Statement of the
VID - Association of Insolvency Administrators and Trustees in Germany
on the proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on the harmonisation of certain aspects of insolvency law

presented on 07.12.2022 - COM (2022) 702 final

Part A formulates a summary assessment of the proposal. Part B contains a detailed analysis of the proposed individual provisions. In order to improve orientation and readability, Part B first lists the text of each proposed article (framed), then the associated recitals (in italics) and the assessment of the proposal, one after the other. Concrete proposals for amendments (blue) form the conclusion. Where appropriate, introductions or headings have been added to individual sections. Where articles are cited in the text without further explanatory addition, they are always articles of the proposal.

Content

Part A ... 3
I. Preliminary remark ... 3
II. fundamental assessment ... 4
III. Summary comments on the main regulatory proposals ... 7
1. AVOIDANCE ACTIONS, Title II ... 8
2. TRACING ASSETS BELONGING TO THE INSOLVENCY ESTATE, Title III ... 9
3. PRE-PACK PROCEEDINGS, Title IV ... 9
4. DIRECTORS' DUTY TO REQUEST THE OPENING OF INSOLVENCY PROCEEDINGS AND CIVIL LIABILITY, Title V ... 12
5. WINDING-UP OF INSOLVENT MICROENTERPRISES, Title VI ... 13
6. CREDITORS' COMMITTEE, Title VII ... 16
7. MEASURES ENHANCING TRANSPARENCY OF NATIONAL INSOLVENCY LAWS, Title VIII ... 18
Part B ... 18
1. introduction ... 18
a) History of the proposal ... 18

b) Aim of the proposal ... 19

c) Efficiency as a regulatory objective ... 23

d) The most important efficiency factors in insolvency proceedings ... 25

2. Avoidance actions (Title II) ... 26

a) Introduction ... 26

b) Chapter 1 – General provisions regarding avoidance actions (Art. 4-5) ... 27

c) Chapter 2 – Specific conditions for avoidance actions (Art. 6-8) ... 30

d) Chapter 3 – Consequences of avoidance actions (Art. 9-12) ... 34

3. Tracing assets belonging to the insolvency estate (Title III) ... 37

a) Chapter 1 – Access to bank account information by designated courts (Art. 13-16) ... 37

(b) Chapter 2 – Access by insolvency practitioners to beneficial ownership information (Art. 17) ... 41

c) Chapter 3 – Access by insolvency practitioners to national asset registers (Art. 18) ... 43

4. Pre-pack proceedings (Title IV) ... 45

a) Chapter 1 – General Provisions (Art. 19-21) ... 45

b) Chapter 2 – Preparation phase (Art. 22-24) ... 48

c) Chapter 3 – Liquidation phase (Art. 25-29) ... 55

d) Chapter 4 – Provisions relevant to both phases of the pre-pack proceedings (Art. 30-35) ... 60

5. Directors´duty to request the opening of insolvency proceedings and civil liability (Title V) ... 68

a) Art. 36 – Duty to request the opening of insolvency proceedings ... 68

b) Art. 37 – Directors' civil liability ... 69

6. Winding-Up of insolvent microenterprises (Title VI) ... 70

a) Chapter 1 – General rules (Art. 38-40) ... 71

b) Chapter 2 – Opening of simplified winding-up proceedings (Art. 41-45) ... 83

(c) Chapter 3 – List of claims and establishment of the insolvency estate (Art. 46-48) 107

d) Chapter 4 – Realisation of the assets and distribution of the proceeds (Art. 49-55) 116

e) Chapter 5 – Discharge of entrepreneurs in simplified winding-up proceedings (Art. 56-57) ... 129

7. creditors' committee (Title VII) ... 133

a) Chapter 1 – Establishment and members of the creditors' committee (Art. 58-62) .. 133

b) Chapter 2 – Working methods and function of the creditors' committee (Art. 63-67) 139
8. measures enhancing transparency of national insolvency laws (Title VIII) 145
Art. 68 – Key information factsheet 145
9. Final provisions (Title IX) 147
Art. 69 – Committee 147
Art. 70 – Review 148
Art. 71 – Transposition 148
Art. 72 – Entry into force 148
Art. 73 – Addressees 148

Part A

I. Preliminary remark

The present proposal for a Directive is intended to follow on from DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on preventive restructuring frameworks, on debt relief and on activity bans and on measures to improve the efficiency of restructuring, insolvency and debt relief proceedings and amending Directive (EU) 2017/1132 – Directive on restructuring and insolvency, hereinafter referred to as the "Restructuring Directive". This essentially served to introduce or harmonise a framework for pre-insolvency restructuring and post-insolvency debt relief for natural persons active in business.

In a further step, the proposal now submitted is intended to unify central aspects of substantive insolvency law for companies for the first time. The aim of this proposal is, according to its Recital 1 and 2:

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

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

The explanatory memorandum of the proposal (page 2-3) further explains:

"The absence of more convergence in insolvency regimes will mean that the level of cross-border investment and cross-border business relationships would not reach its potential. Action at EU level is needed to substantially reduce the fragmentation of insolvency regimes. It would support the convergence of targeted elements of Member States' insolvency rules and create common standards across all Member States, thus facilitating cross-border investment. Measures at EU level would ensure a level playing field and avoid distortions of cross-border investment decisions caused by lack of information about and differences in the designs of insolvency regimes. This would help to facilitate cross-border investments and competition while protecting the orderly functioning of the single market. Since divergences in insolvency regimes are a key obstacle to cross-border investment, addressing this obstacle is crucial to realising a single market for capital in the EU."

This derivation of a need for reform from the functioning of the common market is not convincing. Nobody invests in a certain economic area because they want to suffer losses or insolvency there. Fiscal, labour and social framework conditions are far more important for this. The relative advantages and disadvantages of a stronger orientation towards creditors' rights or debtors' interests also do not provide a clear indication for reforms. They are also not interpreted in the literature as a uniform signal for a particular design of national or European insolvency rules.

Insolvency law becomes relevant for investors, however, when investments are to be made in non-performing loans (NPL) where the risk of loss has already materialised, at least in part, in a reduction in the value of the loan. To the extent of this materialisation, the interest in satisfying the claim as fully as possible is superseded by the interest in realising its remaining residual value as quickly as possible.

Therefore, one gets the impression that this particular form of investment is once again – as already in the context of the Restructuring Directive – in the foreground of the addressed considerations on the functioning of the common market, without this being disclosed in the explanatory memorandum.

II. fundamental assessment

Although moving closer together within the European Union and, more specifically, further harmonisation in insolvency law is to be welcomed, the reason for and the form of the proposed directive must be questioned very critically. This is especially true insofar as the proposed directive breaks with essential basic principles of the Restructuring Directive, which was only adopted in 2019, above all with regulations on the protection of employees, the strengthening of creditors' rights and on proceedings away from the courts. The Restructuring Directive has been implemented in most member states in the meantime and national insolvency law has thus been adapted in line with the Restructuring Directive. The current proposal for a directive calls into question this reorientation of insolvency and restructuring law, which has only recently been initiated by EU law.

- The rights of workers are not even rudimentarily addressed in any of the 73 articles of the proposed directive. In contrast to the Restructuring Directive, which explicitly excludes interference in workers' rights under Article 13, far-reaching interference in workers' rights is now permitted. These include the unrestricted termination of employment contracts in pre-pack proceedings, the lack of administrative and legal support for employees in liquidation proceedings for micro-enterprises and the lack of participation in the creditors' committee. Especially in micro-enterprise-proceedings, employees affected by the insolvency of their employer lack the necessary support from a works council or the trade union. Under the current proposed regulation, employees would be required to seek legal assistance at their own expense, as the support provided by the insolvency administrator, remunerated through the insolvency estate, is lacking.

- Similarly, the rights of creditors are interfered with to the extent that short preclusion periods are set for the lodgement of claims, participation and the exercise of legal remedies are limited or excluded, or early participation in creditors' committees is not mandatory. In addition, creditors must fear having to accept a change of the insolvent contracting party without being able to exert their own influence. One cannot escape the impression that a paradigm shift is to take place with regard to the role and legal position of creditors: The creditor is being degraded from a co-creator of the proceedings to an extra, to the detriment of the creditor autonomy that has been expanded in many recent reforms.

- Especially with regard to the administratorless procedure for micro-enterprises and the pre-pack procedure, a significant disturbance of legal peace is to be expected if the proposals remain unchanged. The conduct of insolvency proceedings with the participation of a competent and independent administrator leads to satisfaction for the creditors involved, which also includes any employees, even beyond a quota payment, because the administrator ensures verification that the debtor is not unlawfully withholding assets from the creditors. A purely bureaucratic handling of insolvency proceedings would in future give rise to the suspicion of creditors that micro-enterprises in difficulties could easily get out of debt at the expense of the creditors involved. It is not without reason that the German legislator referred to the aspect of legal peace as early as the explanatory memorandum to the Insolvency Code: *"The regulatory task of insolvency law in the social market economy, like all law in a democratic and social constitutional state, should create a fair balance, protect the weaker party and establish peace. (...)" (*Explanatory Memorandum to the Insolvency Code, BT-Drs. 12/2443 of 15.04.1992, page 75).

- According to the latest CEPEJ report for the years 2020-2022 (https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279), the European courts, especially in Italy and France, are already overstretched in their capacity, with average trial durations in first-instance civil proceedings of over 600 days. Even member states, such as Germany and

Austria, which have average case durations of around 240 days, are still far behind other European countries, such as Switzerland with only 126 days in first-instance proceedings. In addition to the already existing overload of the courts, demographic change will further weaken the staffing of the courts in the member states in the future. Against this backdrop, imposing the supervision of administratorless proceedings on the courts is counterproductive both in the sense of the debtors concerned, but above all in the sense of the creditors and employees concerned, and serves neither procedural efficiency nor procedural acceleration.

- The procedure without an administrator envisaged for micro-enterprises generally leaves the entrepreneurs concerned alone with their worries and hardships. In its explanatory memorandum, the proposed directive correctly states that these businesses usually file for insolvency too late and have only inadequate documentation. According to the World Bank (Principles for effective Insolvency and Creditor/debtor Regimes – revised edition 2021), it is precisely these micro-enterprises that need special support and should receive it. This is all the more true as there are considerable liability risks for the entrepreneur, especially when it comes to the settlement of competing third-party rights, the proper termination of employment relationships and other contracts or the correct handling of licensing rights in the phase of insolvency-related liquidation. By contrast, in many countries today the smallest proceedings are handled with flat-rate remuneration of the administrators and the insolvency court. In Germany, the court and administrator costs for massless proceedings with a manageable number of creditors are around 3,000.00 €. For this, the insolvency administrator not only takes care of all pending work, but also fully relieves the debtor of tax declaration obligations, duties towards employees and social security institutions, the assessment of complex legal issues such as rights to separation and separation rights, lessors' and landlords' privileges. A true full service without additional liability risks for the entrepreneur concerned.

- Especially the pre-pack procedure, which is incalculable for creditors, but above all also the administratorless procedure and the impairment of legal peace associated with both institutions due to a no longer orderly or transparent settlement of debtor companies, will, according to the assessment of business associations and leading associations of the credit industry, lead both to an increase in the cost of credit conditions for all companies, regardless of their solvency, but also to a risk surcharge for suppliers, especially wholesalers, up to a significant reduction of payment terms or even the demand for advance payments. An associated price increase is hardly justifiable against the background of the current inflation situation and with reference to the strengthening of the Capital Markets Union.

- The interim result is that the proposal for a directive incomprehensibly interferes deeply with workers' and creditors' rights, places additional demands on the judiciary, which is

already overburdened in many member states, jeopardises legal peace, leads to the expectation of interest rate and price increases both at banks and on the supplier side, and finally leaves the micro-entrepreneurs affected without adequate support.

- On the other hand, the regulations on the right of avoidance, asset tracing and transparency provided for in the proposed directive are to be welcomed in principle. The interest pursued by the directive for more efficiency and transparency of insolvency proceedings within the Union could be significantly improved if the digitalisation of insolvency and restructuring proceedings is clearly emphasised, especially obligatory for claims lodgements, communication between the parties to the proceedings or inspection rights via a digital creditor information system.

- The proposal for a directive's demand for simplified procedures for micro-enterprises or insolvency proceedings without assets should by no means be met by dispensing with an administrator, but by simplifying the liquidation rules themselves. This could include, above all, the waiver of claims audits in the case of established insolvency or insolvency without assets, the waiver of commercial and tax law declaration obligations for the administrator or also the simplified termination of proceedings as well as minimum amounts for a distribution. This would significantly accelerate the handling of insolvency proceedings without leaving the micro-enterprises concerned alone with the central and for them largely unmanageable issues of complex areas of law, such as tax law, labour law, licensing law or even international legal relations.

- By means of a regulation on the financing of procedural costs that already exists in many member states, in Germany for example by means of an amendment to the hitherto ineffective section 26 (4) InsO, the above simplification approaches could also be applied to proceedings without sufficient assets and sources of revenue to cover the costs, but then not without an administrator. Prompt liquidation and deletion from the commercial register would then also ensure that these companies no longer appear on the market.

III. Summary comments on the main regulatory proposals

The members of the responsible committee of our professional association have been working intensively on the proposal for a directive over the last few weeks, incorporating their expertise. The following summary is only the extract of this work. As a guide for national and European legislators, we do not want to withhold the overall result from the professional public and attach it as a separate and at the same time supplementary **Part B.**

Regarding the policy proposals in detail, our analysis can be summarised as follows:

1. AVOIDANCE ACTIONS, Title II

In its very first regulatory subject (Title II), the harmonisation of insolvency avoidance law, the draft directive creates the problem that a methodologically very well thought-out and convincing model will encounter sophisticated catalogues of rankings of claims in some Member States. The concept of insolvency avoidance underlying the draft is based, among other things, on the fundamental principle of equal treatment of creditors and provides for the reversal of legal acts that violate the principle of equal treatment. What has been distributed against this principle to favour individual interests is to be redistributed in favour of the collective interest. However, this redistribution objective comes up against limits the more the collective interest is diluted by rankings which, moreover, differ in the member states.

A constellation of different rankings of claims and harmonised avoidance rules would not reduce the fragmentation and intransparency of the insolvency systems in the Member States, because the final yield of avoidance actions for individual creditors could only be determined by taking into account the respective rankings. It also makes little sense to first deprive privileged creditors of their pre-insolvency benefits by means of avoidance actions, in order to then distribute what they have obtained back to the privileged claims. Different regimes in this respect also provoke strategic "forum shopping". At the same time, a far-reaching waiver of avoidance actions in micro-insolvency proceedings (see there), which form the vast majority of corporate insolvencies in Europe, also raises the fundamental question of the sense of the proposal.

Leaving aside these fundamental deficits, the envisaged minimum standards for avoidance actions are to be assessed positively in principle. In particular, there are no binding privileges for individual creditor groups, nor are the requirements overloaded with too many details. This leaves a sufficient degree of flexibility for the further development of avoidance law by the respective national legislator. From the point of view of creditor protection, the decision that the facts and temporal connecting factors named in the draft represent a lower limit is to be welcomed. More far-reaching rules to strengthen the interests of creditors remain permissible at national level. However, there is a risk of circumvention due to the lack of a rejection of privileges for individual creditor groups. This could effectively undermine the actually sensible rules through far-reaching privileges of individual creditor groups, provided that the characteristic of disadvantage for the creditor group as a whole is missing.

Overall, the other provisions of the proposal on this section appear coherent and are strongly oriented towards the structure of avoidance actions going back to Roman law, as it has already been lived for a long time in Germany or Austria, for example, and also in other Member States. Finally, from a legal doctrinal point of view, a clarification of the legal consequence of the voidability of a legal act would be desirable. It would be conceivable to follow the rule in Article 7 m) of Regulation (EU) 2015/84, which

describes the legal consequence of voidability under insolvency law as "void, voidable or relatively ineffective".

2. TRACING ASSETS BELONGING TO THE INSOLVENCY ESTATE, Title III

The improvements to asset tracing proposed in Title III are sensible and helpful. They will facilitate the identification and repatriation of hidden or "forgotten" assets by insolvency administrators, even across borders. The jurisdiction of special courts and their involvement in asset-tracing for accounts is not only legally required, but also necessary from a practical point of view in order to achieve faster results in cooperation with authorities in cross-border cases. However, since the new investigation possibilities are only to be used by insolvency administrators, they would regularly not be available in the simplified liquidation procedure for micro-enterprises proposed under Title VI, because there the appointment of insolvency administrators is only envisaged in exceptional cases. Because at the same time this new procedure offers considerable incentives for abuse, this constellation would considerably weaken the required protection of creditors.

3. PRE-PACK PROCEEDINGS, Title IV

On the face of it, the pre-pack proceedings (PPP for short) seem to create a sensible legal basis for an early attempt to preserve the company through sale. This is supported in particular by the fact that in some member states similar procedural methods exist, in Germany for example the preparation of a company sale in preliminary insolvency proceedings and the sale with the consent of the creditors' committee immediately after the opening of insolvency proceedings. But even at second glance, it must be critically questioned why such proceedings should be conducted exclusively in self-administration, apparently do not require any grounds for insolvency (likelihood of insolvency), are capable of massively interfering with employee and creditor rights and are open even to the most dishonest debtor.

The macroeconomic consequences and the disadvantages for the parties to the proceedings may still seem manageable and controllable in the insolvency of small and medium-sized companies. But how manageable are the consequences in the case of a sale of an internationally active and listed group via PPP? The distortions to be feared here would hardly be manageable.

In part, the provisions even contradict the requirements of Directive (EU) 2019/1023, which has only recently been implemented in most member states. The legal ideas of creditor protection and, above all, the protection of employees contained therein are largely ignored and in fact undermined in the present proposal. Neither do employees or their representative bodies have a say in the preparation and implementation of a business sale via a PPP in the current version, nor is legal recourse to specialised

courts (e.g. labour courts) open to them through concentration at the court responsible for the PPP in order to ensure the observance of essential protection rights such as in section 613a BGB. Moreover, these rights are called into question in the current formulation of Art. 28 to the extent that the member states have to ensure a transfer to the acquirer "free of debts and liabilities" and thus, possibly contrary to Art. 3 of Directive 2001/23/EC, interventions in "old claims" from employment relationships that would otherwise also have to be taken over by an acquirer would be permissible.

From the point of view of the other creditors, there is also the danger of massive interventions, which are likely to be reflected in price-driving risk premiums in future contracts. Critical here is first of all the "forced" transfer of essential contracts to the acquirer of the company even without the consent of the contractual partner. This encroachment on private autonomy represents a breach of the system which, notwithstanding the already very limited rights of appeal under Article 29 of the proposal, is likely to lead to considerable disputes – especially on the question of whether or not the contractual partner is in competition with the acquirer. From a German point of view, this would de facto eliminate one of the main arguments in favour of the insolvency plan procedure, which is geared towards consensus and majority creditor decisions, since, according to the proposal, essential contracts tied to the previous legal entity could also be transferred directly to an acquirer.

The restriction of freedom of contract by Art. 27 will raise constitutional problems in Member States where freedom of contract is one of the fundamental rights (as in Germany via Art. 2 GG). The means of a judicial exception (Art. 27 (2) a)), which is necessary to maintain proportionality, is in the version presented only geared to the interests of debtors and will therefore not be sufficient to address this problem. In addition, there is the practical problem that not only state agencies but also large private contractual partners such as OEM are not in a position, for organisational but also for compliance reasons, to carry out a change of contractual partner without preconditions or within the shortest possible time.

Similarly, Art. 34 of the draft allows for serious encroachments on the rights of secured creditors, which is likely to lead at least to interest rate risk premiums on the part of lenders, if not to greater reluctance to grant loans. In any case, banks would be more cautious in evaluating the collateral securing a loan in the future.

But even beyond such direct interventions, the creditor rights in the PPP are clearly limited, in contrast to Directive (EU) 2019/1023 and also numerous existing national insolvency regimes. For example, the provisions on strengthening creditors' rights contained in Title VII do not apply to the PPP. Rather, the expertise and consent of the creditors to the sale process is largely dispensed with. They are only entitled to an unspecified "legal hearing" under Article 34, without the associated consequences of

rejection or criticism being specified in more detail. The creditors would therefore generally be "presented with a fait accompli", which is likely to be accompanied by a loss of confidence and acceptance. Thus, on the basis of the current proposal, the creditors are left only with the hope that the debtor in self-administration, under the supervision of the administrator and the court, will be able to prepare and implement a sufficiently transparent and successful sale process in the short time available.

This concern could be addressed, at least to some extent, by providing for certain entry hurdles when initiating a PPP. For example, the scope of application could be limited to "bona fide companies" that have so far duly fulfilled their commercial and tax obligations, similar to the requirements for ordering self-administration pursuant to sections 270 et seq. InsO. On the basis of the current version of the proposed directive, even chaotically to criminally managed companies could without further ado make use of the provisions of the PPP and initiate a quick realisation under their own management – with the above-described, only limited possibilities of control and the high risk that in the short time no sufficiently orderly or even a deliberately abusive sales process takes place.

Furthermore, the "entry requirements" for the preparatory phase of a PPP remain largely unclear. Conversely to Art. 23, which allows the suspension of measures of individual enforcement from the stage of "imminent insolvency" during the preparatory phase, an initiation of the PPP is thus conceivable even without a foreseeable reason for insolvency. Even companies that are actually healthy could thus be forced into a PPP and only become "ready for insolvency" during the proceedings. Here, a "likelihood of insolvency" already existing at the initiation of proceedings – as described in Directive (EU) 2019/1023 – should be obligatory. It is also not very plausible why the PPP should have to be conducted in self-administration. Particularly in constellations in which a fundamentally healthy company gets into difficulties due to the death or illness of the previous entrepreneur, an accelerated sale process could make sense – but then rather in (third-party) administration by an appointed administrator.

There is a high potential for conflict in the proposed measures to restrict the rights of contracting parties and dissenting creditors if and to the extent that it is not ensured that the sale takes place in line with the market and to the exclusion of individual preferential treatment through insider information. Current British reform proposals therefore place particular emphasis on the independence of the persons involved. To ensure this independence, Art. 26 (1) d) of Directive (EU) 2019/1023 already provided for a right of refusal of debtors and creditors in case of conflicts of interest.

Finally, the current version of the draft also raises concerns regarding data protection. Especially in the case of asset deals, there is regularly considerable legal uncertainty regarding the transfer of personal data such as the customer base but also personal

data of business partners on whom the acquirer is imposed as a new contractual partner. If this topic continues to be left out of a fundamental revision, concerns of national data protection authorities are likely to prevent a successful implementation in practice.

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

Title V is intended to introduce an insolvency filing obligation for managing directors. As soon as a managing director becomes aware of the insolvency of his company or must reasonably become aware of it, he shall be obliged to file an insolvency petition within a maximum of 3 months (Art. 36). In the event of a breach of this obligation, a civil liability of the managing director for the damages resulting from the delay in filing the petition must be introduced according to Art. 37.

Insolvency filing obligations, which are flanked by liability under civil law, and in some cases also under criminal law (in Germany through § 15 a and b InsO), have already been established in many member states for decades. They have proven themselves as an instrument of creditor protection. Their protective function is directly related to the definition of the grounds for insolvency. Depending on how broadly or narrowly these are defined, there is scope for filing a petition, which can also be used to the detriment of creditors. The absence of a harmonised definition of insolvency is particularly noticeable here and calls into question the achievement of the proposal's efficiency goals.

From the German point of view, the 3 months of Art. 36 for the obligation to file an application are clearly too long. A deadline that is too long will lead to distortions of competition and thus to disadvantages for companies in Germany as well, since longer deadlines are in principle more attractive for entrepreneurs and advisors and at the same time disadvantageous for creditors. The period of 3 months should therefore be shortened. In addition, in the sense of cross-state creditor protection, it would be advisable for the ground for opening proceedings of over-indebtedness to apply generally in Europe.

Regulations on directors' liability (Art. 37) have always existed in Germany. They should be introduced in a similar way in other European states, again also in order to prevent competitive disadvantages to the detriment of states with stricter regulations, since otherwise precisely this disparity between states with strict regulations and states with less strict regulations would hinder the free movement of capital.

Allowing some European states to apply significantly less stringent rules pursuant to Art. 36 and Art. 37 is contrary to the core objective of the proposed directive, according

to which "a key project for further financial and economic integration within the European Union is to advance the Capital Markets Union" (introductory sentence to COM (2022) 702 final). Therefore, the strictest possible uniform rules are needed on the obligation to apply and the liability of directors, as well as on the determination of insolvency.

5. WINDING-UP OF INSOLVENT MICROENTERPRISES, Title VI

Title VI is the most problematic section of the proposal. According to the regulations there, microenterprises are to be subjected to a special liquidation procedure. Art. 2 (j) defines microenterprises according to the Annex to Commission Recommendation 2003/361/EC (Art. 2 No. 3) as enterprises that employ fewer than 10 people and whose annual turnover or balance sheet total does not exceed 2 million euros. At over 80%, this size of company constitutes the absolute majority of all companies affected by insolvency in Germany according to official statistics. No figures are currently available for Europe, but it seems likely that the situation in the other member states does not differ significantly from that in Germany. With this cut, the proposal not only covers the majority of companies, but also the majority of employees affected by insolvencies of their employers each year because of the high proportion of the total number.

For micro-enterprises, Art. 38 (2) initially proposes – contrary to the otherwise significant abstinence in this regard – an independent definition of the ground for insolvency. However, the decisive specification of when it is to be assumed that a micro-enterprise can no longer pay its due liabilities is to be left to the Member States. They are to ensure a clear, simple definition that is easy for the micro-enterprise to ascertain. This leaves a wide scope, the use of which in the sense already described will lead to efficiency losses. Moreover, with the introduction of an additional, non-uniformly prescribed ground for insolvency instead of harmonisation, there is even a fear of further fragmentation in the area of grounds for insolvency.

Art. 38 (3) requires Member States to ensure that simplified winding-up proceedings are also opened if the costs of the proceedings are not covered by the presumable assets. In Germany – as in many other Member States – this will lead to significant additional costs, as up to now the opening of a significant proportion of all requested proceedings (in Germany approx. 30% per year) has been refused due to lack of coverage of the costs of proceedings. Art. 38 (4) imposes on the Member States to bear these procedural costs themselves in case of doubt; in Germany this would lead to a considerable additional burden on the judiciary budgets.

It is worth mentioning at this point that the rejection of an insolvency petition for lack of assets in Germany does not release the debtor or its management from the responsibility for winding up the company. The order of dismissal merely forcibly places legal

persons into liquidation and creditors are not subject to any restrictions in pursuing their rights. By paying an advance they can also obtain the conduct of insolvency proceedings. Insofar as the proposal is only concerned with avoiding uneconomical referral to courts and insolvency administrators and leaving the liquidation of the company to the debtor, this objective is achieved with the German legal consequence of dismissal of an insolvency petition for lack of assets, and more cheaply and effectively than under the proposal.

In order to reduce the costs of proceedings, according to Art. 39 an insolvency administrator shall only be appointed in simplified winding-up proceedings if the debtor, a creditor or a group of creditors so request and the costs of the appointment are covered by the assets or are paid by the applicant. At least in proceedings with little or no assets, this will result in no insolvency administrator being appointed, leaving open who can and should examine the question of cost coverage. In addition, debtors will try to avoid the appointment of an administrator with the intention of concealment. Since court proceedings must nevertheless be conducted, according to the concept of the proposal the court should take over the tasks of an insolvency administrator insofar as they cannot be fulfilled by the debtor himself (Art. 43 (1)) or a creditor appointed for this purpose (Art. 43 (4) b)).

This division of tasks is not convincing and will encounter considerable practical and legal problems.

At least in Germany, insolvency courts are regularly not equipped in terms of personnel and function to take on the tasks assigned to them here. At present, they would also be overburdened with the utilisation assigned to them (Art. 49). The situation of the judiciary in first instance proceedings is also tense in other European states (cf. https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279). The running times recorded there in some cases and the small number of judges already allow the prediction that tasks on the scale proposed here would overwhelm the judicial systems. The creation of independent authorities would be diametrically opposed to the self-imposed goal of efficiency, because it would trigger high expenses in the form of fixed costs – in addition to the time required to prepare the ground. Moreover, the creation of a new authority would not solve the problem of having to find and train enough suitable personnel.

Even if corresponding posts and training courses were created, the already existing shortage of personnel in the judiciary would give rise to fears that the posts could not be filled. This is all the more true as the demographic change in most member states will further thin out the personnel cover in the judiciary and the administration.

Whether electronic sales platforms in the sense of Art. 50-54 would bring about an increase in efficiency cannot yet be assessed, because such special sales platforms do not yet exist in many Member States or lead a shadowy existence. Their introduction despite already existing private offers (e.g. ebay) would also raise the fundamental question of the proportionality of such an intervention in competition.

In no case would a sales platform solve the problem that assets have to be recorded, valued, appropriately posted on the platform, temporarily stored until they are sold – possibly after transport – made accessible for viewing and finally handed over or shipped to buyers.

A transfer to the debtor will regularly be prohibited due to the debtor's incapacity, which Recital 37 explicitly states: *"The balance sheet test may however be unfeasible for microenterprise debtors, particularly where the debtor is an individual entrepreneur, because of a possible lack of proper record and of a clear distinction between personal assets and liabilities and business assets and liabilities."* The inability established here corresponds to practical experience and regularly also speaks against the debtor's ability to properly realise the insolvency estate. He will often already fail in the correct use of the standard form provided (Art. 41 (4)), to which a complete list of existing liabilities and their collateralisation must also be attached. Experience shows that the absolute majority of debtors are not in a position to provide complete and correct information in this regard. Moreover, negligent non-disclosure of assets entails risks of criminal liability for the debtor who is left alone and overburdened. Usually there are competing security interests in tangible assets held by landlords, suppliers and financiers. In the case of the alternative creditor application, corresponding information is also required under Art. 41 (6), but even less is to be expected in a complete and correct form.

Transferring realisation to individual creditors first requires a suitability test and – especially in the case of competing security interests – harbours considerable potential for conflict if the realisation of an already very small mass is placed in the hands of the financial creditors and their servicing companies, who are regularly solely empowered to do so.

Against this background, the further cuts to the procedure envisaged to the detriment of the creditors seem somewhat logical. However, they promise little in the way of efficiency gains. The moratorium on enforcement measures by individual creditors, which is also provided for here (Art. 44 (1)), is called into question by the possibility of individual, vaguely formulated exceptions (Art. 44 (2)). Preclusion of further claims in the event of failure to object to the debtor's statements (Art. 46 (2) and (3)) is particularly detrimental to smaller creditors who cannot constantly monitor official publications on insolvency proceedings (Art. 45).

The practical elimination of insolvency challenges, which creditors are not in a position to assert for lack of information (Art. 47), blocks an important path to increase the insolvency estate and thus to the best possible satisfaction of creditors, at least in German practice in micro-proceedings. Here it is often the claims of public creditors that are still satisfied to the last under the threat of punishment or under enforcement pressure, which therefore particularly often enables avoidance actions. The practical idling of these claims, which Art. 49 would lead to, would be to the detriment of the remaining creditors and, contrary to Title II of the proposal, the consequence of a procedure that throws fundamental principles of insolvency law overboard in favour of acceleration and dispenses with any transparency.

The proposal on liquidation proceedings for micro-enterprises thus completely misses the reality of states with modern insolvency regimes – such as Germany – even in cases where no proceedings are opened for lack of assets. The objective of faster, simpler and more affordable proceedings mentioned in Recital 35 (Recital 36) is not achieved by requiring courts or administrative authorities to build, maintain and act capacity instead of an administrator.

On the contrary, in administratorless proceedings the costs will be higher, the proceedings will take longer and, above all, the numerous obligations within the framework of these proceedings will regularly no longer be fulfilled at all if a professional administrator does not take them on. This concerns in particular the rights of employees, for whom, among other things, wage and insolvency benefit certificates must be issued in order to avoid disadvantages for their later pension claims. Employees will be a major group of stakeholders at whose expense administratorless proceedings will have a negative impact.

The prospect of proceedings without an administrator is also an invitation to abuse and a business field for dubious advisors. Without an insolvency administrator, the danger will materialise in a large number of cases that assets (deliberately) withdrawn from creditor access cannot be traced in the proceedings and added to the insolvency estate for the benefit of the creditors as a whole. Title VI of the proposal thus contradicts not only its Title III, but also the recommendations of the World Bank (Principles for effective Insolvency and Creditor/Debtor Regimes, revised edition 2021 – C 18, p. 34).

6. CREDITORS' COMMITTEE, Title VII

Title VII proposes rules on the design and operation of creditors' committees. These committees are anchored in law in many Member States (in Germany by section 67 InsO) and can often be formed at an early stage of proceedings (section 22a InsO). They are mainly used in larger proceedings where, on the one hand, there is a need

for such a support and control body and, on the other hand, the raising of the additional costs is economically justified by a sufficient insolvency estate for this purpose. The proposed rules correspond in many respects to existing rules or to current practice in the Member States, but in some cases they need to be corrected and their depth of regulation is too far-reaching.

According to Art. 59, the establishment of creditors' committees should only be possible at the request of at least one creditor, even at a very early stage of the proceedings. This provision presupposes that all creditors are already aware of the initiation of proceedings at this stage. Such knowledge will regularly only be obtained by larger market participants who have special sources of information at their disposal. The application model is therefore unsuitable. Following the model of section 22a of the German Insolvency Code (InsO), the court should be authorised to set up a preliminary creditors' committee starting from a certain size of debtor company, which the creditors' meeting can then confirm or dismiss.

With regard to the composition of creditors' committees (Art. 59 (3) and Art. 60), several aspects stand out that should also be corrected to improve creditor protection.

