EIP c/o PLUTA Rechtsanwalts GmbH Barthstraße 16 80339 München

Statement of the European insolvency practitioners' organisations (EIP) on the EU Commission's proposal for a directive on the harmonisation of certain aspects of insolvency law dated 07.12.2022 (COM (2022) 702 final)

Ivo-Meinert Willrodt
President of EIP
c/o PLUTA Rechtsanwalts GmbH
Barthstraße 16
80339 München
Deutschland
P: +49 89 858963-3
M: +49 160 5307244
e-mail: ivo-meinert.willrodt@pluta.net
email@eip-association.eu

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EIP appreciates the opportunity to comment on the EU Commission's draft directive on the harmonisation of certain aspects of insolvency law (COM (2022) 702 final).

EIP is an independent, self-funding association founded by **E**uropean **I**nsolvency **P**ractitioners' organizations. The creation of EIP in May 2016 was motivated by the clear belief of the various members to improve procedures efficiency. Currently EIP represents the following 15 member associations with about 4.900 individual members in 12 Member States of the European Union:

Austria	ReTurn Forum für Restrukturierung und Turnaround Management
Denmark	Insolvency Law Committee of the General Council
Estonia	Kohtutäiturite ja Pankrotihaldurite Koda (The Estonian Chamber of Baliffs and Trustees in Bankruptcy)
France	Conseil National - CNAJMJ
	ASPAJ
	IFPPC
Germany	DAV ARGE Insolvenzrecht & Sanierung
	VID Verband Insolvenzverwalter und Sachwalter Deutschlands e.V.
Latvia	Association of Administrators of Insolvency Proceedings
Lithuania	National Association of Business Administrators

Poland	Instytut Allerhanda
Slovenia	Zbornica upraviteljev Slovenije
Spain	ASPAC
	APACSA
Sweden	REKON

EIP is listed in the lobby registry of the European Union under the number 497384739938-25.

EIP has intensively dealt with the proposal for a new Directive (in the following the “Proposal”) in six working groups consisting of representatives of EIP’s national member organizations. In principle EIP welcomes the Proposal with regard to the topics Avoidance Law (Title II), Asset Tracing (Title III), Pre-pack proceedings (Title IV), Directors’ Duties and Liabilities (Title V) and Creditors’ Committee (Title VI).

In contrast, EIP rejects the Proposal with regard to the special regime for **winding-up of microenterprises (Title VI)** and advocates sticking to, as a rule, the appointment of objective insolvency practitioners as central persons handling insolvency proceedings. The Proposal would in fact lead to the complete abolition of regimes that, in the majority of Member States, function well, in which a neutral and objective insolvency administrator plays the central role in conducting insolvency proceedings, and which essentially serve the protection of creditors’ interests and also generally ensure this in a cost-effective manner.

The provisions under Title VI of the Proposal would considerably worsen the situation for creditors and their practical implementation would not work, especially due to the accumulation of tasks envisaged for the insolvency courts or alternative competent authorities (in the following the “Insolvency Courts” or “Courts”).

There would be extensive violations of creditors' rights, as debtors would not be capable to identify and respect creditors' security interests (e.g. contractual and statutory rights to separation or separate satisfaction), as, due to lack of knowledge, they are regularly not even aware of such rights, or they no longer have the necessary time or interest in a labour-intensive and time-consuming liquidation of their failed enterprise.

Furthermore, micro-entrepreneurs usually have difficulties to clearly distinct between assets of their companies and their personal assets.

Particularly these tasks are carried out and enforced by an insolvency administrator, who also checks whether there have been any detrimental acts by the management prior to the proceeding. Insolvency Courts will not be able to perform these and many other tasks that insolvency administrators currently perform, mainly because, among other things, the job description of judges and judicial officers is completely different.

According to a provisional evaluation, the proposed special regime would be applicable for 90 to 95 % of insolvency proceedings in all Member States. In smaller and medium-sized Member States, such as the Baltic States, Belgium or Austria, this might, on a large scale, lead to the disappearance of insolvency administrator offices and the infrastructure and know-how they stand for, as it will no longer be possible to maintain offices and specialize in this area of law and business in a cost-covering way, due to the lack of proceedings.

Moreover, the proposed Directive is contradictory: On the one hand it rightly seeks to improve the outcome of insolvency proceedings for creditors through enhanced asset tracing possibilities and harmonized rules on avoidance actions and strengthen creditors' involvement through creditors' committees. On the other hand, the special regime applicable for the overwhelming majority of insolvent enterprises de facto abolishes the concept of insolvency proceedings in which these very rules would – and could only – be applied by insolvency administrators.

In addition, the disregard of creditors' rights under the special regime would make it even more difficult for microenterprises to obtain financing from banks. Banks will decrease and raise the costs for lending, when facing the danger that their security interests will not be respected or at least be more difficult to enforce and, in the absence of an objective insolvency administrator, will not be able to uncover detrimental acts of the debtor and voidable actions. These two tasks are core activities of the administrator in insolvency proceedings.

As already pointed out by many national associations, there are better ways to make insolvency proceedings more efficient.

The proposed new **pre-pack proceeding (Title IV)** expands the toolbox in insolvency proceedings in a way that is, in principle, sensible, in order to realize the highest possible sale price for the business in a difficult economic situation. However, it has to be ensured that abuse in the form of selling below value – e.g. to management or former shareholders or persons closely related to them – will be prevented. In this respect the Proposal needs to be revised.

