PROPOSED EU DIRECTIVE HARMONISING INSOLVENCY LAW

- proposal published on 7 December 2022, still at an early stage of the legislative process
- proposal partly complements two recently adopted pieces of legislation: directive 2019/1023 on preventive restructuring frameworks, and regulation 2015/848 on insolvency proceedings
- purpose: offer more certainty and create a common minimum standard of insolvency regimes across Member States, encouraging more effective cross-border investment

PROPOSED EU DIRECTIVE HARMONISING INSOLVENCY LAW

Subject matter and scope

- harmonised conditions for exercising avoidance actions
- tracing of assets belonging to the insolvency estate
- provisions to introduce so called ‘pre-pack’ liquidation procedures
- duty of directors to timely submit a request for the opening of insolvency proceedings
- simplified winding-up proceedings for microenterprises
- requirements for improving the representation of creditors’ interests in the proceedings through creditors’ committees
- enhanced transparency for creditors on the key features of national insolvency regimes

AVOIDANCE ACTIONS

Three grounds for transaction avoidance to enable an insolvent company to recover assets:

- legal acts at an undervalue - transactions taking place within one year prior to an insolvency filing, where the transaction in question involves no or manifestly inadequate consideration;
- fraudulent actions - debtor intentionally causing detriment to its general body of creditors, where the relevant act took place four years prior to the insolvency filing and the other party knew of the debtor's intention;
- creditor preferences - legal acts benefitting or preferring a creditor that were carried out either within three months before the filing of insolvency proceedings or after the filing.

If an act falls under one of the three grounds, it will be void and unenforceable against the insolvent estate and the benefiting party must provide compensation.

Exemptions: the proposed directive states that the rules on preferences (only) should not apply to legal acts that are not subject to avoidance actions in accordance with the Settlement Finality Directive (SFD) and the Financial Collateral Directive (FCD):

- no protection for clearing arrangements covered by the European Market Infrastructure Directive (EMIR)
- no protection for netting provisions not covered by the FCD (e.g., where the netting provision is not part of a financial collateral arrangement or where both of the parties do not fall within the categories covered by the FCD).

EFET

PRE-PACK PROCEEDINGS

Reasoning: “It is generally assumed that more value can be recovered in liquidation by selling the business (or part thereof) as a going concern rather than by piecemeal liquidation”. New form of pre-pack proceedings consisting of two consecutive phases:

- **the preparation phase**, which aims at finding an appropriate buyer for the debtor’s business or part thereof;
- **the liquidation phase**, which aims at approving and executing the sale of the debtor’s business or part thereof and at distributing the proceeds to the creditors.

Stay of individual enforcement actions: during the preparation phase, the debtor can benefit from a stay of individual enforcement actions in accordance with Articles 6 and 7 of the Restructuring Directive, where it facilitates the seamless and effective roll-out of the pre-pack proceedings **--> adverse impact on close-out netting provisions**

Assignment of contracts without counterparty consent: executory contracts which are necessary for the continuation of the business are to be assigned to the purchaser and the assignment does not in principle require the consent of the counterparty.