Firstly, the proposal – in the case of judicial appointment – does not provide for the mandatory or at least regular participation of employee representatives (in Germany section 67 (2) sentence 2 InsO). Especially in larger companies, however, this participation makes perfect sense because there are often representative bodies of the employees that make representative participation in the creditors' committee possible.

Secondly, the proposal does not provide for the possibility of also appointing persons as members of the creditors' committee who are not creditors themselves. This possibility has proven very helpful in Germany, in particular to ensure the qualification of the committees, e.g. through the participation of trade union representatives or persons representing creditor pools without representing individual creditors.

The possibility of challenging appointments by "interested parties" proposed in Art. 59 (5) is very unclear in its legal implications and, in addition to considerable potential for conflict, also harbours the danger that committees are unable to act because of disputes over the appointment of individual members. It should therefore be dropped without replacement.

The possibility provided for in Art. 60 (2) of setting up several creditors' committees in one procedure would not bring about an increase in efficiency because, in addition to numerous legal issues, it would also create considerable additional work, for example in terms of communication requirements, as well as a source of conflict if different opinions were formed there on certain central procedural issues.

This would be particularly problematic where creditors' committees are given the power under national law to approve certain resolutions or legal acts under Art. 64 (2).

The legal remedies provided for this case in Art. 67 (1) harbour the risk of delays, despite the acceleration requirement in Art. 67 (2), which may ultimately jeopardise important procedural results. The associated problem of potential abuse (holdout positions) should be eliminated through appropriate precautions.

7. MEASURES ENHANCING TRANSPARENCY OF NATIONAL INSOLVENCY LAWS, Title VIII

The measures proposed in Art. 68 to increase the transparency of national insolvency law are in principle a useful addition and standardisation of information sources, especially for private individuals and smaller companies. However, even if they are implemented, they will do little to improve the transparency of national peculiarities. For one thing, the requirements on the scope and presentation of information allow at best a rudimentary and thus unhelpful overview. On the other hand, the proposals omission of central harmonisation aspects (grounds for insolvency and order of precedence) leaves a great diversity that is further increased by new procedures and types of proceedings, and which is almost impossible to keep track of even with prior knowledge and if one looks at it in depth.

More intensive digital design of insolvency and restructuring procedures and the introduction of a digital creditor information system could create more transparency and greater accessibility.

Part B

1. introduction

a) History of the proposal

The proposal for a Directive on the harmonisation of certain aspects of insolvency law (hereinafter: the Proposal) submitted on 7.12.2022 marks a further step in the harmonisation of insolvency law in Europe.

The first step was Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, which was reformed and extended by REGULATION (EU) 2015/848 OF THE EURO-

PEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings. It essentially regulates international court jurisdiction for insolvency proceedings, applicable law, mutual recognition of judgments, rights of participation and coordination and cooperation in the case of several insolvency proceedings concerning the assets of a debtor or a group of companies.

A second step was taken with the DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on preventive restructuring frameworks, on debt relief and on activity bans and on measures to improve the efficiency of restructuring, insolvency and debt relief procedures and amending Directive (EU) 2017/1132 – Directive on restructuring and insolvency. Its main purpose was to introduce or harmonise a framework for pre-insolvency restructuring and post-insolvency debt relief for natural persons engaged in business.

In a third step, the proposal now presented is intended to unify central aspects of substantive insolvency law for companies for the first time.

Recital 60 explains the necessary necessity within the framework of the enabling provision in Article 114 of the Treaty on the Functioning of the European Union (TFEU):

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

b) Aim of the proposal

The aim of this proposal is, in the words of its Recital 1 and 2:

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

(2) The wide differences in substantive insolvency laws acknowledged by Regulation (EU) 2015/848 of the European Parliament and of the Council[1] create barriers to the internal market by reducing the attractiveness of cross-border investments, thus impacting the cross-border movement of capital within the Union and to and from third countries."

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

The explanatory memorandum of the proposal (page 2-3) further explains:
"The absence of more convergence in insolvency regimes will mean that the level of cross-border investment and cross-border business relationships would not reach its potential. Action at EU level is needed to substantially reduce the fragmentation of insolvency regimes. It would support the convergence of targeted elements of Member States' insolvency rules and create common standards across all Member States, thus facilitating cross-border investment. Measures at EU level would ensure a level playing field and avoid distortions of cross-border investment decisions caused by lack of information about and differences in the designs of insolvency regimes. This would help to facilitate cross-border investments and competition while protecting the orderly functioning of the single market. Since divergences in insolvency regimes are a key obstacle to cross-border investment, addressing this obstacle is crucial to realising a single market for capital in the EU."

This derivation of a need for reform from the functioning of the common market is not convincing. Nobody invests in a certain economic area because they want to suffer losses or insolvency there. Fiscal, labour and social framework conditions are far more important. The relative advantages and disadvantages of a stronger orientation towards creditors' rights or debtors' interests also do not provide a clear indication for reforms. They are also not interpreted in the literature as a uniform signal for a particular design of national or European insolvency rules.

Insolvency law becomes relevant for investors, however, when investments are to be made in non-performing loans (NPLs) where the risk of loss has already materialised, at least in part, in a reduction in the value of the loan. To the extent of this materialisation, the interest in satisfying the claim as completely as possible is superseded by the interest in realising its remaining residual value as quickly as possible.

The impression therefore arises that this particular form of investment is once again – as already in the context of the Restructuring Directive – at the forefront of the considerations addressed with regard to the functioning of the common market.

Recital 3 explains this:

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

This exploitation background had already been explained in 2016 in the explanatory memorandum to the first draft of the Restructuring and Insolvency Directive (COM (2016) 723 final):

"Despite an improvement in cyclical conditions, the level of non-performing loans, which increased rapidly in most Member States following the economic crisis, remains high. High levels of non-performing loans have a direct consequence on banks' capacity to support growth. In some Member States, targeted reforms have had a positive impact. However, the resilience of non-performing loans in the European Union shows that further action needs to be taken to ensure that the negative feedback loop between poor asset quality, lagging credit developments and low growth does not become prevalent. Measures to increase the effectiveness of restructuring, insolvency and second chance frameworks would contribute to efficient management of defaulting loans and reduce accumulation of non-performing loans on bank balance sheets. They would also contribute to improving the residual value which can be expected by creditors by allowing an earlier and swifter restructuring or resolution for debtors facing financial difficulties. Finally, they can also serve to avoid future build-up of non-performing loans since loans on which performance ceases could be enforced more efficiently. Improving legal settings of enforcement regimes will not fully resolve the issue of existing non-performing loans where enforcement proceedings have already started. However, reinforcement of the judiciary setting could help to speed up the proceedings' remaining steps. In this way, reforms of insolvency laws can complement other ongoing reforms at EU level in the banking sector and as regards capital markets."

The Restructuring Directive had then formulated more cautiously in recitals (6) and (7):

"(6) The excessive length of procedures concerning restructuring, insolvency and discharge of debt in several Member States is an important factor triggering low recovery rates and deterring investors from carrying out business in jurisdictions where procedures risk taking too long and being unduly costly.
(7) Differences between Member States in relation to procedures concerning restructuring, insolvency and discharge of debt translate into additional costs for investors when assessing the risk of debtors getting into financial difficulties in one or more Member States, or of investing in viable businesses in financial difficulties, as well as additional costs of restructuring enterprises that have establishments, creditors or assets in other Member States.(...)"

This approach is not convincing, at least not at present. The Commission itself points out in a Communication of 16 December 2020 (COM (2020) 822 final) that the NPL risk in Europe has fallen significantly since the financial crisis of 2008 and 2009 and also emphasises the still uncertain and incomplete data situation. She explains the further implications for insolvency law (p.17):

"The implementation of Directive (EU) 2019/1023 on preventive restructuring frameworks should also help prevent the build-up of non-performing loans. Improving preventive restructuring frameworks would ensure that action is taken before companies default on their loans, thus helping to reduce the risk of loans becoming non-performing during economic downturns and mitigating the negative impact on the financial sector. At the same time, non-viable companies with no chance of survival should be wound down as quickly as possible. Member States must adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 17 July 2021."

A cautionary note on the necessary implementation of the Restructuring and Insolvency Directive can also be found in several reactions from the business community to the announcement of further harmonisation steps. It remains incomprehensible why further harmonisation is proposed on an unsecured data basis, although the effects of implementing the Restructuring and Insolvency Directive expected by the Commission itself could in part not even occur yet.

In a paper published in 2021 ("How Insolvency and Creditor/Debtor Regimes Can Help Address Nonperforming Loans" – p. 8), the World Bank also points to the so far weak evidence of a link between insolvency rules (ICR) and NPL development:

"The evidence suggests that, all other conditions remaining the same, reforming ICR systems could help decrease NPL occurrence. This evidence is supported by a study on NPL determinants in 36 Middle East and African (MENA) banks finding that stronger legal rights (as measured by the legal rights index of the World Bank's Doing Business) are associated with lower NPL levels (Boudriga, Taktak, and Jellouli 2010).8 It is worth noting, though, that increases in ICR effectiveness have also been found to widen access to credit and to prevent the exclusion of lower-grade borrowers from the market (Jappelli,Pagano, and Bianco 2005; Haselmann, Pistor, and Vig 2009;Houston et al. 2010; Vig 2013). As these effects are associated with riskier lending, the aggregate effect of ICR frame-works on NPL occurrence might be described as ambiguous."

It concludes that only a correlation between the <u>effectiveness</u> of insolvency rules and the ability to reduce the NPL problem can be established:

"The evidence described in this Policy Note suggests that ICR reform can be a powerful tool for combating the NPL problem. Indeed, a growing number of studies suggest that effective ICR regimes, particularly those promoting strong creditors' rights, have the effect of decreasing the frequency and magnitude with which loans become nonperforming. Evidence also shows that more effective ICR regimes can further contribute to improving NPL resolution. In particular, faster contract and out-of-court enforcement, more efficient pre-insolvency mechanisms, and effective insolvency frameworks are all associated with a statistically significant positive impact on reducing NPL levels or accelerating the speed with which these levels are reduced - countries that take an

active stance against NPL levels experience more growth than countries that fail to adopt any measures to combat these loans. "

c) Efficiency as a regulatory objective

In order to achieve the goal of a "real" Capital Markets Union, however, the proposal now aims to specifically increase the efficiency of insolvency proceedings (page 1):

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

Recital 4 states that:

"(4) The integration of the internal market in the area of insolvency laws pursued by this Directive is a key tool for a more efficient functioning of the capital markets in the European Union, including greater access to corporate financing. Therefore, it is necessary to set out minimum requirements in targeted areas of national insolvency proceedings, which have a significant impact on the efficiency and length of such proceedings, especially on cross-border insolvency proceedings."

The effectiveness still emphasised by the World Bank (see above) is no longer mentioned here. Instead, the proposal aims to increase efficiency by harmonising certain aspects of insolvency law.
The concept of efficiency is not further explained or defined in the text of the proposal. However, the Commission's Inception Impact Assessment of 11.11.2020 makes the following reference to this:
"An effective insolvency law should help to speedily and efficiently liquidate non-viable firms and restructure (within insolvency proceedings) those that can be led back to viability and thus enable them to continue operating. Insolvency rules should also preserve the value that can be received by creditors, shareholders, employees, tax authorities and other parties concerned, whilst ensuring an adequate balance of interests of different stakeholders. A better insolvency framework contributes to a more efficient allocation of capital within and across Member States; more efficient and predictable insolvency frameworks are expected to facilitate cross-border investments and flows of market-based finance. The importance of predictability and of having coherent insolvency regimes is even more important when the investment is not secured (collateralised)."

In the introduction to the current proposal for a directive itself (page 12), one still finds this formulation:

"This proposal targets the three key dimensions of insolvency law: (i) the recovery of assets from the liquidated insolvency estate; (ii) the efficiency of proceedings; and (iii) the predictable and fair distribution of recovered value among creditors."

Here, effectiveness as a measure of the ability to achieve goals and efficiency as a measure of the economic use of the resources necessary to do so are juxtaposed.

Accordingly, the draft means by efficiency in the context of insolvency proceedings the achievement of the highest possible returns for creditors with the shortest possible duration of proceedings, low procedural costs and the best possible predictability of the outcome. It also makes clear (see above) that it is only pursuing this goal of increasing efficiency, defined in this way.

This narrow concept of efficiency reduces insolvency proceedings to a court-moderated distillation of financial returns for creditors. The social and regulatory effects of the proceedings remain unevaluated in this view. This is surprising because they have a tangible significance in the field of insolvency proceedings and directly affect the livelihood of those affected.

On the reform of German insolvency law, on the other hand, the draft presented in 1992 had formulated in its explanatory memorandum (BT Drs. 12/2443, p.75):

"Insolvency law, like all law in a democratic and social constitutional state, should create a fair balance, protect the weaker party and bring peace. However, legal policy must not limit itself to viewing insolvency as a social conflict that has already occurred and only strive for the just, judicial distribution of damages and burdens. The reform would miss its task if it saw insolvency merely as a distribution conflict."

This classification of insolvency law still applies today. A shortening of the function of insolvency proceedings addressed here by reducing rights that protect the weaker in favour of a one-sided optimisation of the (macro)economic view risks considerable social damage and a loss of confidence in insolvency law.

However, this is exactly the approach taken in the draft submitted (page 1):

"Insolvency rules are fragmented along national lines. As a result, they deliver different outcomes across Member States, and in particular they have different degrees of efficiency in terms of the time it takes to liquidate a company and the value that can eventually be recovered. In some Member States, this leads to lengthy insolvency procedures and a low average recovery value in liquidation cases."

Such a reduction must be measured in a special way against its own goals. It must therefore at least compensate for deficits elsewhere by ensuring that the efficiency goal is achieved in a sustainable manner.

d) The most important efficiency factors in insolvency proceedings

It is immediately noticeable that two factors in particular, which in practice have a great influence on efficiency in the aforementioned sense, are not the subject of the proposal: the insolvency grounds and the ranking of claims.

Insolvency reasons are the triggers of insolvency proceedings and mark the point in the course of the crisis at which insolvency proceedings must regularly be initiated in order to still save viable parts of the debtor company and to protect the creditors from further damage.

The ranking of the claims then determines which creditors can expect privileged satisfaction from the insolvency estate on which claims and on which claims no or only very low quotas can be expected.

Rankings and insolvency grounds are therefore crucial for efficiency and predictability. They determine when insolvency proceedings will or must take place and what outcome can be expected for which claims.
The earlier insolvency proceedings – also in the sense of restructuring proceedings – are initiated, the better the result as a rule, because the economic erosion of the debtor is not yet too far advanced.

This connection had already been addressed by Directive (EU) 2019/1023 in recital 22:

"The earlier a debtor can detect its financial difficulties and can take appropriate action, the higher the probability of avoiding an impending insolvency or, in the case of a business the viability of which is permanently impaired, the more orderly and efficient the liquidation process would be. "

At the same time, rankings and insolvency grounds exemplify the eminent importance of insolvency law beyond distributional issues. As the ultimate test of contractual or statutory risk provision, insolvency law is always also the arena of distributional conflicts between individual creditors or creditor groups.

The ECB had therefore already expressed disappointment that the proposal did not address these aspects in its opinion of 7 June 2017 on a proposal of the European Parliament and of the Council for a directive on preventive restructuring frameworks, second chance and

measures to improve the efficiency of restructuring, insolvency and debt relief proceedings and amending Directive 2012/30/EU (CON/2017/22):

"Although the proposal introduces a number of highly relevant minimum harmonisation measures for existing restructuring frameworks, it does not follow a holistic approach to the harmonisation of insolvency rules in the Union as a whole, including both restructuring and liquidation, nor does it seek to harmonise key aspects of insolvency law, such as: (a) the conditions for opening insolvency proceedings; (b) a common definition of insolvency; (c) the ranking of insolvency claims; and (d) insolvency avoidance actions. While the ECB is aware of the significant legal and practical challenges involved in developing a holistic approach due to the far-reaching changes in commercial, civil and company law that would have to accompany such an undertaking, it is necessary to take more ambitious measures to establish a common basis for substantial harmonisation of Member States' insolvency laws, thereby achieving more comprehensive harmonisation in the long term and contributing to a well-functioning Capital Markets Union."

By excluding insolvency grounds and rankings, the proposal again avoids a controversial discussion of fundamental political issues that could block the overall project. With the exception of transactions avoidance law, the reforms suggested by the ECB and considered necessary are not proposed. This deficit has a negative impact on many of the proposal's provisions, where it calls into question the hoped-for effects in terms of improving efficiency and reducing the European fragmentation of insolvency proceedings.

2. Avoidance actions (Title II)

a) Introduction

In contrast to some of the other key points in the draft, the envisaged minimum standards on avoidance actions are fundamentally positive. In particular, there are no binding privileges for individual creditor groups, nor are the requirements overloaded with too many details. This leaves a sufficient degree of flexibility for the further development of transactions avoidance law by the respective national legislator.
From the point of view of creditor protection, the decision that the facts and temporal connecting factors named in the draft represent a regulatory minimum is to be welcomed. More far-reaching rules to strengthen creditor interests remain permissible at national level. However, there is a risk of circumvention due to the lack of a rejection of privileges for individual creditor groups. This could effectively undermine the actually sensible rules through far-reaching privileges of individual creditor groups, provided that the characteristic of disadvantage for the creditor group as a whole is missing.

As already stated in the introduction, however, the proposal's waiver of a legal definition of the ground of insolvency represents a further significant "omission", particularly in the area

of avoidance actions. Thus, instead of harmonisation, there is a risk of further fragmentation of the legal situation at national level.

Overall, the remaining provisions of the proposal on this section appear coherent and are strongly oriented towards the structure of transactions avoidance law going back to Roman law, as it has been developed for a long time, for example in Germany or Austria and also in other Member States.

The only need for action on the part of the German legislator is likely to arise with regard to the somewhat "more sharply" formulated definition of "related persons" in Art. 2 q) of the proposal, which in particular contains tightenings under para. 1 iv) and para. 2 iv) in comparison to the present version of § 138 InsO.

The wording in Art. 4 and some of the consequential provisions that legal acts that can be set aside can (should) be "declared null and void" is also worth considering. This could be misinterpreted to mean that the legal consequence of voidability under insolvency law should always be the nullity of the legal act in question triggered by a (judicial?) declaration. Article 7 m) of Regulation (EU) 2015/848 describes the legal consequence of voidability under insolvency law as "void, voidable or relatively ineffective". Art. 5 of the proposal also speaks of the "nullity, voidability or ineffectiveness" of legal acts. The dogmatics in German law tends towards the fact that voidability under insolvency law leads to an automatic ineffectiveness under liability law of the legal act concerned upon the opening of insolvency proceedings, without the need for a specific declaration of voidability. Since it is not apparent that the proposal intends to place the law on avoidance in insolvency on a completely new dogmatic basis, it should be clarified that "void" does not mean a legal consequence requirement.

b) Chapter 1 – General provisions regarding avoidance actions (Art. 4-5)

The provisions on avoidance actions are divided into three parts. Chapter 1 regulates in Art. 4 and 5 of the proposal first the general entry requirements for avoidance actions in the member states. Chapter 2 describes in Articles 6 to 8 a catalogue of transactions relevant to avoidance actions and also defines a time frame for their possible ineffectiveness. Finally, Articles 9 to 12 in Chapter 3 describe the legal consequences of avoidance actions from the perspective of the various parties involved.

The two Articles in Chapter 1 provide the general framework for the proposal's avoidance actions regime. According to Article 4, the basic condition for a transaction to be voidable is that it is detrimental from the point of view of the creditors as a whole. For further details, please refer to Chapter 2. Furthermore, Art. 5 opens up the possibility for the national legislator to create new or maintain existing, more far-reaching regulations for the protection of the body of creditors. Conversely, it is not permissible to fall short of the minimum requirements of the proposal.

aa) Art. 4 – General prerequisites for avoidance actions

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

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

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

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

Thole (ZIP 2023, 390 f.) writes on this:

"According to Art. 6 of the Draft Directive and the further requirements, the Member States must ensure that the voidable legal acts can be declared "null and void". From a German perspective, this raises the question of whether nullity in the strict sense will actually be required, which would turn the dogmatics of the legal consequences of avoidance in German avoidance law on its head. This is because section 143 InsO and German insolvency avoidance have overcome the previously held theory of in rem, according to which the incriminated legal act is ineffective, and "only" grant a restitution claim under the law of obligations and liability. In fact, the wording of the proposal can hardly be overemphasised here, especially since Art. 5 of the Draft Directive also speaks alternatively of provisions on nullity, voidability and ineffectiveness and Art. 9 (2) of the Draft Directive also assumes a claim to compensation in the event of a challenge.
However, the very parallelism of the mention of provisions on nullity, voidability and ineffectiveness addressed here could also indicate that the proposal certainly recognises these differences and has made a quite conscious decision in favour of the legal consequence of nullity.

With regard to the definition of nullity, it should be clarified in a recital that this should apply to transactions involving obligations, but not to transactions involving dispositions.

bb) Art. 5 – Relationship to national provisions

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

By excluding insolvency grounds and ranking, the proposal circumvents a controversial discussion of fundamental political issues that could block the overall project. However, it creates the problem right away in its first regulatory object in (Title II), the minimum harmonisation of avoidance actions rules, that a methodically well thought-out and convincing model will encounter sophisticated catalogues of rankings in some member states. The concept of avoidance actions underlying the draft is based, among other things, on the fundamental principle of equal treatment of creditors and provides for the reversal of legal acts that violate the principle of equal treatment. What was distributed against this principle to favour individual interests is to be redistributed in favour of the collective interest. However, this redistribution objective reaches its limits the more the collective interest is diluted by rankings which, moreover, differ in the member states. It also makes little sense to first deprive privileged creditors of their pre-insolvency advantages by means of avoidance actions, in order to then redistribute what they have obtained among the privileged claims. Different regimes in this respect also provoke strategic "forum shopping".

c) Chapter 2 – Specific conditions for avoidance actions (Art. 6-8)

Chapter 2 (Art. 6-8) regulates in detail the material requirements and the time frame for the voidability or resulting nullity of a transaction.

aa) Art. 6 – Preferences

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

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

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

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

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

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

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

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

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

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

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

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

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

bill or having it endorsed. This knowledge is presumed if the last endorser or the third party was a party closely related to the debtor.

(8) *In the context of avoidance actions, a distinction should be made between legal acts where the claim of the counterparty was due and enforceable and has been satisfied in the owed manner (congruent coverages) and those where performance was not entirely in accordance with the creditor's claim (incongruent coverage). Incongruent coverages include, in particular, premature payments, the satisfaction with unusual means of payments, the subsequent collateralisation of a so far unsecured claim which was not already agreed upon in the original debt agreement, granting an extraordinary termination right or other amendments not provided for in the underlying contract, the waiver of legal defences or objections or the acknowledgement of disputable debts. In the case of congruent coverages, the avoidance ground of preferences can only be invoked if the creditor of the legal act that can be declared void knew, or should have known, at the time of the transaction that the debtor was insolvent.*

(9) *Certain congruent coverages, namely legal acts that are performed directly against fair consideration to the benefit of the insolvency estate, should be exempted from the scope of legal acts that can be declared void. Those legal acts aim at supporting the ordinary daily activity of the debtor's business. Legal acts falling under this exception should have a contractual basis, and require the direct exchange of the mutual performances, but not necessarily a simultaneous exchange of performances, as, in some cases, unavoidable delays may result from practical circumstances. However, this exemption should not cover the granting of credit. Furthermore, performance and counter-performance in those legal acts should have an equivalence in value. At the same time, the counter-performance should benefit the estate and not a third party. This exception should cover, in particular, prompt payment of commodities, wages, or service fees, in particular for legal or economic advisors; cash or card payment of goods necessary for the debtor's daily activity; delivery of goods, products, or services against payment by return; creation of a security right against disbursement of the loan; prompt payment of public fees against consideration (e.g. admittance to public grounds or institutions).*

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

Art. 6 deals with transactions – both payments and the provision of collateral or any other benefit – in a direct temporal connection with the filing of the insolvency petition. Pursuant to para. 1, the relevant period for avoidance is the period from three months prior to the filing of the petition, provided that the debtor was no longer able to pay its due liabilities at that

time. In the case of several petitions, the first admissible petition is taken as the beginning of the relevant period.

Paragraph 2 adds further conditions for avoidance if the debtor has performed a (congruent) service owed in this form. In this case, transactions within the meaning of para. 1 are only voidable if the creditor knew or should have known that the debtor was unable to perform or that an insolvency petition had been filed. It follows from Rec. 8 of the proposal indicates that incongruent cover which the debtor did not owe in that form or at that time is not covered by the restriction in para. 2 and is voidable under the conditions of para. 1. It is worth mentioning that the reference in Art. 2(2)(a) to para. 1 in the German version of the proposal contains the addition "letters a to f", which does not appear in the English version and is also incorrect in terms of content.

If the beneficiary creditor is a person closely associated with the debtor within the meaning of Art. 2 q), the respective knowledge is presumed by reversing the burden of proof. In particular, the extension to employees and advisors of the debtor (Art. 2 q para. 1 iv) should be mentioned, provided they have access to non-public information on the debtor's economic situation. In the case of legal persons, this even applies to their closest relatives – both of these persons with "insider knowledge" and of the company's executive bodies or majority shareholders (cf. Art. 2q para. 2 iv).
Para. 3 contains further restrictions on the voidability / nullity stipulated in para. 1: This concerns in particular the case that the beneficiary had provided an adequate consideration in the immediate (temporal?) context, i.e. the transaction has the character of an everyday cash transaction where there is no disproportion between performance and consideration. The restrictions in connection with cheque and bill of exchange transactions, which are also not to be subject to the avoidance regime under para. 1, are likely to be less relevant in practice. Finally, legal transactions that are subject to the special features of Directives 98/26/EC and 2002/47/EC (payment settlement systems and financial services, respectively) should not be subject to avoidance.

There are no fundamental concerns about the requirements in Art. 6. A clearer definition of incongruent transactions and clarification that benefits obtained through enforcement measures in the critical period are included would be desirable. An exemplary description of incongruent transactions – without clarification on enforcement – can only be found in Recital 8. 8; however, the text of the Directive itself does not contain a definition.
Furthermore, it should be noted that the avoidance under Art. 6 can only be directed against creditors, i.e. against beneficiaries who already had a creditor position prior to the avoidable act. According to the basic interpretation of the provision, avoidance should also be possible against persons for whom the other conditions for avoidance are fulfilled, but who, for example, only acquire a creditor position through the legal act concerned. German law provides for a corresponding catch-all provision in section 132 of the German Insolvency Code (InsO),

which avoids gaps in protection that could result from the restriction to existing creditors as opponents of avoidance.

bb) Art. 7 – Legal acts against no or a manifestly inadequate consideration

1.	*Member States shall ensure that legal acts of the debtor against no or a manifestly inadequate consideration can be declared void where they were perfected within a time period of one year prior to the submission of the request for the opening of insolvency proceedings or after the submission of such request.*
2.	*Paragraph 1 shall not apply to gifts and donations of symbolic value.*
3.	*Where several persons have submitted a request for the opening of insolvency proceedings against the same debtor, the point in time when the first admissible request is submitted shall be considered the beginning of the one-year period referred to in paragraph 1.*

Art. 7 contains provisions on the voidability and concomitant nullity of gifts and donations as well as other transactions where there is a significant disproportion to the consideration. The contestability period for such transactions shall be (at least) one year prior to the filing for insolvency. Gifts or donations of low value ("symbolic value") are excluded. Even as a minimum period, the one-year period for such transactions is likely to be too short, taking into account the protection of creditors on the one hand and the weak justification for protection of the beneficiary in the case of gifts on the other.

cc) Art. 8 – Legal acts intentionally detrimental to creditors

1.	*Member States shall ensure that legal acts by which the debtor has intentionally caused a detriment to the general body of creditors can be declared void where both of the following conditions are met:*
(a)	*those acts were perfected either within a time period of four years prior to the submission of the request for the opening of insolvency proceedings or after the submission of such request;*
(b)	*the other party to the legal act knew or should have known of the debtor's intent to cause a detriment to the general body of creditors.*
The knowledge referred to in the first subparagraph, point (b), shall be presumed if the other party to the legal act was a party closely related to the debtor.	
2.	*Where several persons have submitted a request for the opening of insolvency proceedings against the same debtor, the point in time when the first admissible request is submitted shall be considered the beginning of the four-year period referred to in paragraph 1, first subparagraph, point (a).*

Art. 8 regulates transactions in which the debtor intentionally (or even fraudulently) brings about a disadvantage to the community of creditors. They are to be contestable if the beneficiary knew or should have known of the debtor's intention to disadvantage. The time limit for avoidance in these constellations is four years or more before the oldest admissible insolvency petition. As with Art. 6, knowledge of the opponent of avoidance is presumed if it is a "related person" according to Art. 2 q) of the proposal. The period of presumption of knowledge in the case of related persons goes beyond that under German law (section 133 (4) InsO), but the synchronisation with the contestation period is plausible.

The requirements for contesting intent are also appropriate. The limitation to a contestation period of four years may be debatable. Here, too, an extension by the national legislator is not excluded.

d) Chapter 3 – Consequences of avoidance actions (Art. 9-12)

The third chapter (Art. 9-12) contains regulations on the legal consequences of challenges or the associated nullity of the challengeable transaction on the basis of the possibilities in Chapter 2.

aa) Art. 9 – General consequences

1.	*Member State shall ensure that the claims, rights or obligations resulting from legal acts that have been declared void pursuant to Chapter 2 of this Title may not be invoked to obtain satisfaction from the insolvency estate concerned.*
2.	*Member States shall ensure that the party which benefitted from the legal act that has been declared void is obliged to compensate in full the insolvency estate concerned for the detriment caused to creditors by that legal act.*
	The fact that the enrichment resulting from the legal act that has been declared void is not available anymore in the property of the party which benefited from that legal act ('lapse of enrichment') can only be invoked if that party was neither aware, nor should have been aware, of the circumstances on which the avoidance action is based.
3.	*Member States shall ensure that the limitation period for all claims resulting from the legal act that can be declared void against the other party is three years from the date of the opening of insolvency proceedings.*
4.	*Member States shall ensure that a claim to obtain full compensation pursuant to paragraph 2, first subparagraph, may be assigned to a creditor or a third party.*
5.	*Member States shall ensure that the party that has been obliged to compensate the insolvency estate pursuant to paragraph 2, first subparagraph, cannot set-off this obligation with its claims against the insolvency estate.*

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

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

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

Art. 9 obliges the opposing party to fully return the voidable benefit to the insolvency estate or to render a performance owed if the voidable transaction consisted in its omission. An exception can be made in cases where the opposing party is deprived of the benefit – but only if the opposing party neither knew nor could have known that the transaction was voidable.

The obligations arising from avoidance claims shall not be dischargeable by set-off against claims against the insolvency estate. Member states shall also ensure that the avoidance period is three years from the opening of insolvency proceedings.

There are no fundamental objections to these legal consequences and also to the time frame of the statute of limitations.

bb) Art. 10 – Consequences for the party which benefitted from the legal act that has been declared void

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

> 2. *Member States shall ensure that any counter-performance of the party which benefitted from the legal act that has been declared void performed after or in an instant exchange for the performance of the debtor under that legal act shall be refunded from the insolvency estate to the extent that the counter-performance is still available in the estate in a form that can be distinguished from the rest of the insolvency estate or the insolvency estate is still enriched by its value.*
>
> *In all cases not covered by the first subparagraph, the party which benefitted from the legal act that has been declared void may file claims for the compensation of the counter-performance. For the purposes of the ranking of claims in insolvency proceedings, this claim shall be deemed to have arisen before the opening of insolvency proceedings*

Art. 10 regulates the revival of claims arising from a transaction reversed through avoidance. It is clarified that the corresponding claims of the opponents of avoidance actions have the same rank as other claims from the time before the opening of insolvency (insolvency claims) and are not privileged. This requirement is also appropriate.

cc) Art. 11 – Liability of third parties

> 1. *Member States shall ensure that the rights laid down in Article 9 are enforceable against an heir or another universal successor of the party which benefitted from the legal act that has been declared void.*
>
> 2. *Member States shall ensure that the rights laid down in Article 9 are also enforceable against any individual successor of the other party to the legal act that has been declared void if one of the following conditions is fulfilled:*
>
> *(a) the successor acquired the asset against no or a manifestly inadequate consideration;*
>
> *(b) the successor knew or should have known the circumstances on which the avoidance action is based.*
>
> *The knowledge referred to in the first subparagraph, point (b), shall be presumed if the individual successor is a party closely related to the party which benefitted from the legal act that has been declared void.*

Art. 11 provides that the effects of avoidance actions under Art. 9 also apply comprehensively to heirs or universal successors of the opponent of avoidance actions. In the case of singular succession, however, this shall only apply if the corresponding objects were acquired below value or the circumstances of the voidability of the initial transaction were recognisable.

dd) Art. 12 – Relation to other instruments

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

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

Art. 12 clarifies that the privileged treatment of "fresh money" on the basis of Directive 2019/1023 (there Art. 17 and 18) may not be affected by the provisions in this proposal.

As already stated above, the provisions of the proposal do not contain any rules on the possible ranking of creditors' rights. This decision is apparently to be left to the respective national legislator and will thus lead to very different assessments of transactions in cross-border legal relations in the future. If extensive use is made of this possibility, there is a de facto risk of the actually desirable minimum standards being undermined. This is because in certain cases there will be a lack of disadvantages from the point of view of the creditor community at the national level.
In order to actually develop a uniform avoidance regime that is conducive to the internal market, creditor privileges should be handled in an extremely restrictive manner. Otherwise, there will remain a strong fragmentation at the level of the individual member states.
The same applies to the waiver of a binding minimum definition of insolvency already mentioned in the introduction to this section. Particularly in the area of avoidance actions, but also for many other issues in substantive insolvency law, a corresponding definition would be more than desirable in order to strengthen confidence in cross-border commercial and legal transactions and to ensure a harmonised common understanding.

