankruptcy, but also in suspension of payment proceedings, the debt reorganisation proceedings for individuals and the public WHOA. It should be noted that small insolvency proceedings can be excluded on the basis of statutory provisions and that this applies in particular with respect to microenterprises (Article 58 paragraph 3). Consequently, in most debt reorganisation proceedings for individuals and in a considerable number of bankruptcy cases, such exclusion will be at stake. However, the consequence of Title VII will be that in the other cases there will come an end to the present regime under which the creditors have in fact been deprived of the right to decide on the establishment of a creditors' committee. It will be up to the creditors to decide whether there will be a creditors' committee. The German experience shows that there will not be many cases in which such creditors' committee will be established, because the commercial interests in the liquidation will often be limited.[28]

It has often been lamented that the influence of the creditors on insolvency proceedings is small in the Netherlands. It also is no secret that I consider the office of the supervisory judge to be an anachronism. First, the roles of judge and confidential advisor-supervisor can not be reconciled in a satisfactory way – and this is even made worse by the fact that the Article 67 DBA proceedings are conducted in the same court and that it is not the supervisory judge who has to defend his decisions, but that this task has to be fulfilled by the bankruptcy trustee.[29] Secondly, I perceive a problem as the supervisory judge and, on appeal, the court has to review commercial aspects of decisions. Are judges equipped to fulfill that role or does it mean that their review is essentially limited to a marginal review of the commercial decision of the bankruptcy trustee in the sense that they consider whether the bankruptcy trustee's decision stands the test of reasonability and whether the bankruptcy trustee by his decision violated rules of the law or illegally infringed on someone's rights? Wouldn't it be more appropriate to leave the real commercial decisions with the creditors and their representatives?

However, there also are downsides to a system in which the centre of gravity is shifted to the creditors, the creditors meeting or the creditors' committee.

First, there is the problem that in a large majority of cases the establishment of a creditors' committee is not considered worthwhile. The reason may be that the distribution to the creditors that can be expected is too small or that the only creditors that may expect substantial proceeds from the bankruptcy are secured creditors who have other means to further their interests. This raises the question in what way creditor influence should be realised in such cases. I do not think that charging the general meeting of creditors with all these decisions does constitute a desirable solution, because individual creditors cannot be expected to spend much time and energy on the preparation of the decisions. An alternative is provided by the German system. Under this system, no commercial review of the decisions of the insolvency practitioner takes place if no creditors' committee has been established, because the supervisory court reviews the legality of the decisions only. This is not regarded as an attractive solution and therefore I would prefer to have this task performed by the supervisory judge nevertheless or better, by another new supervisory authority, in cases where there is no creditors' committee.

A second problem is that, although the term "global interest of the creditors" is often used, the use of such container term often conceals the content. An important feature of insolvency proceedings is that the interests of various types of creditors are often conflicting. One creditor that is already completely into the money can only lose if the proceeds of the insolvency proceedings are not being distributed, but are used e.g. to litigate against the managing director, whereas another creditor that will receive little if the status quo remains unaltered, has an interest in the

27 Wessels, *op. cit.* # 4278; R.J. van Galen, 'De crediteurencommissie in faillissement', *TvI* 2000, page 19 et seq.

28 See about German creditors' committees Pape/Grundlach/Vortmann, Handbuch der Gläubigerrechte, 2nd ed. 2011.

29 Which enhances the image of the decision of the supervisory judge as a judgment given by an independent judge rather than as a decision given by a supervisory and committed body of the estate.

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litigation. The same may apply to a decision on the continuation of the business. The risks associated with continuation may cause a loss to some creditors, whereas other creditors may be free riders. These conflicts of interest entail that a balancing of interests by the creditors' committee may be difficult. The provision that each member of the creditors'' committee should represent solely the interests of the whole body of creditors does not make this balancing easier. Moreover, it is to be feared that the members of the creditors' committee nevertheless will look primarily at the consequences of a commercial decision in respect of their own interests. Classification of the members of the creditors' committee, as happens in a WHOA vote, does not provide a solution here. I at least fail to see what the cramdown rules should look like if one or more classes refuse to provide their consent to the decision. For these reasons the question of whether the creditors' committee should only have advisory rights or that it should also have the right to take decisions or refuse consent is difficult to answer. I would prefer a system in which the creditors' committee has approval rights with respect to important decisions of the insolvency practitioner (or the insolvency practitioner in conjunction with the debtor as the case may be) and in which the insolvency practitioner has a right of appeal on the court. The court should review whether the refusal to grant approval violates the law, which then should include for example a proportionality test and a review of the way in which the creditors' committee has dealt with a possible conflict of interests within the creditors' committee.

