



THE DIRECTIVE ON THE HARMONISATION OF CERTAIN ASPECTS OF INSOLVENCY LAW: TOWARDS A MORE ATTRACTIVE EU CAPITAL MARKET

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ABSTRACT

The European Union has recognised that the that divergences in insolvency proceedings among Member States represent a significant barrier to the further development of the EU Capital Market. Therefore, on 21st April 2026, the Directive on harmonisation of certain aspects of insolvency law (hereinafter: Directive) entered into force. The Directive aims to introduce minimum harmonisation standards for certain aspects of insolvency law to encourage cross-border investments within the EU market and to ensure greater legal certainty, comparability, and transparency across Europe's insolvency regimes. The EU covered 6 key areas of harmonisation: avoidance actions in insolvency proceedings, tracing assets, the pre-pack proceeding, directors' duty, creditors' committee, simplified winding-up proceedings for microenterprises and measures enhancing transparency of national insolvency laws. The deadline for transposing the Directive into national law is 22 January 2029, or 10 July 2029 for the introduction of the BARIS banking account system. Although all of the aforementioned represent very ambi-

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tious goals for the European legislator with significant potential, this paper aims to provide a preliminary assessment of the directive's final text. This paper focuses on a critical analysis of the provisions of the Directive relating to avoidance actions in insolvency proceedings, pre-pack proceedings, directors' duties, the creditors' committee. These provisions are critically compared with the existing provisions of the Croatian Insolvency Act to provide de lege ferenda guidelines to the Croatian legislator for the transposition of the Directive into the domestic legal system. Finally, the paper also analyses potential issues in transposing the Directive into the Croatian legal system, which could result in a paradoxical effect, primarily reduced legal certainty and difficulty in applying the Directive's established objectives in practice.

Keywords: *Avoidance actions, Directors' duty and creditors' committee, The pre-pack proceeding*

1. INTRODUCTION: OVERVIEW AND PURPOSE OF THE DIRECTIVE

Strengthening the competitiveness of the EU capital market through increased transparency and simplification of national insolvency procedures has been one of the EU's main goals in the past few decades. One of the key reasons the EU market lags behind competitive capital markets (USA, UK, Singapore, etc.) is attributable to the lack of harmonised rules governing insolvency procedures at the EU level, i.e., the large discrepancies in national insolvency regimes across EU Member States. At the EU level, insolvency is in competence of the Member States; therefore, we currently have 27 parallel insolvency procedures that differ greatly due to differing historical legal traditions and circumstances across the Member States' national markets.

At the EU level, there are unification and harmonisation documents that regulate certain issues of insolvency law. So we currently have The Recast Insolvency Regulation (Regulation (EU) 2015/848)¹, which has applied from June 26, 2017 and which regulates cross-border issues at the EU level and the Directive on Preventive Restructuring (Directive EU 2019/1023)², which Member States were required to transpose by 17 July 2022 and it deals with certain issues of harmonisation of

¹ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141, 5 June 2015. This research was funded by the European Union - NextGenerationEU through the project Green and Digital Transition in the European Union: Legal and Economic Aspects (ZEDEU, ID: 581-UNIOS-89). However, the views and opinions expressed are those of the author(s) only and do not necessarily reflect those of the European Union or the European Commission. Neither the European Union nor the European Commission can be held responsible for them.

² Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, OJ L 172, 26 June 2019.

insolvency procedures in national law. However, a substantial part of substantive insolvency law remained unharmonized at the EU level; therefore, stakeholders in insolvency proceedings face numerous difficulties and legal uncertainties when participating in national proceedings across the EU single market.

To address the alleged issue, the EC published the Proposal for the Insolvency III Directive on December 7, 2022 (hereinafter: EC Proposal).³ Since the insolvency law is very extensive, the EC narrowed its proposal to six key points concerning the introduction of minimum harmonisation standards regarding avoidance actions in insolvency proceedings, tracing assets, the pre-pack proceeding, directors' duty, creditors' committee and key information fact sheets (Article 1(1) of the Directive).

In its proposal, the EC states that it has been observed that there are different outcomes when conducting insolvency proceedings depending on the Member State in which they are conducted, which consequently leads to large differences in terms of the time of completion of the procedure itself, as well as the very solvency of the actors participating in the proceedings in question. As the Commission noted, the duration of the procedures and the low level of collection are key factors for the creditor's decision to be included in insolvency proceedings, but they also represent the backbone for the investor's and creditor's decision, which all consequently leads to the unavailability of sources of financing for entrepreneurs and their possible demise or expansion of activities.⁴

Following the aforementioned EC Proposal, the Council of the European Union reached a general approach on 23 May 2025 (hereinafter: General approach)⁵ which was subsequently submitted for further consideration and negotiations with the European Parliament. On July 1 2025, the European Parliament adopted its position as another step in the legislative process of adopting the directive in question, which, in principle, takes a flexible position and, on many issues, leaves it to the Member States to change or tighten the existing rules in national legislative systems with minimal harmonisation (hereinafter: Report).⁶ This Directive shall take effect 20 days following its publication in the Official Journal of the European Union. Member States are required to implement it into their national leg-

³ European Commission, *Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law*, COM(2022) 702 final, 2022/0408 (COD), 7 December 2022.

⁴ *Ibid.*, Explanatory Memorandum, para. 3.

⁵ Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law – General approach*, 9257/25, 23 May 2025.

⁶ European Parliament, Committee on Legal Affairs, *Report on the proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law*, COM(2022) 702 final, A10-0126/2025, 1 July 2025.

isolation by 22 January 2027. The rules related to the establishment of the BARIS bank account system will become applicable as of 10 July 2029.

2. OBJECTIVES, STRUCTURE AND SCOPE OF APPLICATION

One of the Directive's main objectives is to mitigate barriers arising from fragmentation of national insolvency laws.⁷ The Directive's aim is to introduce a minimum set of harmonised rules into the Member States' cross-border and domestic insolvency proceedings.⁸ The process leading to the final version of the Directive was long and complex, and the original EC Proposal from December 2022 was significantly narrowed in the final version published on April 1, 2026.⁹

As already stated in the introduction, the subject matter in accordance with Article 1(1) of the Directive refers to avoidance actions in insolvency proceedings, tracing assets, the pre-pack proceeding, directors' duty, creditors' committee and key information fact sheets.¹⁰

The rules on avoidance actions exclude collective proceedings that fall under insolvency law, except for preventive restructuring procedures and interim proceedings.¹¹ Titles on pre-pack proceedings creditors' committees apply only to legal persons as debtors.¹²

Pursuant to Article 1(3) of the Directive, its scope excludes entities listed in Article 1(1), first subparagraph of Directive 2014/59/EU of the European Parliament and of the Council¹³, debtors that are reinsurance or insurance undertakings, investment firms or collective investment undertakings, credit institutions, central securities depositories, public bodies under national law and non-entrepreneurial natural persons.¹⁴

⁷ Recital (1) of the Directive.

⁸ Freshfields Bruckhaus Deringer, *EU Insolvency Law Harmonisation: Approaches Reach the Finish Line*, Freshfields, Available at: [<https://www.freshfields.com/globalassets/noindex/documents/eu-insolvency-law-harmonisation-approaches-the-finish-line-v8.pdf>], Accessed 14 April 2026, p. 1.