3. Tracing assets belonging to the insolvency estate (Title III)

a) Chapter 1 – Access to bank account information by designated courts (Art. 13-16)

aa) Art. 13 – Designated courts

1.	*Each Member State shall designate, among its courts that are competent to hear cases related to procedures in restructuring, insolvency or discharge of debt, the courts empowered to access and search its national centralised bank account registry established pursuant to Article 32a of Directive (EU) 2015/849 ('designated courts').*
2.	*Each Member State shall notify the Commission of its designated courts by [6 months from transposition date], and shall notify the Commission of any amendment thereto. The Commission shall publish the notifications in the Official Journal of the European Union.*

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

bb) Art. 14 – Access to and searches of bank account information by designated courts

1.	*Member States shall ensure that, upon request of the insolvency practitioner appointed in ongoing insolvency proceedings, the designated courts have the power to access and search, directly and immediately, bank account information listed in Article 32a(3) of Directive (EU) 2015/849, where necessary for the purposes of identifying and tracing assets belonging to the insolvency estate of the debtor in that proceedings, including those subject to avoidance actions.*
2.	*Member States shall ensure that, upon request of the insolvency practitioner appointed in ongoing insolvency proceedings, the designated courts have the power to access and search, directly and immediately, bank account information in other Member States available through the bank account registers (BAR) single access point set up pursuant to Article XX of Directive (EU) YYYY/XX [OP: the new Anti-Money Laundering Directive] where necessary for the purposes of identifying and tracing assets belonging to the insolvency estate of the debtor in that proceedings, including those subject to avoidance actions.*
3.	*The additional information that Member States consider essential and include in the centralised bank account registries pursuant to Article 32a(4) of Directive (EU) 2015/849 shall not be accessible and searchable by designated courts.*
4.	*For the purpose of paragraphs 1 and 2, access and searches shall be considered to be direct and immediate, inter alia, where the national authorities operating the central bank account registries transmit the bank account information expeditiously by an automated mechanism to the designated courts, provided that no intermediary institution is able to interfere with the requested data or the information to be provided.*

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

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

(18) *Any personal data obtained under this Directive should only be processed in accordance with the applicable data protection rules by designated courts and insolvency practitioners where it is necessary and proportionate for the purposes of identifying and tracing assets belonging to the insolvency estate of the debtor in on-going insolvency proceedings.*

cc) Art. 15 – Conditions for access and for searches by designated courts

1.	*Access to and searches of bank account information in accordance with Article 14 shall be performed only on a case-by-case basis by the staff of each designated court that have been specifically appointed and authorised to perform those tasks.*
2.	*Member States shall ensure that:*
(a)	*the staff of the designated courts maintain high professional standards of confidentiality and data protection, and that they are of high integrity and are appropriately skilled;*
(b)	*technical and organisational measures are in place to ensure the security of the data to high technological standards for the purposes of the exercise by designated courts of the power to access and search bank account information in accordance with Article 14.*

dd) Art. 16 – Monitoring access and searches by designated courts

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

(a) the case reference number;

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

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

(d) the unique identifier of the results;

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

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

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

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

Articles 13 to 16

Art. 13 of the proposal requires Member States to allow (insolvency) courts access to the national database on account data and safe deposit boxes rented from banks established under Art. 32a of Directive 2015/849.

Art. 14 opens up the possibility for the insolvency administrator to initiate bank data searches via the court. According to Art. 2 a), an "insolvency administrator" is an administrator appointed by a judicial or administrative authority in restructuring, insolvency and debt relief proceedings. Upon his or her request, bank account information necessary for the assertion of avoidance actions may also be requested (Art. 14(2)).

Art. 15 stipulates that searches may only be carried out on an ad hoc basis and are reserved for selected personnel within the court in order to prevent abuse. Art. 16 obliges national databases to electronically log incoming queries. It follows from Art. 1(2)(h) that the rules apply to natural persons only insofar as they are entrepreneurs.

Simple and unbureaucratic access by insolvency administrators to national databases regarding bank account information is to be welcomed. The diversions via an (insolvency) court is appropriate and not objectionable in view of the access to personal data. The planned establishment of a central access point for bank account registers to enable queries at European level is also very welcome. Otherwise, the insolvency administrator would have to initiate his

own query in each member state. The establishment of such an office is to be made possible in the future within the framework of a planned new directive to combat money laundering via the central access point for bank account registers (BAR) (see Art. 14 and 15 of the Commission's proposal for the 6th Anti-Money Laundering Directive under COM/2021/423). This is highly recommended.

The provisions should be expanded to the effect that the courts or authorities responsible for conducting insolvency and restructuring proceedings within the scope of their official investigation and court-appointed insolvency experts as well as preliminary insolvency administrators in insolvency petition proceedings have a right of petition under Art. 14.

There is no objective reason not to extend the provisions of Art. 13-16 to all natural persons. Even in consumer insolvency proceedings, bank balances and assets may be located in other Member States.
If the investigation possibilities in consumer insolvency proceedings are worse than in insolvency proceedings for entrepreneurially active persons, a false incentive is set for manipulation with regard to the type of proceedings. At least in Germany, the regulations on consumer insolvency proceedings also apply under certain conditions to former entrepreneurs who have ceased their entrepreneurial activity – even if only recently – at the time of filing for insolvency.

(b) Chapter 2 – Access by insolvency practitioners to beneficial ownership information (Art. 17)

Art. 17 – Access by insolvency practitioners to beneficial ownership information

1.	*Member States shall ensure that insolvency practitioners, when identifying and tracing assets relevant for the insolvency proceedings for which they are appointed, have timely access to the information referred to in Article 30(5), second subparagraph, and in Article 31(4), second subparagraph, of Directive (EU) 2015/849 which is held in the beneficial ownership registers set up in the Member States and is accessible through the system of interconnection of beneficial ownership registers set up in accordance with Article 30(10) and Article 31(9) of Directive (EU) 2015/849.*
2.	*Access to the information by the insolvency practitioners in accordance with paragraph 1 of this Article shall constitute a legitimate interest, whenever it is necessary for identifying and tracing assets belonging to the insolvency estate of the debtor in ongoing insolvency proceedings and is limited to the following information:*
(a)	*the name, the month, the year of birth, the country of residence and the nationality of the legal owner;*
(b)	*the nature and the extent of the beneficial interest held.*

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

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

(19) *Directive (EU) 2015/849 of the European Parliament and the Council*[2] *ensures that persons who are able to demonstrate a legitimate interest are granted access to beneficial ownership information on trusts and other types of legal arrangements, in accordance with data protection rules. Those persons are granted access to information on the name, month and year of birth and the country of residence and nationality of the beneficial owner, as well as the nature and extent of beneficial interest held. It is essential that insolvency practitioners can quickly and easily access that set of information for performing their tasks to trace assets in the context of ongoing insolvency proceedings. It is therefore necessary to clarify that in such a case access by insolvency practitioners constitutes a legitimate interest. At the same time, the scope of data directly accessible by the insolvency practitioners should not be broader than the scope of data accessible by other parties having a legitimate interest.*

Art. 17 of the proposal calls on Member States to provide the insolvency practitioner with direct access, without going through an (insolvency) court, to registers of beneficial owners that enable the insolvency practitioner to identify and trace assets belonging to the insolvency estate. Reference is made to Art. 30 (5) 2nd subparagraph (companies and other legal persons) and Art. 31 (4) 2nd subparagraph (trusts or similar) of Directive (EU) 2015/849. The aim of Art. 17 is to enable the insolvency practitioner to access the name, month and year of birth, country of residence and nationality of the beneficial owner of legal persons, including the nature and extent of the beneficial interest held. Art. 17(2) of the proposal postulates a legal interest within the meaning of Art. 31(4) 2nd subparagraph of Directive (EU) 2015/849, provided that the information required is also necessary in the case of a trust to identify and trace assets belonging to the debtor's insolvency estate in the ongoing insolvency proceedings.

The information regarding the beneficial owners of legal persons is already accessible to the entire public on the basis of Art. 30 (5) 2nd subparagraph of Directive (EU) 2015/849. In this

[2] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141 5.6.2015, p. 73).

respect, Art. 17 merely serves the purpose of clarification. The beneficial owners of trusts and other legal arrangements such as "fiducie" or certain types of trust or "fideicomiso", on the other hand, are only to be disclosed by the competent national registers in the event of a legitimate interest. This legitimate interest is now enshrined in law for the purposes of identifying assets of the insolvency estate.

The provisions should be expanded to the effect that provisional insolvency administrators and court-appointed insolvency experts in insolvency petition proceedings also have a right of inspection under Art. 17. Furthermore, an independent query by the insolvency courts within the scope of their official investigation would also be desirable.

c) Chapter 3 – Access by insolvency practitioners to national asset registers (Art. 18)

Art. 18 – Access by insolvency practitioners to national asset registers

1.	*Member States shall ensure that insolvency practitioners, regardless of the Member State where they have been appointed, have direct and expeditious access to the national asset registers listed in the Annex located in their territory, where available.*
2.	*With respect to access to the national asset registers listed in the Annex, every Member State shall ensure that the insolvency practitioners appointed in another Member State are not subject to access conditions that are de jure or de facto less favourable than the conditions granted to the insolvency practitioners appointed in that Member State.*

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

Article 18 of the proposal calls on Member States to allow all insolvency practitioners direct access to national asset registers. The national asset registers to be considered in this respect are listed in the Annex to the Directive. They include land registers as well as registers of motor vehicles, ships, aircraft, weapons, securities, wills, patents, trademarks and internet domains. It follows from Art. 1(2)(h) that the regulations should only apply to natural persons engaged in business.

Rapid access to information on assets of value such as real estate, motor vehicles, ships and aircraft is of considerable practical importance for the identification of assets of the insolvency estate – especially if they are located in third countries. The proposal includes as many national asset registers as possible.

In the Annex to the proposed Directive, it should be clarified under point 6 that the securities registers required to provide information also include the custodians of e-securities.

It would also be desirable to set up a European database/central access point to enable queries at European level. Otherwise, the insolvency administrator would have to carry out his own search in each member state. The effort involved for administrators and courts would make it more difficult to obtain information and would thus contradict the aim of the regulations.

The provisions should be expanded to the effect that provisional insolvency administrators and court-appointed insolvency experts in insolvency petition proceedings also have a right of inspection under Article 18. Furthermore, an independent query by the insolvency courts within the scope of their official investigation would also be desirable.

There is no objective reason not to extend the provisions of Art. 18 to all natural persons. Even in consumer insolvency proceedings, assets may be located in other member states.

Within the framework of intergovernmental agreements, the European Commission should also work towards extending the consultation of asset registers to countries outside the European Union, in particular countries of the Schengen area such as Switzerland, Liechtenstein and Norway.

4. Pre-pack proceedings (Title IV)

a) Chapter 1 – General Provisions (Art. 19-21)

aa) Art. 19 – Pre-pack proceedings

1.	*Member States shall ensure that pre-pack proceedings are composed of the following two consecutive phases*
(a)	*the preparation phase, which aims at finding an appropriate buyer for the debtor's business or part thereof;*
(b)	*the liquidation phase, which aims at approving and executing the sale of the debtor's business or part thereof and at distributing the proceeds to the creditors.*
2.	*Pre-pack proceedings shall comply with the conditions set out in this Title. As regards all other matters, including the ranking of claims and the rules on distribution of proceeds, Member States shall apply national provisions on winding-up proceedings, provided that they are compatible with Union law, including the rules laid down in this Title.*

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

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

The introduction of PRE-PACK PROCEEDINGS (hereinafter referred to as "the PPP") adds another procedure to the variety of restructuring procedures, which is geared towards the sale as a going concern. It is seen as a measure in connection with the early recognition of crises and is to be welcomed for this reason.

Uncoordinated distress sale scenarios in the "death throes" of insolvency are to be replaced by a legal framework for a structured (company) sale process that does justice to the company's crisis situation by (i) making it the subject of the insolvency proceedings and (ii) introducing a preparatory procedure.
In Germany, this procedural structure suggests its location in the opening proceedings of the Insolvency Code (§§ 21 ff. InsO). The transfer to the liquidation phase represents the caesura of the opening of proceedings and the implementation competence associated with it. This is also expressed in Art. 23, according to which individual compulsory enforcement measures can be suspended during the preparatory phase (comparable to section 21 (2) no. 3 InsO).

The integration of the PPP into the insolvency proceedings must, however, be carefully coordinated with the transferring restructuring already possible under current German law on the effective date of the opening of proceedings on the one hand and the self-administering plan insolvency on the other. The latter, too, does not necessarily have to be aimed at preserving the shareholder structure, but can also be aimed at changing it. The introduction of the PPP therefore requires a strict delineation of the (insolvency law) framework conditions for a company sale.

This demarcation must have its starting point in the application to the insolvency court. The PPP should be designed – comparable to the German Schutzschirmverfahren (§ 270d InsO) – as a special type of application procedure. At least in the preparatory phase, according to Art. 22, the debtor should retain control over the company. While the protective shield aims to preserve the legal entity and (usually) the shareholder structure, the PPP aims to sell the company. The implementation of both procedures is geared to the opening date. The submission of the plan in the case of the protective shield is contrasted with the sale in the case of the PPP.

bb) Art. 20 – Relationship with other Union legal acts

1.	*The liquidation phase referred to in Article 19, paragraph 1, shall be considered to be an insolvency proceeding as defined in Article 2, point (4), of Regulation (EU) 2015/848.* *Monitors referred to in Article 22 may be considered to be insolvency practitioners as defined in Article 2, point (5), of Regulation (EU) 2015/848.*
2.	*For the purposes of Article 5(1) of Council Directive 2001/23/EC[3], the liquidation phase shall be considered to be bankruptcy or insolvency proceedings instituted with a view to the liquidation of the assets of the transferor under the supervision of a competent public authority.*

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

cc) Art. 21 – Jurisdiction in pre-pack proceedings

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

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

According to Art. 28, Member States shall ensure that the purchaser acquires the debtor's business or the relevant part thereof free from debts and liabilities unless the purchaser expressly agrees to bear the debts and liabilities of the business or the relevant part thereof. Accordingly, the comprehensive and exclusive jurisdiction of the court established by Art. 21 would also affect questions that have so far been decided by other courts in the Member States.
In Germany this includes, for example, the questions of a transfer of business pursuant to section 613 a of the German Civil Code (BGB), which up to now have also been decided by the German labour courts in the case of the sale of a company in insolvency, although they concern liabilities of the company purchaser and are closely related to the sale of the company or part of it.

Contrary to the wording of Art. 28, these liabilities are also not dependent on the buyer agreeing to their takeover. Rather, they are a direct legal consequence of the transfer of the business, which can be assumed even if only the most important assets of the business are transferred to a new owner.

Art. 20 (2) expressly declares Art. 5 (1) of Council Directive 2001/23/EC applicable in the liquidation phase of a PPP. According to this provision, the employee rights formulated in Articles 3 and 4 of Council Directive 2001/23/EC do not apply to transfers of undertakings, establishments or parts of undertakings or establishments in respect of which bankruptcy proceedings or analogous proceedings with a view to the liquidation of the assets of the transferor have been opened against the transferor under the supervision of a competent public authority (which may also be understood to include an insolvency administrator authorised by a competent public authority).

This circumstance does not mean, however, that German employees have so far been deprived of their rights in the event of the sale of a company during insolvency. Section 613a of the German Civil Code (BGB) applies in principle to the sale of a business or part of a

business by the insolvency administrator during insolvency proceedings. The grandfathering provisions of section 613a BGB remain fully applicable in insolvency proceedings, but the liability provisions of the provision do not. The acquirer of the business is not liable under section 613a for claims that had already arisen at the time the insolvency proceedings were opened.

Thus, in the PPP, the labour courts would not have jurisdiction, while outside the PPP they would retain their jurisdiction. This would not contribute to the efficiency of the procedure but would only be a further step towards fragmenting an important aspect of company sales in insolvency and a shortening of workers' rights.

The exclusive jurisdiction of the courts having jurisdiction over pre-pack proceedings over all matters relating to the scope and effect of the sale of the debtor's business or part thereof in pre-pack proceedings on debts and liabilities within the meaning of Article 28 should be deleted without replacement.

The introduction of the (also) self-administering PPP must also not lead to established instruments such as the German (plan) insolvency in self-administration losing their acceptance and market penetration, nor to the increased requirements for (plan) insolvency in self-administration (sections 270a et seq. InsO) – which have arrived and been accepted in practice – (being) undermined. This concern is raised in particular by the possible sale of companies to related parties in the PPP, which is expressly provided for in the draft directive.

This concern is even more justified by the fact that the proposed Directive lacks concrete requirements for access to a PPP. It only regulates the procedure during the preparatory phase and that an application for the appointment of a cover pool administrator must be made (Art. 22(1)). The proximity to the design of the application procedure as self-administration suggests an alignment of the initiation and order requirements with sections 270a et seq. of the German Insolvency Code (InsO).

b) Chapter 2 – Preparation phase (Art. 22-24)

aa) Art. 22 – The monitor

1.	*Member States shall provide that, upon request of the debtor, the court appoints a monitor.*
	The appointment of the monitor shall start the preparation phase referred to in Article 19, paragraph 1.
2.	*Member States shall ensure that the monitor:*
(a)	*documents and reports each step of the sale process;*

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

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

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

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

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

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

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

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

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

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

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

(24) *The pre-pack proceedings should ensure that the monitor appointed in the preparation phase might propose the best bid obtained during the sale process for authorisation by the court only if it declares that, in its view, piecemeal liquidation would not recover manifestly more value for creditors than the market price obtained for the business (or part thereof) as a going concern. The going-concern value is, as a rule, higher than the piecemeal liquidation value because it is based on the assumption that the business continues its activity with the minimum of disruption, has the confidence of financial creditors, shareholders and clients and continues to generate revenues. Therefore, the monitor's declaration should not require a valuation being made in every case. The monitor should only reasonably conclude that the sale price is not significantly lower than the proceeds that could be recovered through a piecemeal liquidation. However, an increased scrutiny should be required from the monitor or the insolvency practitioner in cases where the only existing offer is made by a party who is closely related to the debtor. In such situations, the monitor or the insolvency practitioner should reject the offer if it does not satisfy the best-interest-of-creditors test.*

The design of the PPP as a self-administered (debtor in possession) application procedure distinguishes the PPP from the ("classic") transferring reorganisation as the result of regular insolvency proceedings, which has been practised in Germany for many years. In the transferring restructuring, self-administration is also possible as soon as the application is filed.

This is not only the reason for the high requirements for filing an application described in Art. 23 (§270a InsO), but also for the high requirements for the design of the sale procedure and the preparation of the court confirmation decision, which the proposal also considers necessary (Art. 26 (1)).

Although the proposal formulates in Art. 22 (1) the requirement that the debtor must file an application to the competent court, it leaves open what information must be provided in this application.
This gap remains incomprehensible, because according to Art. 22 (1) a preparatory phase should begin with the appointment of a monitor, who must be remunerated. As a rule, the processing of the application will also incur court costs. Art. 22 (5) also logically regulates the question of remuneration and makes the debtor responsible for the remuneration of the monitor if no liquidation phase follows. However, the debtor is not required to prove that he is able to bear the costs of the court and the monitor.
In addition, there is also no possibility of restricting access to the preparatory phase if there are already doubts in advance that elementary conditions for orderly proceedings are not present on the part of the debtor.
Art. 4 (2) of Directive (EU) 2019/1023 states that:

"Member States may provide that debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations under national law are allowed to access a preventive restructuring framework only after those debtors have taken adequate measures to remedy the issues that gave rise to the sentence, with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations."

Access to the preparatory phase of the PPP should be made conditional, along the lines of Art. 4 (2) of Directive (EU) 2019/1023, on proof of compliance with accounting or bookkeeping obligations under national law as well as the ability to bear legal and administrative costs in the event that the preparatory phase is not followed by a liquidation phase.

According to Article 20 (1), the preparatory phase shall not be considered insolvency proceedings within the meaning of Article 2 No. 4 of Regulation (EU) 2015/848, as this characteristic is only attributed to the liquidation phase. Accordingly, during a preparatory phase, a nationally regulated obligation of the debtor to file a petition shall in principle continue to exist according to the requirement of Art. 36. The debtor can only obtain a temporary exemption from this obligation under the conditions of Art. 7 of Directive (EU) 2019/1023.
Art. 7(1) of Directive (EU) 2019/1023 formulates a temporary exemption during a stay of individual enforcement measures from the obligation of a debtor to file a petition to open insolvency proceedings that could lead to the liquidation of the debtor. This protection is extended in Art. 7(2) of Directive (EU) 2019/1023 to creditor petitions filed during this period. However, according to Art. 7(3) of Directive (EU) 2019/1023, Member States should be able

to adopt an exception to these exemptions in the event that a debtor is unable to pay its maturing debts.

If the debtor also applies for suspension of individual enforcement measures for the preparatory phase under Art. 23, the ability to pay all debts falling due during this period would also have to be proven for the period of four months (6) specified in Art. 6 (6).

There is therefore no real reason why the PPP cannot also be structured as regular insolvency proceedings if (strict) entry requirements cannot be met on their own and must be supported by the appointment of a preliminary insolvency administrator. In this respect, a sensible parallelism could also be established here with the design of the German application procedure in the form of protective shield proceedings or as classic regular proceedings, in which an insolvency plan can nevertheless be prepared.

Since the proposal does not contain a time limit for a preparatory phase, the Member States should be allowed to introduce such time limits in line with existing regulations (cf. section 270d (1) sentence 2 InsO). In addition, the preparatory phase should also be able to be structured as part of insolvency proceedings within the meaning of Article 2(4) of Regulation (EU) 2015/848.

Central in this context is the appointment of a so-called "monitor" (Art. 22 (1)), who is simply referred to as "Sachwalter" in the German translation. The same requirements apply to the monitor as to the provisional insolvency administrator (Art. 22 (3)). Consistent with the integration of the PPP into the self-administered application procedure, the task of the "monitor" should therefore be able to be assumed by the provisional administrator.

This process control should be accompanied by regulations aimed at granting a reservation of consent in favour of the monitor for "legal transactions that are not part of the ordinary course of business".

The relationship between confidentiality on the one hand and fairness and transparency on the other is yet to be explored. The (international) recognition of the procedure will require a public announcement.

bb) Art. 23 – Stay of individual enforcement actions

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

proceedings. The monitor shall be heard prior to the decision on the stay of individual enforcement actions.

Like the German Schutzschirmverfahren, the PPP as a self-administered procedure will have to be subject to special order requirements. The Directive is sparse on this, e.g. according to Art. 23 as a situation "in which insolvency is likely or if he is insolvent under national law". It leaves the details to national law.

Due to the early starting point of a probable insolvency, the debtor's continuing control over its assets according to Art. 22 (4) and the possible suspension of individual enforcement measures already in the preparatory phase, the PPP comes close to a restructuring procedure according to Art. 4 et seq. of Directive (EU) 2019/1023.

However, it does not merely present itself as an alternative, but rather as a way of circumventing the rights of employees that are particularly protected in restructuring proceedings (cf. Art. 1 (5) and Art. 13 of Directive (EU) 2019/1023) and the particularly protected rights to an occupational pension (cf. Art. 1 (6) of Directive (EU) 2019/1023). These rights, which are regularly protected in restructuring proceedings (cf. for example the German implementation in § 4 StaRUG) and claims are not specifically protected in the PPP. Only Art. 6 (5) of Directive (EU) 2019/1023, which provides for special protection of employees in the event of the suspension of individual enforcement, is referred to in Art. 23 and thus declared applicable.

The protection of creditors, which is particularly pronounced in restructuring proceedings due to the debtor's obligations to provide evidence and reports (cf. Art. 4 and Art. 8 of Directive (EU) 2019/1023), is also significantly reduced in the PPP. Here, the monitor is apparently to ensure the protection of creditors through the requirements of Art. 22 (2). Further proof and reporting obligations of the debtor are only possible if and insofar as the Member States make use of their rights of organisation in this respect under Art. 19 (2).

The German legislator would probably make use of this leeway by orienting itself towards the strict order requirements for self-administration (cf. sections 270 et seq. InsO).

This orientation would mean that in addition

- A financial plan for the duration of the preparatory and liquidation proceedings until the completion of the sale of the business,
- a concept for the implementation of the sales process that complies with the basic principles of transparency,
- a model of a transaction structure and
- Measures to ensure the transaction capability as well as

- o The effects of the sale of the business for the secured and unsecured creditors in comparison to the effects in the event of liquidation or in the event of restructuring alternatives, provided the business is not unsaleable (section 220 (2) sentence 3 InsO) would have to be documented and submitted by the debtor.

Other member states have different and partly less demanding requirements here. This circumstance perpetuates the fragmentation of national insolvency regimes instead of reducing it. It could also lead to the incentives for abusive forum shopping by stakeholders mentioned by the Commission in the explanatory memorandum of the proposal (page 8).

The blanket reference by Art. 23 to the suspension of individual enforcement measures under Articles 6 and 7 of Directive (EU) 2019/1023 appears legally questionable because of the abridgement of creditors' rights thereby referred to by Art. 7 of Directive (EU) 2019/1023.

The postponement of proceedings to be opened at the request of one or more creditors, which may lead to the liquidation of the debtor, regulated in Art. 7 under (2), makes no sense in the PPP because the purpose of these proceedings is liquidation.

The restrictions on creditors' rights in the drafting of existing contracts regulated in Art. 7 (4) and (5) of Directive (EU) 2019/1023, which are intended to prevent a compulsory liquidation in a restructuring, are also partly unclear and therefore legally problematic.

Pursuant to Art. 7 (5) of Directive (EU) 2019/1023, notice by creditors shall also be precluded (a) on account of an application for the opening of preventive restructuring proceedings, (b) on account of an application for the suspension of individual enforcement measures, (c) on account of the opening of preventive restructuring proceedings, or (d) on account of the granting of a stay of individual enforcement actions as such.
It remains unclear whether this clear reference to restructuring procedures should now be extended by the reference in Art. 23 to a PPP.
So-called Dissolution clauses are also restricted in Germany by the case law of the Federal Supreme Court (most recently IX ZR 213/21 v. 27. 10.2022). According to this case law, ineffectiveness can only be established "if the insolvency-related circumstance in itself enables the dissolution of the contract and the dissolution clause deviates in prerequisites or legal consequences from statutory solution options without there being justified reasons for these deviations when viewed objectively ex ante at the time of the conclusion of the contract on the basis of the mutual interests of the parties".
The BGH further states: "In the case of insolvency-dependent dissolution clauses, such justified reasons can generally result from an objective justified under insolvency law or in favour of a material or service creditor. On the other hand, an insolvency-dependent dissolution clause in favour of a pecuniary creditor is regularly ineffective."

Assuming that a suspension of individual enforcement measures under the PPP is also intended to have the further effects formulated in Art. 7 of Directive (EU) 2019/1023 , significant legal questions arise.
The restrictions on creditors' rights of arrangement formulated in Art. 7 (4) also restrict such rights that are not based on a resolution clause for the case of insolvency.
Art. 7 (4) of Directive (EU) 2019/1023 is also intended to prevent those creditors to whom the suspension applies from refusing performance under material contracts still to be performed, from terminating such contracts, from calling them due early or otherwise modifying them to the detriment of the debtor in respect of debts incurred prior to the suspension and solely on the basis of the fact that the debts have not been repaid by the debtor.
This restriction goes beyond the case law of the BGH described above because it covers cases in which the insolvency-related circumstance (i.e. the filing of an insolvency petition or the opening of insolvency proceedings) does not in itself enable the dissolution of the contract (cf. BGH loc. cit., para. 18).
The German legislator has for good reason (cf. BGH loc.cit. para.35 ff.) refrained from such a far-reaching regulation in order to give private autonomy more room here. Similar to Art. 27 (see there), the proposal also encounters fundamental concerns here because it does not differentiate according to specific contracts.
A continuation obligation in insolvency also exists in sections 108 et seq. InsO for rental and lease agreements. There it can be justified by the existential importance of such tenancies and leases for the insolvent company.
However, Art. 23 states that a suspension of individual enforcement measures and thus the effects under Art. 7 (4) of Directive (EU) 2019/1023 may already be invoked if this facilitates the smooth and effective implementation of the PPP.
Art. 7 (4) does restrict this further to contracts still to be fulfilled which are necessary for the continuation of the daily operation of the enterprise (so-called essential contracts). However, it clearly goes beyond the narrow limits of the German regulation.
The exception clause of Art. 7 (4) subparagraph 2, which provides for national safeguards to ensure adequacy, cannot improve this circumstance either. It is designed as an exception clause and thus to be interpreted narrowly. In this function, it is only intended to prevent unreasonable interference, not to exclude all interference. The right of extraordinary dismissal of employees under section 113 InsO, which is not based on the unreasonableness of the impairment, would therefore probably not be addressed as a national protective measure.
As the example of §§ 108 ff. InsO shows, exceptions exist in the law of the Member States that allow such impairments. However, they are shaped by national legal systems and, in contradiction to the objectives of the proposal, lead to fragmentation of legal consequences and unpredictability of outcomes.

cc) Art. 24 – Principles applicable to the sale process

1.	*Member States shall ensure that the sale process carried out during the preparation phase is competitive, transparent, fair and meets market standards.*
2.	*Where the sale process only produces one binding offer, that offer shall be deemed to reflect the business market price.*
3.	*Member States may depart from paragraph 1 only where the court runs a public auction in the liquidation phase in accordance with Article 26. In this case, Article 22(2), point (b) shall not apply.*

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

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

In the context of Art. 24 (2), it remains unclear how a sales process that produces only one offer is to be determined by competition according to the requirement in Art. 24 (1). Competition has not taken place in this case and the theoretical possibility of competition should not be sufficient according to the wording of Art. 24 (1).

The responsibility of the monitor for deficiencies in the sales process, as required by Rec. 26 should not lead to the monitor's liability for the lack of competition, at least in the case of Art. 24 (2). This should be clarified in Art. 24 (2).

c) Chapter 3 – Liquidation phase (Art. 25-29)

aa) Art. 25 – Appointment of the insolvency practitioner

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

bb) Art. 26 – Authorisation of the sale of the debtor's business or part thereof

1.	*Member States shall ensure that, when the liquidation phase is opened, the court authorises the sale of the debtor's business or part thereof to the acquirer proposed by the monitor, provided that the latter has issued an opinion confirming that the sale process run during the preparation phase complied with the requirements laid down in Article 22(2) and (3), and Article 24(1) and (2).* *The court shall not authorise the sale where the requirements laid down in Article 22(2) and (3) and Article 24(1) and (2) are not met. Member States shall ensure that, in the latter case, the court continues with the insolvency proceedings.*
2.	*In case Member States apply Article 24(3), the public auction referred to in that provision shall last no longer than four weeks and shall be initiated within two weeks as of the opening of the liquidation phase. The offer selected by the monitor shall be used as the initial bid in the public auction. Member States shall ensure that the protections granted to the initial bidder in the preparation phase, such as expense reimbursement or break-up fees, are commensurate and proportionate, and do not deter potentially interested parties from bidding in the liquidation phase.*

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

Contrary to the wording of Art. 26 (1), the reference to Art. 24 (2) does not impose any requirement on the procedure. Art. 24 (2) contains a presumption rule that only refers to the outcome of the sales process and not to its implementation.

Pursuant to Art. 26 (1) sentence 2, the court shall continue the insolvency proceedings outside a PPP if the sale process conducted during the preparatory phase pursuant to Art. 24 (1) was not competitive, transparent and fair and did not meet market standards. According to Art. 22 (2) b), the necessary information shall be provided by the monitor, who shall document and disclose each step of the sale process in writing (the reference to Art. 22 (1) in Art. 22 (2) sentence 2 is obviously meant as a reference to Art. 22 (2)).

Since, according to Art. 22 (4), the debtor retains control over his assets and the daily operation of the business during the preparatory phase and is apparently to be able to appoint the

monitor himself through his right of application under Art. 22 (1), as long as the monitor appointed by him fulfils the requirement formulated in Art. 22 (3), the question already arises at this point as to how the monitor appointed by the debtor is to ensure that he receives all necessary information from the debtor during the preparatory phase.

If a Member State, following the possibility mentioned in Rec. 26, decides to require high standards in the preparatory phase within the meaning of Recital 25. 25, the monitor himself should be responsible for compliance with the market standards. As a rule, however, he can only do this if he is supported by the debtor. However, the proposal leaves precisely this point open and thus falls far short of the necessities of effective creditor protection.

The density of the court's examination still appears to be in need of clarification. On the one hand, the court's examination should not unduly delay the realisation of the sale of the company. On the other hand, the criterion of the creditor's interest must not be lost sight of. The court confirmation (keyword legal force) offers the possibility of making the sale of the business legally secure. However, the strong effects of res judicata, which in the case of the PPP would result in both the release of liabilities (Art. 28) and the assumption of the contract (Art. 27), can only be legitimised if the creditors are provided with sufficient legal protection.

cc) Art. 27 – Assignment or termination of executory contracts

1.	*Member States shall ensure that the acquirer of the debtor's business or part thereof is assigned the executory contracts which are necessary for the continuation of the debtor's business and the suspension of which would lead to a business standstill. The assignment shall not require the consent of the debtor's counterparty or counterparties.*
	The first subparagraph shall not apply if the acquirer of the debtor's business or part thereof is a competitor to the debtor's counterparty or counterparties.
2.	*Member States shall ensure that the court may decide to terminate the executory contracts referred to in paragraph 1, first subparagraph, provided that one of the following conditions applies:*
(a)	*the termination is in the interest of the debtor's business or part thereof;*
(b)	*the executory contract contains public service obligations for which the counterparty is a public authority and the acquirer of the debtor's business or part thereof does not meet the technical and legal obligations to carry out the services provided for in such contract.*
	Point (a) of the first subparagraph shall not apply to executory contracts relating to licenses of intellectual and industrial property rights.
3.	*The law applicable to the assignment or to the termination of executory contracts shall be the law of the Member State where the liquidation phase has been opened.*

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

Art. 27 (1) obliges the contractual partners necessary for the continuation of the business to maintain their contractual relationship also with the buyer. According to Art. 27 (2), exceptions to this are only to be possible if the court agrees or if the buyer does not fulfil certain requirements for the continuation of contractual relations with state partners.