A third problem concerns matters of confidentiality. These become strenuous in particular if decisions are left to the creditors' *meeting* or if the information rights of individual creditors are involved. It regularly happens that an important creditor in insolvency proceedings simultaneously acts as a bidder on assets of the estate or is at least perceived as a prospective purchaser. If such creditor would receive information about other prospective bidders or other information that is relevant to the bidding process which is not available to other prospective bidders, an equal playing field may be disturbed. For that reason, it seems to me that in the context of the sale of assets the obligation to provide information to creditors should be restricted and that the focus should be on rendering accounts after the transaction has taken place. This information problem is less evident if a creditors' committee has been established. The protocol can provide that members of the creditors' committee are not allowed to buy from the estate or that those that do intend to bid will be excluded from the provision of information and the consultation about the topic concerned.[30]

At any rate in my view it is preferable that in case a creditors' committee has been established and that creditors' committee has the power to take or approve decisions, any appeal should be limited to a review of the legality of the creditors' committee's decision.

30 See Vriesendorp, *Insolventierecht* 2021, p. 147.

I submit that the obligation of the creditors' committee to supervise the insolvency practitioner constitutes an improvement in comparison to the present situation. Article 193 paragraph 2 DBA provides that one month after closure of the proceedings, the bankruptcy trustee renders account and justification to the supervisory judge. From this provision it has been inferred that the bankruptcy trustee is not accountable to individual creditors who ask for an explanation[31] or the creditors' committee, but only to the supervisory judge. This means that if the substantive elements of the administration are to be evaluated, the supervisory judge to a large extent becomes the butcher who inspects his own meat, because the supervisory judge has been involved in the decisions of the bankruptcy trustee at an earlier stage and therefore has contributed to those decisions. If those decisions have to be evaluated retrospectively in order to determine whether they were prudent or justifiable (also with the knowledge at the time of the decisions), the supervisory judge is insufficiently independent of the decision process itself to be able to judge those decisions. Therefore in practice, the rendering of accounts and justification under Article 193 paragraph 2 DBA has deteriorated into a mere arithmetic exercise. The bankruptcy trustee only has to show that the books and records are correct. I do not know of any case in which it was held that the bankruptcy trustee had spent too much money and cashed too much in fees, for activities which had little chance to render substantial proceeds for the estate or in which advances of fees were reclaimed for such reasons. However there is also another more principled issue and that is that the starting point should be that if someone represents the interests of others, the creditors, who as a consequence must forego their individual rights – to take recourse against the assets of the debtor – that person should render account and justification of the administration managed on their behalf and they should be able to review his activities.[32] That is not what presently happens and this regularly causes dissatisfaction of the creditors. The Proposal provides a solution here, because the creditors' committee must supervise the insolvency practitioner. However, it is not spelled out that the insolvency practitioner is accountable to the creditors' committee.

In my view, a further improvement could be realised if the Proposal would not only provide for the rights, powers and duties of the creditors' committee, but would also contain provisions on the rights of the individual creditors and the possibility to convene a general meeting of creditors if no creditors' committee has been established.

31 DSC 21 January 2005, ECLI:NL:HR:2005:AR3406 en AS3534 (Jomed).

32 See about the agency function of the bankruptcy trustee B.P.A. Santen en S.E. Castaño Ortiz, 'Na HR 6 juni 2014: Een hernieuwd pleidooi voor rechterlijke facilitering van de voorlopige crediteurencommissie', *TvI* 2015/8.

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Prof. dr. F.E.J. Beekhoven van den Boezem & mr. E. Schmieman[1]

Fostering cross border investment by enhancing transparency of national insolvency laws: magic potion or plaster for a wooden leg?