⁹ Compare the EC Proposal with the final text published in OJ from 1 April 2026.

¹⁰ Article 1(1) of the Directive.

¹¹ Article 1(2) of the Directive.

¹² Article 1(4) of the Directive.

¹³ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, OJ L 173, 12 June 2014.

¹⁴ Article 1(3) of the Directive.

3. TRANSPOSITION INTO NATIONAL LAW

3.1. Avoidance actions

Provisions on avoidance actions serve to protect creditors and act in their favour, but also ensure that the result is the return of property alienated by the refutable legal action to the insolvency estate.¹⁵ Although the Directive Title II regulates several issues and institutes of avoidance actions, this paper is based only on some of the institutes that have been the most discussed in the legislative procedure or on which the national legislator should intervene in the existing text of the Bankruptcy Act.

The rules on avoiding the debtor's legal acts were designed as a minimum standard, leaving Member States free to retain, strengthen, or introduce provisions ensuring greater creditor protection¹⁶. In this regard, one of the Commission's proposals was to establish special conditions for avoidance actions, under which the European Commission distinguishes between situations involving legal actions from which creditors benefit by satisfaction or collateralisation and situations in which a creditor's valid claim is satisfied or guaranteed to the detriment of others¹⁷.

The condition that must be met in both situations, according to the EC Proposal, is that the detrimental act was committed within three months prior to the filing of the application for insolvency proceedings, or within three months after the filing of such an application and debtor's inability to pay its debt existed. However, in a situation where a due claim has been satisfied or secured to the detriment of the creditor, an additional condition is that such an act may be void, voidable or unenforceable if the creditor knew or should have known about the debtor's inability to pay his due debts or that an application for the initiation had been filed, while such knowledge is not required in a situation where legal acts from which creditors benefit by satisfaction or collateralisation are contested.¹⁸

¹⁵ For more on avoidance actions in domestic literature, see: Čuveljak, J., *Time Limits for Bringing Actions to Challenge Legal Acts in Insolvency Proceedings*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 43, No. 2, 2006, pp. 115–128; Bilić, A.; Bratković, M., *Avoidability of Intentional Prejudice to Creditors of the Insolvency Debtor*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 71, No. 3–4, 2021, pp. 443–476; Dika, M., *Avoidance of Legal Acts in Insolvency Proceedings*, in: *Treća novela Stečajnog zakona*, Zagreb, Narodne novine, 2003, pp. 145–209; Čuveljak, J., *Avoidance of the Debtor's Legal Acts on the Grounds of Intentional Prejudice to Creditors in Insolvency Proceedings*, Hrvatska pravna revija, Vol. 6, 2010, pp. 74–85; Dika, M., *Avoidance of the Insolvency Debtor's Legal Acts*, in: *Aktualnosti hrvatskog zakonodavstva i pravne prakse*, Zagreb, Organizator, 2000, pp. 217–264; Bilić, A., *Preconditions for the Avoidance of the Debtor's Legal Acts under the Obligations Act and the Insolvency Act*, in: *Zbornik 55. susreta pravnika, Opatija '17*, Zagreb, Hrvatski savez udruga pravnika u gospodarstvu, 2017, pp. 281–344.

¹⁶ Pool, J.M.W.; Boon, J.M.G.J.; Vriesendorp, R.D., *Harmonisation of European Insolvency Law: Operation Patchwork has Commenced, but Where Will it Take Us?*, *TvI*, 2023, No. 11, 16 May 2023, p. 5.

¹⁷ Article 6(2) of the EC Proposal.

¹⁸ Article 8(1)(b) of the EC Proposal.

The General Approach, however, excludes “should have known”¹⁹ as a standard of care from the text, thereby providing a large degree of protection for creditors with whom a potentially detrimental act has been concluded. Parliament endorses this approach and, in its Report through Amendment 89, retains the legal standard of the creditor’s “knowledge” of the debtor’s inability to meet due obligations, or about the submission of a request, or, where no formal request exists, about the adoption of a decision to open insolvency proceedings.²⁰ The final text of the directive supports the position of the Council and Parliament and applies only the “knowledge” of the creditor as a legal standard of care, completely omitting the stricter category of “should have known”.²¹

The Directive in question, unlike the Bankruptcy Act, does not separately regulate congruent and incongruent coverage, although it mentions and clearly distinguishes between them in its recitals²². The Bankruptcy Act, both in the provisions of Article 199, which regulates congruent coverage²³, and in the provisions of Article 200, which regulates incongruent coverage²⁴, regulates the presumption of knowledge of the creditor, the realisation of which is necessary for such a legal action to be successfully avoided. In the remainder of the text, the authors of this article will analyse the need to implement Article 7(1) of the Directive²⁵ and Article 7(2) of the Directive²⁶ into the text of the Bankruptcy Act regarding the provisions of congruent and incongruent coverage.

In cases of congruent coverage under the Bankruptcy Act, a legal act can be set aside if it took place within three months before the initiation of bankruptcy proceedings, the debtor was insolvent, and the creditor knew of that insolvency.²⁷ In other words, the Bankruptcy Act allows the avoidance of the legal act that is in accordance with the content of the creditor’s rights if all three prerequisites are cumulatively met, while the Directive, on the other hand, sets the same deadline for the avoidance of a legal act in which creditors benefit from satisfaction or col-

¹⁹ Council of the European Union, *op. cit.*, note 5, p. 66.

²⁰ European Parliament, *Report*, Amendment 89, Art. 6(2), first subparagraph, point (b).

²¹ Article 7(2)(b) of the Directive.

²² Recital (11) of the Directive.

²³ Which represents a method of settlement in which the creditor is provided with or provided with security or settlement that is in accordance with the content of his right.

²⁴ What constitutes a method of settlement in which the creditor is provided with or given secured or settlement that is not in accordance with the content of his right.

²⁵ Which regulates the avoidance of detrimental legal acts that benefit a creditor or a group of creditors through satisfaction or collateralisation.

²⁶ Which provision governs the avoidance of detrimental legal acts in cases where a creditor’s due claim has been satisfied or secured as owed.

²⁷ Article 199(1) of the Bankruptcy act Official Gazette No. 71/2015, 104/2017, 36/2022, 27/2024.

lateralisation (three months before the filing of the proposal), and also regulates the condition of the debtor's inability to pay debts, but in this case, it does not set the condition of the creditor's knowledge of such inability. Based on the above, the authors of this article conclude that the domestic legislator is faced with the challenge of amending the provision of Article 199, Paragraph 1 of the Bankruptcy Act, given that the additional requirement of creditor knowledge constitutes an aggravating circumstance for actively legitimized persons in proving and subsequently successfully avoiding a legal act committed to the detriment of the creditor, when it comes to congruent settlement.

Reflecting the aim and spirit of the Directive, which permits Member States to adopt requirements or presumptions that ease the burden of proof for the party alleging that a such an act is void, voidable or unenforceable²⁸, it is yet to be determined whether the national legislator will acknowledge the need to amend the Article as outlined above. The situation is different with the regulation of the institute of incongruent coverage, given that the provision of Article 200, Paragraph 1, Point 2 of the Bankruptcy Act already contains the possibility of challenging a legal act that was undertaken within three months before the submission of the proposal, and the debtor was unable to pay²⁹, while other cases only represent a greater level of creditor's protection than it is provided by the Directive in the provision of Article 7, Paragraph 1.