Among other points, the relationship between the possible Court initiated auction and the actual pre-pack procedure led by the monitor requires revision. Some EIP members fear that the proposed concept (Art. 19, 22 and 24) can lose its meaning, if an objective M&A process is carried out in the preparation phase under the supervision of a monitor and the best bid from this then only serves as a stalking horse bid in a subsequent auction. The threat of an auction can provoke the lowest possible bids in the preceding M&A process. It can discourage bidders from undertaking the considerable effort of due diligence at the outset, if even the best bid in the M&A process does not guarantee acceptance of the bid and the timetable may be delayed. A public auction should only be an option for the Court, if the monitor or creditors have expressed serious suspicions of abuse, or if the only bidders are the management or former shareholders or persons closely related to them.

In principle, EIP welcomes the proposed regulations on **avoidance actions (Title II)**, as they are suitable for enforcing the principle of equal treatment of creditors. Why should creditors who, e.g., because of special knowledge, a close relationship to the debtor or special rights in enforcement, be better off than other creditors in the situation where the debtor's assets are insufficient? However, the equal treatment of creditors does not improve, if the enlargement of the insolvency estate through avoidance actions is not distributed equally among all creditors due to complex ranking systems for the creditors' claims. An avoidance action, e.g., against the tax office or a social insurance agency makes little sense, if these creditors are prioritized under national law in the distribution of the proceeds of the avoidance action. In a further step, therefore, the European legislator must also tackle and harmonize the diverse national ranking systems, preferably in the sense of equal treatment of all (unsecured) insolvency claims.

In detail, EIP's comments on the different parts of the proposal are as follows (in order of importance):

1. Special regime for winding-up of insolvent microenterprises (Title VI)

EIP does not favour the mandatory introduction of a simplified winding-up proceeding for microenterprises according to the provisions under Title VI of the Proposal. As no Member States concerned are mentioned in the Proposal, it is not possible to verify the assumptions on page 17 of the explanatory memorandum and in Recital 35, that "in many Member States no orderly liquidation of such businesses takes place […]" and that "national insolvency rules are not always fit to treat insolvent microenterprises properly and in a proportionate manner". EIP members are not aware of any examples which would support these findings and where the proposed concept would lead to improvements. On the contrary, a number of Member States have well-functioning regimes, which, in the absence of disturbing factors not based in the procedural provisions, allow for the swift and cost-effective winding-up of insolvent microenterprises.

For instance, Poland and Germany (and most probably other Member States) have simple, swift and low-cost proceedings for the deletion of "dead" insolvent companies from the commercial register, if, which is checked beforehand, the company's assets don't cover the costs of an insolvency proceeding. Both in Poland and Germany the companies' register Courts – not the Insolvency Courts – are competent for the deletion proceeding. Even without the appointment of an insolvency practitioner, the simplified winding-up proceeding under the proposed Directive would be more complex and would require more time and more official capacities without leading to a different result. Access for individual entrepreneurs or shareholders to a discharge of debt is already ensured through the implementation of Art. 20-24 of the Directive (EU) 2019/1023.

For France, the existing legislation already provides for an effective, proportionate and cost-efficient treatment of insolvent microenterprises (which account for about 93% of all proceedings), allowing for a Lawful and speedy procedure at a very limited cost (as low as 1500€ in the case of impecunious insolvency proceedings, financed by a dedicated fund, which represent around 2/3 of the total of liquidation proceedings). Therefore, opening winding-up proceedings without appointing an IP would, in France, be deeply detrimental to creditors rights and employees rights (the IP's intervention is necessary to activate the national fund guaranteeing the payment of wages), as well as to the implementation of environmental laws (which require IP's intervention to secure polluted sites) and the protection of economic public order (implementation of anti-fraud and AML-CFT requirements in particular), for no foreseeable benefit.

For Member States like Latvia, which have problems with the timely deletion of inactive "empty companies" the proposal might solve those problems and speed up liquidations, but too detailed regulated liquidation proceedings for microenterprises should be avoided, as they are not proportionate to the dimensions and indicators of smaller economies like Latvia. Solutions like described above appear more suitable.

Functioning regimes would be adversely affected by a mandatory switch to the proposed proceeding, which, among other flaws, is highly questionable regarding its practicality. In fact, especially the proposal to, as a rule, abstain from the appointment of an insolvency practitioner, would trigger the opposite effect of the intended increase in efficiency. The idea that efficiency can be improved by engaging persons who neither have the capacities nor the qualification required for the tasks at hand is as unconvincing here as it is in general.

It is worth noting that the transfer of Court tasks to insolvency practitioners (e.g. claim lodgment and insolvency table in Germany and France or consumer insolvency in Poland) has proven to enhance quality and efficiency, while there are no known positive examples for the reverse case.

Microenterprises, which the proposal targets, regularly have difficulties conducting their own business properly (see Recital 37) and thus are even less capable of selecting and conducting the suitable insolvency proceeding. Therefore, they are prone to become “victim” of questionable advisors, who are, unlike insolvency practitioners, neither neutral, nor subject to regulations regarding fees and qualification.