TvI 2023/17

1. Introduction

On 7 December 2022, the European Commission presented a proposal for a directive harmonising certain aspects of insolvency law ("the Proposal").[2] The Proposal is part of the Commission's priority to advance the Capital Markets Union (CMU). The lack of harmonised insolvency regimes has been identified as an obstacle to the freedom of movement of capital in the EU and to a greater integration of the EU's capital markets.[3] Insolvency legislation is fragmented along national lines and leads to different outcomes across Member States. Therefore, the Commission proposes to harmonise certain elements of insolvency legislation to maximise the recovery value of the liquidated estate, enhance procedural efficiency and achieve a fair and predictable distribution of recovered value in case of cross-border investments.

The objective of achieving a predictable distribution in the case of cross-border investments is based on the assumption that differences in national regimes lead to higher information and learning costs for cross-border investors compared to those who only operate domestically. Investors are reluctant to proceed with cross-border investments if they have insufficient knowledge and understanding of the core elements of the insolvency legislation of the countries in which their investments are to take place.[4] The Commission assumes that an overview of the main elements of the Member States' national insolvency rules will provide more transparency and clarity for investors and will lead to an increase in cross-border investment. To achieve such transparency and clarity, Article 1(g) in combination with Article 68 of the Proposal requires that Member States prepare a so-called 'key information fact sheet' summarising the main elements of their insolvency legislation and to publish and maintain this fact sheet in the E-justice portal.[5] The assumption is that this enables potential cross-border investors to perform a "glance through" assessment of the insolvency legislation in a given Member State.[6]

In this contribution we will discuss the key elements of Article 68, the assumptions that it is based on as well as why this approach has been chosen rather than an actual harmonisation of the elements of the insolvency legislation that the key information fact sheet is meant to create transparency on. We will assess to what extent one can realistically expect that a key information fact sheet would lead to more transparency and clarity and an increase in cross-border investments. In this light, we will touch upon some other initiatives undertaken by the Commission in the frame of the CMU to achieve the same objective. We will conclude that the key information fact sheet could indeed be helpful to foster cross-border investments, but it will most likely be insufficient to make a difference. The key reason for this seems to be that investors' decisions to invest cross-border are generally influenced by many more elements of the legal environment of the Member State that they envisage to invest in.

2. Advancing the Capital Markets Union

As stated, the Proposal stems from the European Commission's objective to further increase the integration of the EU capital markets. Whereas a lot has been done in this area already, the degree of market integration in the Eurozone still leaves much to be desired: investments are mainly made within national borders. Furthermore, European non-financial companies primarily use bank financing rather than accessing the capital markets. This leads to corporate debt primarily being on bank balance sheets. This, in turn, results in a build-up of unwanted systemic risk. The enhancement of the CMU, therefore, envisages to strengthen the internal market for capital with the aim of facilitating cross-border capital flows and ensuring efficient capital allocation, improving access to capital markets for companies and providing them with more financing options in order to become less dependent on bank financing. This stimulates economic activity and promotes the resilience of the European Monetary Union.

While this and other contributions to this special issue of *TvI* focus on the harmonisation of insolvency law, the Commission also deems further action to be necessary for other areas to achieve the goal of enhancing the Capital Markets Union, especially in financial law. The general boundaries within which the financial markets operate have been

1 Prof. Dr. F.E.J. Beekhoven van den Boezem is General Counsel at De Nederlandsche Bank and Professor of Company & Finance at the Business and Law Research Centre of the Radboud University Nijmegen.
Mr. E. Schmieman is Coordinating Legal Counsel at the Netherlands Ministry for Economic Affairs and Climate Policy and Research Fellow at the Business and Law Research Centre of the Radboud University Nijmegen.

2 Proposal for a directive of the European Parliament and of the Council for harmonising certain aspects of the insolvency law, 7 December 2022, COM/2022/702 final.

3 Explanatory Memorandum p. 1.

4 Recital 1-3.

5 The European E-Justice Portal is conceived as a future one stop shop in the area of justice. It provides general basic information on the EU Member States' justice systems, in 23 languages, https://e-justice.europa.eu.

6 Recital 58.

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tightened or harmonised and a number of initiatives have been taken to ensure that supervisory regulations are further harmonised and applied uniformly. A European regulatory framework has been created for various financial submarkets such as venture capital and crowdfunding, and the development of markets for complex financial products has been encouraged through a European regulatory framework driving standardisation and transparency (e.g. securitisations[7] and covered bonds[8]).