With regard to the situation previously mentioned, where the Directive allows for the possibility of avoidance a legal act in the case of a due creditor's claim that has been satisfied or collateralized if all three prerequisites are met (i.e. it was committed within three months before the submission of the proposal and in that time the inability of the debtor to pay its due debts existed, and the creditor knew of the inability or of submitting the proposal or decision)³⁰, the domestic legislator, in accordance with the author's position, should not make changes to the provisions governing congruent coverage, given that such a situation is already prescribed by the first paragraph of Article 199 of the Bankruptcy Act. The same applies to incongruent coverage, given that the Bankruptcy Act does not provide in any provision of Article 200 that all three prerequisites must be met in order for a legal, that is not in accordance with the content of the rights of the creditor whose due claim has been settled and secured to be challenged, to be avoidant, but rather provides more possibilities for challenging such a legal act than the Directive does.

²⁸ Recital (8) of the Directive.

²⁹ Article 200(1)(2) of the Bankruptcy act.

³⁰ Article 7(2) of the Directive.

Therefore, given that the Directive sets a baseline for avoidance actions and allows Member States to adopt or retain rules that better protect creditors, it is anticipated that the domestic legislator will not modify the existing provisions of the Bankruptcy Act in this regard.

A major difference between the EC Proposal and the General Approach is also reflected in the reduction of the time limits for challenging actions that were intentionally taken to the detriment of creditors. Article 8 of the EC Proposal regulates that Member States ensure that legal actions that were intentionally taken to the detriment of creditors can be challenged in the event of cumulative fulfillment of the conditions, including that such act was perfected within four years before the application to initiate proceedings was filed or after it was filed, and the counterparty knew or should have known about such a harmful intention of the debtor³¹. The General Approach shortens the time limit in question by half and requires, as a standard of care, only that the counterparty with whom the legal act was taken knew about the intention of the debtor, in which text the standard “should have known”³² is omitted.

The Parliament, on the other hand, strikes a balance between the Commission and the Council, providing for such a time limit of three years³³, but, just like the Council, it omits the legal standard “should have known”³⁴. Although the European Parliament accepts the Commission’s proposal that knowledge is presumed if the counterparty was related to the debtor, in its amendment it relativizes the aforementioned provision and emphasizes that such a presumption must be rebuttable, which allows passively legitimized persons who are related closely to the debtor to prove before the court, in the procedure provided for that purpose, that they were unaware of such intention of the debtor.³⁵

With regard to the establishment of rules on legal acts intentionally taken to the detriment of creditors, the final text of the Directive provides that two conditions must be met cumulatively for such a legal act to be avoidable. The first condition requires that the legal act was taken within two years before the request to open proceedings was filed, and if there is no such request, then within two years before the court’s decision, or after the request or decision was filed and before the open-

³¹ Article 8(2) of the EC Proposal.

³² Council of the European Union, *op. cit.*, note 5, p. 68.

³³ European Parliament, *Report*, Amendment 89, Art. 8(1), first subparagraph, point (a).

³⁴ European Parliament, *Report*, Amendment 99, Art. 8(1), first subparagraph, point (b).

³⁵ European Parliament, *Report* Amendment 100, Art. 8(1), second subparagraph.

ing of insolvency proceedings. The second condition is the other person's knowledge of the debtor's intention to cause harm to the creditors.³⁶

Legal acts intentionally detrimental to creditors are recognized by the domestic legislator as the most severe, which is why they can be avoided within the longest time limits.³⁷ Considering that the intention to cause detriment is a key element in this type of avoidance, it is not required that the debtor was insolvent in the moment legal act was carried out.³⁸

Unlike the two-year period before filing a request for opening the insolvency proceedings imposed by the Directive, the Bankruptcy Act, by the provision of Article 202, paragraph 1, regulates that an action that was intentionally taken to the detriment of a creditor may be avoided if it was taken in the last ten years before filing a request for opening the proceedings or thereafter, if, at the time the legal act was concluded, the other party was aware of the debtor's intention.³⁹ Given that the domestic legislator undoubtedly ensures greater protection of creditors and the bankruptcy estate by prescribing such a long period for taking legal action that was done with the intention of detriment creditors, and the Directive is intended to provide a baseline level of protection with regard to rebuttable actions that are detrimental to creditors, it can be assumed that the provision in question will not be subject to amendments by the domestic legislator.

However, the difference between the Directive and the Bankruptcy Act is also reflected in how they regulate the other party's presumed knowledge of the debtor's intention. According to the Directive's final text, the presumption applies only to a person considered to be related to the debtor.⁴⁰ Conversely, the Bankruptcy Act assumes knowledge of intent if the other party knew about the impending insolvency and that creditors would be harmed by such an action.⁴¹ In the very next provision, the domestic legislator also introduces a presumption of knowledge of the impending insolvency and that creditors would be harmed by such an action if the creditor was aware, or ought to have been aware, of circumstances indicating the debtor's inability to meet its obligations and that the act would prejudice other creditors.⁴² Just as in the above example, by prescribing further presump-

³⁶ Article 9(1) of the Directive.

³⁷ Čuveljak, J., *Komentar Stečajnog zakona*, Zagreb, Narodne novine, 2018, p. 653.

³⁸ N.B. Pannevis, *The European harmonisation of avoidance rules, a Dutch perspective on reshaping an age-old instrument*, TvI 2023/12, 16 May 2023, p. 6.

³⁹ Article 202(1) of the Bankruptcy act.

⁴⁰ Article 8(1) of the Directive.

⁴¹ Article 202(1) of the Bankruptcy act.

⁴² Article 202(2) of the Bankruptcy act.

tions of knowledge of creditors, the domestic legislator provides a greater scope of protection for the bankruptcy estate than is provided by the provisions of the Directive; therefore, in this respect, no intervention by the legislator in the existing provisions of the article regulating acts intentionally detrimental to creditors is expected.

The Directive further sets out provisions concerning transactions made without consideration or for clearly insufficient consideration, as also regulated under the Bankruptcy Act⁴³, but unlike the domestic legislator who provides that such actions must be taken within a four year period prior to submission of the request to open proceedings, the European legislator provides that such actions must be taken within a period twelve months before the request was filed, and in the absence of such a request, within the twelve months preceding the decision to commence insolvency proceedings, or in the period following the submission of the request or the adoption of the decision and prior to the opening of proceedings.⁴⁴ The provision in question does not contain subjective conditions, since such transactions do not deserve special legal protection if the other party gains a benefit without appropriate compensation or counter-performance⁴⁵, and at the same time, such actions may also constitute act intentionally detrimental to creditors because the lack of appropriate counter-performance implies that there was an intention on the part of the bankruptcy debtor and there was the knowledge of the opponent party of such an intention.⁴⁶

The legislative process also saw debate over the limitation period for claims arising from a void, voidable, or unenforceable legal act. Pursuant to Article 9 of the EC Proposal, avoidance actions must be initiated within three years from the commencement of insolvency proceedings.⁴⁷ The General Approach rejects such a proposal entirely, ensuring that Member States themselves determine the limitation periods within which persons with legal standing will be able to bring actions and other legal remedies⁴⁸, unlike the Parliament, which this time, for reasons of legal certainty and the aim of minimum harmonisation, aligns with the Commis-

⁴³ Article 203 of the Bankruptcy act.