The restriction of freedom of contract by Art. 27 will raise constitutional problems in Member States where freedom of contract is one of the fundamental rights (as in Germany via Art. 2 GG).
In contrast to Art. 7 (4) and (5) of Directive (EU) 2019/1023 , which obviously served as a model for the contract preservation proposed here, this encroachment on private autonomy is also not placed under the primacy of reasonableness (cf. Art. 7 (4) subparagraph 2 there). This is surprising because the provision proposed in Art. 27 (1) interferes much more deeply with the private autonomy of the contracting parties. It binds the contracting parties to a buyer whom they have not regularly chosen themselves as a new contracting party.
Any rights of defence as a creditor are also severely restricted to this end.
In order not to jeopardise the success of the sale through objections by individual creditors, such objections under Art. 29 should not be able to have a suspensive effect as long as the creditor does not provide security for potential damage caused by delay. Art. 32, which stipulates the need for information when close relatives act as purchasers, does not mention creditors, but extends this duty to inform in para. 1 sentence 1 only to other prospective purchasers, the court and the administrator. Art. 35 (2) further restricts the rights of creditors to be heard.

The means of a judicial exception (Art. 27 (2) (a)), which is necessary to maintain proportionality, is in the version presented only geared to the interests of the debtors and will therefore not be sufficient to address these problems.

In addition, there is the practical problem that not only government agencies, but also large companies as contractual partners are not in a position, for organisational but also for compliance reasons, to carry out a change of contractual partner without preconditions or within a short period of time. Cases such as the discussion about the sale of Frankfurt/Hahn Airport to a Russian oligarch impressively show that a review and, if necessary, a refusal to preserve the contract must also be possible for further (e.g. sanction) legal reasons.

The waiver of the consent of the debtor's counterparty(ies) in an assignment (Art. 27 (1) sentence 2) should therefore be deleted without replacement.

dd) Art. 28 – Debts and liabilities of the business acquired via the pre-pack proceedings

Member States shall ensure that the acquirer acquires the debtor's business or part thereof free of debts and liabilities, unless the acquirer expressly consents to bear the debts and the liabilities of the business or part thereof.

ee) Art. 29 – Specific rules on the suspensive effects of appeals

1. *Member States shall ensure that appeals against decisions of the court relating to the authorisation or execution of the sale of the debtor's business or part thereof may have suspensive effects only subject to the provision by the appellant of a security that is adequate to cover the potential damages caused by the stay of the realisation of the sale.*
2. *Member States shall ensure that the court hearing the appeal has discretion to exempt a natural person appellant, totally or partially, from the provision of a security if it considers such exemption appropriate in light of the circumstances of the given case.*

The shortening of the legal protection laid down in Art. 29 is highly problematic from several points of view.

The provision of security under Art. 29 (1) raises the question of how damages that may only occur in the future can already be estimated with sufficient accuracy at the time of filing an appeal.

Since such a sufficiently precise assessment will not be possible at this point in time, the danger increases that such security deposits will either be prohibitively high or set significantly too low. In the case of a prohibitively high security deposit, the legal protection of appellants would regularly be restricted in a constitutionally questionable manner. If, on the

other hand, the security deposit were regularly set too low, it would not be possible to cover any damage that might occur at a later date. This would have correspondingly detrimental effects for the creditors concerned.
Instead of this potentially very conflictual solution, a solution along the lines of section 251 (3) InsO should therefore be considered, which provides for compensation from the sale proceeds at a later date in the event that the appellant proves that he is in a worse position.

Art. 29 (2) is associated with a further, legally problematic reduction, because only natural persons as appellants could exceptionally be exempted from a security deposit. The unequal treatment applied here cannot be objectively justified and is therefore constitutionally problematic. A factual reason for differentiation is not discernible. Moreover, it could invite circumvention strategies or abuses if natural persons were regularly "sent forward" as appellants in order to avoid a security deposit. Insofar as the mention of adequacy in Article 29 (2) should be understood as a reference to the lower capacity of natural persons in individual cases, legal persons with a correspondingly lower capacity would also have to be treated equally.

d) Chapter 4 – Provisions relevant to both phases of the pre-pack proceedings (Art. 30-35)

aa) Art. 30 – Criteria to select the best offer

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

bb) Art. 31 – Civil liability of the monitor and of the insolvency practitioner

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

cc) Art. 32 – Parties closely related to the debtor in the sale process

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

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

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

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

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

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

The possibility of a sale to related parties granted in Art. 32 is associated with a considerable potential for conflict if and to the extent that it is not ensured that the sale is made in line with the market and to the exclusion of individual preferential treatment through insider information.

In the current British reform proposals (https://www.gov.uk/government/publications/pre-pack-sales-in-administration.), particular emphasis is therefore placed on the independence of the persons involved as trustees. To ensure this independence, Art. 26 (1) d) of the Restructuring and Insolvency Directive already provided for a right of refusal by debtors and creditors in the event of conflicts of interest.

The group of persons defined in Art. 2 q includes all persons, including legal persons, who have preferential access to non-public information about the debtor's business.

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

(i) the spouse or partner of the debtor;

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

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

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

(v) legal entities in which the debtor or one of the persons referred to in points (i) to (iv) of this subparagraph is a member of the administrative,

management or supervisory bodies or performs duties which provide for access to non-public information on the affairs of the debtor.

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

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

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

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

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

For the determination of the relevant point in time, Art. 3 b) shall be based on the day on which the preparatory phase begins or three months before the beginning of the preparatory phase.
Compared to § 138 InsO, for example, the provision of Art. 2 q is broader. However, its implementation for a PPP in Art. 32 contains a number of loopholes that call into question its protective effect in these proceedings.

Art. 32 (1) provides for a sanction only in the case of a breach of the obligations under Art. 32 (1) a in the form of the possible revocation of the benefits for the buyer under Art. 28. The failure to adequately inform the other parties involved in the sale process about the parties close to the debtor and their relationship to the debtor, on the other hand, is to remain inconsequential under Art. 32 (1) b. Since the close relationship to the debtor also means the possibility of gaining a special advantage in the sale process through insider information, in this case a sale process would no longer be competitive, transparent, fair and in line with market standards in the sense of Art. 22.
Also, insufficient time for unrelated persons to make their own offer should not have any effect on the buyer's benefits under Art. 28, according to Art. 32 (1) c. As in the case of Art. 32 (1) b, the sales process would also be compromised here. This, incidentally, with the liability consequence under Art. 31 for Monitors and insolvency administrators and thus with the highly problematic result that an insolvency administrator would possibly have to be liable for the deficits of a sales process not caused by him, while the buyer close to the debtor who is actually obliged to provide information would not have to fear any disadvantages.

Art 32 (2) formulates a duty of rejection by the insolvency administrator in the particularly problematic case of a single offer by a related person if the criterion of creditor interest is violated. Art 2 (h) defines it as a criterion according to which no creditor may be placed in a

worse position in the context of a liquidation in the PPP than when applying the normal order of liquidation priorities in the case of a piecemeal liquidation.
It remains unclear how the insolvency administrator is to determine a breach of this criterion. Rec. 26 does speak of the insolvency administrator being responsible for ensuring that the sale process is competitive, transparent and fair and complies with market standards. However, he will not be able to implement this against the background of the debtor's continuing control over its assets and the daily operation of the company during the preparatory phase according to Art. 22 (4) if the debtor does not cooperate. However, such willingness to cooperate seems particularly doubtful in the case of a sale to a related person. Here, a strong incentive arises to withhold from the insolvency administrator any information that could jeopardise the sale.

dd) Art. 33 – Measures to maximize the value of the debtor's business or part thereof

1.	*Where interim financing is needed, Member States shall ensure that:*
(a)	*the monitor or the insolvency practitioner takes the necessary steps to obtain interim financing at the lowest possible cost;*
(b)	*grantors of interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims;*
(c)	*security interests over the sale proceeds may be granted to providers of interim financing in order to secure reimbursement;*
(d)	*interim financing is eligible to be set-off against the price to be disbursed under the adjudicated offer, when provided by interested bidders.*
2.	*Member States shall ensure that no pre-emption rights are conceded to bidders.*
3.	*Member States shall ensure that, where security interests encumber the business subject to the pre-pack proceedings, creditors who are the beneficiaries of those security interests may offset their claims in their bid only provided that the value of those claims is significantly below market value of the business.*

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

(30) *Member States should allow secured creditors to participate in the bidding process in the pre-pack proceedings by offering the amount of their secured claims as consideration for*

> *the purchase of the assets over which they hold a security (credit bidding). Credit bidding should not, however, be used in a way that provides secured creditors with an undue advantage in the bidding process, such as when the amount of their secured claim against the debtor's assets is above the market value of the business.*

According to its title, Art. 33 is intended to maximise value, but in Art. 33 (1) it is not aimed at maximising value for all creditors but introduces an independent, new privilege for the creditors of interim financing.

Art. 2 i) defines interim financing as *"any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during pre-pack proceedings, and that is reasonable and immediately necessary for the debtor's business or part thereof to continue operating, or to preserve or enhance the value of that business;"*

This definition was taken from Art. 2 (8) of Directive (EU) 2019/1023. There, however, it was interpreted as financial support at least during the suspension of individual enforcement measures. Privileging should therefore only take place if at least an interim financing commitment was also made in this difficult situation manifested by the need for a suspension. The new definition in Art. 2 i) goes beyond this criterion by no longer requiring financial support at least during suspension of individual enforcement measures.
According to Art. 23, this suspension is already possible during the preparatory phase. However, it is obviously intended to be circumvented here as a hurdle because it can only be used if this facilitates the smooth and effective implementation of the pre-pack procedure.

This change in the prerequisites for a privilege compared to Directive (EU) 2019/1023 is highly problematic. By linking it to the suspension of individual enforcement measures under Art. 23, it forgoes an essential corrective to prevent abuses.
Otherwise, debtors providing interim financing could approach lenders, e.g. persons close to them (e.g. shareholders), in order to obtain the most favourable interim financing possible within the meaning of Art. 33 (1) a), which a supervisor or insolvency administrator would not be able to refuse on account of this characteristic.
As a consequence, financing would be privileged under Art.33 (1) a), b) and c).
The possibility of a targeted repayment of shareholder loans and the subsequent initiation of a preparatory phase with the granting of the shareholder loan just repaid as new interim financing would be a massive incentive to circumvent creditor-protecting rules, which regularly provide for the subordination of shareholder loans in insolvency.
To achieve this effect, it would not even be necessary to open the liquidation phase.
The described avoidance strategy could therefore also succeed without a sale, since the debtor retains control over its assets and the daily operation of the company in the preparatory phase according to Art. 22 (4) and this phase does not necessarily have to be followed by a liquidation phase (cf. Art. 22 (5) a)).
Since Art. 23 refers to Art. 6 and 7 of Directive (EU) 2019/1023, without the suspension of individual enforcement measures the safeguards for employees provided for therein in Art. 6

(5) would also be ineffective. As a result, interim financing in individual enforcement during a PPP could receive privileges over individual enforcement from employee claims. Since according to Art. 23 only the debtor can apply for a stay, employees would also have no possibility to bring about the protective effect of Art. 6 (5) of Directive (EU) 2019/1023 through their own application for a stay.

The gaps described are particularly serious because the envisaged privileging of interim financing in PPPs also goes beyond the limits set by Art. 17 of Directive (EU) 2019/1023 in a problematic way.

According to Art. 17 (5) of Directive (EU) 2019/1023 , Member States may provide that providers of new financing or interim financing are entitled to receive payments in subsequent insolvency proceedings in priority to other creditors who would otherwise have claims of higher or equal priority. In contrast, Art. 33 (1) no longer leaves such a provision to the discretion of the member states but requires it as a fixed component of a PPP.

This overrides the legal rankings in the member states or, where such rankings have been abolished as in Germany, establishes a new ranking.

This step is initially contradictory because it runs counter to the declared intention of the proposal to leave the nationally regulated ranking of claims in insolvency proceedings untouched. It is also very conflictual because the privilege in Art. 33 is only linked to the criterion of necessity. Art. 2 i) also speaks of reasonableness and immediate necessity, but offers no further indications of these very broad legal concepts.

If insolvency is artificially "created" by the repayment of shareholder loans, then this form of abuse would also be covered by the definitions in Art. 33 (1) and Art. 2 i).

Even a PPP initiated without abuse and in a state of only imminent insolvency will regularly require interim financing in this sense in order to be able to continue operations. Although according to Art. 20 (1) only the liquidation phase is to be classified as insolvency proceedings within the meaning of Article 2(4) of Regulation (EU) 2015/848 (and thus as subject to disclosure under Art. 24 (1) of that Regulation), a preparatory phase will also be difficult to conceal if it is to trigger a sale process under Art. 24 (1) that is competitive, transparent and fair and complies with market standards. This will cause suppliers to switch to advance payment and may even necessitate an application for suspension of individual enforcement measures. In the context of such a suspension, Art. 6 of Directive (EU) 2019/1023 would again be applicable via Art. 23, which provides for exceptions for certain claims in its paragraphs 4 and 5. The use of these, for example by employees, or the lifting of the suspension of individual enforcement measures at the request of a creditor under paragraph 9, would quickly bring about insolvency and thus the immediate need for interim financing.

Finally, Art. 33 (1) d) creates a further incentive to abuse interim financing. If they are granted by shareholders according to the method described above, then this opens up the possibility of implementing a purchase of the company for the contribution originally made as a subordinated shareholder loan to finance one's own company, at the end of which there is a

debt-free repurchase of the company according to Art. 28. Since a sale to related parties is not excluded and can be carried out according to Art. 24 (2) even if the related party submits the only bid, interim financing according to the described model would also be the best way to create a distance between the related party and possible further bidders in the sale process, if necessary, in order to be proposed as the best bidder within the meaning of Art. 22 (2) c) in any case.
The provision in Art. 33 (3) formulated to secure the value would come to nothing here and would even be a further incentive because it restricts creditors with security interests in relation to the company subject to the pre-pack procedure. These will regularly be financial creditors (banks) who have only extended their loans against appropriate collateral and are now restricted in offsetting their credit claims in contrast to interim financing. In the abuse model described, this regulation therefore also reduces the danger that such creditors will act as bidders and undermine their own strategy.

In order to avoid targeted abuses, Art. 33 should clarify that a sale to the debtor or persons close to him can only be considered if these persons were not involved as providers of interim financing.

ee) Art. 34 – Protection of the interests of the creditors

1.	*Member States shall ensure that creditors as well as holders of equity of the debtor's business have the right to be heard by the court before the authorisation or the execution of the sale of the debtor's business or part thereof.*
	Member States shall lay down detailed rules in order to ensure the effectiveness of the right to be heard under the first subparagraph.
2.	*By way of derogation from paragraph 1, Member States may by law not grant the right to be heard to:*
(a)	*the creditors or holders of equity who would not receive any payment or keep any interest according to the normal ranking of liquidation priorities under national law;*
(b)	*the creditors of executory contracts whose claims against the debtor arose before the authorisation of the sale of the debtor's business or part thereof and are supposed to be paid in full under the terms of the pre-pack offer.*
3.	*Member States shall ensure that security interests are released in pre-pack proceedings under the same requirements that would apply in winding-up proceedings.*
4.	*Member States in which consent from holders of secured claims is required in winding-up proceedings for the release of security interests may depart from requiring such consent, provided that the security interests relate to assets that are necessary for the continuation of the day-to-day operations of the debtor's business or part thereof and one of the following conditions is fulfilled:*
(a)	*creditors of secured claims fail to prove that the pre-pack offer does not satisfy the best-interest-of-creditors test;*

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

The (confidential) pre-pack sale must be based on market-driven, transparent and fair criteria. The exact structure is the responsibility of the administrator, and the insolvency court is responsible for monitoring. The role of the insolvency creditors remains largely unresolved.

The legislator of the Directive is well aware of the importance of the creditors, represented by the creditors' committee, which is expressed by the creation of Title VII; it merely omits to integrate the regulations on the creditors' committee into the regulations of Title IV on the PPP. A say for the creditors also reduces the difficulty of finding a market price, which is characteristic of the transferring restructuring, especially if the insolvency creditors are granted partial claims against the acquirer of the business.

Therefore, not only hearing rights and a general reference to the best-interest-of-creditor test would be desirable, but also concrete regulations on the involvement of creditors in the sale process. This would not only be conducive to the search for a potential investor, but would once again significantly increase acceptance for the outcome of the procedure.

Consequently, the strengthening of creditors' rights must be accompanied by the involvement of employees and their protection. The case law of the BAG on section 613a of the German Civil Code (BGB) and its application in the case of acquisition out of insolvency will presumably provide sufficient protection in the context of the sale. There is no legal framework for participation and involvement in the (decisive) preparatory phase.

Compulsory membership of an employee representative in the creditors' committee could be the logical consequence of strengthening this body.

ff) Art. 35 – Impact of competition law procedures on the timing or the successful outcome of the bid

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

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

3.	*Member States shall ensure that, where an offer entails an appreciable risk of a delay as referred to in paragraph 1, that offer may be disregarded, provided that both of the following conditions apply:*
(a)	*such offer is not the only existing offer;*
(b)	*the delay in the conclusion of the pre-pack business sale with the bidder concerned would result in a damage for the debtor's business or part thereof.*

(31) This Directive should be without prejudice to the application of Union competition law, especially Council Regulation (EC) No 139/2004[4] *nor should it prevent Member States from enforcing national merger control systems. When selecting the best offer, the monitor should be allowed to take into account the regulatory risks raised by offers requiring the authorisation of competition authorities and may consult with those authorities if allowed under applicable rules. It should remain the responsibility of the bidders to provide all necessary information to assess those risks and to engage in timely manner with competent competition authorities in order to mitigate those risks. In order to increase the likelihood that procedures are successful, in presence of an offer that raises such risks, the monitor should be required to perform its role in a way that facilitates the presentation of alternative bids.*

5. Directors´duty to request the opening of insolvency proceedings and civil liability (Title V)

a) Art. 36 – Duty to request the opening of insolvency proceedings

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

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

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

Insolvency filing obligations, which are flanked by liability under civil law, and in some cases also under criminal law (in Germany through § 15 a and b InsO), have already been established in many member states for decades. They have proven themselves as an instrument of creditor protection. According to the proposal, an application obligation should not be introduced for natural persons. However, from the German point of view, the 3 months mentioned are clearly too long. This could lead to distortion of competition and possibly to disadvantages for companies in Germany.

Therefore, a shortening of the 3 months should be considered throughout Europe.

The protective function of insolvency filing obligations is directly related to the definition of the grounds for insolvency. Depending on how broadly or how narrowly these are defined, there remains scope for filing a petition, which can also be used to the detriment of creditors. Against this background, it is very regrettable that the central concept of solvency, which is supposed to trigger an application obligation in Art. 36, remains unclear. The partial definition offered in Art. 38 (2) is only to apply to micro-enterprises and, moreover, its terms are to be shaped by the member states. In practice, this will lead to very different "insolvencies". Fragmentation and intransparency, which already characterise this most important reason for insolvency in Europe, will not be reduced or eliminated. The absence of a harmonised definition of insolvency is particularly noticeable here and calls into question the achievement of the proposal's efficiency goals.

It should be clarified that stricter provisions (such as the procedural ground of over-indebtedness in the case of legal persons or partnerships without a natural person as a fully liable legal subject) continue to apply insofar as they exist in the Member States.

In the sense of cross-border creditor protection, it would be welcome if the procedural ground of over-indebtedness were recognised in Europe at all, after it has already proven its useful and positive influence on the early recognition of insolvency risks in a number of Member States.

b) Art. 37 – Directors' civil liability

1.	*Member States shall ensure that the insolvent legal entity's directors are liable for damages incurred by creditors as a result of their failure to comply with the obligation laid down in Article 36.*
2.	*Paragraph 1 shall be without prejudice to national rules on civil liability for the breach of the duty of directors to submit a request for the opening of insolvency proceedings as set out in Article 36that are stricter towards directors.*

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

The rules on liability for damages, which have existed for many decades, have been extensively codified in Germany in recent times (cf. § 15b InsO). However, by linking liability to the insolvency mentioned but not further defined in Art. 36, Art. 37 calls into question the uniform effect of such liability rules. Depending on the structure of insolvency in the individual member states, the actual effects of the threat of liability on the behaviour of company management will vary greatly.

This is also a missed opportunity to remove an incentive for the actually undesirable "forum shopping" in Europe. The motive of avoiding liability has already played a role in the relocation of companies in the past. By "shaking off" creditors, their participation in proceedings in the context of insolvency proceedings opened in another member state is regularly made more difficult. If insolvency is interpreted more generously in the country of destination, a company management can escape the obligation to file and thus also liability through migration. In addition, facts giving rise to liability in the company's original country of origin can regularly only be clarified after its migration through appropriate administrative assistance. The instruments formulated in the proposal to improve asset tracing (cf. Art. 13 et seq.) can only be helpful in clarifying the question of whether there is still a prospect of recovery when asserting liability against the persons acting in the event of success. Without the results of criminal investigations, the clarification of the facts giving rise to liability is regularly dependent on requests for information under civil or public law, with very different results and prospects of success depending on the Member State.

6. Winding-Up of insolvent microenterprises (Title VI)

Title VI hides the most problematic section of the proposal.

According to the regulations there, microenterprises are to be subjected to a special liquidation procedure. Art. 2 (j) defines microenterprises in the sense of the Annex to Commission Recommendation 2003/361/EC, as enterprises that employed less than 10 employees on average in the previous year with an annual turnover or balance sheet total of no more than 2 million euros. At over 80%, this size of company constitutes the absolute majority of all companies affected by insolvency in Germany according to official statistics. No figures are currently available for Europe. However, the high proportion of micro-enterprises suggests that

their share in the total number of insolvencies is not lower than in Germany. Recital 35 of the proposal motivates the Member States to allow access to the new procedure not only for micro-enterprises but also for small and medium-sized enterprises.

This means that the scope of application goes too far, at least with regard to turnover and balance sheet total, because companies with a corresponding size (can) already have quite complex structures and asset relationships. More realistic in this respect is the approach of the Spanish new regulations in Art. 685 Ley Concursal, which is apparently oriented towards Art. 3 (1) of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013, in which micro-entities are defined according to other size criteria. Accordingly, micro-enterprises are enterprises with a maximum of 10 employees, a net turnover of up to €700,000 or a balance sheet total of up to €350,000.

According to the practical experience of German insolvency administrators, companies of this size are also not suitable "micro-enterprises" for liquidation without an administrator. The regulation also raises the constitutionally relevant question of whether consumer insolvency proceedings would then also have to be handled without an administrator in future.

a) Chapter 1 – General rules (Art. 38-40)

aa) Art. 38 – Rules on winding-up of microenterprises

1.	*Member States shall ensure that microenterprises, when insolvent, have access to simplified winding-up proceedings that comply with the provisions laid down in this Title.*
2.	*A microenterprise shall be deemed insolvent for the purposes of simplified winding-up proceedings when it is generally unable to pay its debts as they mature. Member States shall set out the conditions under which a microenterprise is deemed to be generally unable to pay its debts as they mature and ensure that these conditions are clear, simple and easily ascertainable by the microenterprise concerned.*
3.	*The opening and conduct of simplified winding-up proceedings may not be denied on the ground that the debtor has no assets or its assets are not sufficient to cover the costs of the simplified winding-up proceedings.*
4.	*Member States shall ensure that the costs of the simplified winding-up proceedings are covered in the situations set out in paragraph 3.*

(34) Microenterprises often take the form of sole proprietorships or small partnerships whose founders, owners or members do not enjoy limited liability protection and thus are exposed to unlimited liability for business debts. Where microenterprises operate as limited liability entities, limited liability protection is usually illusory for microenterprises owners because they are often expected to secure microenterprises business debts using

their personal assets as collateral. Moreover, since microenterprises heavily depend on payments from their clients they often face cash-flow problems and higher default risks that follow from the loss of a significant business partner or from late payments by their clients. In addition, microenterprises also face scarcity of working capital, higher interest rates and larger collateral requirements, which make raising finance, especially in situations of financial distress, difficult, if not impossible. As a consequence, they may be prone to insolvency more often than larger enterprises.

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

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

(39) All microenterprises should be able to commence proceedings to address their financial difficulties and obtain a discharge. Access to simplified winding-up proceedings should not depend on the microenterprise's ability to cover the administrative costs of such proceedings. The laws of the Member States should introduce rules for covering the costs of administering simplified winding-up proceedings where assets and sources of revenue of the debtor are insufficient to cover those costs.

For micro-enterprises – contrary to the proposal's other abstinence in this regard – the insolvency ground of insolvency is to be defined independently according to Art. 38 (2). The decisive specification of when exactly it is to be assumed that a micro-enterprise can no longer meet its due payment obligations is left to the Member States. They are to ensure a clear, simple definition that is easy for the micro-enterprise to ascertain. This provision leaves a wide margin of manoeuvre, the use of which is likely to lead to considerable efficiency losses with a view to the harmonisation objective. Moreover, with the introduction of an additional, non-uniformly specified ground for insolvency instead of harmonisation, there is even a risk of further fragmentation in the area of grounds for insolvency.

The requirement in recital 37 that the criterion of insolvency is fulfilled "as long as these conditions are clear, simple and easily ascertainable for the micro-enterprise concerned" is

to be welcomed – and not only for micro-enterprises. The mathematical determination of insolvency, or – as the proposal calls it – the "solvency test" must, on the one hand, be able to be calculated in Europe according to uniform criteria and, on the other hand, simply.

The German legal practice with the previous, partly different case law does not currently meet this requirement either. It must be easy to calculate or recognise both prospectively and retrospectively. The VID refers to its recommendations on insolvency law – determination of insolvency of 22.06.2022 (https://www.vid.de/bgh-setzt-neue-akzente-bei-der-zahlungsunfaehigkeit/; published in ZRI 2022, 660). In this context, the figures to be used as a basis must be determined on specific dates that correlate with the requirements of accounting and cost accounting. A percentage gap as a relevant figure should be excluded because it is susceptible to abuse and not at all realistic because it depends on payment behaviour (volume effect and thus reduction of the gap through non-payment of due liabilities).

It must be possible to determine insolvency in the same way for all companies and the simplicity of the determination demanded by the proposal must also and especially be demanded for large companies in view of the complexity of the business transactions existing in these companies.

The proposal leaves open how to deal with enterprises that do not draw up balance sheets or cannot provide the necessary key figures for their own classification as micro-enterprises due to a lack of proper accounting. Art. 41 (4) does not provide for information on employees, balance sheet total or turnover. The contents of the application listed in Art. 41 and Rec. 37 indicate that access to the procedure should also be possible for such enterprises.

Since Art. 43 (3) also assumes that the debtor should only be denied self-administration and the associated continuation of its own accounting practice in exceptional cases, the application must already show whether such an exceptional case exists. This requires proof there as to whether the accounting is up-to-date, complete and thus meaningful enough to determine the scale of the business. There are no indications of this in the introduction, in the recitals and then consequently also in the provisions of Art. 41 itself.
The court would therefore in any case have to be given at least a discretion to refuse simplified winding-up proceedings if the conditions of the definition of a micro-enterprise under Art. 2 lj) of the proposal cannot be verified.

(Cost-)barrier-free access to insolvency proceedings and thus to a discharge of residual debt already exists in Germany for natural persons even in the case of insolvency through the possibility of deferral of costs according to section 4a InsO.
For legal persons, a deferral model could also be introduced to implement Art. 38 (3). Since Art. 56 requires consolidation or at least coordination of insolvency proceedings of those founders, owners or partners of a micro-enterprise with unlimited liability who are personally liable for the debts of the micro-enterprise, the deferral of costs would also be possible if,

following these proceedings, the enterprise were deleted. In this case, the former founders, owners or partners, who are now fully discharged of their debts, could continue to be available for repayment of the deferred procedural costs in instalments.

However, the fundamental question arises as to what sense it makes to conduct simplified insolvency proceedings in the case of so-called micro-enterprises if there are no assets to cover the costs of the proceedings, the entrepreneur's discharge from residual debt is – as in German law – already guaranteed by the existing provisions and the company is deleted from the register if the proceedings are dismissed for lack of assets pursuant to section 60 (1) no. 5 in conjunction with section 65 (1) GmbHG. Section 65 (1) GmbHG is carried out ex officio.
The objective mentioned in Rec. 35 is not achieved here by a court or administrative authority acting instead of an administrator (Rec. 36) and opening proceedings.
The goal of reducing "administrative costs", because "the intervention of the insolvency administrator is the main cost factor in insolvency proceedings" (p. 20 of the draft directive), is not promoted by the use of authorities – usually precisely not oriented towards economic criteria – which, moreover, are regularly unable to react to strongly fluctuating insolvency figures by quickly reducing or increasing staff.
Since the goal should only be an "orderly liquidation" of the company in whatever form without satisfying creditors, the question also arises as to where the incentive should lie to initiate these proceedings in good time. It is obvious that companies choose the procedural route so late that there is nothing left for the creditors and only a simple liquidation comes into question - in connection with the fact that then – see below, Art. 39 – in all probability no insolvency administrator will be appointed to deal with the business transactions. This merely creates a massive incentive to abuse the procedure, reminiscent of the conditions in Germany before the introduction of the Insolvency Code.
A particular danger for the legal systems would additionally arise if – see Recital. 35 –, the regulations were also extended to small and medium-sized enterprises.

Art. 38 (1) and (2) indicate that only insolvency, but not over-indebtedness ("balance sheet test"), should be the reason for opening a micro-enterprise.

Over-indebtedness should also be a ground for opening in the case of micro-enterprises in the sense of the proposal. Its protective effect for creditors has been described extensively and would be of particular importance here because of the otherwise withdrawn protective measures for creditors.

For creditor protection reasons, it would even make more sense to consider that – even if this would not be "enforceable" in its entirety throughout Europe – the Member States should be recommended to extend the procedural grounds to over-indebtedness for companies of all sizes and regardless of their legal form. The original idea – at least in Germany – that over-indebtedness in the case of a natural person (who is also an entrepreneur) does not have to

be a reason for opening proceedings, because sooner or later the natural person has to repay all debts, no longer applies since the introduction of the InsO with residual debt discharge. The same applies to an application obligation for natural persons who are entrepreneurs in the case of insolvency (the draft is silent on this, possibly on the assumption that there is no such obligation per se).

bb) Art. 39 – Insolvency practitioner

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

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

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

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

According to Art. 39, an appointment of an administrator shall be made dependent on a corresponding decision by the debtor or a creditor or a group of creditors and, in addition, on cost recovery from the insolvency estate or from financing by petitioning parties.

In this arrangement, it would be indispensable for the debtor who decides against an insolvency administrator to be informed about the obligations that await him, e.g. certificates of employment, etc., so that a large number of debtors would have the administrator appointed. If a procedure without an administrator were to be introduced, liability for the persons acting (managing director of the legal entity operating a micro-enterprise) would have to be regulated. Likewise, the liability of the institutions (authorities, courts) then partly acting instead of the administrator would have to be adapted to the previous standards of administrator liability.

However, there are important reasons against appointing insolvency administrators only in exceptional cases, especially in the case of micro-enterprises:

- Smallest enterprises in particular would regularly be overburdened with self-administration (cf. recital 37). This concerns both the obligations under insolvency law towards creditors and the courts as well as the special duties of care towards employees in the event of insolvency.

- According to the legal practice of many Member States, it is not necessary to open all insolvency proceedings of micro-enterprises, irrespective of cost recovery, in order to liquidate and extinguish the enterprise (cf. for the German legal situation the comments on Art. 38).

- There would be a danger of the targeted "plundering" of the company without the later enforcement of liability claims by an administrator. The World Bank also sees this danger and therefore recommends that, especially in the case of micro-enterprises, an insolvency administrator should only be appointed in exceptional cases (cf. Principles for effective Insolvency and Creditor/debtor Regimes – revised edition 2021 – C 19.6: "In simplified liquidation proceedings, the law should specify under which exceptional circumstances an insolvency representative or liquidator may not be appointed"). The indication that individual creditors could pursue these claims is impractical and unrealistic because of the individual costs involved.

- If self-administration is already unsuccessful in larger insolvencies despite great effort, this is even more to be expected in small proceedings. Moreover, the administratorless procedure is a self-administration without an administrator. The necessary expertise could only be provided by external advisors, who regularly cannot be paid in small proceedings without assets and therefore do not work there.

- Even in proceedings without an administrator, costs would be incurred which, as a rule, would not be less than in proceedings with an administrator. Small proceedings with all their requirements cannot be handled in a way that covers costs, at least in Germany, but are often part of a "mixed calculation" for insolvency administrators, which only works out because the assumption of small proceedings is often made a condition for appointment in larger cases. If the proceedings then change from proceedings without an administrator to proceedings with an administrator, even higher costs may arise. The administrator's costs are then added to the previous advisor's costs, which might not have been incurred in the case of direct administrator proceedings.