Furthermore, the Directive on credit servicers and credit purchasers aims to develop a secondary market for non-performing loans by introducing a common set of rules for credit servicers and credit purchasers.[9] The objective of this is to tackle undue obstacles to credit servicing and to the transfer of bank loans to third parties. This should make it easier to transfer non-performing loans from the balance sheets of European banks to other financial market participants and in this way address situations in which a high volume of NPLs deteriorates the capital position of a bank, making it more difficult for them to provide further credit to enterprises.[10] The directive was adopted in a slimmed-down form. Initially, it also included a proposed regime for the enforcement of security rights, the so-called Accelerated Extrajudicial Collateral Enforcement procedure (AECE). That part, however, was removed from the directive, postponed and agreed on by the Member States at a later stage. Despite it having been considerably watered down from what was originally proposed by the Commission,[11] certain Member States still strongly opposed it. They argued that it would be difficult to incorporate in their differing national enforcement procedures that combine closely intertwined elements of property law, procedural law, enforcement law and insolvency law. Member States only agreed after the AECE procedure was made facultative. The negotiations to reach a compromise with the European Parliament are currently on hold.

Similar objections were brought forward by Member States during the negotiations on the Proposal for a regulation on the third-party effects of the international assignment of claims, that was proposed in 2018 as part of the – then – Capital Market Union Action Plan. The objective of the proposal on the assignment of claims is to promote cross-border investment in the EU and to facilitate access to financing for companies by clarifying which national law applies when determining who owns a claim after it has been assigned in a cross-border case. As a general rule the law of the country where the assignor has his habitual residence was supposed to apply. After several years of very long and difficult discussions however, Member States barely even managed to agree on a proposal that was significantly watered down by the inclusion of many exceptions to the general rule in order to make it fit into Member States' legal traditions and to accommodate financial market practices.[12] Because the European Parliament would like to see most of these exceptions eliminated, negotiations on this proposal are still ongoing. In the process of harmonisation of the insolvency legislation, which we will discuss next, a similar scenario of compromises and eliminations seems to be unfolding and the question arises whether any harmonisation can be expected at all.

3. The harmonisation of insolvency legislation

The process of harmonisation of material insolvency law started with the Directive on restructuring and insolvency.[13] The negotiations on this instrument only led to an agreement between the Member States after a rather detailed initial proposal was replaced by a much more principle-based approach during the negotiations.

With the current proposal, *groundhog day* seems to have arrived. The Commission originally again targeted an overall harmonisation. In the Inception Impact Assessment,[14] the Commission announced they were considering to harmonise the following subjects: (i) prerequisites for when insolvency proceedings should be commenced, including a definition of insolvency and provisions on who is entitled to file for insolvency; (ii) conditions for determining avoidance actions and effects of claw-back rights; (iii) directors' duties related to handling imminent/actual insolvency proceedings; (iv) the position of secured creditors in insolvency taking into account specific needs for the protection of other creditors (e.g. employees, suppliers), in other words: the ranking of creditors; (v) the court capacity with regard to the required expertise and necessary training of judges, and (vi) asset tracing in particular in the context of avoidance actions.[15] In the public consultation that followed the

7 Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012, *OJ* 2017 L 347/35.

8 Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision and amending Directives 2009/65/EC and 2014/59/EU, *OJ* 2019, L 328/29.

9 Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 200/48/EC and 2014/17/EU, *OJ* 2021, 64, L 438.

10 Cf. F.E.J. Beekhoven van den Boezem and L.S. Aalders, De nieuwe richtlijn inzake kredietservicers en kredietkopers, *Ondernemingsrecht* 2022/51.

11 COM_2018_0135_FIN.ENG.xhtml.1_EN_ACT_part1_v9.docx (europa.eu).

12 https://data.consilium.europa.eu/doc/document/ST-9050-2021-INIT/en/pdf.

13 Directive (EU) 2019/2 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* 2019 L 172/18.

14 Inception Impact Assessments aim to inform citizens and stakeholders about the Commission's plans in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Citizens and stakeholders are in particular invited to provide views on the Commission's understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options.