Furthermore a system of „checks and balances“ between the Court, the creditors and an insolvency practitioner in combination with an adequate remuneration system is the best way to tackle inefficiencies, quality deficits, misuse of such proceedings and, as far as that’s an issue, corruption.

The EU legislator should refrain from a legislative measure in this area and limit itself to recommendations that can and, in case there is a real need, will be taken up by Member States which consider the recommendations an improvement over their current regime.

More specifically the Proposal under Title VI prompts the following remarks:

1.1. The definition of “microenterprise” in Art. 2 (j) referring to the Commission’s recommendation 2003/361/EC includes entities (< 2 mio. € turnover/balance sheet total) which are regularly too big and complex for the special regime. Recital 35 even suggests extending the provisions to small and medium-sized enterprises. The size limit of Art. 685 Ley Concursal, the new Spanish law (< 10

1.2. FTEs and < 700 k€ turnover or < 350 k€ debts), which was obviously inspired by Art. 3 (1) of the Directive 2013/34/EU seems more realistic. As in the Directive (EU) 2019/1023 (see Recital 18) it should be left to the Member States to define the size of microenterprises a simplified proceeding might be suitable for.

1.3. The Proposal under Title II (avoidance actions) and Title III aim to improve the possibilities to trace and realize assets belonging to the estate and reverse legal acts, which were detrimental to the creditors, in order to maximize the outcome for them. The practical implementation of both sets of rules requires a qualified and neutral person. The Proposal under Title IV (pre-pack proceedings) are also based on the (correct) assumption that the preparation of a business sale has to be monitored by a neutral and qualified person in order to avoid misuse and promote acceptability among the creditors. The simplified proceeding according to the provisions under Title VI is not in line with the concept of the other parts of the proposal by, as a rule, refraining from the involvement of a neutral person, who has the qualification and capacities to handle the proceeding, trace assets and avoidance claims and maximize the value for the creditors.

1.4. Furthermore, if microenterprises, which make up the vast majority of all enterprises in the EU, made use of the simplified proceeding to an extent that justified its invention, Member States would hardly be able to equip Courts or establish competent authorities with sufficient qualified staff required to handle the number of tasks an insolvency practitioner would otherwise perform and are therefore now for courts/authorities. In this context it is worth recalling that the Directive (EU) 2019/1023 (see Recital 85, 86) saw significant room for improvement of Court performance. There are Member States, where Courts still require more professionalization and supervision than insolvency practitioners. In the proposed simplified winding-up proceeding the – new or additional – tasks for Courts or other competent authorities would involve, among else,

- ongoing monitoring of the debtor in order to assess the necessity for measures according to Art. 43 (3),

- the potential exercise of a reservation of consent according to Art. 43 (4) (a), which requires permanent engagement with the debtor's business, often including on site presence,

- the examination of potential avoidance claims in order to decide upon conversion of the proceeding according to Art. 47 (c),

- determination of the list of assets, included and excluded assets according to Art. 48 (1)-(3), and

- asset valuation in order to decide on the realization according to Art. 49.

If the Courts are overwhelmed by the demands of a specific case or the volume of proceedings, they must, beyond Art. 47 (c), have the possibility to appoint an insolvency practitioner at their discretion, or convert the simplified proceeding into standard proceedings.

1.5. If a simplified regime without appointment of an insolvency practitioner was used to an extent that justified its invention, the effects would not be limited to the actual handling of proceedings and the Court capacities. As already mentioned, microenterprises, in particular according to the definition in Art. 2 j) of the Proposal, make up the vast majority of enterprises in probably all Member States and thus the vast majority of insolvency proceedings. It may not be considered as an argument against the simplified regime, that many insolvency practitioners would lose their field of activity, if the majority of insolvent microenterprises were wound up without appointment of an insolvency practitioner. However, it should be kept in mind that training insolvency practitioners and maintaining sufficient qualified staff for the handling of bigger cases requires a certain workload with smaller cases. It is doubtful whether both in insolvency practitioners' firms and within a jurisdiction a significant reduction of cases would still allow to maintain a healthy, competition-driven market and culture of sufficient and sufficiently qualified insolvency practitioners' firms.

1.6. In principle, the use of standard forms is a good idea. However, they have to be both user-friendly (a negative example in this regard being the standard form according to Art. 55 (1), 88 of the Regulation (EU) 2015/848) and complete. The content of the standard form according to Art. 41 (4) is not complete, because it does not even provide for all information the Court needs to examine all preconditions for opening of proceedings according to Art. 42 (2), in particular lit. a) and d). In addition, the debtor should submit supporting documents to the information about creditors, their claims and their securities (Art. 41 (4) d)-f)) in order to allow the Court a verification and avoid misuse of the simplified admission of claims according to Art. 46 (3). Even though Recital 37 of the Proposal may be understood otherwise, it wouldn't make any sense to allow debtors, whose books are not properly maintained and up to date, access to a simplified proceeding without a qualified neutral person who verifies the existence of assets and avoidance claims. Otherwise, the Court has no chance to verify the information provided by the debtor and the proceeding would be an invitation to avoid proper bookkeeping and conceal potential valuables and insolvency related claims.