⁴⁴ Article 8 of the Directive.

⁴⁵ N.B. Pannevis, *The European harmonisation of avoidance rules, a Dutch perspective on reshaping an age-old instrument*, TvI 2023/12, 16 May 2023, p. 6.

⁴⁶ Bilić, A.; Bratković, M., *Avoidance of Gratuitous Legal Acts of the Insolvent Debtor*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 43, No. 3, 2022, p. 780.

⁴⁷ Article 9 of the EC Proposal.

⁴⁸ Council of the European Union, *op. cit.*, note 5, p. 69.

sion's view and sets a three-year time limit starting from the opening of insolvency proceedings.⁴⁹

As stated above, the Directive establishes minimum standards, allowing Member States to provide for or preserve provisions that offer a greater protection to creditors than those set out therein.⁵⁰ By way of exception to the rule above, the Directive sets a limitation period of up to three years for all claims arising from legal acts that are void, voidable, or unenforceable.⁵¹ In national legislation, this period is two years and is calculated from the opening of insolvency proceedings⁵², so the national legislator is free to amend the provision in question, both as regards the period itself and as regards the start of its calculation, since the provision in question provides the possibility for Member States to regulate that limitation period shall be calculated from the moment insolvency practitioner became aware of the facts underlying the claim against the other party.⁵³

Such a determination, according to the authors, particularly produces the desired effects in more complex insolvency proceedings, which require more time for the insolvency practitioner to become familiar with the debtor's economic situation, including his previous assets and benefits that are no longer a part of insolvency estate at the time of the opening the proceedings. However, taking into account the subjective nature of such a deadline, as it is to be determined from the moment the insolvency practitioner gained knowledge of specific circumstances, the aforementioned determination could create a certain legal uncertainty, given that it is often very difficult to determine the exact day of becoming aware of a legally relevant fact, which in itself depends on the interpretation of the interested party. In addition, it should be noted that the domestic legislator does not prescribe deadlines for the insolvency practitioner to take action, such as reviewing the documentation or acquainting themselves with the debtor's previous business operations.⁵⁴

⁴⁹ European Parliament, *Report*, Amendment 105, Article 9(3).

⁵⁰ Recital 8 of the Directive.

⁵¹ Article 10(3) of the Directive.

⁵² Article 212(2) of the Bankruptcy act.

⁵³ Article 10(3) of the Directive.

⁵⁴ The provision of Article 89 of the Bankruptcy Act lists only some of the obligations of the insolvency practitioner, including bringing the accounting records in order by the date of opening the bankruptcy proceedings or drawing up the initial balance of assets, which obligations, although not time-bound, are performed in the initial stages of the bankruptcy proceedings. In the practice of bankruptcy administration, there are often cases in which the previous persons authorized to represent the debtor do not act in accordance with the mandatory provision of Article 117 of the Bankruptcy Act, which prescribes the obligation of such persons to submit all necessary data and information to the bankruptcy authorities.

Notwithstanding the above, determining the commencement of the limitation period based on the insolvency practitioner's awareness of legally relevant facts, although it may in itself lead to prolongation of the proceedings, undeniably produces the desired effects in the form of a greater possibility of sanctioning persons who act fraudulently, and, no less importantly, a consequent higher degree of satisfaction of creditors.

With regard to the complete regulation of the institute of avoidance actions, it is important to emphasise a novelty from the Directive that the Bankruptcy Act does not provide for when regulating the said institute. Namely, pursuant to Article 10(5) of the Directive, Member States must guarantee that the party required to restore the benefits obtained to the insolvency estate is not entitled to set off such an obligation with a claim that it would otherwise realise in insolvency proceedings.⁵⁵ Although the Bankruptcy Act, in the provision of Article 176, Paragraph 1, Point 4, determines that set-off is not permitted if the possibility of set-off is acquired through an act subject to avoidance⁵⁶, the authors point out that such regulation, in accordance with domestic case law⁵⁷, represents a situation in which the creditor uses the institute of set-off as a method of settlement when fulfilling a contract that constitutes an act subject to avoidance. In this particular case, the Directive addresses the set-off of a claim realised by the creditor in insolvency proceedings against the obligation arising from the avoidance of a legal act, as the creditor is required to return the benefits received or their monetary value to the insolvency estate.⁵⁸

3.2. Pre Pack Proceedings

The EC Proposal envisages pre-pack proceedings, or rather a mechanism with two consecutive phases, and the General Approach imposes a restriction that such a system should apply only to legal entities. The aforementioned proceedings apply to the sale of a company or part thereof that constitutes a separate economic or business entity, excluding the individual assets sale.⁵⁹ According to certain foreign authors, a pre-pack should be the most effective and efficient instrument for achieving the liquidation of insolvent legal entities and the transfer of their busi-

⁵⁵ Article 10(5) of the Directive.

⁵⁶ See more about set-off in bankruptcy: Markovinović, H.; Pušić, M., *Set-off in Insolvency Proceedings*, *Pravo u gospodarstvu*, Vol. 57, No. 3, 2018, pp. 575–596.

⁵⁷ Supreme Court of the Republic of Croatia, Revd-1674/2024-2, 9 July 2024., Supreme Court of the Republic of Croatia, Revt 20/13-2, 30 May 2017, Supreme Court of the Republic of Croatia, Revt 78/16-2, 30 May 2017, High Commercial Court of the Republic of Croatia, Pž-818/2021-3, 24 September 2021, High Commercial Court of the Republic of Croatia, Pž-4354/2024-2, 28 January 2025.

⁵⁸ Article 10(2) of the Directive.

⁵⁹ Instituto Jurídico, *A Nova Proposta de Diretiva sobre Direito da Insolvência*, Coimbra, 2024, p. 33.

ness as a functional unit (when there is surplus value as a going concern) at the highest available market price.⁶⁰

In the recitals of the Directive, a pre-pack procedure should be considered for the preparation of the transfer of a company or part of a company, under judicial oversight and with the involvement of a monitor, ahead of the commencement of insolvency proceedings.⁶¹

The Commission envisages, as the first stage, actions that serve only to prepare the debtor for the next stage, which is finding a suitable buyer for business of the debtor or its part. The second phase is organised as a liquidation process, culminating in the sale of all or part of the debtor's business and the distribution of the resulting funds among creditors.⁶² In such a two-stage procedure, the key decision would, according to the EC Proposal, be made by an independent body, i.e. the monitor. Parliament emphasises the elements of such independence and stipulates in detail that the monitor must remain independent not only of the debtor but also of the holders of its business shares, creditors, or any other person with any economic or legal interest in the debtor or its business.⁶³ In its final form, the Directive explicitly stipulates that the monitor must be independent from the debtor and associated persons, but does not accept Parliament's amendment and instead entrusts Member States with setting any additional independence criteria concerning creditors and shareholders.⁶⁴

It is evident from Article 22 of the EC Proposal that the role of the monitor is to document each step of the sale⁶⁵, explain the competitiveness, transparency, fairness and satisfaction of market standards⁶⁶, and also to recommend the best bidder⁶⁷, whose offer is consistent with the best-interest-of-creditors test⁶⁸. All the above duties remained essentially unchanged in the General Approach, although it is evident from further provisions that the role of the monitor as the central body of the pre-pack procedure is significantly reduced, taking into account that

⁶⁰ A. Thery, *The pre-pack regulation in the EU Commission proposal for a second insolvency directive*, European Insolvency and Restructuring Journal, 2023, No. 4, p. 3, Vidić, M.; Baće, M.; Soldić, I., *Models of Insolvency Liquidation*, Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, No. 21, Mostar, 2024, pp. 281.