15 Insolvency laws: increasing convergence of national laws to encourage cross-border investment (europa.eu).

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Commission brought up largely the same issues as mentioned above.[16]

In this light, the market probably expected a far-reaching proposal that indeed targeted an overall harmonisation.[17] But this did not happen: the Commission chose an approach of targeted harmonisation of less controversial subjects instead. The more controversial topics were dropped: Member States only have to publish basic information about those in a key information fact sheet.

This approach of targeted harmonisation only is based on the experiences described earlier in section 2 above and the fact that there are indeed many indications that Member States are at this stage not prepared to accept an overall harmonisation on all subjects of insolvency law the Commission originally had in mind. Member States are especially reluctant where the benefit of harmonisation is insufficiently obvious to them given that well-functioning rules are already in place in their own national systems. This is clearly illustrated by a letter that was received by the Commission from a number of Member States in the preliminary phase of the Proposal, to which the Commission refers in the explanatory memorandum to the Proposal, as well as by critical comments made by various Member States during the consultation phase.[18]

In this light, it is no surprise that already during the Member States' first discussions of the Proposal, reservations have been expressed, among others that the Proposal is too detailed and leaves too little flexibility for the Member States. One needs to bear in mind that for many Member States harmonisation of insolvency law is a politically very sensitive issue. Especially in a time of crisis (first: pandemic, now: inflation and Ukraine), a rebalancing of the interests of various groups of creditors could add to an already existing sense of unrest and uncertainty. Member States are concerned that harmonisation could interfere with other objectives that they have chosen to prioritise in their national legislation such as those of employees or their treasury. In addition, insolvency law is very closely intertwined with other fields of law that have, to a large extent, not been harmonised, or where attempts to do so have failed for the same reasons.

Indeed, harmonisation in the area of insolvency law cannot be viewed independently from harmonisation in other areas, such as property law including rules on collateral, contract law, company law, labour law and tax law. The Proposal contains ample examples of this. We will describe two. The first example relates to transaction avoidance or *actio pauliana* for which harmonised rules are proposed. However, to answer the question of whether establishing a right of pledge on a claim can be subject to avoidance, it is important to establish whether and from what moment in time a future claim can be pledged in a particular legal system. This issue will not be harmonised.

The second example regards the proposed harmonised rules on prepackaged insolvencies. The proposed Article 27(1) stipulates that all contracts deemed necessary for the continuation of a business are automatically transferred to the purchaser of the business without the consent of the counterparty being necessary. This might imply a forced contract takeover and thus possibly conflicts with the principle of freedom of contract.[19] Further, the proposed rules on prepackaged insolvencies codify the ECJ's ruling that a takeover prepared within the framework of a pre-pack proceedings under circumstances[20] falls within the exception as mentioned in Article 5(1) of the Transfers of Enterprise Directive on the basis of which employment contracts do not automatically transfer with the entity in the event of a transfer of the business in the context of an insolvency proceeding.[21] In The Netherlands this issue has held up a bill introducing prepackaged insolvencies for years as it was feared by the trade unions that the applicability of this exception would lead to abuse.[22] These concerns have indeed been accommodated by the Proposal and its condition that the transfer of the business needs to be effectuated in the context of an insolvency proceeding. However, the focus on a transfer does not do justice to the fact that where transfer and continuation is not possible, prepackaged insolvencies can still be very useful for the purpose of limiting damages for employees. For this reason the proposed Dutch bill on prepackaged insolvencies did provide for this possibility.[23]

With regard to the relationship between insolvency law and company law, another question that comes up is how the obligation of directors to file for bankruptcy as proposed by the Commission relates to the obligation for directors to do everything possible to avoid bankruptcy as described in the Directive on Restructuring and Insolvency.[24] One could also wonder how the Commission's far-reaching proposals on sustainable corporate governance and the obligations of companies resulting from it should be applied when a company finds itself in financial difficulties.[25]

To conclude, it can hardly be a surprise that the Commission opted for an approach of targeted harmonisation instead of