- The question arises as to who should assert the "unjust asset dispositions" in advance by way of avoidance actions (see also the Principles for effective Insolvency and Creditor/debtor Regimes – revised edition 2021). It also undermines the creditor-oriented procedure if the creditors themselves shy away from appointing an administrator because of the costs to be borne and for this reason the special assets are not enforced;

to justify this solely on the grounds of creditor autonomy cannot be in the interest of a legal system in which regulatory objectives are considered important.

In the opinion of the VID, the proposal for Art. 39 COM (2022) clearly contradicts the interests of debtors, creditors or state parties such as tax offices and other authorities, towards whom there are numerous obligations in insolvency proceedings, which have so far been regularly fulfilled by the administrator even in micro proceedings. In the opinion of the VID, it is highly unlikely that anyone will fulfil these duties in proceedings without an administrator. It is less likely that the debtor will fulfil these duties, if necessary together with an advisor.

The courts should therefore be empowered to appoint an expert on their own initiative to examine whether the conditions for the simplified winding-up procedure are met.
Furthermore, the courts should be able to appoint an insolvency practitioner even without a request from the persons previously mentioned in Article 39 if, in their view, this makes sense for the conduct of the proceedings – and the costs can be borne by the insolvency estate (Art. 39 (b)).

It should be regulated who and in what form may maintain a special account for the proceeds from the realisation of the insolvency estate. For reasons of creditor protection, it would be unacceptable to leave the management of the account to the debtor in the event of liquidation.

In order to be able to open proceedings even without initial coverage of the costs of the proceedings, instead of waiving the appointment of insolvency administrators, a deferral of costs could alternatively be permitted along the lines of section 4a InsO.
This model would provide a number of incentives to increase efficiency. It motivates the deferring Member State to be prudent, and (in the German example) legally limited, in the remuneration of insolvency administrators. At the same time, it motivates the appointed insolvency administrator to actively investigate liability and avoidance claims, which can contribute to the increase of the insolvency estate and thus (at least in Germany) also increase his remuneration. In this case, creditors are relieved of the need to make individual contributions to the costs of proceedings. Moreover, according to German experience, the prospects of deferred costs being repaid in instalments by debtors freed from their other debts after the conclusion of the proceedings are above average.

The regular appointment of insolvency administrators would also avoid a whole range of consequential problems that would arise if such appointments were not made:

Financing sovereignty of the member states

The obligation of the Member States provided for in Art. 38 (3) and (4) to ensure that the costs of the proceedings are covered in any case, in combination with Art. 39, also constitutes an encroachment on the financial sovereignty of the Member States. For if an obligation to finance the proceedings is imposed on the Member States, there is no recognisable justification for a prohibition on regulating at their own discretion whether judicial capacities are to be maintained and financed for the tasks to be performed or whether insolvency administrators are to be appointed and financed. Member states such as Germany, whose legal system already provides for functional, effective and inexpensive liquidation options for all types of micro-enterprises, must be left to decide for themselves whether they expect a gain in efficiency and cost advantage from proceedings without an administrator or whether they follow the World Bank's assessment in this respect.

New requirements for competent courts / authorities ("court")

The provisions in Title IV on the introduction of pre-pack proceedings already provide for a new task for the insolvency court, at least for Germany, with the judicial confirmation of a sale of a company pursuant to Art. 26. The provisions in Title VI go far beyond this with the introduction of new tasks.

According to the proposal, in the simplified winding-up proceedings for micro-enterprises, the appointment of an insolvency practitioner should be the exception and should only take place at the request of the debtor or a group of creditors if, in addition, the costs are covered by the estate or the claimant(s) (Recital 40, Art. 39). An appointment of an administrator on the court's initiative is not provided for; the court is to be able to convert the simplified procedure under Art. 47 c) into regular proceedings only if the pursuit of avoidance claims, which is at the discretion of the creditors without an administrator under Art. 47 a), would not be possible under the conditions of the simplified procedure. The waiver of an administrator is to be compensated by the court or also creditors taking over tasks that are usually incumbent on an administrator or another person appointed by the court or in any case not on the court.

The refraining from appointing an administrator is obviously intended to save costs. The Explanatory Memorandum to the proposal (point 5., p. 20 of the German version) explicitly states: "For example, as a rule, no insolvency administrator should be appointed in the proceedings, since the intervention of the insolvency administrator is the main cost factor in insolvency proceedings".

According to Rec. 35 sentence 2, there is (allegedly) a "need for faster, simpler and affordable procedures".

The consideration that an administrator is dispensable in simplified winding-up proceedings is also based on the assumption expressed in recital. 40: "In simplified winding-up proceedings there is usually no need to appoint an insolvency practitioner in view of the simple business activities of micro-entities which can be adequately supervised by the competent authority". (also point 5., p. 20 of the German version of the Explanatory Memorandum to the proposal).

These assumptions are neither comprehensible in the context of the proposal nor correct when considering the simplified procedure according to the concept of Art. 38 et seq. in isolation.

No need for a simplified liquidation procedure

Which Member States actually have a need for a faster, simpler and cheaper winding-up procedure, be it for micro-entities or in general, is not clear from the proposal and the supplementary documents. Even if one assumes a basic need in some Member States, however, it is unclear for whom the need should exist. The proposal apparently assumes that there is a demand among micro-entrepreneurs themselves for a possibility to liquidate their business in a simplified procedure and thereby obtain debt relief. This may have been true for debt relief in the past, but it has become superfluous through the implementation of Art. 20 et seq. of Directive (EU) 2019/1023. Also with regard to a simplified procedure, such a demand cannot be ascertained, at least in Germany:

Both natural and legal persons may cease operations at any time. If the insolvency petition of a legal person is rejected for lack of assets, this forcibly places the legal persons in the liquidation stage and the creditors are not subject to any restrictions in pursuing their rights. In accordance with the AnfG, they even have the possibility to challenge the debtor's legal acts (actio pauliana). If necessary, however, creditors can still obtain the implementation of insolvency proceedings at this stage – even after the debtor has been deleted from the commercial register – if they pay an advance or if cost-covering assets can still be uncovered. Insofar as the proposal for a directive is only concerned with avoiding uneconomical referral to courts and insolvency administrators and leaving the winding-up of the company to the debtor, this objective is achieved with the German legal consequence of rejecting an insolvency petition for lack of assets. Natural persons – be they entrepreneurs or debtors who are jointly liable for companies and who may not themselves be engaged in entrepreneurial activities – can achieve the opening of insolvency proceedings by means of a deferral of the costs of the proceedings even without assets that cover the costs and, by means of the possibility of a "release" of self-employed activity pursuant to section 35 (2) InsO, can continue an entrepreneurial activity. They can continue an entrepreneurial activity immediately after the opening of insolvency proceedings free of insolvency or start such an activity anew, even while the insolvency proceedings are still running on the old assets, in which – according to Directive (EU) 2019/1023 - they can obtain residual debt discharge after three years. The possibility of

self-administration exists in Germany regardless of the size of the proceedings, but is linked to a sufficient quality of the insolvency petition and qualification of the debtor or his advisors to perform the tasks specific to the proceedings. The costs of insolvency proceedings (with an administrator) are usually less than € 5,000.00 in the case of insolvency.

In addition, there is the possibility of pre-insolvency restructuring for companies of any size under the StaRUG, with which Germany has implemented Directive (EU) 2019/1023.

Both the StaRUG and the InsO provide for the possibility of discharging the debt of jointly liable partners in addition to the debtor via a restructuring or insolvency plan. As already mentioned, every natural person has a debt relief perspective via their own insolvency proceedings regardless of this.

If, as the Explanatory Memorandum to the proposal states (point 5., p. 20 of the German version), micro-enterprises in particular do not make use of the aforementioned options, this is not because the available options are too elaborate or too expensive. From a practical point of view, the main reasons are rather that debtors or their advisors do not sufficiently know or understand the existing possibilities, ignore signs of crisis and possibly also advice and cling to unrealistic hopes, are not willing to liquidate their company and/or do not want to expose themselves to the supposed stigma of proceedings. The problem of becoming aware of and understanding existing opportunities will presumably not be reduced by expanding and diversifying the range of options.

Whether the demand for a simplified liquidation procedure in the sense of the proposal exists among creditors or courts or for economic considerations can be left open. After all, according to the proposal, the procedure is only possible on the initiative of the debtor or, in any case, only with the debtor's active and voluntary participation, as can be seen from Art. 41 (3), (4), (6), (7) and Art. 43. According to Rec. 40 sentence 3, "the debtor should provide accurate, reliable and complete information on his financial situation and business affairs at the outset and throughout the proceedings." If the debtor refuses or is unable to properly cooperate, the proceedings cannot be opened or properly conducted, regardless of the wishes of creditors, courts or the legislature.

Reduction of the regulatory function

The conduct of insolvency proceedings with the appointment of a neutral, expert administrator also fulfils a regulatory function, because the administrator performs tasks that are in the public interest and are not usually performed or cannot be performed by the debtor. This procedural objective is expressed in German law in particular in the fact that proceedings under section 26 InsO are opened even if there is no prospect of creditors getting reimbursed, but only the costs of the proceedings are covered. On the one hand, the explanatory memorandum to the proposal addresses this regulatory function by stating that the aim is to ensure

"an orderly liquidation" even for micro-enterprises for which insolvency proceedings would not currently be opened due to a lack of cost recovery (Explanatory Memorandum, point 5, p. 20 of the German version). On the other hand, however, the aim of the simplified procedure is primarily to liquidate the debtor company quickly, easily and at low cost. These goals are difficult to reconcile if speed and cost savings, as is the case with the proposal, inevitably come at the expense of the regulatory function. The purpose of opening proceedings is difficult to understand if practically nothing remains of the regulatory function except the fact that proceedings or procedural acts take place that hardly go beyond ritual elements. If the regulatory function is to be subordinated to speed and cost savings anyway, it would be quicker, simpler, cheaper and more sparing of judicial capacities to allow the debtor to give notice of cessation of business and low-mass liquidation and to leave the distribution of any assets to the debtor and the individual creditor initiative. Natural persons already have the possibility under Directive 2019/1023 to obtain residual debt discharge and a fresh start; legal persons can be discharged and do not require debt discharge. If the proposal is based on the idea that proceedings regularly conducted without an administrator can also fulfil the regulatory function, this is characterised by a lack of understanding of the tasks that must be completed in order to fulfil the regulatory function.

This misconception is expressed, for example, in the assumption that an administrator can be dispensed with because the "simple business activities of micro-enterprises" (recital 40) only require the supervision of the court, but not an administrator. Apart from the fact that the proceedings are aimed at closure and liquidation, which in themselves imply measures outside the ordinary course of business with which debtors are generally unfamiliar, the proposal in recital 40 ignores the fact that it is procedurally necessary to appoint an administrator. 40 ignores the fact that there are tasks specific to the proceedings that a debtor generally has neither the necessary qualifications nor the administrative infrastructure to perform, and which are also outside the scope of what court staff are trained and equipped to do.

No acceleration effect

Should the proposal be based on the assumption that proceedings for the liquidation of an insolvent company will be faster and simpler (Recital 35, second sentence) if no administrator is appointed, this assumption would not be comprehensible. After all, why should it speed up and complicate the proceedings if the liquidation is entrusted to a person who – unlike the debtor – knows what to do and how to do it? If the proposal is not based on the aforementioned assumption, the only reason for dispensing with an administrator is the supposed cost saving. However, this too is to be doubted.

It is significant that the special procedure for micro-enterprises just introduced in Spain under Art. 687 (6) of the Ley Concursal is only accessible to debtors who are represented by a legal advisor or lawyer. The new Spanish law, which here bows to the realisation that especially debtors in the field of micro-enterprises lack the qualification to handle even a simplified

procedure, was drafted by *Ignacio Tirado,* who was also significantly involved in the academic preparatory work underlying the procedure under Title VI of the proposal (UNCITRAL, ELI, CODIRE). With the Spanish regulation, cost relief only takes place on the face of it, in that instead of the costs of an insolvency administrator, the costs of a debtor's advisor are incurred.

That the assumptions on which the proposal is based are incorrect is also indicated by the fact that they are diametrically opposed to the relevant recommendations of the World Bank (PRINCIPLES FOR EFFECTIVE INSOLVENCY AND CREDITOR/DEBTOR REGIMES – revised edition 2021 – C 6.1 and C 19.6). The World Bank recommends not only appointing an "insolvency representative" in liquidation proceedings in general, but also refraining from appointing an "insolvency representative or liquidator" in simplified proceedings only in exceptional cases.

cc) Art. 40 – Means of communication

Member States shall ensure that in simplified winding-up proceedings all communications between the competent authority and, where relevant, the insolvency practitioner, on the one hand, and the parties to such proceedings, on the other hand, can be performed by electronic means, in accordance with Article 28 of Directive (EU) 2019/1023.

Ensuring that all procedural communication between the parties can be done electronically makes sense in principle, but in practice it comes up against various potential limits:

On the one hand, it is not (yet) guaranteed that all creditors have access to electronic means of communication. It is probably inadmissible, if only on the basis of the fundamental right to effective legal protection, to link participation in proceedings to technical requirements.

Secondly, especially in the case of debtors whose assets are not even sufficient to cover the costs of the proceedings, there is no guarantee that they will be able to pay for and thus maintain or continue to use the technical equipment and services that are necessary for electronic data processing and communication. As a rule, micro-enterprises delegate accounting work to external service providers due to a lack of their own capacities and qualifications, and as a rule, there are payment arrears to these service providers in the event of insolvency. There are also regularly arrears of payment to telecommunications providers and providers of internet services. These service providers usually request a promise of payment from the (provisional) administrator or payment in advance for future services shortly after (provisional) insolvency proceedings become known and block their services if they do not receive a promise of payment.

Thirdly, a changeover of the procedure-related communication to electronic means only contributes to a significant increase in effectiveness and facilitation if a common electronic platform is used for the procedure in the form of the "Regsol" platform established in Belgian

insolvency courts, where the procedure-related data and communications are brought together on one platform.

b) Chapter 2 – Opening of simplified winding-up proceedings (Art. 41-45)

General remarks:

Improving transparency for cross-border investments?

The proposal is part of the implementation of the Action Plan to establish a Capital Markets Union. The Explanatory Memorandum to the proposal (point 1., p. 1) addresses this circumstance as well as the fact that the insolvency law rules in the Member States are very different. Cross-border investments would be hampered, among other things, by the fact that it would be difficult for investors to assess 27 different insolvency systems. Without further standardisation of insolvency systems, the potential of cross-border investments and business relationships could not be fully exploited.

Title VIII of the proposal contains provisions aimed at making Member States' insolvency systems more transparent.

It is doubtful whether the planned introduction of simplified liquidation procedures for micro-enterprises is suitable for increasing the transparency of insolvency systems and making it easier for cross-border investors to assess the various systems. This is because the regulations of Title VI represent a framework within which Member States are required to introduce a new procedure or a new type of procedure.
In addition, according to the statements in recital. 37 and Art. 38 (2), Member States are apparently to introduce an independent definition of insolvency as a ground for insolvency for micro-enterprises, which differs from existing definitions of this ground for insolvency if they do not already comply with the new requirement. As the rules are only a framework, the individual procedures and the definitions of the "new" ground for micro-enterprise insolvency will differ between Member States. Moreover, recital. 35 motivates Member States to allow access to the new procedure not only to micro-enterprises but also to small and medium-sized enterprises. If Member States make different use of this, not only the new procedures but also the areas of application will differ. This will not lead to a reduction in diversity, but to an increase in it. Cross-border investors will be confronted with increased complexity, as each Member State will add a new type of procedure and possibly a new ground for insolvency, which will potentially differ in scope and in any case within the other scope of transposition.

The example of the introduction of a special regime for micro-enterprises in Spain shows that a corresponding special regime can be very complex.

Improving the outcome of procedures?

In the Explanatory Memorandum to the proposal (point 1., p. 1 f.), it is presented as a grievance that the outcome of insolvency proceedings varies greatly, among other things, with regard to the recovery rates for creditors.

It is unclear on what basis this analysis stands. In any case, it should be noted that statistical surveys on satisfaction rates in insolvency proceedings are only comparable insofar as the proceedings and their prerequisites for opening are the same, and that satisfaction rates are not indicative of the efficiency of insolvency proceedings. If – in the interest of the regulatory function of insolvency proceedings – the opening of insolvency proceedings is not linked, for example, to the prerequisite that there is a prospect of recovery for the creditors, as is also provided for in Art. 38 (3) of the proposal, the average opening rate will be increased, but the recovery rate will inevitably be worsened by proceedings that are opened without a quota perspective. Moreover, satisfaction rates are not comparable if no distinction is made between secured and unsecured claims and if systems with and without or with different priority or ranking of claims are compared.

In this respect, the proposed special rules would not lead to an improvement but to a deterioration of the average recovery ratio because, according to the provision in Art. 38 (3), more proceedings would have to be opened in case of doubt and, in addition, the restriction of the assertion of avoidance claims under Art. 47 would prevent potential inflows of assets.

Against this background, the thesis in the Impact Assessment Report of 07.12.2022 that "A special regime for MSEs and transparency on insolvency triggers would increase the recovery value because more MSEs would be subject to an orderly liquidation and faster debt discharge" is not comprehensible.
The mere opening and conduct of proceedings does not increase the debtor's assets, especially if the proceedings are not geared to professional and best possible discovery and realisation of values and avoidance claims, but to speed and cost savings. With this shift in the purposes of the proceedings, even reduced costs do not lead to a significant improvement in the ratio if the debtor's assets are not sufficient to cover the costs of regular insolvency proceedings.

The assumption in the Impact Assessment Report (op. cit.) that a reduction in the duration of proceedings and the costs "incurred for MSEs" would increase the incentive for debtors to make use of the procedure is unrealistic and characterised by a misconception. Usually debtors of the target group size have hardly any idea of the duration and costs of insolvency proceedings. It is not these factors that are decisive for reservations about insolvency proceedings, but rather fears of loss and stigmatisation as well as irrational hopes. It is not apparent that the assumption to the contrary in the Impact Assessment Report is based on empirically obtained findings. Debtors who (should) consider filing for insolvency are also unlikely to be

under the misapprehension that a reduction in the costs of proceedings would leave them with assets. Although the costs are charged to the debtor's assets, they affect the creditors economically, i.e. they are actually "incurred for creditors". Contrary to what is assumed in the impact assessment, debtors can therefore be indifferent to the costs of proceedings and usually are. If the general debtor motivation for initiating proceedings were the best possible protection of creditors' interests, applications would generally be filed earlier now.

Inconsistency and incompatibility of Title IV with other elements of the proposal

The approach of the rules in Title VI of the proposal on a special procedure for the winding-up of micro-enterprises, which the Member States are to make optionally available to small and medium-sized enterprises according to Recital 35, is not consistent with other parts of the proposal, in particular Titles II to IV. 35, is not in line with other parts of the proposal, in particular with Titles II to IV. However, there are also doubts as to the compatibility with Title VII.

Contradiction between Title VI and Title II

According to Title II of the proposal, minimum standards for avoidance actions are to be introduced "in order to protect the value of the insolvency estate for the creditors" (recital 5, first sentence). Title II emphasises the importance of insolvency proceedings, and in particular of avoidance in insolvency, for the protection of the economic interests of creditors. The study by *Bork/Veder* underlying Title II is based on fundamental principles that are inherent in all insolvency law systems, both historically and comparatively.

In contrast, in the simplified liquidation procedure under Title VI, no neutral person with comprehensive access to information is regularly supposed to examine the existence of avoidance claims; rather, the assertion of such claims is supposed to be at the discretion of the creditors according to Art. 47 a). However, due to the lack of access to information, creditors usually cannot have knowledge of avoidance facts that do not concern them, and even if they do have knowledge, creditors usually do not have access to necessary evidence from the debtor's accounting and business records.

If, especially in cases where the assets have been used up to such an extent that not even the costs of the proceedings are covered, a standard examination of avoidance claims is waived, this is to the detriment of the community of creditors and contradicts basic principles of insolvency law.

Contradiction between Title VI and Title III

Title III of the Proposal contains provisions to give insolvency practitioners better and easier access to information in order to identify and take possession of assets of the insolvency

estate. Corresponding provisions are, according to recital. 13 "essential to maximise the value of that insolvency estate". Rec. 14 goes on to say: "It is therefore necessary to lay down provisions to ensure that insolvency practitioners, in the exercise of their functions in insolvency proceedings, may have access, directly or indirectly, to information stored in databases which are not publicly accessible."

These findings are contradicted by the fact that in simplified proceedings under Title VI of the proposal, there is regularly no investigation at all by a neutral administrator with investigative powers. The assets of the insolvency estate are to be determined solely on the basis of the information provided by the debtor, Art. 41 (4) c), Art. 48 (1), and the debtor's statement of assets and liabilities is not even intended to be sent to the creditors by default under Art. 45 (2) sentence 2. Therefore, they cannot check the statement of assets for completeness and accuracy.

Even if the creditors were given the opportunity to supplement the debtor's statement of assets, their investigative possibilities can never go as far as those of an insolvency administrator who has the resources of Title III at his disposal. The rules of the simplified proceedings under Title VI thus not only make it easy for the debtor to leave contestable past impairments of assets undiscovered, they also make it easier to conceal assets still existing at the opening of insolvency proceedings.

Contradiction between Title VI and Title IV

According to Title IV of the proposal, Member States are to introduce pre-pack procedures, in which the opening of the actual insolvency proceedings is preceded by a preparatory phase in which a sale of the company taking place upon the opening of insolvency proceedings can be prepared. For the preparatory phase, according to Art. 22 (3), the appointment of an independent and qualified monitor is deemed necessary in order to ensure, according to Recital. 26, "to ensure that the sale process is competitive, transparent and fair and complies with market standards". According to Art. 25, the monitor is to be appointed as insolvency administrator upon the opening of the liquidation phase.

In accordance with Art. 50 (1) sentence 2, a sale of the business as a going concern shall also be possible in the simplified procedure. However, no standard accompaniment by a neutral, qualified person is provided for. This cannot be justified by the fact that the sale takes place within the framework of an auction and a bid for the business as a whole must necessarily be better than the sum of the proceeds for an individual sale. This is because without transparent sales efforts in line with the market, there is no guarantee that the value potential of the farm will be realised. Why what is considered necessary in the pre-pack procedure should not apply in the simplified procedure is not clear.

In addition, the proposal does not contain any obstacles to combining the pre-pack procedure with the simplified winding-up procedure. In particular, Art. 42 (2) does not contain the possibility to refuse the opening of simplified winding-up proceedings on the grounds that the debtor has previously gone through the preparatory phase of Art. 22 et seq. In this case, however, the rules on the appointment of liquidators in Art. 25 and Art. 39 contradict each other.

Incompatibility with Title V

Title V of the proposal requires Member States to introduce an insolvency filing requirement for legal persons and rules on the liability of management in the event of a breach of the filing requirement.

The provisions for simplified liquidation proceedings under Title VI do not provide for the court to reject a petition to open insolvency proceedings if liability claims against the directors are at issue, e.g. for delay in insolvency (Art. 42 (2)). In addition, the principle of self-administration should also apply in this case (Art. 43 (1)), the court should not be able to appoint an insolvency administrator at its own discretion (Art. 39) and only avoidance claims are assigned to possible assertion by creditors (Art. 47). It can therefore be assumed that liability claims against the management – e.g. pursuant to Art. 37 – but also against shareholders in the simplified liquidation procedure will come to nothing. This is because it is not to be expected that the management will pursue claims against itself. Either it fails to recognise the existence of liability claims because it already fails to recognise the insolvency delay, or it deliberately conceals such claims.

Managers who recognise their personal liability but seek to conceal it are thus provided with an ideal framework for abuse through the simplified liquidation procedure, which runs counter to the spirit and purpose of the provisions in Title V.

Compatibility with Title VII?

The provisions in Title VII of the proposal concern the establishment of creditors' committees. According to Art. 58 (1), this should normally only take place on the basis of a decision by the creditors' meeting; however, according to Art. 58 (2), the Member States may also allow the court to provisionally appoint a creditors' committee if at least one creditor requests this. According to Art. 58 (3), Member States may declare the appointment of a creditors' committee inadmissible, inter alia, if the debtor is a microenterprise.

At first sight, therefore, creditors' committees play no role in simplified proceedings under Title VI. On the one hand, however, Member States are not obliged to exempt simplified proceedings from the provisions of Title VII; on the other hand, the establishment of a creditors' committee may be desirable and objectively reasonable for the reasons mentioned in Recital

47. The establishment of a creditors' committee may also be desirable and objectively reasonable for micro-enterprises. In addition, Recital. 35, third sentence, encourages Member States to make simplified procedures available to small and medium-sized enterprises. However, the rules on the simplified procedure do not provide for creditors' meetings in which a final decision could be taken on the establishment of a creditors' committee. At least in this respect, they are therefore not compatible with the rules in Title VII.

aa) Art. 41 – Request for the opening of simplified winding-up proceedings

1.	*Member States shall ensure that insolvent microenterprises can submit a request for the opening of simplified winding-up proceedings to a competent authority.*
2.	*Member States shall ensure that any creditor of an insolvent microenterprise can submit a request for the opening of simplified winding-up proceedings against the microenterprise to a competent authority. The microenterprise concerned shall be given the opportunity to respond to the request, by contesting or consenting to it.*
3.	*Member States shall ensure that microenterprises can submit a request for the opening of simplified winding-up proceedings using a standard form.*
4.	*The standard form referred to in paragraph 3 shall allow for the inclusion, among others, of the following information:*
(a)	*if the microenterprise is a legal person, the debtor's name, registration number, registered office or, if different, postal address;*
(b)	*if the microenterprise is an entrepreneur, the debtor's name, registration number, if any, and postal address or, where the address is protected, the debtor's place and date of birth;*
(c)	*a list of the assets of the microenterprise;*
(d)	*name, address or other contact details of creditors of the microenterprise, as known to the microenterprise at the time of the submission of the request,*
(e)	*the list of the claims against the microenterprise and, for each claim, its amount specifying the principal and, where applicable, interest and the date on which it arose and the date on which it became due, if different;*
(f)	*if security in rem or a reservation of title is alleged in respect of a certain claim and, if so, what assets are covered by the security interest.*
5.	*The Commission shall establish the standard form referred to in paragraph 3 by way of implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 69(2)*
6.	*Member States shall ensure that when the request for opening simplified winding-up proceedings is submitted by a creditor, and the microenterprise expressed its consent to the opening of the proceedings, the microenterprise is required to submit the information listed in paragraph 4 together with the response referred to in paragraph 2 of this Article, where available.*

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

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

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

Debtor application

Access to the proceedings on the debtor's application pursuant to para. 1 does not in itself require further comment. A form requirement can be helpful in principle to ensure that the necessary information is provided as completely as possible. However, requiring a form can also be counterproductive if it is not user-friendly. The standard form for lodging a claim pursuant to Art. 55 (1), 88 of Regulation (EU) 2015/848 is a negative example in this respect. German experience with interim attempts to introduce standard forms for corporate insolvencies points in a similar direction.

The wording of Art. 41 (3) ("...that micro-entities may request the opening of simplified winding-up proceedings by means of a standard form") allows for the interpretation that Member States do not have to make the use of the standard form mandatory. This may have advantages if the standard form is not designed to be user-friendly. However, it may also lead to additional work for the court if applications that are not filed by form are more difficult to examine and the court cannot reject them solely because no form was used. It would therefore be preferable to make forms compulsory and to provide a (user-friendly) standard form.

In conjunction with the content requirements for a debtor's petition set out in Art. 41 (4), the court's obligation to decide on an insolvency petition within a maximum of two weeks as provided for in Art. 42 (1) must be interpreted in such a way that only a complete petition triggers the time limit for a decision.

Completeness in this context means the quality of the content, which cannot be verified automatically even in the context of an electronic application. In the case of an incorrect or incomplete application, the court must therefore have the possibility to request the debtor to rectify the situation. The consequence is not regulated in the event that the debtor does not succeed in sufficiently rectifying the situation within the set time limit. In this case, the opening of regular proceedings is possible, provided the application meets the requirements, or the application is dismissed.

The court should be given the possibility to interpret an incomplete request to open simplified winding-up proceedings as a request to open regular proceedings, unless the debtor has filed a corresponding request himself in the alternative. A clarification in the Directive would be helpful.

Creditor application

A creditor's application under Art. 41 (3) sentence 1 is followed by a hearing of the debtor under sentence 2. Art. 42 (1) does not distinguish between a debtor's and a creditor's application with regard to the two-week period within which the court must decide on an application. Since the court must first examine a creditor application and then conduct the hearing procedure according to Art. 41 (3) sentence 2, which may include an exchange of mutual opinions, the two-week period for deciding on a creditor application is too short.

Art. 42 (1) should be corrected to the effect that only admissible debtor's applications set the time limit in motion.

Above all, it follows from the possibility of procedural conversion in Art. 47 c) that regular proceedings can also be conducted over the assets of micro-enterprises, i.e. that the special procedure under Title VI of the proposal does not necessarily have to be the only permissible procedure for micro-enterprises.
Against this background, the question arises as to why Art. 41 (3) also grants creditors the right to request special proceedings. At first glance, the argument seems obvious that creditors may also have an interest in proceedings that are supposedly faster and cheaper without an administrator. On closer examination, however, this argument does not hold water. Conceivable motives for creditors to apply for special proceedings without an administrator instead of regular proceedings could be:

a) The petitioning creditor has dominant influence over the debtor or has made arrangements with the debtor, i.e. promises himself individual advantages which an insolvency administrator could thwart.

b) The petitioning creditor wants to avoid the appointment of an administrator because he would then have to fear the discovery and prosecution of avoidance claims.

c) The petitioning creditor uses the proceedings merely as a means of exerting pressure to induce the debtor to make payments or to achieve the debtor's exit from the market, especially since according to Art. 41 (6) it should be possible to open proceedings even against an objection by the debtor.

All of the aforementioned motives are not based – at least according to the current German understanding – on interests that would be worthy of protection when weighed against the interests of the debtor, the creditors as a whole and the public.

An economic interest in the sense of a higher quota expectation is not a plausible motive for a creditor's application if the debtor has no significant assets. If he has assets, the advantage of a more professional handling of the proceedings outweighs the alleged cost disadvantage.

Furthermore, the prospect of debt relief for jointly liable persons under Art. 56 and 57 is likely to have a deterrent effect on creditors. The creditors who have corresponding third-party collateral cannot have any interest in devaluing it, and neither can the other creditors, because the total claims against the debtor can be reduced – increasing the quotas for the other creditors – through the use of the third-party collateral.

In addition, the lack of inclusion of creditors in Art. 41 (3) and the debtor's duty to provide information according to paras. (6) and (7) mean that the creditor does not have to use a form for his application. He will therefore only have to state his claim and the debtor's insolvency within the meaning of Art. 38 (2). If the debtor agrees to the opening of the special proceedings in accordance with paragraph (6) and can provide the information in accordance with paragraph (4), he could also have filed the application himself. In this case, it is not apparent why the creditor's right to file an application is needed. No plausible reason is the overcoming of shareholder resistance that prevents a debtor-director from filing the petition himself. This is because if the insolvency ground of Art. 38 (2) exists, there is an obligation to file an application anyway (cf. Title V, Arts. 36, 37 of the proposal).

If the debtor cannot provide the information under Art. 41 (4) despite consenting to the opening of proceedings, the consequence is unclear. Paragraph (7) suggests that proceedings may be opened if the debtor objects or does not respond during the hearing; however, it does not regulate the case where the debtor consents but still does not submit information.

Even if in this case – by way of a first right conclusion – the opening of proceedings is permitted and, in accordance with Art. 41 (7), it is required that the debtor submit the information in accordance with para. (4), the question arises as to how to proceed if the debtor does not or not completely fulfil his duty to provide information even after the opening of proceedings. According to practical experience, such debtor behaviour is the standard case in creditor applications. The reasons for this can be incompetence, obstruction or a misjudgement of their

own situation. In all these cases, however, the proceedings are then already opened in self-administration after the proposal has been presented. In the case of an incompetent, obstructive or reality-refusing debtor, it does not differ qualitatively much from the case where no proceedings are opened, except that the court has to expend considerable effort. The court only has the option of appointing an insolvency administrator on its own initiative in the constellation of Art. 47 c), i.e. not in the case of mere incompetence, obstruction or lack of reality on the part of the debtor. A procedure is then imposed on the court that causes administrative expense but fails to achieve its purpose.

However, if self-administration proceedings without sufficient participation of the debtor defeat their purpose, the possibility of a creditor application should be abandoned from the outset, at least if it is to be maintained that the proceedings are to be conducted without an administrator by default, without the court being able to deviate from this in general, be it through the right to appoint an administrator at its own discretion or through a conversion right in accordance with Art. 47 c) even in cases where the debtor proves to be unsuitable for self-administration.

One result of the ESUG evaluation (https://www.bmj.de/SharedDocs/Downloads/DE/News/Artikel/101018_Gesamtbericht_Evaluierung_ESUG.html) in Germany was that self-administration proceedings only make sense if the debtor is sufficiently qualified to handle the proceedings properly – either himself or through suitable advisors. The German legislator therefore increased the requirements for ordering self-administration. If the debtor is not only unqualified, but does not want the proceedings at all, self-administration cannot work.

Content of the standard form

The mandatory information to be provided by the debtor pursuant to Art. 41 (4) makes sense. However, the majority of debtors will only be able to fill out this standard form with professional and thus costly assistance and otherwise will regularly fail to provide proper or accurate information according to Art. 41 (4) e) (exact list of principal and accessory claims with date of origin and due date) and f) (designation of security interests).