⁶¹ Recital (31) of the Directive.

⁶² Article 19(1) of the EC Proposal.

⁶³ European Parliament, *Report*, Amendment 148, Art. 22(1), first subparagraph.

⁶⁴ Article 23(2) of the Directive.

⁶⁵ Article 22(2)(a) of the Directive.

⁶⁶ Article 22(2)(b) of the Directive.

⁶⁷ Article 22(2)(c) of the Directive.

⁶⁸ Article 22(2)(d) of the Directive.

the General Approach provides greater flexibility for Member States to decide on the mechanisms of sale by public auction or with the approval of creditors⁶⁹, which reduces the key role of the monitor as the body whose recommendation of the best bidder is implemented in the said procedure.

The European legislator, in the Directive's final text, introduced the possibility of a stay of enforcement actions to facilitate the objectives of the preparatory phase of the pre-pack procedure.⁷⁰ As another means of ensuring the completion of the preparatory phase, the Directive also provides for the suspension of the liquidation phase if a creditor files a request to open insolvency proceedings during the preparatory phase, provided that the opening of the liquidation phase would not be in the interests of all creditors.⁷¹

The liquidation phase, according to the Directive's final text, commences upon the decision to open insolvency proceedings⁷², in which the competent authority should approve the debtor's business sale if such a sale is approved by the creditors or the purchaser is chosen through a public auction, or if the purchaser is proposed by the monitor with an opinion on the fulfillment of the legal requirements or approval of the court on the fulfillment of the legal requirements⁷³. Judicial authorisation of the sale of all or part of the debtor's business may not be required where national law allows creditors to approve such a transaction⁷⁴.

The sale of the debtor's entire property is regulated by the Bankruptcy Act, but unlike the Directive, the Bankruptcy Act constitutes such sale rules in greater detail. Pursuant to Article 235, Paragraph 1 of the Bankruptcy Act, the report of the insolvency practitioner or the findings and opinions of a court expert are the basis for the court's decision on the sale.⁷⁵ In the aforementioned procedure, which lacks a "preliminary phase", the decision is made by the creditors at a reporting hearing or another creditors' meeting.⁷⁶ The Directive, unlike the Bankruptcy Act, provides for the possibility of the court's decision on such a sale being omitted in cases where the domestic legislator provides for the consent of the creditors⁷⁷, but the Bankruptcy Act, without exception, provides for a court decision in the form

⁶⁹ Council of the European Union, *op. cit.*, note 5, p. 5.

⁷⁰ Article 25(1) of the Directive.

⁷¹ Article 26 of the Directive.

⁷² Article 29(1) of the Directive.

⁷³ *Ibid.*

⁷⁴ Article 29(2) of the Directive.

⁷⁵ Article 235(1) of the Bankruptcy act.

⁷⁶ *Ibid.*

⁷⁷ Article 29(2) of the Directive.

of a confirmation as a prerequisite for the sale itself, and only where the court is satisfied that such a sale would not leave creditors in a worse position than if the debtor's assets were disposed of individually.⁷⁸

The key difference between the Directive and the provisions of the Bankruptcy Act, according to the authors, is the act of selling a company's assets "that is operating on a permanent basis". It has been observed that the Bankruptcy Act provides for the procedure for the sale of assets as a whole, without regulating the transfer of the business carried out with such assets, while the text of the Directive itself, especially its recitals, shows that the European legislator had in mind to enable the liquidation by selling the company or its part which should, after the sale itself, continue to operate as a "going concern".⁷⁹ The domestic legislator does not provide for the continuation of business itself in the provisions relating to the sale of all of the debtor's assets, but focuses exclusively on the sale of the assets themselves.

The above-mentioned difference is also evident in the further provisions of the Directive that regulate executory contracts relating to the debtor's business or its part.

The Commission attempted to regulate the debtor's market restrictively and thus, in Article 27 of the EC Proposal, envisaged the unconditional transfer of existing contracts to the business acquirer, provided that such contracts are crucial for the ongoing operations of the debtor and their suspension would lead to a cessation of activities.⁸⁰ Such a limitation of the party autonomy is supported in foreign literature by the argument that the forced takeover of the contract does not have a negative effect on the other contracting party, who did business with a person in financial difficulties and who was certainly threatened with the termination of cooperation, so this approach enables the other contracting party to continue business cooperation with the acquirer of the debtor's business.⁸¹

The General Approach again softens this formulation by granting Member States the authority to determine whether the other party's consent is required for the transfer of contracts⁸², depending on its type, the interests of the business or the nature of the parties⁸³, and providing for the right to terminate the contract provided that a notice period of no less than three months is observed from the transfer date.⁸⁴

⁷⁸ Article 235(6) of the Bankruptcy act.

⁷⁹ Recital (29) of the Directive.

⁸⁰ Article 27 (1) of the EC Proposal.

⁸¹ Van Zanten, M.R., *Proposal for European rules on pre-pack proceedings should be supported*, TvI, 2023, No. 14, 17 May 2023, p. 8.

⁸² Council of the European Union, *op. cit.*, note 5, p. 92.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, p. 93.

The final text of the Directive adopts both approaches and regulates the possibility of transfer without consent, with an exception for competitors of the acquirer⁸⁵, and the possibility of transfer with the other party's consent, depending on the contract type, the interests of the business or the nature of the parties⁸⁶, with the right to terminate the contract upon giving at least three months' notice, but only if such a transfer would unfairly harm the other party.⁸⁷

In addition to the possibility of termination of the contract by the other contracting parties, the Commission has further provided for the possibility of the court itself terminating executory contracts that are necessary for the debtor to continue its business and whose termination would lead to a standstill in business, where at least one of the following conditions is fulfilled. As the first condition, the Commission suggests that termination of such a contract may be justified in the interest of the debtor's business, whereas the second condition concerns public service contracts in which the acquirer is unable to meet the legal or technical obligations provided for therein.⁸⁸

In its final form, the Directive abandons court regulation of contract termination while allowing Member States to provide that licence agreements for intellectual and industrial property rights, where the debtor is the licensor, may only be terminated with the consent of the licensee.⁸⁹

Regulating the possibility of terminating a contract by a court, especially with the condition of a court interpretation of the usefulness of such termination, according to the authors of this article, would constitute a legal precedent in domestic legislation, which sets the autonomy of the parties' will as the basis for the creation, modification and termination of a legal obligation⁹⁰. Judicial termination as such is provided by the Obligations Act in the part regarding the modification or termination of a contract due to changed circumstances and sufficiently provides protective mechanisms to the contracting parties that would make the fulfilment of its obligations excessively difficult or would cause excessive losses. Nevertheless, the court does not pronounce termination of the contract *ex lege*; rather, it requires the will of one of the contracting parties to bring such a claim before the court.⁹¹

⁸⁵ Article 30(1) of the Directive.