16 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Enhancing-the-convergence-of-insolvency-laws-/public-consultation.
17 See e.g. B.A. Schuijling, Het Commissievoorstel voor een nieuwe insolventierichtlijn, *FIP* 2023/500.
18 See note 16.
19 Parliamentary Documents II 2022-2023, 22112, 3598, p. 9.
20 One of the requirements set by the ECJ is that the pre-pack proceedings should have a legal basis.
21 Court of Justice of the European Union 22 April 2022, ECLI:EU:C:2022:321.
22 The legal basis required by the ECJ is therefore not yet provided in The Netherlands. In fact the Advocate-General to the Netherlands Supreme Court has therefore advised the Supreme Court to rule that the exception to the Transfers of Enterprise Directive does not (yet) apply. The Supreme Court will most likely follow this advice. See ECLI:NL:PHR:2023:368.
23 Parliamentary Documents I 2015-2016, 34 218, A.
24 Art. 19(1)(b).
25 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 [COM/2022/71 final].

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full harmonisation. Focusing on a limited number of issues, while leaving open many others where Member States will only be obliged to provide investors with insight into how they are regulated nationally in a so-called fact sheet seems to be the only way that can possibly lead to results. We will discuss this in more detail in the next section.

4. Title VIII, Measures enhancing transparency of national insolvency laws, article 1 sub (g) jo. 68

As stated earlier, one of the objectives of the harmonisation operation is to help creditors with cross-border claims assess what would happen if their debtor were to go into insolvency. The Proposal, therefore, tries to make the main features of national insolvency proceedings more transparent so that (potential) investors would be more inclined to invest in a Member State.

Based on Article 1(g) in combination with Article 68 of the Proposal, Member States will be required to compile a so-called 'key information fact sheet' that summarises the key elements of their insolvency legislation in non-technical and easy-to-understand language, publish it in the European e-Justice Portal[26] and then regularly update it. According to Article 68, this fact sheet will at least need to cover four key topics: (i) the conditions for the opening of an insolvency proceeding, (ii) the rules governing the lodging, verification and admission of claims, (iii) the rules governing the ranking of creditors' claims and the distribution of proceeds from the monetisation of assets included in the insolvency proceeding, and (iv) the average reported duration of insolvency proceedings.

A full review of the implications of this for The Netherlands would go beyond the realm of this article, but with regard to the first topic, the Dutch information fact sheet would definitely need to cover the Dutch standard for declaring a debtor insolvent, which requires that the facts and circumstances obviously confirm that a debtor has ceased to pay his due debts.[27] The Dutch information fact sheet will need to make clear that the threat of this happening rather than the event in itself is insufficient basis according to Dutch law. In addition, Dutch law also requires there to be multiple creditors, which means that a creditor requesting for the debtor to be declared insolvent will need to prove that he or she is not the only creditor at the time that the court is to declare a debtor to be insolvent (*ex nunc*).[28] Finally, it would be good for a foreign investor to know that the courts maintain a specific list of lawyers who are qualified to act as an insolvency administrator as well as that in those cases where deep financial skills are needed, the court can appoint an accountant as second insolvency administrator.

With regard to the second topic, it would be important to state that there is a deadline for filing proof of claims, the 'bar date',[29] which was introduced in January 2019 by the "Wet Modernisering Faillissementsprocedure". This legislation introduced a time-limited period in which parties can file claims against the insolvency estate, which is typically the 14-day period before the meeting in which all claims filed are to be verified. It is important that creditors know that claims submitted after the bar date will not be verified. Furthermore, it would be important to note that even when the insolvency administrator can compile a preliminary list of acknowledged creditors by their own motion,[30] this does not take away the responsibility of the creditors for getting their claims correctly filed and verified.[31] Final point for the fact sheet to make on the second topic, would be the existence of a central register of insolvency procedures,[32] that gives creditors fast access to key information regarding the insolvency procedures that they are a party to, like for example the person who has been appointed as insolvency administrator.[33]

What is specific to Dutch insolvency law with regard to the third topic? One could think of the fact that even though in The Netherlands the *paritas creditorum* is the point of departure, creditors holding collateral in the form of a right of mortgage or pledge – usually banks – are placed ahead of the other creditors in case of an insolvency of a debtor. The same goes for those creditors that have a preferential status defined by law such as the tax authorities[34] and the social security institutes (UWV). Any foreign investor should therefore prepare him or herself for the fact that not much might be left for other creditors after those parties with preferential treatment are made whole. A cross-border investor should also be aware that he or she will have a wider choice of settlement options in an insolvency procedure, than before insolvency is declared. For example, when an investor is both creditor as well as debtor to the insolvent party, he will have the option to settle his debt with his credit claim under the condition that both existed before insolvency was declared. Outside of an insolvency procedure, the debt would need to be due to be able to do this.[35] This broader settlement option thus essentially provides a preferential treatment option in the insolvency procedure compared to other creditors.