1.7. It is unclear whether the two weeks time limit, within which the Court has to decide upon the request according to Art. 42 (1), applies in any case or only upon a correct and admissible request, which fulfils all requirements laid out in Art. 41 (4) with the amendments mentioned above. The latter is preferrable and should be stated in the provision. However, even then the time limit will regularly be too short, in particular, when the Court has to verify the information provided by the debtor or hear the debtor before it can decide on a creditor's request. Furthermore, in addition to the reasons laid out in Art. 42 (2), the Court must have the right to refuse opening of simplified winding-up proceedings, if the information submitted with the request is incomplete or flawed.

1.8. Both the debtor's obligation to quantify the creditors' claims and the deadlines for creditors to object and lodge claims in Art. 46 are practically not manageable for a number of claims, in particular for claims to future damages due to malperformance or non-performance of contractual obligations. The proposal doesn't address the effect of the proceeding on contracts; however, winding-up requires the possibility to terminate contracts, which leads to liabilities of the estate in the termination period and to potential damage claims for the non-performance of contractual obligations in connection with the termination. The definition of 'full discharge of debt' in Art. 2 (m) leaves it open, whether or to which extent the discharge covers post-opening claims as well or just pre-opening claims. It must be pointed out, once again, that the standard microenterprise debtor will regularly not be capable of properly and at the earliest possible time terminating contracts, which "survive" opening of insolvency proceedings, and the Court could – capacity problems aside – only support him, if it had a full overview of all contractual relationships and information about the potential need to maintain them temporarily. Therefore, the question of damage claims and post-opening debt includes the issue of debts, which the debtor could have avoided by taking the necessary measures in time.

1.9. Neither the proceeding for lodgment and admission of claims laid out in Art. 46 nor a provision regarding the distribution of proceeds tackles the question of how to deal with or who is responsible to oversee the correct ranking of claims in Member States with a ranking system or with a system under which the lodgment of claims with a certain rank may only be admissible under certain circumstances. Disregarding national ranking systems in simplified proceedings is hardly an option in view of the conversion possibility in Art. 47 (c), if the harmonization doesn't include the elimination of ranking systems in all insolvency proceedings EU-wide.

1.10. The establishment and use of electronic auction systems may have beneficial effects, even though in many Member States there are already numerous highly professional online auction systems operated by service providers who inventory, evaluate and sell assets from (among else) insolvency estates. However, special electronic auction systems for simplified proceedings are not prone to provide considerable simplification or cost reduction. Even with an electronic sales platform someone has to record and value the items in question and put them on the platform in a suitable manner (i.e. usually withphotos and descriptions). In the case of computers and other items with storage media on which personal data could be stored, a data protection-compliant deletion of the storage media must be carried out before a sale. Until the assets are sold, they must be temporarily stored at their previous location and secured against unauthorized access or, if this location cannot be further used or secured, they must be transported to another temporary storage facility. Depending on the items for sale, they may also have to be made accessible for inspection and, in any case, finally handed over or shipped to purchasers. In this context, proper invoicing and payment control must be ensured as well as proper declaration and payment of taxes. The attempt to sell an ongoing business according to Art. 50 (1) subpara 2, (2) requires marketing, the possibility for a due diligence (after signing an NDA and preparing the relevant information), a professional Asset Purchase Agreement and negotiations with potential purchasers. As regularly neither the debtor nor the Court will be capable of carrying out these tasks, it must be possible, at the Court's discretion, to involve service providers, advisors or appoint an insolvency practitioner.

1.11. The proposal does not contain any provisions on dealing with employees and their rights. If an insolvency practitioner is appointed, he informs the debtor's employees about the proceeding, its implications and their rights without delay after the commencement of proceedings and he takes care of all other necessary measures and papers. Debtors (especially owners or managers of micro-enterprises) are almost invariably not sufficiently qualified to inform employees about the implications of insolvency proceedings and produce the necessary documents. It is doubtful whether the Courts would be capable of these tasks, but it would be the only conceivable substitute for an insolvency administrator, if the level of information and protection of employees is not supposed to depend on the size of the company or the debtor's capabilities. The Court would also be the only conceivable institution that could support employees in making use of the mechanism for the protection of employees' claims in the event of the insolvency of their employer according to the Directive 2008/94/EC, and, in case of a going concern sale pursuant to Art. 50 (1) subpara 2 of the proposal, to properly inform employees about the transfer of their employment relationship and its consequences according to Art. 3 (2) of the Directive 2001/23/EC. It is hardly imaginable that the protection of employee rights could be ensured on the level of quality and efficiency in simplified proceedings without appointment of an insolvency practitioner as they are in regular proceedings.

2. **Pre-pack proceedings (Title IV)**

As an overall position, EIP favours the Proposal regarding Pre-pack proceedings. Some of the EIP members already experience Pre-pack in their national legal framework (France, Spain, Poland), some don't or by a process not necessarily legally and formally framed (Germany).

As a matter of concern, if the Pre-pack proceeding is to become part of a final Directive, it should establish strict rules to avoid misuse at the expense of creditors' interests. Some specific topics need a careful study such as forced transfer of contracts without the consent of the contractor, which might lead to a constitutional issue e.g. in Germany, where freedom of contract is one of the freedoms protected by fundamental rights.

The Commission recalls that these procedures are effective in terms of preserving value for creditors because they take a going concern approach, are prepared and negotiated in a professional, competitive and confidential framework. The Proposal is careful to define a going concern sale as opposed to a sale of individual assets. It stresses that this procedure must be included in the insolvency law of the Member States in order to give the sale its judicial character and thus comply with the provisions of Directive 2001/23/EC.