⁸⁶ Article 30(2) of the Directive.

⁸⁷ Article 30(3) of the Directive.

⁸⁸ Article 27 (2) of the EC Proposal.

⁸⁹ Article 30(4) of the Directive.

⁹⁰ The freedom to regulate obligatory relations as a principle is prescribed by Article 2 of the Civil obligations Act.

⁹¹ Article 369 of Obligations Act Official Gazette No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022, 156/2022, 155/2023.

Although the provision of the possibility of judicial termination has been recognized by some foreign authors as an effective mechanism for completing the process of sale⁹², the authors of this article believe that the Directive sufficiently provides Member States with the possibility of protecting both the continuation of the business itself and the debtor's other contractual parties, as a result of which leaving the decision on the termination of the contract to the contractual parties themselves stands out as an effective choice of the European legislator, which is in line with other provisions of domestic legislation.

When regulating the second stage of the pre-pack procedure, the European legislator has also provided for the treatment of the debts and obligations of the company whose assets are transferred in their entirety. Thus, Article 31, Paragraph 1 of the Directive provides that Member States guarantee that the acquisition of the debtor's business occurs without any attached debts or obligations, except with the debtor's express consent to assume such debts and obligations.⁹³ The aforementioned mechanism is not unknown to the Bankruptcy Act, which provides such a possibility only as part of a bankruptcy plan by which the entirety or a portion of the debtor's assets can be transferred to another person, with the exclusion of the rules on joining a debt in the case of the takeover of the entire property.⁹⁴

The rules on joining a debt are established by the Obligations Act, which regulates that the acquirer of a property entity is liable for the obligations arising from such an entity, but only up to the value of its assets, which the contracting parties cannot exclude by their dispositions, and such a provision would not produce effects towards creditors.⁹⁵ The most recent example of the application of the provision that allows the transfer of property to the acquirer without debts and obligations relating to such an entity, in domestic legislation and legal practice, is the Settlement⁹⁶ reached in the extraordinary administration procedure that was conducted in accordance with the provisions of the Act on the Extraordinary Administration Procedure in Companies of Systemic Importance for the Republic of Croatia.⁹⁷ The aforementioned Settlement, among other things, provided for the transfer of the property of 47 unviable companies⁹⁸ to newly established acquiring companies, thereby ensuring the continuation of the existing business operations.

⁹² Van Zanten, *op. cit.*, note 81, p. 8.

⁹³ Article 31(1) of the Directive.

⁹⁴ Article 303(2)(2) of the Bankruptcy act.

⁹⁵ Article 200 of Civil obligations Act.

⁹⁶ Settlement Proposal (Agrokor), Available at: [<https://nagodba.agrokor.hr/storage/2018/06/Prijedlog-Nagodbe-azuriran-25062018.pdf>], Accessed 20 April 2026.

⁹⁷ Act on the Procedure of Extraordinary Administration in Companies of Systemic Importance for the Republic of Croatia, Official Gazette, No. 32/2017.

⁹⁸ Article 22.1. of the Settlement.

3.3. Creditors' Committee

The committee serves as the body representing creditors during insolvency proceedings pursuant to Article 2(1)(j) of the Directive. In the final text of the Directive, the provisions on the creditors' committee are positioned in title VI. and divided into two chapters from Articles 44 to 50. The six articles on the creditors' committee elaborate on issues concerning the establishment⁹⁹, appointment and composition¹⁰⁰, dismissal and replacement of members¹⁰¹, working methods of the creditors' committee¹⁰², functions, rights and duties of the creditors' committee¹⁰³, costs and fees¹⁰⁴, and liability of the members of the creditors' committee¹⁰⁵.

Pursuant to Article 44 of the Directive, Member States must establish a creditors' committee upon the commencement of insolvency proceedings and may, in accordance with national law, allow for its establishment at an earlier stage.¹⁰⁶

The creditors' committee is not intended as a formal body, but as a real body that represents and protects different groups of creditors by, among other things, supervising the work of insolvency practitioners and guaranteeing that creditors are provided with information on the progress of the proceedings and the state of the insolvency estate.¹⁰⁷ The intention of the European legislator is to improve the representation of different groups of creditors, especially cross-border and workers' representatives, while maintaining a balance between achieving the stated objective and rationalizing costs.¹⁰⁸ Under the Directive, this is permitted only where it is explicitly provided for in national law, in particular where the insolvency estate is of modest value, the number of creditors is small, or there is a risk that it may negatively affect the debtor's financial position.¹⁰⁹

⁹⁹ Article 44 of the Directive.

¹⁰⁰ Article 45 of the Directive.

¹⁰¹ Article 46 of the Directive.

¹⁰² Article 47 of the Directive.

¹⁰³ Article 48 of the Directive.

¹⁰⁴ Article 49 of the Directive.

¹⁰⁵ Article 50 of the Directive.

¹⁰⁶ Article 44(2) of the Directive.

¹⁰⁷ Article 48(1) of the Directive.

¹⁰⁸ One of the Commission's proposals was the possibility of excluding the creditors' committee in specific cases, namely in the case of micro-entrepreneurs, in the insolvency proceedings there is a small number of creditors or the economic importance of the insolvent estate is small. The Council completely rejected the mentioned cases and provided that the Member States themselves specify the mentioned conditions in national law. However, the Parliament is leaning towards the EC Proposal and makes a minor change, only in the form of the possibility of excluding the creditors' committee taking into account the scope and the nature of the debtor's business, while leaving the other, exhaustively listed cases as proposed by the Commission.

¹⁰⁹ Article 44(3) of the Directive.

The aforementioned solution introduced by the Directive is the result of major disputes that occurred during the legislative procedure. Namely, during the legislative process, the Council highlighted the concerns of the Member States that creditors' committee establishment could prolong the procedure or complicate its implementation. Therefore, as a compromise, the Council proposed that the creditors' committee be excluded in cases where establishing it would not yield the benefits envisaged by exercising the function of such a committee. For the above-mentioned reasons, the Council, by the provision of Article 1(4) of the Opinion, provided that Member States may apply the title of creditors' committee only to large undertakings within the meaning of Directive 2013/34/EU. The above-mentioned implies that for smaller undertakings, Member States may provide for sufficient mechanisms for the protection of creditors' interests under national law without establishing a creditors' committee, and its function may also be performed by the creditors' assembly, or by the creditors themselves in Member States that do not provide for the assembly as a special body of insolvency proceedings.