Finally, when looking at the fourth topic, the fact sheet would have to state the average reported length of insolvency proceedings in The Netherlands. According to Article 29(1)(b) of the Directive on Restructuring and Insolvency,

26 See note 5.
27 Article 1 jo. Article 6 Dutch Bankruptcy Code.
28 HR 11 July 2014, ECLI:NL:HR:2014:1681, *NJ* 2014/407 (*Berzona*) and HR 24 March 2017, *NJ* 2018/225 (*Säkaphen GmbH/Carrecon-Piguillet B.V.*),

29 Article 127 Dutch Bankruptcy Code.
30 Article 110 Dutch Bankruptcy Code.
31 To this extent, the creditor will have to provide an invoice or any other proof of the claim and its amount. If the claim is secured by collateral or has any preference, the creditor should also make sure this is correctly administrated.
32 https://insolventies.rechtspraak.nl.
33 Article 68 Dutch Bankruptcy Code.
34 For example article 21 Collection of State Taxes Act 1990.
35 Articles 53 and 54 Dutch Bankruptcy Code.

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this will have to be monitored anyway but for the time being no structured information is available yet. According to the information from the World Bank this is about one year for non-complicated insolvencies[36] However, for more complicated insolvencies, longer periods can apply.

Based on our review of the four topics the key information fact sheet should contain information on, it seems that the third topic – the ranking of creditors – would likely be the most important one for investors. However, not just the ranking is important, but also the conditions attached to that ranking. For example, under Dutch law, a person entitled to security not only has priority in recourse, but he is also a separatist, which means that in principle the debtor's insolvency does not affect him. On top, the security holder has the right of immediate execution, which means that he already has an enforcement order and does not have to go through a court to be able to proceed with enforcement. The latter is different in many Member States and therefore became an obstacle during the negotiations on the AECE instrument, as we discussed earlier. Certain Member States considered such a power to go too far to the detriment of creditor protection.

5. Conclusion

To what extent can the national fact sheets actually be expected to help cross-border investors to make an informed decision and thus enhance cross-border investments? We believe that while they might be helpful to some extent, their impact should not be overestimated. After all, a number of the subjects concern complicated doctrines with many nuances, often developed in many years of jurisprudence. These cannot be summarised in five A4-sized sheets of non-technical language, let alone can they be comprehensive. Moreover, the key information factsheets will only provide information about national insolvency law rules. As already mentioned, information about other or related areas of national law can be just as or even more relevant for the investment to be made. In addition, reporting obligations about the so-called recovery rate in a particular Member State seem to be missing while for many investors this can be crucial information.[37]

The idea that a "glance through assessment" would convince investors to invest is therefore not only very optimistic, but possibly also not without risk. Investors that rely on these factsheets could be in for a rude awakening when upon insolvency of their debtor it becomes clear that they missed important information. If one looks at the extensive information obligations that follow from e.g. legislation on capital markets prospectus, the question whether rudimentary information is helpful for investors becomes even more pregnant.

So in short: will the key information factsheet promote cross-border investments? Maybe to a limited extent. However, rather than a real solution, it seems to be more of a stop-gap measure.

Would things be different if there had not been just a key information fact sheet, but (real) harmonisation on the subjects mentioned in article 68? To be honest, this is highly questionable, as investment decisions depend equally – or perhaps to a greater extent – on other elements of the legal system, such as the stability and flexibility of rules and regulations and the quality, expertise, speed and independence of the judiciary.

36 https://www.ceps.eu/wp-content/uploads/2016/07/HarmonisingInsolvencyLaws.pdf, p. 13.

37 For example from the European Banking Authority Report on the Benchmarking of national loan enforcement frameworks, it becomes clear that The Netherlands performs well above average here, see page 23 and following.

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