Rec. 37 recognises this circumstance when it explicitly states that a balance sheet test may not be feasible if the debtor is a microenterprise, especially in the case of sole traders, as proper records may not be available and a clear distinction may not be made between private assets and liabilities and business assets and liabilities.
If, in the case of non-advised debtors, the court is seen as having a duty to assist the debtor completing the form, the court will incur a considerable amount of work. If, on the other hand, the court is not to assist with the application and does not (have to) examine the debtor's information in detail, there will be a lack of basic information for the decisions to be taken in the subsequent proceedings (in particular Art. 49).

The names and contact details of the creditors to be provided pursuant to Art. 41 (4) d), supplemented by information on the claims, will often include personal data within the meaning of Art. 4 No. 1 GDPR, the specific processing of which in the proceedings and, above all, the sending of which to other creditors pursuant to Art. 45 (2) a) of the proposal will generally not have been consented to in advance by any of the creditors pursuant to Art. 6 (1) a) GDPR. In order not to expose the debtor, the court and the creditors who receive personal data of the other creditors to data protection problems, legal clarifications on the admissibility of the processing would be desirable, if at all possible from a data protection perspective.

According to the wording of the provision, the list of information in Art. 41 (4) is not exhaustive; it apparently only contains the information deemed mandatory. However, these are not sufficient.
It would also be compulsory for the debtor to provide information on the balance sheet total and the annual turnover as well as on the employees employed by him, if any (cf. above the comments on Art. 38). This information together with supporting documents – at least the number of employees – is necessary because according to Art. 42 (2) a) the court must be able to check whether the scope of application of the special procedure is open (less than 10 employees).
The information on the balance sheet total and annual turnover must be made plausible by a balance sheet or at least by accounting documents. The debtor's mere assertion that his company meets the criteria of Art. 2 j) cannot be sufficient here because it would otherwise simply override existing and more far-reaching obligations to provide evidence in individual Member States due to the obligation to open formulated in Art. 42. Germany requires such information in the insolvency petition on the previous business year in section 13 (1) sentence 5 InsO if the debtor has a business operation that has not been discontinued.
The requirement for mandatory disclosures should also specify the period to be covered by the disclosures on key business figures, how to proceed if the company cannot provide (balance sheet) figures for this period, and whether the number of employees refers to headcount or full-time positions.
The checkpoints in Art. 42 (2) c) and d) entail the requirement of further mandatory information: Debtors must also set out the facts that are relevant for the territorial jurisdiction of the court under national law and they must set out and, if necessary, prove the facts that allow an examination of the international jurisdiction of the court under Art. 3 (1) of Regulation (EU) 2015/848.
It should also be mandatory for the debtor to provide information that allows an assessment of whether there are claims under insolvency avoidance under the respective national law, e.g. information on gratuitous benefits in the relevant period prior to the filing of the application.

The minimum information of the applicant debtor listed in Art. 41 (4) should be supplemented by the information explained above in order to enable the court to examine the application quickly.

bb) Art. 42 – Decision on the request to opening of simplified winding-up proceedings

1.	*Member States shall ensure that the competent authority takes a decision on the request for the opening of simplified winding-up proceedings no later than two weeks after receiving the request.*
2.	*The opening of simplified winding-up proceedings may be refused only if one or more of the following conditions is fulfilled:*
(a)	*the debtor is not a microenterprise;*
(b)	*the debtor is not insolvent pursuant to Article 38(2) of this Directive;*
(c)	*the competent authority where the request was submitted has no jurisdiction over the case;*
(d)	*the Member State where the request was submitted has no international jurisdiction over the case.*
3.	*Member States shall ensure that the microenterprise or any creditor of the microenterprise may challenge before a court the decision on the request for the opening of simplified winding-up proceedings. The challenge has no suspensive effect on the opening of simplified winding-up proceedings and shall be dealt with promptly by the court.*

Decision deadline

The two-week period within which the court is to decide on the opening of simplified proceedings after receipt of an application is very short even if the application and the annexes are complete and in order. This is because the court must check the debtor's information and possibly verify it for this purpose (see above). This already follows, for example, from Art. 42 (2) d) of the proposal in conjunction with the court's obligation under Art. 4 (1) of Regulation (EU) 2015/848 to examine and substantiate its international jurisdiction in writing. This examination would be pure formalism if it were limited to a conclusive examination of the debtor's information. However, if the court has to verify the facts alleged by the debtor and correspond with third parties, for example, two weeks is too short a time limit for a decision.

If the court were obliged to make a decision within the two-week period even if the debtor's application was incomplete or not in order, only a refusal to open proceedings would make sense as a decision. However, Art. 42 (2) does not provide for a refusal on this ground. However, the court cannot be obliged to open proceedings if the application is incomplete or not in order, because the necessary basis for the decision is then missing.

As mentioned above, Art. 42 (1) must therefore be interpreted (and should be supplemented accordingly) in such a way that only an admissible debtor's application sets a time limit for the court in motion.

In Regulation (EU) 2015/848 – following the ECJ's Eurofood ruling – the definitions of the terms "decision to open insolvency proceedings" and "time of opening of proceedings" in Art. 2 No. 7 and 8 EuInsVO were deliberately chosen so that provisional insolvency proceedings are also covered. The provisions in Artt. 42 and 45 of the proposal indicate that no preliminary proceedings can take place in simplified liquidation proceedings. At least for Germany, this would be disadvantageous for the debtor, but also and in particular for the creditors, because the possibility would then be lost of still generating funds and preparing a sale of the business by pre-financing the "Insolvenzgeld".

It remains open what the consequences are if the court does not comply with the time limit of Art. 42 (1). If a failure to comply with the time limit is to have no consequences, a mandatory provision would suffice. Alternatively, the possibility that the court has to compensate for any damage caused by the delay could be considered as a consequence of exceeding the deadline. This would be the obvious interpretation of the current version of Art. 42 (1). In this case, however, the time limit would have to be designed in such a way that it can be met in any case (see above). However, a threat of liability for damages on the part of the court would create incentives to place compliance with the time limit before proper, careful processing of the application. This would not be in the spirit of due process, which the proposal allegedly seeks to achieve.

Examination procedure

In the event of a (proper) application pursuant to Art. 41, the court shall only be able to refuse to open simplified winding-up proceedings on the grounds exhaustively listed in Art. 42 (2).

First of all, reference can be made to the above statements in two respects:

First, as already explained, the mandatory information provided for the standard form under Art. 41 (4) is not sufficient to allow the court to fully examine the conditions for opening or dismissal in Art. 42 (2).

Secondly, it would make sense to clarify that the judicial review is not limited to the conclusiveness of the information contained in the application, but also goes beyond this in the sense of an official investigation (see above).

In addition, it should be noted that in the case of national local lack of jurisdiction of the court pursuant to Art. 42 (2) c), in addition to a dismissal of the application to open proceedings, a reference and, upon request, a referral to the competent court should also be considered.

On the question of international jurisdiction under Art. 42(2)(d), mention should be made of the possibility of secondary or particular insolvency proceedings under Art. 3(2), (4) of Regulation (EU) 2015/848 (see also above), for which information beyond that provided for in Art. 41(4) for the standard form would also be required.

As already mentioned several times, practical experience indicates considerable doubts that debtors in the target group of the simplified winding-up procedure would be able to properly fulfil the tasks involved in the winding-up.
The practical experience with the inadequacies of debtors in self-administration processed within the framework of the ESUG evaluation in Germany prompted the German legislator to introduce regulations enabling the court to reject self-administration from the outset (section 270b (1) sentence 1 InsO) or to revoke it after it has been ordered (sections 270e, 272 InsO) if it is to be feared that the debtor is not capable of conducting the proceedings properly.

Unless the approach – which is mistaken in this case – that an insolvency administrator can only be appointed in exceptional cases and not at the discretion of the court is abandoned, the court should at least be given the possibility, in addition to Art. 42 (2), to refuse to open simplified liquidation proceedings in self-administration if the debtor is obviously unable to conduct them properly or if self-administration would give rise to fears of not only insignificant disadvantages for the creditors for other reasons.

In particular, disadvantages for creditors will regularly loom if the debtor is already in a state of insolvency delay within the meaning of Art. 36 of the proposal and claims exist against the management pursuant to Art. 37. This is because it is not to be expected that managers of the debtor who have made themselves personally liable by disregarding the obligation to file for insolvency will pursue corresponding claims against themselves.
Either they are not even aware of the insolvency delay and liability or they are aware of it and deliberately choose a type of procedure in which they can avoid asserting liability. The same applies in the case of claims against shareholders. The German legislator has deliberately assigned the assertion of corresponding liability claims in self-administration to the court-appointed administrator in section 280 InsO.

Legal remedy

According to the wording of Art. 42 (3) sentence 1, it is to be assumed that an appeal against the decision on an application under Art. 41 (1) or (2) exists not only for the respective applicant if the court does not comply with his or her application, but also

a) for the debtor, if the court opens the proceedings at the creditor's request;
b) for the debtor if the court dismisses a creditor's application;
(c) for each creditor, if the court opens the proceedings on the debtor's application;
(d) for any creditor, if the court dismisses a debtor's petition;
(e) for any non-petitioning creditor, if the court opens the proceedings at the request of another creditor;
(f) for any non-petitioning creditor, if the court dismisses the petition of any other creditor.

In cases d)-f), an appeal would probably not be wanted and would in any case be neither necessary nor meaningful or justified.

In case b), too, there is no apparent need for an appeal.

The wording of Art. 42 (3) should be corrected so that it only obliges Member States to allow remedies that are reasonable and justified and for which there is an interest worth protecting.

Furthermore, via Art. 42 (3), the lack of international jurisdiction of the court under para (2) d) should not be amenable to a separate appeal.

In this respect, a remedy already exists under Art. 5 of Regulation (EU) 2015/848 and to the extent that this remedy has a suspensive effect under national law (which the provision does not exclude), this would result in a contradiction with Art. 42 (3) sentence 2 of the proposal.

For systematic reasons, it must be assumed that an appeal under Art. 42 (3) can only be based on grounds listed in Art. 42 (2). Thus, the appealability of the decision for creditors' remedies is likely to be practically empty, because creditors generally do not have information and evidence that would enable them to prove that the debtor is not a microenterprise within the meaning of Art. 2 (j) or not insolvent within the meaning of Art. 38 (2). The creditors' remedy makes sense if, as suggested above, further grounds for refusal are introduced.

The suspensive effect of an appeal, which is excluded by Art. 42 (3) sentence 2, accepts the risk that a debtor, who should not actually be granted access to proceedings, makes effective dispositions to the detriment of creditors in – ostensibly ordinary – proceedings in self-administration until the appeal has been finally decided.

In order to counter the risk of prejudice to creditors, the court should at least be given the possibility to order a stay of the appeal if, according to its reasoning, the advantages of the stay outweigh its possible disadvantages.

The concept that the decision to open simplified winding-up proceedings – to be taken at very short notice under Art. 42 (1) – can only be revised on appeal and that conversion into

regular proceedings is only possible under the narrow conditions of Art. 47 c) also means that the simplified winding-up proceedings must be continued as such even if it subsequently transpires that the debtor has obtained access by providing false or incomplete information.

The court should also be able to convert simplified liquidation proceedings into normal insolvency proceedings in accordance with Art. 47 c) in the event of intentionally false or incomplete information provided by the debtor.

cc) Art. 43 – Debtor in possession

1.	*Member States shall ensure that, subject to the conditions laid down in paragraphs 2, 3 and 4, debtors accessing simplified winding-up proceedings remain in control of their assets and the day-to-day operation of the business.*
2.	*Member States shall ensure that, where an insolvency practitioner is appointed, the competent authority specifies in the decision on the appointment whether the rights and duties to manage and dispose of the debtor's assets are transferred to the insolvency practitioner.*
3.	*Member States shall specify the circumstances in which the competent authority may, exceptionally, decide to remove the debtor's right to manage and dispose of its assets. Such a decision must be based on a case-by-case assessment in view of all relevant elements of law and facts.*
4.	*Member States shall ensure that, where the debtor no longer holds the right to manage and dispose of its assets and no insolvency practitioner is appointed, one of the following applies:*
(a)	*any decision of the debtor to that effect becomes subject to the approval of the competent authority, or*
(b)	*the competent authority entrusts the right to manage and dispose of the assets of the debtor to a creditor.*

Headline

Article 43 is entitled "debtor in possession". For this formulation, Regulation (EU) 2015/848 contains a legal definition in Art. 2 No. 3, but Art. 2 of the proposal does not.
Even if the legal definition of the Regulation does not automatically apply to the Directive, in order to avoid inconsistencies, care should be taken to ensure that self-administration in simplified winding-up proceedings corresponds to the definition or, if this is not desired, is designated differently in the heading.

Debtor's power of disposal and day-to-day business

Art. 43 (1) establishes as a basic rule that the debtor shall conduct the proceedings in self-administration. Paragraphs (2) and (3) deal with exceptions to this rule. The principle of self-administration is the consequence of the hurdles set in Art. 39 for the appointment of an insolvency administrator. The exception in Art. 43 (2) requires that parties apply for the appointment of an insolvency administrator. If the court considers it disadvantageous that the debtor retains full power of administration and disposal, the debtor is otherwise left with the option of assuming administrator duties himself under Art. 43 (3) and (4) or finding a creditor for this purpose, which encounters the problems already outlined (see above).

Nevertheless, Art. 43 (1) contains a certain inconsistency insofar as only the day-to-day operation of the enterprise is to be subject to the debtor's control in addition to the assets.
As stated above, liquidation and the winding up of insolvency proceedings pose procedural demands that are beyond the daily operations of a business and cannot usually be handled by debtors in the target group of the proceedings without expert assistance.
This problem cannot be solved by the fact that, according to Recital 40, the debtor should "provide accurate, reliable and complete information about his financial situation and business affairs at the outset and throughout the proceedings". This is because a debtor cannot provide qualified information on circumstances of which he has no knowledge, even if the debtor meets the ideal of Recital 40. The fact that this ideal image is only partially realistic is already evident from the already mentioned statement in Recital. 37, according to which micro-enterprises are often not even in a position to properly fulfil their regular accounting obligations, even though these are part of the daily business, which according to Rec. 40 and Art. 43 (1) can be left to the debtor's control.

If the restriction that only the day-to-day business is to remain under the control of the debtor is based on the realisation that the debtor is regularly not sufficiently qualified, at least for activities specific to the proceedings, the provisions in Articles 39 and 43 do not take sufficient account of this, because they also prevent the court from appointing an administrator at its own discretion only for the tasks specific to the proceedings. If at least this possibility were opened up, a clear demarcation of competences and responsibilities between the debtor and the administrator would be required, as the liability risk for the administrator in particular must be clearly identifiable.

However, the possibility of the court to appoint an administrator even without an application and to confer full power of administration and disposition on him/her is preferable, as has already been mentioned several times above.
In German practice, there is long-standing experience with a distribution of responsibilities and powers of disposal in preliminary insolvency proceedings and in insolvency proceedings in self-administration. Particularly in the case of debtors in the target group of Title VI of the proposal, it is often, if not regularly, necessary for the court-appointed office holder to assume

responsibility beyond his limited scope of duties and powers because the debtor is unable to do so and, moreover, other parties involved regard the office holder as the primary contact person. In the case of an obstructive, uncooperative, unreliable or simply absent debtor, the cooperation necessary in the case of a division of tasks is doomed to failure from the outset.

Powers of an administrator

In the absence of any indication to the contrary, Art. 39 is likely to be interpreted in such a way that an administrator may be appointed upon application not only at the beginning of the proceedings, but throughout the proceedings. This allows a certain degree of flexibility for those entitled to apply, although it is unclear how and from where creditors can obtain information on the course of the proceedings that will enable them to assess whether an application for the appointment of an administrator is warranted and whether the costs of an administrator are covered by the estate.

The wording of Art. 43 (2) is unclear with regard to the question of whether the court can grant powers in the case of an appointment of an insolvency administrator in line with requirements and whether it can subsequently change this decision. The wording that the competent authority in the appointment decision "shall determine whether rights and duties to administer and dispose of the debtor's assets shall be transferred to the insolvency administrator" suggests on the one hand that an administrator appointment is also possible without transferring the (full) power of administration and disposal. On the other hand, this presumed alternative is not specified and insofar as other provisions provide for duties of an insolvency administrator (Artt. 46 (4), 47 a), 48 (1) and (3), 54 (2)), no differentiation is made as to whether the powers conferred by the court include these duties.

If the aim of the proposal is that an insolvency administrator in simplified winding-up proceedings should not have any flexible powers but always the full power of administration and disposal, for which there is a case for simplification, the wording of Art. 43 (2) should be amended as follows:
"Member States shall ensure that, where an insolvency practitioner is appointed, the competent authority specifies in the decision appointing him that the rights and obligations to manage and dispose of the debtor's assets are transferred to the insolvency practitioner."

If, on the other hand, it is intended that the court can delegate powers to the administrator in a flexible and needs-based manner, e.g. only the examination and assertion of avoidance actions, this should be made clear and should also be taken into account in the other provisions that provide for the administrator's tasks.
In this case, it should also be made clear that full administrative and disposal powers can be transferred not only together with the appointment decision, but also at a later stage of the proceedings.

Restrictions on disposal

The possibility provided for in Art. 43 (3) that the court may deprive the debtor of the right to manage and dispose of his assets is to be welcomed in principle, because if the court finds that the debtor is unwilling or unable – in the sense of the purpose of the proceedings – to properly exercise the power of administration and disposal, a consequence must be possible.

First, however, a weakness in the wording of the provision must be noted: Art. 43 (4) a) does not describe a (complete) withdrawal of the right to manage and dispose of assets, but a reservation of authorisation.
Correctly, the passage in question in Art. 43 (3) should therefore read:
"... restrict or deprive the debtor of the right to manage and dispose of its assets."

Since German law defines the term "authorisation" in § 184 (1) BGB as subsequent consent, it would make sense to choose in the German translation of Art. 43 (4) a) the term that is meant according to German understanding.

The restriction of the debtor's power of administration and disposal shall only be possible "in exceptional cases" in the constellation regulated by Art. 43 (3) and (4) that no administrator has been appointed.
Apart from the fact that the recitals do not provide any indications as to what characterises an exceptional case, the reason for this restriction is not comprehensible. If it remains without effect on the costs of the proceedings and serves the efficiency of the handling of the proceedings, it should not only be possible by way of exception, but should be placed in the dutiful discretion of the court as to whether it orders restraints on disposals. This applies above all in view of the practical experience already mentioned several times that debtors of the target group of the proceedings will not only exceptionally, but regularly be overwhelmed by the requirements of a proper handling of the proceedings.

The problem of the envisaged exceptional nature of a restraint on disposal continues in the requirement that the decision must be "based on a case-by-case assessment, taking into account all relevant legal and factual circumstances".
As already explained (see above), a corresponding examination requires investigative measures. Whether the court is in a position to do so is doubtful. In any case, the circumstances that would require a deprivation of the power of administration and disposition remain hidden from the court in case of doubt precisely if the debtor is malicious and does not provide complete and truthful information.
The short decision period of Art. 42 (1) contributes to the fact that the court's investigation possibilities at the start of proceedings are limited – in terms of time and thus also in terms of content. The possibility of obtaining discharge of residual debt abroad more easily than in Germany is already being "advertised" by corresponding service providers with short court decision periods, for example the one-day decision period in Latvia.

However, restrictions or a complete withdrawal of the power of administration and disposition ultimately only make sense if a person qualified and willing to properly exercise the power of disposition is available to the court and the court can also delegate the power to him or her.

If applicable, exercise of a reservation of consent or delegation of the power of administration and disposal to a creditor, Art. 43 (4) a), b)

Operational (winding-up) activities related to the debtor's business must generally be carried out by the debtor itself or its employees, even if an administrator is appointed.
The exercise of a reservation of consent or full power of disposal regularly requires, at least in the initial phase, a certain presence on site, liquidity planning, possibly the recalculation of current or pending orders or projects and, in any case, ongoing coordination with the debtor on the dispositions to be made. In addition, correspondence with the addressees of the orders is necessary (confidence-building, explanation of the factual and legal situation and assurances) and usually quick decisions are required on sometimes numerous transactions (e.g. in the case of order or payment runs several times a week, which in some industries take place outside regular business and working hours).

In addition, if there are restrictions on disposal, measures must be taken to handle monetary transactions: If the debtor no longer has credit accounts, a new account must be set up. Insolvent debtors who are subject to restraints on disposal are usually no longer given their own accounts. The proposal leaves open whether in this case the court itself should (be able to) open and manage accounts. Even if the debtor (still) has a credit account, a requirement for the court's consent would probably require the designation of a specific court person who must provide the respective bank with the documents relevant to money laundering (including personal data).
If the court wants to delegate the full power of disposal to a creditor, a creditor must be willing to do so. The court must therefore identify potentially suitable creditors, correspond with them and explain the task. In doing so, the court will also have to point out that with the full power of disposal the responsibility (including liability risks) is also transferred to the creditor, e.g. for

- Fulfilment of obligations under commercial and tax law
- Fulfilment of duties under labour law
- Compliance with data protection obligations in the course of business management and utilisation
- Compliance with sector-specific obligations (e.g. food law)

In selecting the creditor, the court will also have to check the creditor's creditworthiness and reliability, and prevent the creditor from being a person who colludes with the debtor or acts only for his or her own benefit, thereby harming the interests of the comunnity of creditors.
This means that – in order to avoid liability of the court – not only a selection control but also an exercise control is necessary. In addition, the details of the fiduciary relationship between the creditor assuming the power of disposal, the other creditors and the debtor will have to be regulated by law or contract.

If a creditor wants to administer the debtor's funds, he faces the problem addressed above of the need for a special account. According to the current state of affairs in Germany, it is not to be expected, if only for reasons of money laundering law, that banks will accept creditors who are not professional or public officials as holders of other, trust or special accounts. In the event of a commingling of the debtor's funds with his own assets, which would be inevitable without such accounts, the creditor with power of disposal exposes himself to civil and criminal liability.

In all of this, no remuneration is apparently envisaged for the creditor with power of disposal; otherwise there would be no cost saving compared to the appointment of an insolvency administrator.

For all these reasons, it is difficult to imagine that a serious creditor would regularly be willing to take over the power of disposal. However, the proposal does not provide for any consequence in this case; in particular, the court cannot decide on a conversion into a regular procedure according to Art. 47 c) in this constellation.

The idea of the proposal for a creditor to take possession is reminiscent of the bonorum venditio procedure developed in Roman law in the 7th century. Here, a creditor could be put in possession of the insolvent debtor upon application (missio in bona debitoris) and the property taken into possession was publicly tendered (proscriptio bonorum).
The procedure of bonorum venditio was gradually replaced by that of distractio bonorum. Here, the creditors elected a curator who was responsible for selling the debtor's assets and distributing the proceeds proportionately among the creditors. Even in the early Middle Ages, under a much less complex framework, the exercise of the power of disposal by a creditor thus proved to be neither sensible nor practicable.

In the case assumed by the proposal that there are creditors willing to take over the power of disposal, the constellation is also created that several creditors apply for this task.
In this case, the court must establish a selection procedure, base its selection decision on objective criteria and probably also set these out in writing. In this constellation, disputes about the selection and about the court's liability are also conceivable if the selection subsequently proves to be – avoidably – bad and has led to disadvantages for the creditors as a whole.

The possibility provided for in Art. 43 (4) b) to transfer the right to manage and dispose of the debtor's assets to a creditor should be deleted without replacement.

dd) Art. 44 – Stay of individual enforcement actions

1.	*Member States shall ensure that debtors benefit from a stay of individual enforcement actions upon the decision of the competent authority to open simplified winding-up proceedings and until the closure of that proceedings.*
2.	*Member States may provide that the competent authority excludes, upon request by the debtor or a creditor, a claim from the scope of the stay of individual enforcement actions where both of the following conditions are fulfilled:*
(a)	*the enforcement is not likely to jeopardise the legitimate expectations of the general body of creditors and;*
(b)	*the stay would unfairly prejudice the creditor of that claim.*

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

Suspension of enforcement

A suspension of individual enforcement for the duration of the insolvency proceedings makes sense in principle in the interest of equal treatment of creditors and should correspond to international standards.

Experience shows, however, that enforcement can cause problems, especially if there are already attachments when the proceedings are opened. At least under German law, protection against execution under insolvency law does not automatically cease or suspend e.g. an attachment of a bank account. Rather, in order to remove the (public law) entanglement caused by a state sovereign act with an attachment, a contrary state sovereign act or a declaration of waiver by the attachment creditor is required (section 843 ZPO). According to recent case law of the Federal Supreme Court (BGH), instead of a waiver or complete lifting of the attachment, a stay may also be granted for the duration of the insolvency proceedings.

If an insolvency administrator has been appointed, it can be expected that he or she is familiar with the legal situation and can take the appropriate steps to enforce the stay of enforcement and, if necessary, file the right appeal with the right body. In contrast, debtors in the target

group of simplified liquidation proceedings will generally have neither the necessary legal knowledge to properly enforce the stay of enforcement nor the ability to persuade the creditor. Without an insolvency administrator, debtors will therefore regularly need qualified advisors. If they are unable to finance an advisor, the stay of execution will, in case of doubt, come to nothing, because experience shows that no attachment creditor will declare a stay or waiver of an attachment lien on its own initiative.

Exceptions

The exception in Art. 44 (2) is not formulated as a mandatory requirement but as an option for the national legislator. In Germany, it would primarily affect real estate enforcement in the form of forced sale and/or forced administration, which is possible for creditors with a right to satisfaction from immovable property under section 49 InsO even during insolvency proceedings, as well as the enforcement of new creditors with tort or maintenance claims in the part of the new acquisition that is not attachable for other creditors (section 89 (2) InsO).

Insofar as the national legislature has already regulated exceptions from enforcement protection under insolvency law for the standard insolvency proceedings, such as those mentioned above in Germany, Art. 44 (2) should not have to introduce any deviating standards or requirements if a Member State makes use of the regulatory option. This concerns in particular the requirement of a court decision as well as the requirement of Art. 44 (2) b) with the factual characteristic of inadequacy.

In the alternative, it should be made clear that any restriction of creditors' rights compared to the standard insolvency proceedings is unreasonable.

In Art. 6 (9) c) of Directive EU 2019/1023, the following formulation on the suspension of individual enforcement measures is worth considering:

(9. Member States shall ensure that judicial or administrative authorities may lift a suspension of individual enforcement measures in the following cases: ...

(c) where provided for under national law, one or more creditors or classes of creditors are or would be unduly prejudiced by the stay of individual enforcement measures; or....

ee) Art. 45 – Publicity of the opening of simplified winding-up proceedings

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

2.	*Member States shall ensure that the competent authority immediately informs the debtor and all known creditors, by individual notices, of the opening of simplified winding-up proceedings.*
The notice shall include, in particular:	
(a)	*the list of claims against the debtor as indicated by the debtor;*
(b)	*an invitation to the creditor to lodge any claims not included in the list referred to in point (a) or to rectify any incorrect statement on those claims no later than 30 days upon the receipt of the notice;*
(c)	*a statement to the effect that, without further action by the creditor, the claims included in the list referred to in point (a) will be considered as lodged by the creditor concerned.*

Publication

The public announcement of the opening of insolvency proceedings is a European standard and, according to Recital 12 of Regulation (EU) 2015/848, a prerequisite for the applicability of this Regulation and thus the cross-border effects regulated therein.

With their applicability, however, the debtor in self-administration is also subject to the further publication obligations of Art. 28 and 29 of Regulation (EU) 2015/848. As a rule, debtors in the target group of the simplified winding-up procedure are likely to be overburdened with the fulfilment of these obligations.

Individual communication

The individual notification of known creditors about the opening of proceedings is also in line with the common European standard and, insofar as foreign creditors are involved, with the obligation under Art. 54 (1) of Regulation (EU) 2015/848.

The fact that Art. 45 (2) of the proposal sets lower requirements for the notification than Art. 54 (2) and (3) of Regulation (EU) 2015/848 should not be interpreted as meaning that the higher requirements do not apply in the simplified winding-up procedure. A clarification in this regard would be helpful.

It would also be helpful to add that the opening order can also be served on the debtor's debtors if national law regularly provides for this in insolvency proceedings.

Immediate information of all parties about the opening of proceedings, Art. 45 (2) and about the auction, Art. 54 (2)

Although service is also the responsibility of the court in Germany, it is practically always delegated to the administrator pursuant to section 8 (3) InsO. This also applies to the information of foreign creditors pursuant to Art. 54 of Regulation (EU) 2015/848 of the European Parliament and of the Council.

A takeover of these notifications by courts would encounter legal and practical difficulties:

According to the content requirements of Art. 45 (2) a) to c) of the proposal, the court would have to send various attachments with the information.
Since not all creditors are obliged to provide (data protection compliant) electronic communication facilities within the meaning of Art. 40, or existing communication facilities of the creditors are not necessarily known to the debtor, the court would have to carry out an address check, if necessary ascertain the address, and also send a mail.
Art. 45 (2) a) implies the processing and sending of personal data of individual creditors. In this respect, the court would be the controller within the meaning of Art. 4 No. 7 GDPR. The processing and sending of personal data of creditors without their prior consent would only be permissible under the conditions of Art. 6 (1) c), e) or f) GDPR. At least for the mailing under Art. 45 (2) a) of the proposal, this is questionable; the court would therefore have to black out personal creditor data in case of doubt.
This is also supported by Recital. 18, according to which "any personal data obtained pursuant to this Directive [...] shall be processed by designated courts [...] only if necessary and proportionate for the purposes of identifying and tracing assets forming part of the debtor's insolvency estate". It is also worth mentioning in this respect that the transfer of sensitive data about the debtor or his company should only be allowed to the competent representative bodies on the creditor's side, not to arbitrary recipients on the creditor's side.

The information on the auction pursuant to Art. 54 (2) requires the processing of the concrete list of the objects concerned. Common (fee-based) software for insolvency administrators contains tools for such processing, court software does not so far.

(c) Chapter 3 – List of claims and establishment of the insolvency estate (Art. 46-48)

aa) Art. 46 – Lodgement and admission of claims

1.	*Member States shall ensure that the claims against the debtor are considered as lodged without any further action from the creditors concerned, where those claims are indicated by the debtor in one of the following submissions:*
(a)	*in its request for the opening of simplified winding-up proceedings;*
(b)	*in its response to the request for the opening of such proceedings submitted by a creditor;*

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

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

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

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

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

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

Receipt and processing/admission of claims and any corrections, Art. 46 (2) and (4), and, if necessary, decision on disputed claims, Art. 46 (5)

The filing fiction in Art. 46 (1) is associated with considerable legal concerns.
Up to now, the filing of insolvency claims has regularly been left to the creditor concerned. It is done on his initiative and with the content he himself has filed.
The smallest entrepreneur, who is regularly overburdened according to the description in Para. 37, will hardly be in a position as a debtor to correctly state the claims of all creditors. The vagueness applied here would be acceptable if it were compensated for the creditors concerned by the anticipated cost savings. However, this could only be assumed for creditors whose claims are actually listed by the debtor and are at least approximately correct.
Creditors whose claims are stated incorrectly or not at all by the debtor should, according to Art. 46 (2), only have 30 days for a corrective filing. According to the already mentioned explanations in Rec. 37 and the experience from German insolvency practice, several creditors would be expected to fall into this category in almost every proceeding. In future, they would only be left with the option of either finding out about the debtor's filings in a timely manner, or accepting an incorrect or even omitted filing by the debtor.

If a creditor is not indicated at all by the debtor and is thus unknown within the meaning of Art. 49 (2), the period of 30 days shall start to run from the date of publication of the date of opening of the simplified winding-up proceedings in the insolvency register.

Art. 49 (2) speaks of the fact that within this period of time it must be possible for the Member States to lodge a claim.
At first, it remains unclear where and with whom such a filing would have to be made. Since, according to Art. 43 (1), the debtor is to retain control over its assets and the day-to-day operation of the company, but is not to assume any further functions in the proceedings, it cannot be considered for a filing. According to Art. 39, an insolvency administrator is only to be appointed in exceptional cases and would therefore not regularly be available for filings in this procedural model.
This leaves only the competent authority or the competent court as the addressee of applications.
Common (fee-based) software for insolvency administrators includes tools for recording and processing claims filings. Court software – at least in Germany – cannot do this so far.
This circumstance alone would lead to considerable cost increases in the judiciary in Germany and a number of other Member States and thus once again call into question the hoped-for efficiency gains. If, as in Germany, insolvency law provides for creditors to file their claims with the insolvency administrator and for the administrator to draw up the insolvency table in order to relieve the burden on court capacities, both the administrator and the court must in future have corresponding software solutions available that are also compatible.

If the creditor not indicated by the debtor cannot or does not wish to make use of the possibility to lodge a claim within the period defined by Art. 49 (2), he is referred to Art. 49 (4).

However, this regulation is unclear.
According to its wording, it only concerns claims of a creditor that go beyond the claims mentioned in Art. 49 (1). Art. 49 (1) only mentions claims that the debtor has indicated himself. This wording suggests the possibility that only claims already stated by the debtor but underestimated are to be covered by the provision of Art. 49 (4).

In Art. 49 (4), it should therefore be made clear that claims that have not yet been filed are also to be covered by its effect.

Assuming that claims not previously mentioned by the debtor are also to be covered by Art. 49 (4), the creditors affected by this would be referred to the fact that their claims would have to be established in accordance with paragraph 2 and the appropriate criteria laid down in national law.
In accordance with Art. 49 (2), however, their claims could no longer be established if the 30-day period had already elapsed.

The reference to Art. 49 (2) therefore either goes nowhere or it indicates that a legal consequence is to be addressed here, which, however, is not specified in more detail. The assumption fiction of Art. 49 (3) cannot be meant here because it only concerns claims that were included in the debtor's submissions mentioned in paragraph 1.
Accordingly, it can only be a matter of the right to raise objections or express concerns with regard to the claims contained in one of these submissions. Since this right is regularly (cf. in Germany § 178 InsO) already enshrined in law in the Member States, a reference to Art. 49 (2) would not make sense at this point.