In the creditors' committee, there must be representatives of the different groups of creditors.¹¹⁰

The Directive also introduces the possibility of filing an appeal to contest the decision on the composition of the creditors' committee, if prescribed by national law.¹¹¹ Members of the board must be able to be dismissed either intentionally or due to negligence, or if there is a conflict of interest.¹¹²

The Directive obliges Member States to set out provisions regulating how the creditors' committee operates.¹¹³ It concerns the rules on the voting procedure, quorum, conflicts of interest, recording of attendance, etc.¹¹⁴

¹¹⁰ Article 45(2) of the Directive. As regards the appointment of members of the creditors' committee, the Commission's proposal aimed to establish deadlines for the appointment of its members, to balance the interests of all represented creditors, to ensure the representation of cross-border creditors and creditors whose claims have been provisionally accepted, and to ensure the possibility of challenging the appointment if it has not been carried out in accordance with the applicable provisions of national law. The General Approach focuses exclusively on the structure of the creditors' committee itself, completely rejecting the proposals concerning the deadlines for appointment, and emphasises the possibility of participation of persons other than creditors themselves. Furthermore, the possibility of challenging the appointment of members of the creditors' committee has been abandoned, while the provisions regarding the possibility of replacing or terminating a member of the creditors' committee have been retained to some extent. Article 59 (1) 1-5 of the EC Proposal; Opinion of the Council 121-123.

¹¹¹ Article 45(4) of the Directive.

¹¹² Article 46(2) of the Directive

¹¹³ Article 47 of the Directive.

¹¹⁴ Article 47(1) of the Directive.

Creditors' committee members can also receive compensation for their work, but only if it is proportional to their function.¹¹⁵ Article 50 of the Directive prescribes the exemption from liability of members of the creditors' committee, except in cases of intent or gross negligence in relation to the interests of creditors.

In terms of the implementation of individual provisions into Croatian national law, it is worth emphasizing that the transposition of the rules governing creditors' committees will proceed without major tectonic changes, as the provisions of the Croatian Bankruptcy Act already have detailed provisions on the creditors' committee. Therefore, it is to be assumed that the Croatian legislator will decide to introduce a greater degree of harmonisation than the minimum prescribed by the Directive.¹¹⁶

3.4 Director's Duty To Request the Opening of Insolvency Proceedings and Civil Liability

Directors are required to initiate insolvency proceedings within a set timeframe in order to prevent the continued erosion of assets and the unequal treatment of creditors through individual satisfaction, all of which should lead to a greater and proportionate satisfaction of all creditors.¹¹⁷

The provision most extensively modified by the Council deals with the directors' obligation to file for the opening of insolvency proceedings, for which the Commission proposed a deadline not exceeding three months from the point at which the directors became, or could reasonably have become, aware of the debtor's insolvency under national law.¹¹⁸ In addition to the above, the Commission also provided for civil liability of directors for damage to creditors resulting from failure to fulfil such an obligation, which does not call into question the stricter rules on civil liability prescribed by the provisions of national law.¹¹⁹ At the same time, the Council adds a new article which provides exemptions from the obligation in question for directors who are responsible for the debts of the company or who are natural persons, and with additional items provides for the possibility of

¹¹⁵ Article 49 of the Directive.

¹¹⁶ Freshfields Bruckhaus Deringer, *EU Insolvency Law Harmonisation: Approaches Reach the Finish Line*, Freshfields, Available at: [<https://www.freshfields.com/globalassets/noindex/documents/eu-insolvency-law-harmonisation-approaches-the-finish-line-v8.pdf>], Accessed 14 April 2026, p. 4; van Galen, R. J., *The creditors' committee under the Proposal*, TvI 2023/16, pp. 1–2.

¹¹⁷ Radić, I. M., *Directors' Duty to Consider the Interests of Creditors and Other Stakeholders When There Is a Likelihood of Insolvency*, Strani pravni život, 2021, No. 1, p. 147.

¹¹⁸ Article 36(1) of the EC Proposal.

¹¹⁹ *Ibid.*

Member States to provide that such an obligation may be fulfilled by making the company's insolvency public through publication in a public register within the same prescribed period, thereby making sure that creditors may themselves seek the opening of insolvency proceedings themselves.¹²⁰

The Council also puts forward that Member States may allow the duty to request the opening of insolvency proceedings to be suspended where directors implement appropriate measures to safeguard creditors and ensure protection for the general body of creditors at a level comparable to that established by the provision. In addition, the Council entirely omits the Commission's proposal for a rule without prejudice to stricter national provisions on civil liability.¹²¹ On the other hand, Parliament concentrates its amendments on directors' overarching duties from the stage where a company is likely to become insolvent, imposing an obligation to prevent insolvency and, failing that, to take steps to avert bankruptcy.¹²²

Furthermore, the Council stipulates that, in the exercise of such duties, directors must have regard to the interests of creditors and refrain from any intentional or grossly negligent conduct that may endanger the company's viability. Ultimately, Parliament highlights that Member States must ensure directors act without unnecessary delay in seeking the opening of insolvency proceedings once they know, or ought to know, of the entity's insolvency.¹²³

Despite many amendments and proposals by the Council and Parliament, the final text of the Directive regarding the duty of directors to submit a proposal to initiate insolvency proceedings is only formulated in two short articles, which makes it evident that there is still no desire, at least at the European level, to encroach too restrictively on the liability of natural persons.

In its final form, the Directive stipulates that directors are required to commence insolvency proceedings within three months from the point at which they knew, or ought reasonably to have known, of the entity's insolvency.¹²⁴ The domestic legislator, in Article 110, paragraph 2 of the Bankruptcy Act, sets a very short deadline for submitting a proposal to initiate bankruptcy proceedings, namely, 21 days from the occurrence of the bankruptcy grounds.¹²⁵ The duty of directors

¹²⁰ Council of the European Union, *op. cit.*, note 5, p. 102.

¹²¹ *Ibid.*

¹²² European Parliament, *Report*, Amendment 47, Article 36(1).

¹²³ *Ibid.*

¹²⁴ Article 36 of the Directive.

¹²⁵ The grounds for bankruptcy are regulated by the provisions of Article 5 of the Bankruptcy Act and are referred to by the law as insolvency and over-indebtedness. Insolvency, in accordance with the provisions of Article 6, paragraph 1, exists if the debtor is no longer able to meet his due financial

in question is not only provided in the Bankruptcy Act, but also in the Companies Act, which, in the provision of Article 251, paragraph 2, stipulates that the management of the company is obliged, without delay and no later than three weeks after the occurrence of the bankruptcy grounds, to request the initiation of bankruptcy proceedings.¹²⁶

Although certain legislation provides for different deadlines for fulfilling the duties of a director depending on the bankruptcy grounds in a specific case¹²⁷, foreign literature has noted criticism of the European legislator for leaving it to the Member States to define the bankruptcy grounds in the context of prescribing such a director's obligation, given that it could lead to significant differences in the application of this obligation, which calls into question the goal of harmonizing such provisions.¹²⁸ As in previous examples, the Bankruptcy Act provides for stricter rules, i.e., shorter deadlines for initiating bankruptcy proceedings, as a result of which no significant intervention by the domestic legislator in the articles in question is expected.

Both the Directive¹²⁹ and the Bankruptcy Act¹³⁰ provide for the civil liability of directors for damage caused to creditors due to a breach of this obligation, while the Bankruptcy Act also regulates the obligation of directors to pay the advance payment to cover bankruptcy proceedings costs, if they have acted contrary to the obligation to initiate bankruptcy proceedings within the time limit.¹³¹ Although, during the legislative process, taking into account the proposals of the Council and Parliament, it was expected that the provision in question would also cover further duties of directors, at least in the form of preparatory actions, i.e. actions and measures reasonably necessary to prevent the occurrence of bankruptcy grounds and the subsequent initiation of bankruptcy proceedings, the aforementioned regulation has not been implemented in any respect.