The Proposal recalls (Art. 28) that a judicial sale is free of debts, with a particular view with Art. 34, which seeks to protect the rights of creditors and, in particular, to see the application of the national insolvency law in force for the release of securities.

It also recalls that collective proceedings opened for the purposes of the transfer do not entail the termination of current contracts, and that the judicial transfer entails the transfer of contracts necessary for the business. As pointed out earlier, these principles can bring difficulties in countries like Germany, whereas it is common practice in France, Spain or Poland.

The Proposal provides for the process to be made more secure by ensuring that potential buyers are contacted and that a competitive process is in place to obtain the best price.

The Proposal insists on the predominant role of the "Monitor", a pivotal figure in the conduct of the Pre-pack. As already pointed out above, the concept pursued in Title VI of the Proposal is not in line with this – correct – assumption.

The concept of Art. 24 (3) and 26 (2) intends to leave to the Court the choice between adopting the offer presented by the Monitor or launching a rapid (4 weeks) open auction process. In the latter case, the Proposal suggests that the candidate presented by the Monitor should be maintained as a "floor bid", and that he should be compensated for his costs, to a certain extent, in case of a higher bid. This mechanism, inspired by business practice in acquisitions, could lead to poor first offers if the bidder fears an open auction afterwards. Then the Auction mechanism should only be an option for the Court, if the monitor or creditors have expressed serious suspicions of abuse, or if the only bidders are the management or former shareholders or persons closely related to them.

The risk identified by the Proposal of a price that is too low, when presented by a closely related party, is overcome by the Monitor's obligation to carry out the best interests of creditors test, which is consistent with Directive (EU) 2019/1023 introducing such concept in Member States' insolvency laws.

2.1. Art. 21 of the Proposal very clearly states that the competent Court that hears the pre-pack procedure will have exclusive jurisdiction to hear disputes about the effects and consequences of this procedure. It will therefore have jurisdiction to order the subsequent assignment in insolvency proceedings. In its explanatory note, the Commission clarifies that the Court with international jurisdiction over the main proceedings has jurisdiction over the pre-pack proceedings.

It is not clear, whether the exclusive competence suggested in Art. 21 also applies for disputes for which national laws order the exclusive competence of specialized Courts, like Labour Courts.

2.2. Art. 19 of the Proposal requires Member States to introduce into their insolvency law a pre-pack sale regime consisting of two phases, that of preparation of the sale and that of liquidation of the structure, beginning with the judicial sale.

Adapting to this new frame will be a challenge in Member States that do not allow such practice. Some EIP members, e.g. the Polish member, think that the Proposal is presenting a far too complicated legal framework, where current M&A processes can lead to good results in terms of value preservation.

This is the case for the stay of proceedings in the preparation phase, while there would be no insolvency proceeding opened yet. The Proposal thus provides the debtor with the benefit of a suspension of individual enforcement measures during the pre-pack preparation phase, even though this stage of the proceeding does not have a time limit, is potentially confidential and obviously does not suspend an obligation under national law (or Art. 36) to file for insolvency.

The Proposal asks the Court to choose between accepting the bid submitted, provided that the transfer process is considered satisfactory (competitive, transparent, fair, in line with market standards) and that the Monitor attests to this, just as he or she must attest to the fact that the bid appears to him or her to be the best according to the criteria for transfer in insolvency, or to decide to open a new call for bids within two weeks, which may not exceed four weeks. This choice mechanism is intended, to protect the rights of creditors. It is already in place in France and Spain but, as stated above, the auction process should be limited to situations where the monitor or creditors have expressed serious suspicions of abuse, or if the only bidders are the management or former shareholders or persons closely related to them.

2.3. The possibility in Art. 27 of transferring contracts to the purchaser independently of the consent of the contractual partner is an encroachment on private autonomy, which, despite the limited rights of appeal under Art. 29, is likely to provoke considerable disputes – e.g. on the question of whether the contractual partner is in competition with the purchaser or not. As already mentioned, Art. 27 may be considered unconstitutional in some Member States.

In addition, there is the practical problem that not only government agencies, but also large private contractors such as OEMs are not in the position to carry out a forced change of a contractor unconditionally or within a very short time for organizational reasons as well as for reasons of compliance.

2.4. Pre-emption rights, in order to limit their scope in relation to the sale plan, would be given legislative provisions. Art. 33 (2) of the Proposal lays down a rule according to which "Member States shall ensure that no right of pre-emption is granted to a purchaser". The wording raises a number of questions: the fact that buyers who participate in the pre-pack tender are not granted a right of pre-emption (or exclusivity) seems easy to understand and to transpose. However, what will happen to pre-emptive rights, i.e. rights to buy into the pre-pack process, granted prior to the procedure to persons who are not buyers? This is the whole issue of an effective transfer, which French case law addresses by ruling out the right of pre-emption in the case of a judicial transfer of business.

It shall be possible under Art. 34 (4) of the Proposal to remove a security interest in an assigned asset, where this requires the creditor's authorization under national law, provided that the assigned asset is necessary for the business and that one of the following two conditions is met:

- The holder of the security interest fails to demonstrate that the offer is contrary to the best interests of creditors test;
- it has not, directly or indirectly, made a better offer.