Claims not stated by the debtor, which are thus only filed subsequently by creditors, cannot participate in the fiction of Art. 49 (3). Thus, they must be established separately by the competent authority or the competent court according to Art. 49 (4).
If the separate determination is refused by the competent authority or court, the isolated continuation of the proceedings (Art. 49 (5) sentence 2) is legally problematic. In this case, the authority or court would have the possibility to determine the scope of the proceedings itself by simply denying such claims. It is not without reason that section 178 InsO assigns the right to dispute claims only to the insolvency administrator or the insolvency creditors. This avoids circumvention of the application principle (no proceedings without a corresponding application), which plays a central role in enforcement law.

Art. 49 (4) should be amended to the effect that only the insolvency administrator or an insolvency creditor may dispute claims and a determination may only be refused in this case.

The legal consequence of an isolated continuation of the proceedings for the contested claims is not elaborated in Art. 49. Since they are no longer to participate in the proceedings, they can also no longer participate in the outcome and trigger a quota payment. However, they remain intact both in their legal existence and in their enforceability, as their exclusion from the proceedings cannot lead to a permanent obstacle to enforcement.

For contested claims excluded from the proceedings under Art. 49 (5), it should therefore be stated that they are no longer covered by the effects of the proceedings as a result of their exclusion.

It would otherwise be unclear whether an exclusion should also affect the suspension of individual enforcement measures under Art. 44. If it were to lift this stay for the excluded claim, it could now be enforced outside of the proceedings and by circumventing the exceptions of Art. 44 (2). The demanding requirements of these exceptions indicate that this is not the intention of the proposal. Rec. 42, however, does not address this issue. It merely addresses the fact that contested claims should be treated in a way that does not unnecessarily complicate the conduct of simplified winding-up proceedings for micro-enterprises. However, there is no question of unnecessary complication if the claim is contested by the competent authority or

the competent court. Also the possibility of delay by contesting the claim as mentioned in para. 42 cannot constitute an unnecessary delay in this case either.

In the event of the conversion of simplified winding-up proceedings into ordinary proceedings pursuant to Art. 47 c), it remains open whether the filing fiction of Art. 46 (1) continues to exist in the ordinary proceedings and whether claims already filed pursuant to Art. 46 (2) remain effective, which requires a data transmission from the court to the liquidator, or whether the filing procedure must be repeated (for all creditors?).

In the case of a conversion into a standard procedure under Art. 47 c), it should be clarified whether the fiction of filing under Art. 46 (1) continues to exist in the standard procedure and whether claims already filed under Art. 46 (2) remain valid.

bb) Art. 47 – Avoidance actions

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

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

(b) any decision by creditors not to commence avoidance actions shall not affect the liability of the debtor under civil or criminal law, where it is later discovered that the information communicated by the debtor about assets or liabilities was concealed or forged;

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

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

In the explanatory memorandum to the draft law on the German Insolvency Code (BT Drs. 12/2443 v. 15.4.1992 – p. 82) it was stated:
"The lack of assets in today's bankruptcy proceedings is largely due to the fact that debtors transfer considerable assets to third parties in the run-up to an approaching, often planned, insolvency and thus deprive their creditors of them. The elements of the law on avoidance should therefore be designed in such a way that the enforcement of avoidance claims is made considerably easier, unless requirements of legal certainty and protection of the market conflict with this. The tightening of the law on avoidance is expected to significantly enrich the insolvency estate and thus also facilitate the opening of proceedings."

The World Bank (Principles for effective Insolvency and Creditor/debtor Regimes – revised edition 2021 – C 18: "Implement an effective regime to prevent and sanction fraud, improper use and abuse of MSEs insolvency proceedings") also sees the efficient prevention of abuses as an essential requirement for the legal design of special procedures for microentrepreneurs.

Against this background, it remains incomprehensible why the proposal apparently assumes that creditors – not supported by an insolvency administrator according to the proposed regular procedure – should identify and enforce challenges without corresponding information. They will regularly not be in a position to do so or, in individual cases, even prevent avoidance actions to the detriment of the other creditors because of the advantages they have obtained themselves in advance.
According to the proposed regular procedure, the investigation would not have to be carried out by an insolvency administrator, but by the debtor who is to take over this task as self-administrator. He will have no interest in doing so in the case of his own abuse or, in the case of the already mentioned excessive demands, he will not be able to do so.
Civil or criminal liability of the debtor for false information about assets or liabilities does not provide a remedy in this context. It could only be asserted – if at all – if the information necessary to do so were identified. However, the debtor in self-administration will have no interest in disclosing circumstances that could give rise to its own liability.

Art. 47 c) provides for an exception to this waiver: If the prosecution of avoidance claims is not possible in simplified proceedings due to their importance in relation to the value of the assets, the court may convert the proceedings into regular proceedings, in which an administrator will then regularly have to be appointed.

Art. 47 c), apparently conceived as an "emergency exit", will not be able to prevent mass abuse.
First of all, Art. 47 c) contradicts the objectives of the proposal, because it counteracts the alleged predictability for the parties involved, which is to be increased by the introduction of a simplified liquidation procedure. This is because if the parties involved do not know and can assess all potential avoidance actions in advance, which realistically can never be the case, they must always expect conversion to regular proceedings. However, its insertion

shows that the proposal itself assumes the possibility of large, challenge-relevant asset shifts, even in the case of micro-enterprises, and must at least offer an "emergency exit" for this.
However, its preconditions already raise doubts about its ability to function. Conversion into regular insolvency proceedings is only to be possible if the conduct of avoidance actions would not be possible due to the significance of the underlying claims in relation to the value of the insolvency estate and due to the expected duration of the avoidance proceedings. It remains questionable whether this exception should only apply if both characteristics are cumulatively fulfilled.
Otherwise, if the underlying claims were of great significance in relation to the value of the insolvency estate and the duration of the avoidance proceedings was likely to be short, the transition to regular insolvency proceedings would not be permissible. Since Art. 39 does not provide for the exceptional appointment of an insolvency administrator for this case, one would arrive at a perverse result. Precisely where avoidance proceedings would have the greatest prospects of significantly improving the outcome of the proceedings for the creditors and thus the efficiency of the proceedings in a short time, it would be incumbent on the creditors to ascertain, assess and enforce the avoidance claims themselves and without the support of an insolvency administrator.

In Art. 47 c) it should be clarified that only the significance of the underlying claims in relation to the value of the insolvency estate is sufficient as a criterion for a transfer to regular insolvency proceedings.

In order to be able to examine the prerequisites for a decision under Art. 47 c) at all, the court must become aware that creditors (want to) assert avoidance claims under Art. 47 a), it must obtain/receive sufficient information from these creditors, examine the claims and make an assessment of the complexity and duration of enforcement. However, as described above, these preconditions will only be fulfilled in rare cases. Since the court itself does not have the means of investigation without this assistance or the assistance of experts and insolvency administrators, decisions under Art. 47 c) would in fact always fail due to a lack of basis for the decision.

In order not to exclude insolvency avoidance claims to a large extent in practice and to prevent massive false incentives for debtors, the Member States would have to be expressly granted the possibility in Art. 47 c) to regularly appoint an appropriate expert for their determination.

In addition, there is no provision for cost recovery in the case of conversion. A financing commitment on the part of the creditor pursuant to Art. 39 b) will only refer to the costs of the simplified proceedings and the obligation of the Member States to ensure cost recovery in Art. 38 (3) and (4) only refers to simplified proceedings. If extensive or complex avoidance claims require regular proceedings, it will often not be possible to realise them without dispute or with sufficient certainty to base the assumption of procedural cost recovery on them.

Art. 47 c) should expressly permit a conversion of simplified winding-up proceedings into normal insolvency proceedings even if it is still unclear whether the costs for the intervention of the insolvency administrator can be covered by the insolvency estate.

cc) Art. 48 – Establishment of the insolvency estate

1.	*Member States shall ensure that the competent authority or, where appointed, the insolvency practitioner, determines the final list of assets that constitute the insolvency estate, on the basis of the list of assets submitted by the debtor as referred to Article 41(4), point (c) and of the relevant additional information received thereafter.*
2.	*The assets of the insolvency estate shall include assets in the possession of the debtor at the time of the opening of simplified winding-up proceedings, assets acquired after the submission of the request for opening of such proceedings and assets recovered through avoidance actions or other actions.*
3.	*Member States shall ensure that, where the debtor is an entrepreneur, the competent authority or, if appointed, the insolvency practitioner specifies which assets are excluded from the insolvency estate and can therefore be retained by the debtor.*

Determination of the list of assets belonging to the estate, Art. 48 (1)

The volume of assets belonging to the estate can be considerable in the case of micro-enterprises, which, according to the definition in Art. 2 j), can have a turnover or a balance sheet total of up to € 2 million, and can be distributed over several locations (e.g. craft business with several warehouses and/or equipment/supplies in vehicles and on construction sites; IT equipment in an external server farm or in the home office of employees). As a rule, the complete recording of the items belonging to the insolvency estate requires an on-site inventory, especially since the bookkeeping is inadequate or unreliable in a large number of cases, which is explicitly stated in Recital 37. 37 explicitly states.

The fact that the list is to be established by the court implies that, at least on the basis of the information available, no further examination as to completeness and possibly a legal examination with regard to third-party and collateral property is to take place.
However, the question of liability remains unresolved insofar as a competent authority or court under Art. 48 (1) determines the final list of assets on the basis of the list of assets submitted by the debtor under Art. 41 (4) c) and the relevant additional information subsequently received. Since Art. 48 does not provide for an appeal against a list of assets, it is not intended – apparently for reasons of accelerating proceedings – to open up the possibility (secured in Germany by section 197 InsO) of taking action against the final list of assets constituting the insolvency estate and obtaining a correction in the event of errors. In Germany, an insolvency administrator is personally and fully liable for corresponding errors under section 60 InsO if he does not show the diligence of a prudent and conscientious insolvency

administrator. Without a corresponding liability regulation, injured creditors would only be left with the option of claiming their damages by way of state liability according to the respective national rules. This would call into question the supposed efficiency gain by denying a remedy (see above).

It also remains unclear where the court should subsequently obtain relevant additional information.
A search of bank account information under Art. 14 will be ruled out as a rule, because this requires the application of an insolvency administrator, who is not usually to be appointed in simplified liquidation proceedings pursuant to Art. 39. Since access to further information under Articles 17 and 18 is also to be restricted to insolvency administrators, these sources of information will also remain closed to the courts.
If the other debtor assets are potentially valuable and/or extensive, in Germany correspondingly specialised companies are regularly commissioned for the recording and valuation, which if necessary, but not necessarily (e.g. not in the case of a sale of the company as a whole), also carry out the realisation, which may take place on their own platforms.
It is not clear from the proposal whether such commissions should also be possible in the simplified procedure; if necessary, a corresponding service provider would have to be commissioned and paid.
If sufficient free funds are not available with sufficient certainty, which would have to be examined by the court, a commissioning is out of the question. Even if sufficient funds are available or are in prospect (through realisation), service providers are likely to require a commissioning or at least an assurance of payment by the court (or a creditor with power of disposal under Art. 43 (4) b)) to secure their remuneration, which would also be valid in the case of a conversion of proceedings within the meaning of Art. 47 c). The court would thus also have the task of selecting service providers and involving them in the awarding of contracts, as well as verifying proper accounting.

Art. 48 (1) should explicitly provide for the possibility to object as a creditor to the final list of assets.

Examination and determination of new acquisition and avoidance proceeds, Art. 48 (2)

For this purpose, the court must continuously monitor the debtor's monetary transactions and any other acquisitions and obtain information on the outcome from creditors pursuing avoidance claims, although the proposal does not provide for an obligation of contesting creditors to provide information and disburse avoidance proceeds (to whom?). A duty of the debtor to provide information on an ongoing basis is only addressed in Recital. 40, sentence 3. Even the debtor does not necessarily learn about avoidance efforts of individual creditors and their results.

It is unclear how it is to be ensured that the debtor only uses the unattachable new acquisition for his lifestyle and separates the attachable new acquisition. In the starting point, according to Art. 48 (3), the court must examine and determine how much of the new acquisition remains unattachable to the debtor, and to secure the attachable new acquisition, a separate account must be set up if necessary, possibly by the court itself (see above).

A mechanism for separating and securing assets belonging to the estate from the access of individual creditors is necessary in particular if the protection against execution provided for in Art. 44 (1) is revoked in favour of individual creditors in accordance with Art. 44 (2).

Examination and determination of excluded assets, Art. 48 (3)

This task concerns not only the new acquisition (see above) but also the existing assets at the opening of proceedings and may require an inspection and valuation of objects. Competent authorities or competent courts will regularly not be able to carry out this task themselves. The resulting question of commissioning appropriate service providers and paying them is linked to the questions already mentioned above and would also have to be resolved.

d) Chapter 4 – Realisation of the assets and distribution of the proceeds (Art. 49-55)

Chapter 4 of Title VI contains the rules on realisation by way of possible asset auctions via internet portals, which the national "insolvency authorities" have to provide. Based on the fundamental considerations of both cost minimisation and procedural efficiency, realisation in small claims proceedings starts with the decision of the insolvency authority under Article 49 on the applicable procedure.
The insolvency authority shall decide on the course of further proceedings after having carried out the prior investigation of the insolvency estate, preparation of the list for the determination of the creditors' claims.
The recitals to this chapter and the rules it contains are extremely sparse. Ultimately, it is only stated that simplified liquidation proceedings are to take place through online auctions. This is the rule and always takes place if the insolvency authority is of the opinion that there are sufficient assets for such proceedings.

aa) Art. 49 – Decision on the procedure to be used

1.	*Member States shall ensure that in simplified winding-up proceedings once the insolvency estate has been established and the list of claims against the debtor has been determined, the competent authority:*
(a)	*proceeds with the realisation of the assets and the distribution of the proceeds; or*
(b)	*takes a decision on the closure of the simplified winding-up proceedings without any realisation of the assets, in accordance with paragraph 2.*

2.	*Member States shall ensure that the competent authority can take a decision on the immediate closure of the simplified winding-up proceedings without any realisation of the assets, only if any of the following conditions is fulfilled:*
(a)	*there are no assets in the insolvency estate;*
(b)	*the assets of the insolvency estate are of such a low value that it would not justify the costs or time of their sale and of the distribution of proceeds;*
(c)	*the apparent value of encumbered assets is lower than the amount owed to the secured creditor(s) and the competent authority considers it justified to allow those secured creditor(s) to take over the asset(s).*
3.	*Member States shall ensure that, where the competent authority proceeds with the realisation of the debtor's assets as referred to in paragraph 1, point (a), the competent authority also specifies the means of realisation of the assets. Other means than the sale of the debtor's assets through an electronic public auction may only be selected, if their use is deemed more appropriate in light of the nature of the assets or the circumstances of the proceedings.*

The insolvency authority shall, after the previous course of proceedings, examine how the further proceedings are to take place (Art. 49 (1)).
If no insolvency estate is available, the proceedings shall be discontinued pursuant to Article 49 (2) a). If there is only such a small amount of realisable assets that the costs and time involved in realisation are not expected to yield any proceeds, the proceedings shall be discontinued pursuant to Art. 49 (2) b). In the event that there are only collateral assets in the estate whose value is below the value of the secured creditor claim(s), the insolvency authority may permit release to the creditor(s) and then discontinue the proceedings pursuant to Art. 49 (2) c).

The decision as to whether realisation makes economic sense requires a valuation of the objects to be realised as well as an estimate of the probable realisation costs, Art. 49 (2) b), and this requires knowledge or a determination of their marketability. In addition, the assessment of whether realisation should be left to secured creditors within the meaning of Art. 49 (2) c) requires an examination of whether and to what extent third party rights exist and, in the case of competing third party rights (usually rights from retention of title, landlord's lien and security agreement), possibly also a decision as to which security interest has priority and to what extent.

The decision on the type of recovery under Art. 49 (3) also requires knowledge or identification of alternatives and their assessment.

Usually, courts have neither sufficient qualifications nor the personnel and time capacities to be able to carry out the aforementioned, necessary preliminary work for a qualified decision on the implementation of a realisation. A sensible alternative regulation to simplify proceedings would be for a court-appointed administrator to examine the prerequisites of Art. 49 (2),

make a recommendation and the court can then decide, if necessary, that realisation should not take place.

These requirements of Art. 49 (2) essentially correspond to the current considerations of the German Insolvency Code. Only the fact of release to the creditor (simplified realisation within the meaning of section 168 (3) InsO) is a realisation option that is not implemented by the insolvency court but by the insolvency administrator with the creditor. The fundamental difference overall is that the insolvency authority's decision under the proposal is likely to be at the end of the proceedings. The InsO provides for this decision to take place at the beginning of the insolvency proceedings and then makes the choice between natural persons with residual debt discharge and deferral of the costs of the proceedings and legal persons. Since there is currently no deferral of procedural costs for legal persons, these proceedings are only opened after an advance payment has been made. The question of deferral only comes into play within the framework of the proposal, since the residual debt discharge for natural persons as shareholders/founders/organ persons is in fact to find its way into the proceedings of legal persons through the backdoor of the liability of the organ persons.

An improvement of the situation through the proposal cannot be ascertained. On the contrary, the current regulation under the InsO is significantly better in terms of efficiency and costs. The question of immateriality is clarified in advance in the interest of the creditors and the parties involved before proceedings even have to be initiated.
There is no provision for the participation of the creditors in the question of whether or not the proceedings are discontinued. Overall, this procedure loses sight of creditor autonomy.
If the insolvency authority comes to the conclusion that the assets are sufficient to continue the proceedings and the distribution will have to be made, the insolvency authority must make a decision as to what type of realisation is envisaged. The rule is the "internet auction", unless the nature of the assets or the circumstances of the proceedings require a different type of realisation.
The realisation is basically planned as an online auction. However, it has apparently been recognised that not all assets can be sold by auction and an opening option has been created in this respect. However, the wording should be understood as meaning that this must be linked to a resolution. If implemented in national law, this should also require access to legal remedies.
Furthermore, no indications or considerations are formulated on how to organise the complex legal or tax issues in connection with the realisation.
Nor are there any indications or considerations on the issues of possible liability of the insolvency authority for erroneous investigations or decisions.
Here, too, the creditors do not have their say. The question of whether and how realisation takes place is currently assigned to creditor autonomy in the German Insolvency Code. The creditors' meeting decides on closure or continuation, partial or total sale and, if necessary, also on the purchase price and general conditions of the realisation.

bb) Art. 50 – Electronic auction systems for the sale of the assets of the debtor

1.	*Member States shall ensure that one or several electronic auction platforms are established and maintained in their territory for the purpose of the sale of the assets of the insolvency estate in simplified winding-up proceedings.* *Member States may set out that for the purpose of the sale of the debtor's assets users may also place bids for the purchase of the debtor's business as a going concern.*
2.	*Member States shall ensure that the electronic auction platforms, as referred to in paragraph 1, are used whenever the debtor's business or assets subject to simplified winding-up proceedings are realised through auction.*
3.	*Member States may extend the use of the electronic auction systems, as referred to in paragraph 1, to the sale of the debtor's business or assets that are subject to other types of insolvency proceedings opened in their territory.*
4.	*Member States shall ensure that the electronic auction platforms, as referred to in paragraph 1, are accessible by all natural and legal persons with domicile or place of registration in their territory or in the territory of another Member State. Access to the auction system may be subject to electronic identification of the user, in which case persons with domicile or place of registration in another Member State shall be able to use their national electronic identification schemes, in accordance with Regulation (EU) No 910/2014*

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

Provided the insolvency authority has come to the conclusion that realisation of the debtor's assets is worthwhile and suitable, the sale will be implemented via the electronic auction platform.

Each member state must introduce this platform or, if necessary, several different platforms. The member states must set up and maintain these in order to be able to carry out the simplified liquidation procedures. According to Art. 50 (1) S. 2, these must be designed in such a way that, in addition to all possible assets, bids can also be made on the debtor company in its entirety. The use of the platforms is mandatory in cases of simplified winding-up proceedings. The platforms must be designed as auction platforms.

This already raises the question of why Member States are required to set up and maintain auction platforms in the manner of a "Justice eBay", although such platforms already exist.

According to Art. 106 TFEU, such platforms would be bound by EU competition rules. In establishing and maintaining them, measures contrary to the Treaties and in particular Articles 18 and 101 to 109 TFEU would be allowed to be taken or maintained. Moreover, they would also be subject to EU state aid rules under Article 107 TFEU. Whether their establishment and maintenance would have to be considered as promoting important projects of common European interest or remedying a serious disturbance in the economy of a Member State under Art. 107 (3) b) TFEU seems questionable.
Neither the explanatory memorandum of the proposal nor its recitals address this issue. It is doubtful whether the sale of assets from insolvency proceedings, which is already often carried out today via private-sector auction platforms, can actually be promoted by the establishment of further state monopoly companies. Their establishment is also not necessary to ensure such auctions due to the sufficiently existing infrastructure.

Access to the auction platforms must be made available to all natural and legal persons domiciled (resident or HR) within the EU. Registration to participate may be provided for, whereby effective electronic registration in a Member State should be sufficient.

Art. 50 requires Member States to design, set up and manage one or more electronic auction platforms, which must in principle be used for the auctioning of debtors' assets in the simplified winding-up procedure. This instruction is followed by numerous questions that have not been clarified by the proposal:
Auctioning should therefore be the rule and other realisations only the exception. However, it is not defined which assets are suitable and which are not. Nor does it address who sets the data. Who values the assets, who sets purchase prices or minimum bids, who takes photos for the auction, etc.?
Art. 50 (1) subparagraph 2 also expressly provides that bids can also be made on the entire debtor company for the takeover of a current business. However, no idea is formulated as to what the further steps of realisation should then look like. It is also not clear who among the actors involved must feel called upon to accompany and handle the legally complex facts.
According to Art. 51 (1) sentence 3, the system shall contain, inter alia, information on all auction processes conducted on national platforms in all official languages of the Union. It is not clear from the proposal who is to arrange for the translations. In the administratorless procedure, only the court that is generally responsible for the pre-announcement of the auction according to Art. 54 can be considered for this.

The court is also responsible under Art. 54 (2) in administratorless proceedings for informing all creditors of the details of the upcoming auction.
Even if one does not assume the auction of a living business, then the individual assets alone are endowed with legally complex issues which, although they may in principle be amenable to an auction, must in any case be competently accompanied.

According to the explanations in the Explanatory Memorandum (para. 5, p. 21 of the German version), the possibility for the court to use an electronic auction system should lead to a (further) reduction in procedural costs.
What the assumption of the cost-reducing effect is based on is not to be inferred from the memorandum and is also not immediately apparent. In no case could an electronic sales platform change anything about the fact that the assets to be realised have to be recorded and valued.
In order to be able to offer them via a digital platform, they must also be posted on the platform in a suitable manner, i.e. usually with photos and descriptions, which must be prepared beforehand in as professional a manner as possible.
In the case of computers and other objects with storage media on which personal data could be stored, a data protection-compliant deletion of the storage media must be carried out before disposal (Apple devices must also be checked to ensure that the last user has logged off, as they are otherwise useless for acquirers).
Until they are sold, the items must be temporarily stored at their previous location and secured against third-party access or, if this location cannot be further used or secured, they must be transported to another temporary storage facility.
Depending on the nature of the objects, they may also have to be made accessible for viewing and, in any case, eventually handed over or shipped to purchasers.
In this context, proper invoicing and payment control must be ensured. If collateral is not realised by the collateral creditor itself, this results – at least according to German insolvency tax law – in a triple turnover for VAT purposes, which must be properly accounted for and declared for tax purposes. A separate bulk tax number, which the tax office issues on application, is required for proper tax processing.
It should be clear that the court cannot carry out all these measures with its own staff, but according to the proposal it should at least initiate, coordinate and control them.

In the case of an ongoing business, according to Art. 50 (1) sentence 2, bids shall also be possible for the debtor company as an ongoing business and also in this respect the bidding procedure according to Art. 50 (2) shall regularly run via the electronic auction system.
The sale of a business or part of a business requires – at least for non-insiders – information about the business in addition to knowledge of the acquisition opportunity itself and the items for sale.
Usually, when a company is sold, a "teaser" with brief information about the company is first created to address potential acquirers.
Serious interested parties will then be allowed to carry out more detailed due diligence if they submit a confidentiality agreement.
The provision of documents often takes place via a data room to which access and access rights can be limited. The documents and information to be made available must be screened, sorted and prepared in advance, regardless of how they are made available.
If, after the due diligence, there remains an interest in acquisition, all interested parties must – in the interest of the comparability of several offers – be provided with a uniform draft

contract, which is then usually filled out and negotiated in detail, even if only with regard to the practical handling of various issues requiring clarification. In the course of this, it is almost always necessary to inform the prospective buyers about the special features of a purchase out of insolvency.
With regard to these activities, too, it is unrealistic to expect them to be carried out by the court in proceedings without an administrator. The question also arises as to whether delegating the task of realisation to the court does not contradict the principle of separation of powers. In the final analysis, the insolvency court, if it were responsible for the opening as well as the liquidation and realisation, would be the executive organ of enforcement.

As a rule, a transfer to the debtor will not be an option.
It is already doubtful whether the debtor will still have the necessary material resources and labour freely available and for a sufficient period of time in view of the liquidation. The liquidating debtor himself or his managing director will also have to give priority to finding new gainful employment to support himself in the future and will not be available to a sufficient extent for (unpaid) liquidation activities. In addition, there are shortcomings in many microenterprises, as referred to in Recital 37. 37 points out: "However, the balance sheet test may not be feasible where the debtor is a microenterprise, particularly in the case of sole traders, as proper records may not be available and a clear distinction may not be made between personal assets and liabilities and business assets and liabilities." The circumstances addressed here coincide with practical experience in most cases of micro-enterprises and also regularly speak against the debtor's ability to adequately manage and realise the insolvency estate. He will often fail to provide correct and complete information in the standard form provided for under Art. 41 (4), which requires, among other things, a complete list of existing liabilities and their collateralisation. Usually there are competing security interests in existing assets and inventories held by landlords, suppliers and financiers.

The transfer of the preparation and execution of the electronic auction to individual creditors is likely to be unrealistic from the outset; in any case, however, it can be ruled out that creditors would carry out the activities free of charge, especially as they also expose themselves to the risk of responsibility for complaints and warranty claims from purchasers by carrying out the auction.

Regardless of who conducts the auction, the person conducting the auction must, in case of doubt, comply with the respective applicable rules of online commerce, i.e. e.g. proper instructions, especially vis-à-vis consumers, details of the person responsible, delivery times and delivery costs, if applicable, details of payment, manufacturer's warranty, contract text, general terms and conditions, etc.

Thus, for the activities and duties that are also indispensable in the case of realisation via an electronic system, only the use of external, specialised service providers remains, which – at

least in Germany – already work with their own electronic sales platforms. The court is then at least responsible for the selection and control of service providers.
A cost-saving effect through the establishment of new electronic auction systems is therefore not recognisable.

The obligation to establish and maintain new electronic auction platforms for the sale of assets or even entire companies in insolvency proceedings should be refrained from.

cc) Art. 51 – Interconnection of the electronic auction systems

1.	*The Commission shall establish a system for the interconnection of the national electronic auction systems as referred to in Article 50by means of implementing acts. The system shall be composed of national electronic auction systems interconnected via the European e-Justice Portal, which shall serve as a central electronic access point in the system. The system shall contain in all the official languages of the Union information on all auction processes announced in national electronic auction platforms, enable the search among these auction processes and provide hyperlinks leading to the pages of the national systems where offers may be directly submitted.*
2.	*The Commission shall lay down by means of implementing acts technical specifications and procedures necessary to provide for the interconnection of Member States' national electronic auction systems, setting out:*
(a)	*the technical specification or specifications defining the methods of communication and information exchange by electronic means on the basis of the established interface specification for the system of interconnection of the electronic auction systems;*
(b)	*the technical measures ensuring the minimum information technology security standards for communication and distribution of information within the system of interconnection of electronic auction systems;*
(c)	*the minimum set of information that shall be made accessible through the central platform;*
(d)	*the minimum criteria for the presentation of announced auction processes via the European e-Justice Portal;*
(e)	*the minimum criteria for the search of announced auction processes via the European e-Justice Portal;*
(f)	*minimum criteria for guiding the users to the platform of the national auction system of the Member State where they may submit their offers directly in the announced auction processes;*
(g)	*the means and the technical conditions of availability of services provided by the system of interconnection;*
(h)	*the use of the European unique identifier referred to in Article 16(1) of Directive (EU) 2017/1132,*
(i)	*specification of which personal data can be accessed;*
(j)	*data protection safeguards.*

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

(45) The auction systems operated for the purposes of realising the assets of debtors in simplified winding-up proceedings should be interconnected via the European e-Justice Portal. The e-Justice Portal should serve as a central electronic access point to the on-line judicial auction processes run in the national system or systems, provide a search functionality for users and guide them to the relevant national on-line platforms if they intend to participate in the bidding. When determining the technical specifications of that interconnection system by way of implementing act, the Commission should, in accordance with the Commission's "Dual Pillar Approach", present the result of the analysis of existing solutions already provided by the Commission with the potential for their reuse or should carry out a market screening for potential off-the shelf commercial solutions to use as such or with little customisation.

In future, the national auction platforms shall be interconnected at European level. The necessary harmonisation steps shall be adopted by the Commission within the framework of individual implementing acts. Rec. 45 states that the common European e-Justice portal shall be the central online access point. From there, access to the national platforms shall be given, so that a European exploitation of the assets can or should take place. For the development, the market should first be examined to see which customary solutions are available that can be used promptly through adaptations.
The approach given here indicates very clearly that a national approach is undesirable. A European solution is to be found and favoured. All the essential features of the auction platforms are specified by the Commission. This does not promise any efficiency gains, but rather a considerable bureaucratic effort that is blatantly disproportionate to the achievable effects.

dd) Art. 52 – Costs of establishing and interconnecting electronic auction systems

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

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

Art. 52 sets out the obligation to bear the costs for the participants in the e-Justice portal. The national systems are to be borne by the Member States themselves. The EU e-Justice portal is borne by the EU budget.

ee) Art. 53 – Responsibilities of the Commission in connection with the processing of personal data in the system of interconnection of electronic auction platforms

1.	*The Commission shall exercise the responsibilities of controller pursuant to Article 3(8) of Regulation (EU) 2018/1725 in accordance with its respective responsibilities defined in this Article.*
2.	*The Commission shall define the necessary policies and apply the necessary technical solutions to fulfil its responsibilities within the scope of the function of controller.*
3.	*The Commission shall implement the technical measures required to ensure the security of personal data while in transit, in particular the confidentiality and integrity of any transmission to and from the European e-Justice Portal.*
4.	*With regard to the information from the interconnected national auction systems, no personal data relating to data subjects shall be stored in the European e-Justice Portal. All such data shall be stored in the national auction systems operated by the Member States or other bodies.*

Art. 53 defines the responsibilities with regard to data protection in the exchange of information between the national and European systems. The necessary personal data is stored on the national system alone.

However, it remains unclear how the complex requirements of the GDPR can be reconciled with the necessary information in the context of an overall sale of a business via an auction platform. In order to be able to offer a purchase price in line with the market, the prospective buyer requires a large amount of data, the disclosure of which already currently presents insolvency administrators with problems on a regular basis. How this is to be achieved by the debtor, a creditor or the court (or the "insolvency authority") without violating the rights of the parties involved is not clear. Any potential bidding acquirer needs access to at least the customer and employee data in order to check the economic framework data of the business to be acquired. This data is then to be placed on an international auction exchange without this causing problems under data protection law and without professional monitoring of this process.

ff) Art. 54 – Sale of the assets by electronic auction

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

2.	*Member States shall ensure that the competent authority or, where relevant, the insolvency practitioner, informs through individual notices all known creditors on the object, time and date of the electronic auction, as well as on the requirements to participate therein.*
3.	*Member States shall ensure that any interested person, including the existing shareholders or directors of the debtor, are allowed to participate in the electronic auction and bid.*
4.	*If there are bids both on the acquisition of the debtor's business as a going concern and on the individual assets of the insolvency estate, creditors shall decide which of the alternatives they prefer.*

Art. 54 stipulates that certain information obligations and deadlines must be established in order to inform all interested parties sufficiently in advance of the start of the online auction of assets. All known creditors as well as directors and shareholders and all interested persons should be allowed to participate in the auction. In the case of bids submitted for individual assets and also the entire business as a transfer of business in the case of continuation, the creditors should make the decision of acceptance of the bid.

Overall, in the context of the realisation of the debtor's assets in administratorless proceedings, creditors' rights are addressed in a rudimentary manner at best. Creditors may participate in the auction, but they can only make the decision on the acceptance of the bid if the choice between transfer of business and individual liquidation has to be made.
Unlike in the InsO, the creditors have no rights to decide whether particularly interested parties may participate in the realisation. The shareholders and managing directors are to be allowed to bid in the auction.
Section 162 InsO may be undermined in this way. In order to protect the creditors from possible unilateral influence by prospective buyers – or persons who hold at least one fifth of the capital of a company interested in purchase – with (directly, cf. para. 1 or indirectly, cf. para. 2) a prominent position with regard to information about the debtor (cf. para. 1 no. 1) or opportunities to influence the proceedings (cf. para. 1 no. 2), the final decision on the sale to such a group of persons is left to the creditors' meeting. Thus, the highest self-governing body of the creditors decides for itself whether the procedural rules of a proper sale of the company have been complied with and whether at the end of the transfer there is a fair market value (BeckOK InsR/Verhoeven/Theiselmann, 29th ed. 15.1.2022, InsO § 162).