The authors of this article point out that in practice, there are few cases in which directors initiate bankruptcy proceedings within the prescribed period, which is

obligations, while over-indebtedness is considered a situation in which the debtor's assets are less than his existing obligations, as regulated by the provisions of Article 7, paragraph 1 of the Bankruptcy Act.

¹²⁶ Article 251(2) of the Companies Act.

¹²⁷ Germany and Austria define insolvency on the basis of the liquidity test (which represents the inability to meet the obligations due), and the balance test ("liabilities exceed assets" or *Überschuldung*). Also: A. Karapetian and L. Lennarts, *The Directors' Duty to File for Insolvency Proceedings in the European Commission's Proposal for Harmonising Insolvency Law: the Dutch Perspective*, Tvl 2023/15, 17 May 2023, p. 4.

¹²⁸ *Ibid.*

¹²⁹ Article 37(1) of the Directive.

¹³⁰ Article 110(3) of the Bankruptcy act.

¹³¹ Article 113(1) of the Bankruptcy act.

precisely why the domestic legislator, in the 2015 Amendment to the Bankruptcy Act¹³², provided for the duty of the Financial Agency to file a request to initiate bankruptcy proceedings if the debtor has in the register of the order of payment any unfulfilled basis for more than 120 days.¹³³ Similarly, there are a few court proceedings in which the subject of the dispute is the civil liability of directors for failure to initiate bankruptcy proceedings within the prescribed period, taking into account the difficulty of proving assumptions for damage in such cases.¹³⁴

A specific obstacle (apart from the amount of provable damage), in the authors' view, lies in causation itself, namely the fact that the creditor suffered damage as a consequence of the director's failure to commence insolvency proceedings; in other words, that, in the ordinary course of events, had the application for the opening of insolvency proceedings been filed in due time, the creditor would have been able to recover its claim in the amount sought in the action. To succeed in court proceedings with such a request, the creditor should specify, among other things, what changes occurred in assets of the debtor in the period when bankruptcy proceedings were not yet opened, although they should have been, and what led to the inability to collect his claim in the amount claimed, and what amount of settlement he would have achieved if bankruptcy proceedings had been opened on time.

Of particular interest is also the issue of the liability of the directors towards creditors who entered into a business relationship with the debtor after the prerequisites for opening insolvency proceedings have occurred, or after the deadline within which the directors are obliged to initiate such proceedings has expired. Namely, if the directors had fulfilled their duties in a timely manner and taken appropriate measures to protect the interests of creditors, or had initiated insolvency proceedings at the time when the legal requirements were met, such creditors would most likely not have entered into a business relationship with the debtor.

In such circumstances, creditors make business decisions based on the assumption that the company is capable of properly fulfilling its obligations. By postponing the initiation of proceedings, directors enable the creation of an illusion of the company's financial stability, which may lead third parties to conclude contracts, deliver goods or provide services that they would not otherwise undertake if they were to become familiar with the debtor's real financial situation.

¹³² See more about this: Garašić, J., *The Most Significant Amendments to the Insolvency Act of 2015*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 38, No. 1, 2017, pp. 152, also: Čuveljak, J., *Proposal of the European Directive on the Harmonisation of Certain Aspects of Insolvency Law*, Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća, 2023, p. 288.

¹³³ Article 110(2) of the Bankruptcy act., also: Čuveljak, Jelena, *Komentar Stečajnog zakona*, Narodne Novine, Zagreb, 2018., p. 352.

¹³⁴ Also: Čuveljak, J., *Komentar Stečajnog zakona*, Narodne Novine, Zagreb, 2018., p. 352.

Therefore, it can be argued that the damage suffered by such creditors is not solely a consequence of the company's insolvency, but also of the members' failure to react in a timely manner to the company's financial difficulties. This is precisely where the importance of directors' duties in a period of impending insolvency is evident. The director's duty is not only to preserve the value of the company's assets, but also to protect potential new creditors from entering into legal relationships that are burdened with a high risk of default from the very beginning of the business relationship.

The authors of this paper take the position that the European legislator has not regulated the provisions on directors' liability in a sufficiently systematic and developed manner to, at least in a deterrent manner, deter directors from failing to fulfil their legally prescribed obligations. Therefore, it is up to the domestic legislator, following the objectives and spirit of the Directive in question, which encourages this, to provide mechanisms to ensure an enhanced level of legal clarity and certainty and discipline in the actions of persons required to submit a request to open bankruptcy proceedings.

4. CONCLUSION

The ambitious plan of the European legislator to harmonize certain substantive aspects of insolvency law began with the publication of the EC Proposal in December 2022. The final text of the Directive, after an extensive legislative procedure, was published on April 1, 2026 and consists of VIII titles which, among other things, introduce rules for minimum harmonization: avoidance actions in insolvency proceedings, tracing assets, the pre-pack proceeding, directors' duty, creditors' committee and key information factsheets (Article 1 of the Directive).

The analysis in the paper established that in the legislative procedure, under the pressure of the Member States, the EC Proposal was narrowed down and that the compromise solution in the final version of the Directive is largely a consequence of different legal historical national systems.

This paper is limited to the analysis of the Directive's provisions relating to avoidance actions in insolvency proceedings, the pre-pack proceeding, the creditors' committee, and directors' duties.

In terms of avoidance of actions, it was found that, even though the European legislator sets only a baseline level of protection for creditors, giving the opportunity to Member States to leave or enact provisions that guarantee a greater level of protection for creditors, it is up to the domestic legislator to recognize the need to improve the possibilities for challenging the debtor's legal acts and ultimately

maximize the value of the insolvency estate. In this regard, the Directive provides solid ground for the legislator to make appropriate amendments to protect and preserve the rights of creditors and restore benefits to the insolvency estate, so it remains to be seen whether the legislator will recognize the need to amend the existing provisions of the Bankruptcy Act in the manner proposed in this article.

Regarding the pre-pack proceedings, it was concluded that the European legislator provides another institute that should be an effective and efficient instrument for achieving the liquidation of insolvent legal entities and the transfer of their business as a functional unit at the highest market price to the acquirers who continue the business or its part, and it remains to be seen how the domestic legislator will implement this institute into the national legal system, especially in terms of its harmonisation with the existing bankruptcy rules, while at the same time preserving its fundamental purpose, which is efficient liquidation through the transfer of business as a functional unit.

With regard to the creditors' committee, it was concluded that Croatian law already has detailed provisions on the creditors' committee, and no major issues are expected during the transposition of these provisions into Croatian national law.

Regarding directors' duties, the European legislator has not regulated directors' responsibilities clearly and systematically enough, in particular with regard to creating a deterrent effect on persons authorised to represent in order to prevent them from failing to fulfil their legal obligations. It is therefore up to the national legislator, in accordance with the objectives and spirit of this Directive, to establish appropriate mechanisms that will contribute to greater legal certainty and more responsible conduct of persons obliged to submit a request for the opening of insolvency proceedings.

The deadline for transposing the Directive into national law is 22 January 2029, or 10 July 2029 for the introduction of the BARIS banking account system. Despite everything, it remains to be seen how things will come together and whether the EU will finally strengthen its position in global capital markets.

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