The possibility to intervene in the rights of secured creditors will probably lead to higher risk premiums on the part of lenders, if not to greater reluctance to grant loans. In any case, banks would evaluate the collateral securing a loan with greater caution in the future.

2.5. A key player, the "Monitor", supervisor, actor

A preponderant part of the pre-pack proceeding as proposed by the Commission is based on the intervention of an insolvency professional. Called "Monitor" in the whole scheme, there is no doubt that it is the insolvency professional that the Courts designate.

Thus, the very detailed Art. 22 of the Proposal provides that the monitor is appointed by the Court at the request of the debtor and that it must meet the criteria applicable to insolvency practitioners of the State initiating the pre-pack proceedings (the preparatory phase), and to be appointed in the subsequent insolvency proceedings (the liquidation phase). Art. 25 also provides that the Court shall appoint the Monitor as insolvency practitioner. The explanatory note states that it is important that the same person fulfils both roles in the two successive stages of the pre-pack procedure.

This professional will have to:

- document and report on the stages of the sales process;
- justify why he or she considers the process to be competitive, transparent, fair and in line with market standards;
- recommend the best offer, based on the criteria of the national insolvency law;
- and, finally, certify that it considers that the best offer does not flagrantly infringe the criterion of the best interests of creditors.

The professional, in both roles, is liable for damages caused by his fault to creditors and third parties affected by the pre-pack procedure. This provision is in line with the status of insolvency practitioners among EIP members.

3. Avoidance actions (Title II)

Avoidance actions are frequently the source of additional funds for the bankruptcy estate, thus it is important to address them on the common, European level.

Some detailed comments and remarks below are based upon the expertise and experience of the EIP regarding insolvency law. They should taken into account in the debate concerning the Proposal for a Directive.

Comments, remarks, criticism and areas to improve:

3.1. Title II of the Proposal for a Directive (Articles 4 – 12) establishes a few ways and manners of dealing with avoidance actions. First and foremost, the Proposal for a Directive provides in Article 5 that national law that already is in force, can be more harsh for debtors. This seems to be a good idea, because many legal frameworks of the EU Member States have a long tradition of addressing avoidance actions.

3.2. What is also important within this context is that in the EU there are Member States with varying experiences with regard to the protection of creditors at the brink of insolvency of the debtor. Some of these actions date back to even Roman Empire times and law drafted in these times. Such a tradition is worth keeping therefore in our opinion leaving this to the national legislation should be treated as the best option to combine those legal regimes with the more relaxed ones.

3.3. Look-back period should be left to be regulated on a national level, but with the longest possible period set for the Member States, to ensure legal certainty. It would be unacceptable if the same action perfected in one country by the company from one group (holding) can be treated as voidable, while in another it's not. with only this difference that we speak about different Member States. This is not contrary to Article 5 of the Proposal. In some Member States the look-back period is longer than in others, but leaving the highest period only at a national level can be contrary to the protection of economy as well as to the issue of competition within legislation and legal framework.

3.4. This issue is even more important regarding the multinational holdings and groups of companies, more and more common on the European market. For the reason of clarity and due to the fact that on European market there are (as signalized above) more and more multinational companies, or groups of companies, related entities have their definition – as proposed in Article 2 (q) – should be the same in every Member State. Such a definition is broad enough to cover most of the typical situations, while not staying too broad to cover almost any situation when economic cooperation between companies takes place. Similar definitions are already in force in many Member States, thus implementing these provisions should not be a problem at all. Yet sometimes appropriate wording of a definitions section of a legal act is one of the most important issues for the whole legal act, therefore the Commission should pay a lot of attention to this.

3.5. Avoidance actions are also related to the issue of declaring insolvency – namely within the context of a premise to declare insolvency as having enough assets to cover the costs of the insolvency proceedings. If there are potential ineffective (voidable) transactions, the costs requirement is treated in a smoother way, and this should be also related to the general voidability of a transaction.
If the transaction is ineffective by operation of insolvency law, then the court may decide not to dismiss the case on the grounds of 'poverty of the insolvency estate'. If the transaction is held ineffective by a court of law (actio pauliana), then the possibility not to dismiss the case for this reason should also exist.
To recap, the debtor may sometimes perfect voidable transactions, but analysing the law literally, the insolvency court may not be able to declare insolvency because of the lack of funds to cover the costs of the proceedings. In this sense, it is important to recover the funds effectively and efficiently for the costs, even if some transaction is generally voidable, not only within the realm of insolvency law. Within this context however, the EIP is aware that the assessment of such actions and transactions can be a challenge as it requires more consideration and further analysis. In such cases it can also be a good idea to suggest that the insolvency court requests from the creditors an advance payment towards the costs of the proceedings.
The compensation for the insolvency estate should also be treated as a giving back money- mainly because this is the most important for the creditors. For the companies who benefitted from voidable transactions, after some time from their perfection, it is less problematic to compensate the insolvency estate with cash, instead of giving back the exact object of the transaction in question.