The entire proposal hardly provides for creditor interests. Consideration of these is at best only marginally possible for individual issues.

There are also no rules in the proposal on the question of how long an auction remains online. Nor does it regulate what happens to the assets that are not knocked down. What happens to

the rights of mass creditors who are significantly affected by assets left behind and not realised? Landlords are likely to take a keen interest in seeing their rights vanish into thin air and the costs of disposal remain with them. The "fast-track procedure" does not find a word on the subject of estate liabilities. Not even with regard to the distribution of proceeds between creditors of the estate and insolvency creditors. This is against the background of the general priority of business continuations in self-administration.

There is also no mention of the question of employee rights, which is within the realm of possibility in the course of the quite conceivable transfer of operations under para. 4. A bid for the entire business with the "assumed" consent of the creditors means that, according to § 613 a BGB, complex issues have to be dealt with that are clearly beyond the expected capabilities of a debtor. All questions of employee rights, pension insurance, insolvency compensations (Insolvenzgeld), social security, etc. remain excluded. In fact, however, there cannot be any significant insolvency compensation claims in the proposed type of procedure; either no one will take care of these claims or the duration of the claim is too short due to the time requirements for the opening procedure (two weeks insolvency opening procedure according to Art. 42).

gg) Art. 55 – Decision on the closure of the simplified winding-up proceedings

1.	*Member States shall ensure that after the distribution of proceeds of the sale of the debtor's business or assets, the competent authority takes a decision on the closure of the simplified winding-up proceedings no later than two weeks after the distribution of proceeds has been completed.*
2.	*Member States shall ensure that the decision on the closure of the simplified winding-up proceedings includes a specification of the time period leading to the discharge of the entrepreneur debtor or of those founders, owners or members of an unlimited liability microenterprise debtor who are personally liable for the debts of the debtor.*

Art. 55 regulates the termination of the simplified liquidation proceedings. It is to be ensured that two weeks after the distribution of proceeds to the creditors, the proceedings are to be terminated. This decision shall then also include a decision on the period of time still to be waited for after which the debtor (managing director or shareholder) will be granted residual debt discharge.

The criteria according to which this decision is made remain unclear. Nor is there any mention of whether there is any participation of the creditors in the process. There are no indications of any tortious acts and the exemption from residual debt discharge.
Rec. 46 makes it quite clear that the proceedings are to be marched through at great speed. It is inevitable that this haste will lead to losses in realisation. What is clearly intended is the discharge of residual debt before the recovery effect of insolvency for the creditors. The focus should be on a new start for the debtor and not on satisfying the creditors. Therefore, no

creditors' rights are taken into account in the proceedings on the generation of proceeds by online auction. Creditors' decisions on the "how" of realisation only come into focus when bids are made simultaneously on the entire business or individual items.
The rules on the auction procedure clearly show a glaring discrepancy between the different realities of life within the EU. When looking through the regulations on the online auctioning of businesses, the image of small gastronomies, textile or souvenir shops with two collaborating family members in European tourist areas comes to mind. Unfortunately, this has nothing whatsoever to do with the extremely complex economic reality of German SMEs in the craft or manufacturing sector.

It is to be expected that predominantly northern European economic structures, for example in northern Italy, Austria, Benelux or Scandinavia, will have similar problems with this. The procedure is only suitable if one does not take into account the interests of creditors, workers' rights, state structures such as taxes and contributions from pension insurance and social security.
The noble goal of acceleration only serves the debtor's discharge from residual debt and the liquidation of small businesses without sufficient consideration for the interests of creditors. Consideration of the improved recovery of creditors claims cannot be guaranteed in this way at all. This procedure sacrifices important achievements of German insolvency law with regard to recovery for creditors, the regulatory function of insolvency and state order criteria with regard to taxes and social security contributions as well as employee rights and interests.

The regulations on online auctions alone violate almost all procedural objectives that were introduced into insolvency proceedings with the creation of the German Insolvency Code. In this regard, reference is made to BT-Drs. 12/2443 of 15.04.1992.

The principle of creditor autonomy is almost no longer taken into account. Insolvency compensation will presumably be abolished. The function of securing legal peace and the regulatory function of insolvency will be abandoned in favour of a fast-track procedure. In addition to the creditors' autonomy, the parties' autonomy with regard to the manner in which the proceedings are conducted will also be abolished. The issues of creditor-damaging manipulations and the question of "familia suspecta" are no longer relevant in the conduct of the auction. It is expressly intended that shareholders, directors or persons involved participate in the procedure. Ultimately, all employee rights are surrendered. Neither is it regulated whether and in what way the interests of the employees are protected in the auction procedure. Nor has even the thought of questions of works constitution law been included in the proposal. Issues of protection against dismissal are also not taken into account, although a complete transfer of a business with 9 employees in an auction procedure is conceivable or even desired.

The auction without the regulative of an insolvency administrator, for example, will raise many legal problems that subsequently cannot be solved by anyone. Either the debtor will have to

use expensive advisors in advance, in which case the question arises as to who should pay for them. Or the respective bidding creditor will price this advisory service into the bid price and in the end will hardly be willing to pay any significant amounts.

The unresolved issues of prefinancing of Insolvenzgeld, employee rights, taxes and duties, liability for wage tax and turnover tax, filing of declarations, possibly open liabilities of the insolvency estate during the continuation of the business, etc. in the event of an award to a going-concern business do not promote efficiency either. They show very clearly that the proposal does not do justice to the complex handling of even the smallest corporate insolvencies. "Only the insolvency administrator can do what the insolvency administrator can do!" is not just a phrase, but is demonstrated daily in the professional handling of businesses with small insolvency estates. It remains incomprehensible how this could be accomplished by the debtor or an institution yet to be created.

e) Chapter 5 – Discharge of entrepreneurs in simplified winding-up proceedings (Art. 56-57)

In Art. 56 and 57, the proposal requires Member States to allow entrepreneurs, fully and jointly liable partners as well as guarantors and jointly liable third parties to discharge their debts. Art. 2 m) contains a definition of the term "full debt relief". However, the proposal does not address, either in the context of this definition or elsewhere, the issues of the demarcation of insolvency claims and assets involved in insolvency proceedings, the automatic or optional termination of ongoing legal relationships and a possible right of the debtor to (refuse) performance with regard to mutual contractual relationships.
Corresponding legal relationships almost always exist – even in mass proceedings. Even if one assumes that these subjects of regulation are left to national law or that the provisions of the respective standard procedure are to be applicable, it may also be assumed that the debtor will regularly not even be in a position to grasp the legal circumstances and possibilities of action; much less will he be able to make use of them in the required manner. This in turn has the consequence that after the opening of proceedings, which according to Art. 42 (1) has to take place very quickly, new liabilities accrue avoidably, or in avoidable amounts. The exercise of rights of arrangement by the court is just as likely to be ruled out as the provision of advice to the debtor in this regard, and the transfer to creditors within the meaning of Art. 43 (4) b) is already unfeasible due to their lack of neutrality, but is in fact unrealistic anyway.

On the subject of debt relief, Art. 2 n) still contains a definition of the term "repayment plan". However, this term does not appear anywhere else in the proposal or its explanatory memorandum.

aa) Art. 56 – Access to discharge

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

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

According to Art. 2 (10) of Directive (EU) 2019/1023, *"full debt relief"* means that *the recovery of the outstanding debt eligible for debt relief is excluded, or that the outstanding debt eligible for debt relief is forgiven as such, as part of a procedure that includes a realisation of assets or a repayment plan, or both*
Could.
Art. 24 of Directive (EU) 2019/1023 had formulated the following further requirements for the consolidation of proceedings in relation to professional and private debts:

1. Member States shall ensure that, where insolvent entrepreneurs have professional debts incurred in the course of their trade, business, craft or profession as well as personal debts incurred outside those activities, which cannot be reasonably separated, such debts, if dischargeable, shall be treated in a single procedure for the purposes of obtaining a full discharge of debt.

2. Member States may provide that, where professional debts and personal debts can be separated, those debts are to be treated, for the purposes of obtaining a full discharge of debt, either in separate but coordinated procedures or in the same procedure.

To the extent that simplified liquidation proceedings should always trigger at least a second, coordinated parallel procedure to relieve the entrepreneur of private debts as well, it remains unclear whether and how such a procedure should be opened without a corresponding application by the entrepreneur.

Provided that the personally liable party alone or the personally liable parties jointly can cover the liabilities, there is no need for debt relief otherwise.

However, this is regularly not the case, which is why there is a fundamental need for debt relief regulations.

The existing regulations in the German Insolvency Code already meet these requirements insofar as proceedings have been opened against the assets of the corporate debtor.

If the proceedings concern a partnership (BGB, OHG or KG), up to now the insolvency administrator of the partnership has exclusively asserted the claims against the personally liable parties, section 93 InsO.

Up to now, a separate procedure concerning the assets of a founder, owner or partner of a micro-enterprise with unlimited liability has been necessary at the request of the personally liable debtor in order to achieve debt relief. Up to now, all debts, whether professional or private, have been covered by these insolvency proceedings on the assets of the personally liable debtor. However, these are separate insolvency proceedings with their own file number, their own administrator, their own assets and their own list of creditors.

Insofar as the debt relief should take place in the same procedure (wording: "in simplified liquidation procedures, corporate debtors as well as.... are fully discharged" this could only apply to corporate debts of this micro-enterprise. Problematic would be constellations in which the person in question had other debts, such as privately initiated debts or debts in connection with another enterprise. In these cases, the debt relief would have to take place in separate proceedings or in proceedings with separate assets and insolvency tables.

In any case, the debt relief and inclusion of the liability of the corporate debtors and the other persons mentioned can only be effected on the basis of a separate application for debt relief, the requirements of which correspond to those of section 287 InsO.

The alternative to a continued strict separation of proceedings would be to combine professional and private debts in one proceeding. This would mean a consolidation of insolvency assets that have so far been available to different creditor groups as separate liability substrates. Depending on the membership of these groups of creditors, this would involve preferential treatment or disadvantage for individual creditors, which could only be justified if consolidation could not affect their prospects of recovery in individual cases. This would only be the case if there were no assets left in both insolvency estates.

The necessary judicial determination of this circumstance would previously – contrary to the regulation provided for in Art. 48 (1) – at least require the involvement of an expert by the court. Without such a determination by an independent expert appointed by the court, full debt relief would have to be granted solely on the basis of the information provided by the debtor. The incentive for debtors to abuse such a procedure would be palpable.

Incorrect or incomplete information can lead to a revocation of the debt relief for the debtor according to Art. 23 (1) and (2) of Directive (EU) 2019/1023 . However, the judicial determination of such conduct on the part of the debtor requires access to information which, according to Art. 14 et seq. and a number of national provisions, can regularly only be obtained by insolvency administrators – provided for only exceptionally in simplified liquidation proceedings due to Art. 39.

bb) Art. 57 – Treatment of personal guarantees provided for business-related debts

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

The starting point of the regulation in Art. 57 are insolvency proceedings or individual enforcement proceedings against the assets of founders or partners of legal persons or entrepreneurs and his family members, which were initiated due to personal guarantees for the company.

In these cases, according to Art. 57, the Member States must ensure that the measures or proceedings based on the personal guarantee are either coordinated or consolidated with the simplified winding-up proceedings. Art. 57 therefore does not contain any regulation on the discharge of residual debt, but only concerns the coordination or consolidation of several proceedings against different debtors. Consolidation is generally ruled out for the reasons already described for Art. 56.

Coordinating the proceedings also becomes difficult due to time constraints. This is because measures of compulsory enforcement or third-party applications against debtors on the basis of guarantee obligations require titling (usually in civil proceedings), which can take a long time under certain circumstances. The simplified liquidation procedure is then normally already completed. The regulation will therefore only apply if the guarantor himself has filed for insolvency proceedings against himself.

It is unclear who can be a "member of a legal person". Is it a person of the body or is the member part of the owners (partners) of the enterprise? It is incomprehensible why the scope of application does not also extend to micro-enterprises, which are partnerships. Participants who are not liable for the debts of the enterprise anyway also vouch for the debts of partnerships. There seems to be a regulatory gap here.

In the case of the merging of the proceedings, which is not yet known to German law, the interest of the respective creditor groups would have to be taken into account by the formation of special masses for the surety creditors. Otherwise, the value of the guarantee security for the guarantee creditors would be diluted.

The coordination of the proceedings against the guarantor and the simplified winding-up proceedings should at least lead to the local jurisdiction of an insolvency court.

7. creditors' committee (Title VII)

a) Chapter 1 – Establishment and members of the creditors' committee (Art. 58-62)

aa) Art. 58 – Establishment of the creditors' committee

1.	*Member States shall ensure that a creditors' committee is established only if the general meeting of creditors so decides.*
2.	*By way of derogation from paragraph (1)_Member States may provide that, before the opening of insolvency proceedings, the creditors' committee can be established as of the submission of a request for the opening of insolvency proceedings where one or more creditors submit a request to the court for the establishment of such committee.*
	Member States shall ensure that the first general meeting of creditors decides on the continuation and the composition of the creditors' committee established in accordance with subparagraph 1.
3.	*Member States may exclude in national law the possibility to establish a creditors' committee in insolvency proceedings, when the overall costs of the involvement of such a committee are not justified in view of the low economic relevance of the insolvency estate, of the low number of creditors or the circumstance that the debtor is a microenterprise.*

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

Art. 58 (1) and (2)

The obligation to establish a (final) creditors' committee (hereinafter: CC) only by resolution of the creditors' meeting is not objectionable in compliance with Art. 58 (2).

However, an appointment by the court under Art. 58 (2) should not only be made at the request of one or more creditors. It can make sense at an early stage of the proceedings, when only a minority of creditors are aware of the insolvency petition that is regularly required. A provision modelled on section 22a (1) InsO should therefore be inserted here. According to this provision, the court must appoint a provisional insolvency administrator if the debtor has fulfilled at least two of the following three criteria in the previous business year:

1. at least EUR 6 000 000 balance sheet total after deduction of a deficit shown on the assets side within the meaning of § 268 paragraph 3 of the Commercial Code;
2. at least EUR 12 000 000 turnover in the twelve months preceding the balance sheet date;
3. an annual average of at least fifty employees.

This provision would ensure that at least in proceedings of a certain size, in which many creditors are regularly affected, the ignorance of individual creditors of the filing of the application does not reduce their possibility to work towards the appointment of a CC, which is usually necessary in any case for such a size.

It also falls short of the mark that an appointment should only be made at the request of a creditor or several creditors. The debtor himself must also have such a right of application.

Art. 58 (3)

The exclusion of the possibility of appointing the CC if the total costs of the involvement of such a committee are not justified in view of the minor economic importance of the insolvency estate, the small number of creditors or the fact that the debtor is a microenterprise is not objectionable in principle.

bb) Art. 59 – Appointment of the members of the creditors' committee

1.	*Member States shall ensure that the members of the creditors' committee are appointed either at the general meeting of creditors or by decision of the court, within 30 days from the date of the opening of the proceedings as referred to in Article 24(2), point (a) of Regulation (EU) 2015/848.*
2.	*Where the members of the creditors' committee are appointed at the general meeting of creditors, Member States shall ensure that the court certifies the appointment within 5 days from the date of the communication of the appointment to the court.*
3.	*Member States shall ensure that the appointed members of the creditors' committee fairly reflect the different interests of creditors or groups thereof.*
4.	*Member States shall ensure that creditors whose claims have only been provisionally admitted and cross-border creditors are also eligible for the appointment to the creditors' committee.*

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

(49) *Member States should clarify the requirements, duties and procedures for the appointment of members of the creditors' committee, as well as the functions attributed to the creditors' committee. Member States should be given the option to decide whether the appointment should be done by the general meeting of creditors or by the court. To avoid undue delays in the set-up of the creditors' committee, the members should be appointed expeditiously. Member States should cater for a fair representation of creditors in the committee and ensure that the participation in the creditors' committee is not precluded to creditors whose claim is not yet admitted or to creditors that are resident in another Member State.*

Art. 59 (1)

The appointment of the CC by the insolvency court within 30 days after the opening of the insolvency proceedings is not objectionable.
The appointment of the CC by the creditors' meeting requires that it takes place within 30 days after the opening of the insolvency proceedings. For this purpose, deadlines for summons must be observed, whereby 30 days are generally sufficient.
However, the examination date would then regularly have to take place separately, as 30 days is a short period for filing and examination (cf. section 28 (1) sentence 2 InsO: period of notice to file: at least 2 weeks, at most 3 months).

Art. 59 (2)

It is problematic that the regulation suggests an obligation on the part of the insolvency court to confirm the CC members elected by the creditors' assembly, irrespective of the existence of the prerequisites.

Art. 59 (2) should therefore expressly make the appointment by the court subject to the proviso that the provisions on the appointment under Art. 59 (3) and the dismissal (Art.62) of members of the GA must be observed.

Art. 59 (3)

The scheme should name the key stakeholders and also keep the door open for employee representatives and non-creditors.

To this end, Member States should not only ensure that the appointed members of the CC adequately reflect the different interests of the creditors or their groups. The CC should include at least the creditors entitled to separate satisfaction, the insolvency creditors with the highest claims, the small creditors and a representative of the employees.

The proposal does not provide for the mandatory or at least regular participation of employee representatives (in Germany through section 67 (2) sentence 2 InsO). Especially in larger companies, however, this participation makes sense because there are often elected representative bodies of the employees that make a representative participation in the CC possible.
In addition, the proposal does not provide for the possibility of also appointing persons as members of the CC who are not creditors themselves. This possibility has proven successful in Germany, in particular to ensure the qualification of the committees, e.g. through the participation of trade union representatives or persons representing creditor pools without representing individual creditors.

It should therefore also be possible to appoint persons as members of the CC who are not creditors.

Art. 59 (4)

The claims are examined in the first months after the opening of the insolvency proceedings. However, the GA is to be elected within 30 days. At this time, claims will not yet have been filed and will not be "provisionally disputed". Currently, in Germany, the CC is based on the bookkeeping. However, there is no need for a separate regulation on this.

Art. 58 (5)

Legal remedies against the appointment of a CC member are not objectionable. So far, they have not been provided for in the German Insolvency Code. There, an appointed member of the creditors' committee can so far only be dismissed ex officio, at his own request or at the request of the creditors' assembly, according to section 70 InsO.
The remedy now proposed in Art. 58 (5) is to be available to any interested party. The use of the term "party", which e.g. in Art. 2 q refers to persons who are not necessarily also creditors in the insolvency proceedings, is not explained further. This circumstance suggests that this term should be further specified here. Persons who are not creditors would already lack the need for legal protection for an appeal because their rights could not be violated by appointments.
For appeals against appointments, rules would also have to be added concerning votes in the CC with the participation of the member whose appointment is challenged by an appeal. The clarification of this question should not be left to the Member States, which here and thus also with regard to the legal effects of such decisions (cf. Art. 64 (2)) would possibly arrive at very different legal consequences of a challenge to appointments.

cc) Art. 60 – Duty of creditors as members of the creditors' committee

1.	*Member States shall ensure that members of the creditors' committee represent solely the interests of the whole body of creditors and act independently of the insolvency practitioner.* *By way of derogation from the previous subparagraph, Member States may maintain national provisions that allow to set up more than one creditors' committee representing different groups of creditors in the same insolvency proceedings. In this case, the members of the creditors' committee represent solely the interests of the creditors who appointed them.*
2.	*The creditors' committee owes the duties to all creditors it represents.*

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

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

Art. 60 (1) S. 1

There are no objections to the rules on the independence of the CC and its representation of the interests of the creditors as a whole. The rules on dismissal according to Art. 62 (2), on tasks and duties according to Art. 64 (1) and on liability according to Art. 66 should be sufficient to ensure conduct in accordance with the rules in individual cases.

Art. 60 (1) S. 2

The option of appointing several CCs, each of whom is to represent (only) the interests of a part of the creditors, is to be clearly criticised. This is in contradiction to Art. 60 para. 1 sentence 1. The independence of the CC would no longer be guaranteed. For example, the CC of the group of secured financial creditors, who have an interest in a quick liquidation instead of a continuation of operations, could decide to liquidate the debtor with the loss of jobs, with the consequence of quick proceeds on the rights to separate satisfaction and a subsequent insufficiency of assets, i.e. disadvantages for the remaining creditors.
Professional creditors can also gain an advantage due to their degree of organisation by having their "own" CC and can also assert their interests against the interests of the other creditors. Also unregulated and potentially conflictual is how to proceed if there are divergent decisions by several CCs and/or if there is parity of votes in an even number of CCs.

This requirement should therefore be deleted without replacement.

dd) Art. 61 – Number of members

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

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

The regulation is not objectionable. In German practice, the CC regularly consists of 3 to 7 members.

ee) Art. 62 – Removal of a member and replacement

1.	*Member States shall lay down rules specifying both the grounds for removal and replacement of members of the creditors' committee and the related procedures. Those rules shall also cater for the situation where members of the creditors' committee resign or are unable to perform the required functions, such as in cases of serious illness or death.*
2.	*Grounds for removal shall at least include fraudulent or grossly negligent conduct, wilful misconduct, or breach of fiduciary duties with respect to the creditors' interests.*

Art. 62 (1)

§ Section 70 of the German Insolvency Code regulates the dismissal of members of the general meeting of insolvency practitioners with an indeterminate legal term and thus generally "for good cause". It is not objectionable to list important reasons by way of example.

German insolvency law has so far not regulated the replacement of resigning members of the general assembly and the procedure for replacement (by the insolvency court or by the creditors' assembly).

Art. 62 (2)
The above-mentioned important reasons for the dismissal of members of the CC (fraudulent or grossly negligent behaviour, breach of fiduciary duties towards the interests of the creditors) are not objectionable.

b) Chapter 2 – Working methods and function of the creditors' committee (Art. 63-67)

aa) Art. 63 – Working method of the creditors' committee

1.	*Member States shall ensure that a creditors' committee lays down a protocol of working methods within 15 working days following the appointment of the members. If the creditors' committee fails to comply with this obligation, the court shall be empowered to lay down the protocol on behalf of the creditors' committee within 15 working days following the expiry of the first 15 working day period. In the first meeting of the creditors' committee, its members shall approve the working methods by simple majority of the present members.*
2.	*That protocol referred to in paragraph (1) shall at least address the following matters:*
(a)	*eligibility to attend and participate in the creditors' committee's meetings;;*
(b)	*eligibility to vote and the necessary quorum;*
(c)	*conflict of interests;*
(d)	*confidentiality of information.*
3.	*Member States shall ensure that the protocol referred to in paragraph (1) is available to all creditors, the court and the insolvency practitioner.*
4.	*Member States shall ensure that the members of the creditors' committee are given the possibility to participate and vote either in person or via electronic means.*
5.	*Member States shall ensure that members of the creditors' committee may be represented by a party supplied with a power of attorney.*
6.	*The Commission shall establish a standard protocol by way of implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 69(2).*

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

Art. 63 (1)
Rules of procedure are already common practice in German CCs. It makes sense to have binding rules of procedure that are primarily adopted by the insolvency practitioners themselves and secondarily by the insolvency court (see also section 72 InsO).

Art. 63 (2)
The catalogue of mandatory regulations in the rules of procedure is not objectionable (right to participate, voting rights, conflicts of interest, confidentiality) and is currently common practice in Germany. If necessary, conflicts of interest could be described in more detail, for example by naming related persons.

Art. 63 (3)

The availability of the rules of procedure for the creditors, the insolvency court and the insolvency administrator is not objectionable.

Art. 63 (4)
The use of digital media in the context of the CC meetings (meetings and participation) makes sense and is also common practice in Germany.

Art. 63 (5)

The continuous participation of identical natural persons in the meetings is goal-oriented. This is counteracted by the delegation of several alternating legal representatives. This can lead to the participation of a large number of persons in the meetings of the CC. On the other hand, companies in particular must be able to send a representative.

Art. 63 (6)

It is not obvious why the Commission should set standard rules of procedure. That should be left to the nation states.

bb) Art. 64 – Function, rights, duties and powers of the creditors' committee

1.	*Member States shall ensure that the creditors' committee's function is to ensure that in the conduct of the insolvency proceedings the creditors' interests are protected and individual creditors are involved.* *To that end, Member States shall ensure that the creditors' committee has at least the following rights, duties and powers:*
(a)	*the right to hear the insolvency practitioner at any time;*
(b)	*the right to appear and to be heard in insolvency proceedings;*

(c)	*the duty to supervise the insolvency practitioner, including by consulting with the insolvency practitioner and informing the insolvency practitioner of the wishes of creditors;*
(d)	*the power to request relevant and necessary information from the debtor, the court or the insolvency practitioner at any time during insolvency proceedings;*
(e)	*the duty to provide information to the creditors represented by the creditors' committee and the right to receive information from those creditors;*
(f)	*the right to receive notice of and be consulted on matters in which the creditors represented by the creditors' committee have an interest, including the sale of assets outside the ordinary course of business;*
(g)	*the power to request external advice on matters in which the creditors represented by the creditors' committee have an interest.*
2.	*Where Member States entrust the creditors' committee with the power to approve certain decisions or legal acts, they shall clearly specify the matters on which such approval is required.*

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

Art. 64 (1)

The duties of the CC are regulated in German insolvency law under section 69 InsO.
The proposal describes the tasks only in general terms ("ensure that the interests of creditors are protected and individual creditors are involved in the conduct of insolvency proceedings")

The CC should not have to involve only individual creditors, but should be obliged exclusively to the creditors as a whole. Otherwise there may be conflicts of interest.
Sentence 2 establishes a minimum catalogue of means on how these tasks are to be fulfilled. The catalogue is partially objectionable.

What is objectionable is Art. 64 (1) lit. e (the duty to inform creditors represented by the CC and the right to receive information from these creditors). Under German insolvency law, creditors have the right to obtain information at creditors' meetings and by inspecting the files kept at the court. If the CC were to be obliged to provide information, this would probably place intensive demands on him, to the limit of his capacity or beyond. A large number of

individual enquiries or deliberate mass enquiries by individual obstructing creditors can hinder the proceedings and thus contradict the acceleration maxim. In addition, confidential information is shared to a large extent in the CC (e.g. on details of the continuation of operations, on the transfer of business operations), which can bring the CC into a conflict of interest.

Art. 64 (1) p. 2 should be amended as follows:
"Member States shall ensure that the role of the CC is to ensure that the interests of creditors are protected and individual creditors are involved in the conduct of insolvency proceedings".
Art. 64 (1) p. 2 lit. a-d, f, g remain unchanged, but could also be formulated more generally;
Art. 64 (1) p. 2 lit. e should be deleted without replacement.

Art. 64 (2)
Consent requirements for certain legal acts or decisions are not objectionable. These are already found in German law, for example in 158 (1) InsO or section 160 (1) InsO.

cc) Art. 65 – Expenses and remuneration

1.	*Member States shall specify who bears the expenses incurred by the creditors' committee in exercising its function referred to in Article 64.*
2.	*Where the expenses referred to in paragraph 1 are borne by the insolvency estate, Member States shall ensure that the creditors' committee keeps record of such expenses and the court has the authority to limit unjustified and disproportionate expenses.*
3.	*Where Member States allow members of the creditors' committee to be remunerated and such remuneration is borne by the insolvency estate, they shall ensure that the remuneration is proportionate to the function performed by the members and that the creditors' committee keeps record of it.*

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

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

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

Art. 65 (1)
It is not objectionable that expenses of the CC are reimbursable and the cost bearer is to be determined (cf. section 73 InsO, section 17 (1) InsVV, at the expense of the insolvency estate).

Art. 65 (2)
In Germany, expenses are set by the insolvency court. The draft provides that the insolvency court may limit unjustified, disproportionate expenses.

Art. 65 (3)
It can be concluded from this that the CC members do not necessarily have to be remunerated. This must be corrected.
The draft provides that if the remuneration is to be paid from the insolvency estate, it must be proportionate to the task of its members. This is guaranteed by the current procedure in Germany and is not objectionable.

Art. 65 (3) should be amended as follows:
~~Where Member States allow members of the creditors' committee to be remunerated and such remuneration is borne by the insolvency estate, they shall~~
The Member States shall ensure that the remuneration is commensurate with the tasks performed by the members and that the creditors' committee keeps records thereof."

dd) Art. 66 – Liability

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

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

The standard of liability of the insolvency practitioner and the (provisional) insolvency administrator/ administrator in rem/ self-administrator must be identical. Otherwise, a decision of

the insolvency practitioner which is implemented by the insolvency administrator/ administrator in rem/ self-administrator may give rise to the liability of the insolvency practitioner/ administrator in rem alone, which may lead to conflicts of interest.

The lowering of the liability risk also has an influence on the diligence of the CC member's work. A lowered standard of care does not do justice to the interests of the creditors as a whole.
CC members in Germany are regularly protected by a liability insurance. This does not regularly exclude gross negligence. If gross negligence is excluded by law, the premium for the CC could decrease. However, this may increase the premiums for the insolvency insurance of the (provisional) insolvency administrator/ trustee/ self-administrator.

The provision should either be deleted without replacement or the liability of the (provisional) insolvency administrator/ administrator in kind/ self-administrator for simple negligence should be excluded.

ee) Art. 67 – Appeal

1.	*Where Member States entrust the creditors' committee with the power to approve certain decisions or transactions, they shall also provide for a right to appeal against such an approval.*
2.	*Member States shall ensure that the appeal procedure is efficient and expeditious.*

Art. 67 (1)

In German law, consents are provided for as follows:
Section 160 para. 1 InsO (legal acts of particular importance for the insolvency proceedings, in particular if the enterprise or a business, the stock of goods as a whole, an immovable object held by the debtor free of charge, the debtor's shareholding in another enterprise intended to establish a permanent link with that enterprise, or the right to receive recurring income is to be disposed of, if a loan is to be taken out which would significantly burden the insolvency estate, if litigation with a significant amount in dispute is to be brought or commenced, if commencement of such litigation is to be refused or if a settlement or arbitration agreement is to be concluded to settle or avoid such litigation),

Section 158 (1) InsO (closure or sale of the company before the reporting date).
An appeal against urgent consents jeopardises the procedural purpose of increasing the insolvency estate and contradicts the principle of acceleration. First of all, it is questionable who should be entitled to appeal. If these are individual creditors, they would first have to be

informed about the consent itself and also sufficiently about the basis of the consent. However, this regularly involves confidential data that individual creditors could use in a way that could harm insolvency estates.

An at least exemplary list of transferable powers in Art.64 (2) would counteract European fragmentation here.

The legal consequence of the legal remedy and thus of the legal transaction or act for which the consent was granted is also questionable. If an appeal against a consent would lead to the pending invalidity of the approved legal transaction, the resulting legal uncertainty could jeopardise its success.

Art. 67 (2)

The speed and efficiency required in Art. 67 (2) would also not prevent such pending ineffective legal transactions from being burdened with considerable risks, especially if they were associated with financing for the counterparty due to their magnitude.
A pending ineffectiveness could also lead to abuse (holdout problems).
In the case of interventions in property-protected assets of creditors or contractual partners, an appealable decision of the court and not only of the CC (e.g. in the case of interventions in continuing obligations for the future) should be provided for.

8. measures enhancing transparency of national insolvency laws (Title VIII)

Art. 68 – Key information factsheet

1.	*Member States shall provide, within the framework of the European e-Justice Portal, a key information factsheet on certain elements of national law on insolvency proceedings.*
2.	*The content of the key information factsheet referred to in paragraph (1) shall be accurate, clear and not misleading and set out the facts in a balanced and fair manner. It shall be consistent with other information on insolvency or bankruptcy law provided within the framework of the European e-Justice Portal in accordance with Article 86 of Regulation (EU) 2015/848.*
3.	*The key information factsheet shall:*
(a)	*be drawn up and submitted to the Commission in an official language of the Union by [6 months after the deadline for transposition of this Directive];*
(b)	*have a maximum length of five sides of A4-sized paper when printed, using characters of readable size;*
(c)	*be written in a clear, non-technical and comprehensible language.*

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) the time limit to lodge a claim;

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

(e) how and where to lodge a claim;

(f) how the claim is verified and validated.

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

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

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

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

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

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

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

The proposal aims to improve the transparency of national insolvency proceedings for creditors and takes the sensible approach of formalised and regularly updated information sheets. However, the requirement for clear, non-technical and comprehensible language will not be met in many cases. Given the complexity of national conditions for the opening of insolvency proceedings, rankings and distribution rules, it will not be possible to present the wealth of information required in para. 4 and described in more detail in paras. 5 and 6 in the required brevity without recourse to technical terms. At this point it becomes apparent once again what consequences the bypassed harmonisation of these central elements also has for the necessary transparency. The fragmentation of national insolvency rules, which is further deepened by the proposal, also calls into question the hoped-for gain in transparency through the fact sheet.

9. Final provisions (Title IX)

Art. 69 – Committee

1.	*The Commission shall be assisted by the Committee on Restructuring and Insolvency (the 'Committee') as referred to in Article 30 of Directive (EU) 2019/1023 of the European Parliament and of the Council. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.*
2.	*Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply*

Art. 70 – Review

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

Art. 71 – Transposition

1.	*Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [2 years from entry into force] at the latest. They shall forthwith communicate to the Commission the text of those provisions.* *When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.*
2.	*Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.*

Art. 72 – Entry into force

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

Art. 73 – Addressees

This Directive is addressed to the Member States.

Berlin, 09.03.2023 (translated on 2023, April 17th)

Contact:

Verband Insolvenzverwalter und Sachwalter Deutschlands e.V. (VID)
Am Zirkus 3
10117 Berlin
Germany
Tel.: +49/30/ 20 45 55 25
email: info@vid.de / web: www.vid.de