3.6. Due to the non-uniformity of the right of avoidance within de Member States, it is also important to address the issue of the governing law from the European point of view. Since some Member States apply avoidance via insolvency law and some within tort law. This leads to different results when answering the question of the local jurisdiction of the courts.
This gap can be well illustrated in the context of a recent CJEU case No C-337/17 (Feniks), relating to applicable law. According to this ruling, there is an exemption from the rule that actio pauliana is governed by the law of the state where the proceedings were opened. The CJEU concluded that an actio pauliana, whereby the person entitled to a debt arising under a contract requests that an act by which

his debtor has transferred an asset to a third party and which is allegedly detrimental to his rights be declared ineffective in relation to the creditor, is covered by the rule of international jurisdiction provided for in Article 7(1)(a) of Regulation (EU) No 1215/2012.

The CJEU concluded that an ***actio pauliana***, whereby the person entitled to a debt arising under a contract request that an act by which his debtor has transferred an asset to a third party and which is allegedly detrimental to his rights be declared ineffective in relation to the creditor, is covered by the rule of international jurisdiction provided for in Article 7(1)(a) of Regulation (EU) No 1215/2012.

However, the Feniks judgment resolves the disputed jurisdictional issues only partially, referring only to the protection of contractual claims. Knowing that some member states handle the right of challenge via tort law, the decision does not cover this area and is not conclusive for cases of the same origin in substance.

The decisive factor in creditor avoidance is not only the determination of detriment and intent but also a regulation on local jurisdiction, to avoid legal issues. The EIP welcomes a harmonisation of the directive in order to form a more uniform insolvency law within the EU. To avoid legal loopholes, we consider it imperative to include a correspondingly concrete provision in Article 8 of the Directive, which unambiguously regulates the local jurisdiction of the courts. For this purpose, the governing law should be the one of the countries of the court declaring insolvency.

3.7. Furthermore, Article 8 of the Directive should be amendment with regards to specifing the creditor’s knowledge of the disadvantage. Currently, the draft leaves too much room, causing speculation and uncertainty as to when “knowledge” or “need to know” is assumed. E.g. in Germany the debtor acts with intent to disadvantage creditors if, when performing the legal act, he generally intends the disadvantage of the creditors as the result of his legal act or recognises and approves it as the presumed consequence - even if it is an unavoidable secondary consequence of another advantage sought per se. This requires an element of knowledge, i.e., knowledge of the creditor's disadvantage, and an element of will, i.e., approval of the creditor's disadvantage.

Insofar § 133 of the German Insolvency Code (Insolvenzordnung - InsO), which was the actual model law for Art. 8 formerly, contained a regulation comparable to Art. 8, which was restricted about knowledge in order to strengthen the protection of trust. Because a stricter regulation is a disadvantage to creditors and in the end does not lead to the desired result. Therefore, we propose to adapt Art. 8 of the Directive according to the current German model in Article § 133 InsO and to choose as a prerequisite that the opposing party must have positive knowledge of the debtor's intention to prejudice the creditor and of the legal act at the time of the challenged legal act. This knowledge can be presumed if the other party knew that the debtor's insolvency was imminent and that the act disadvantaged the creditors.

3.8. To improve efficiency of the proceedings related to avoidance actions, it is recommended to allow the insolvency court, which usually assesses the question whether a particular transaction is voidable ex lege or not, to confirm the avoidance of the transaction. This possibility could lead to lowering the efforts and costs of the interested parties, because the avoidance will be confirmed by the insolvency court (for example: as regulated in Art. 127 Polish Insolvency Law/ prawo upadlosciowe), rather than other courts after the usually lengthy proceedings.

These important issues should be added to the Proposal to ensure certainty of the law and clear directions within international cases.

4. Creditors' committee (Title VII)

EIP would like to mention that Creditors' Committees play, especially in bigger insolvency cases, an important role within insolvency proceedings, as far as some of the creditors are willing to get involved and it is a good idea to cover this regulations by commented proposal, so as to harmonize the matter on EU level.

Creditors' Committees work efficiently and help both general body of creditors (It must be highlited that France does not have a general body or assembly of creditors, since they are represented by a dedicated IP, the « mandataire judiciaire », appointed only by Court and not by creditors.), the debtor and trustee/administrator. However, some amendment to reflect the Proposal (upon becoming the Directive) will be required – considering especially the multiple committees within one single insolvency proceedings (which is a possible derogation from the general rule of taking into consideration the whole body of creditors' interest within proceedings). Creditors' Committees are playing a rule in many member state countries especially in bigger cases (size and amount of receivables).

On the other hand, it is worth pointing out that due to the low popularity of Creditors' Committees in other jurisdictions, it should be decided in particular proceedings, whether to appoint the Committee or not, taking into consideration especially the free will of creditors to play role in Creditors' Committees. Therefore it is also good to have in the Proposal and Directive incentives to become a member of the Committee in particular proceeding, maybe with regard to more access to information, which can be crucial for the creditor to properly assess the position within particular insolvency case.

The Proposal covers important issues regarding regulation for Creditors' Committees, because they can enhance creditors participation within the proceedings. Basically, the role of Creditors' Committees is to supervise the IOH (insolvency office holder, the trustee, the administrator), and good and sound communication between IOH and creditors is crucial within insolvency proceedings.

Comments, remarks, criticism and areas to improve:

4.1. Proposed in Article 58.1. appointment by general meeting of creditors seems to be a good idea, but it should be connected with the enhancing more popularity of general meeting of creditors, apart from enhancing the popularity of participation in Creditors' Committees at first, because EIP sees the differences between Member States with this regard. In fact, there should be implemented solutions for bigger insolvency proceedings, so as to practically cover the general meeting of creditors.

4.2. However, possibility of establishing (appointment) even in the decision on the declaring of bankruptcy/insolvency (as set forth in planned Article 58.2.) may speed up proceedings and allow creditors to participate even at earlier stage, what can be especially important with regard to creditors' bankruptcy/insolvency petition.

4.3. (*multiple committees*] The Proposal sets forth in Article 60.1. the possibility to establish few Creditors' Committees related to different groups of creditors. This proposal (for few Creditors' Committees related to different groups of creditors) seems to be an excellent idea, but it should be borne in mind that creditors involved in Creditors' Committees should take into account general body of creditors' interests and position. The role (and exact purpose) of such multiple committees should be therefore properly addressed within national laws, where they have such possibility in their legal framework.

4.4. Bearing in mind different interest of different creditors sometimes, it is a good idea to ensure removal or replacement of creditors' committees members, as suggested in Article 62. However, just to be sure about Commission's idea – in EIP's view participance in the Creditors' Committee should be followed by consent of a particular creditor and resignation, even without providing any reason for that, should be allowed. In such case, the protocol of working methods (described in more detailed way in Article 63), may propose short deadlines for complementing the composition of the committee, and also allowing to act by the deputy Creditors' Committee member – previously appointed by the Court/general meeting of creditors.

(*frequent establishment and appointment*] Member States may decide whether the Creditors' Committees should be established in all proceedings or only in major ones. Limiting the possibility of establishing Creditors' Committees only in bigger cases (as suggested in Article 58.3.) need more consideration, because the final decision should be left to creditors themselves. So as to reflect justification of Article 58.3., in EIP's opinion national legislation may provide lower number of Creditors' Committee members – opposed to proposed 3 – 7 members. Yet, taking into consideration the role of Creditors' Committees – their establishment should be popularized and promoted also on the EU level.

4.5. [*liability*] When it comes to the liability issues, as set forth in Article 66, in EIP's view it should be open for particular jurisdiction with regard to details and grounds for liability, however rationale behind limiting the liability of Creditors' Committees members is clear and should encourage taking active part in Creditors Committees, benefiting the general body of creditors and efficiently controlling the trustee (IOH).

4.6. [*efficiency*] Also important provision is set forth in Article 67.2., touching very important issue of efficiency within proceedings – but it should be left to Member States to decide whether the appeal blocks the execution and enforcement of the appealed decision.

4.7. For this reason, the accent should be put on digital manner of proceedings and covering meetings in such a way that ensures efficiency – also within bankruptcy/insolvency courts.

5. Directors' duties and liabilities (Title V)

The Proposal is welcome and represents a first step towards harmonising the obligation to file for insolvency and the corresponding liability of managing directors.

Other points, such as a duty to file for insolvency in the event of over-indebtedness or a shift of fiduciary duties to creditors, were not taken into account in the draft Directive. The EIP is in favour of further harmonisation in future steps, if the national regulations on the obligation to file for insolvency and the liability of management boards are also increasingly harmonised.

6. **Asset tracing (Title III)**

The Proposal is supported in full.

Comments, remarks, criticism and areas to improve:

6.1. The Commission may consider to amend Nr. 6 of Annex 1 as follows: Other security registers, including securities depository registers and book-entry registers, if existing also for electronic securities and krypto-assets;

6.2. The Proposal in Art. 13-18 provide for access to information only for insolvency practitioners appointed in ongoing insolvency proceedings. With a view both to

the simplified winding-up proceedings for microenterprises according to Title VI of the proposal, but also to existing procedures or stages of procedure, in which an insolvency practitioners hasn't (yet) been appointed and investigations are carried out by the court or competent authority, the proposal should be supplemented to the effect that when an insolvency practitioner hasn't been appointed, the court or competent authority before which the proceedings are conducted have the same access to information as an appointed insolvency practitioner.

6.3. Member States should ensure that national insolvency office holders have access at least to all national asset registers listed in Annex 1 to the proposal, because this may not yet be the case in all Member States.

6.4. Member States should ensure that when a register receives evidence for the opening of an insolvency proceeding in connection with a request for information under Art. 13-18 of the proposal and finds that assets belonging to the insolvency estate have been entered, the body keeping the register shall automatically enter the opening of insolvency proceedings in the register.

All 12 national member associations of EIP and their representatives were involved in the preparation of this position paper. The following persons have chaired the respective working groups in EIP on the individual areas:

Avoidance actions (Title II)	Pawel Kuglarz, **Instytut Allerhanda (PL)**
Asset tracing (Titel III)	Ruben Garcia-Quismondo **ASPAC (SP)**
Pre-pack (Title IV)	Christophe THEVENOT, **CNAJMJ (FR)**
Directors' duties and liabilities (Titel V)	Béatrice Dunogué-Gaffié, **CNAJMJ (FR)**
Special regime for microenterprises (Title VI)	Robert Hänel **VID (D)**
Creditors' committee (Title VII)	M. Kaliński, **Instytut Allerhanda (PL)**
Harmonization Law Officer	Daniel Fritz **DAV (D)**

Sincerely,

Ivo-Meinert Willrodt

Ivo-Meinert Willrodt
President

Sincerely Yours

Luis Martin
Vice President

Béatrice Dunogué-Gaffié
Vice President

Sincerely Yours

Ieva Broka
General Secretary