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Harmonisation and other Challenges for the Insolvency Profession in 2023

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Chapter 5

Avoidance Actions and Proposed EU-level Harmonisation: A Comparative Analysis

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1. Introduction

EU insolvency practitioners who face the question of whether it is possible to get at the value that has escaped from the bankruptcy estate have a difficult task, in particular if the value escaped through a cross-border transaction. In such cases, even if the *lex concursus* would allow an EU insolvency practitioner to challenge the transaction, the international aspect must still be addressed. In the past, the EU legislator has already taken action to assist EU insolvency practitioners by developing rules that help establish which court has jurisdiction and the applicable law regarding the voidness, voidability, or unenforceability of legal acts detrimental to the general body of creditors. EU insolvency practitioners need only rely on the Insolvency Regulation.[1] However, where assets end up outside of the EU, e.g., in England or Switzerland, an EU insolvency practitioner will be confronted by other questions of private international law.

The EU legislator has recently taken the initiative to deal with intra-EU avoidance actions with its Proposal for a Directive harmonising certain aspects of insolvency law.[2] In this article, the authors will first examine the Proposed Directive, insofar as it affects avoidance actions, and then map the changes which the Proposed Directive will bring to the legal systems of Belgium, Germany, Poland, and Slovakia. Additionally, this article will also address the English and Swiss perspectives on this new development in EU insolvency law.

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1 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast)

2 Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL harmonising certain aspects of insolvency law (COM/2022/702)

Currently, Articles 6, 7 and, in particular, 16 of the Insolvency Regulation guide EU insolvency practitioners in determining which court has jurisdiction and which law applies when they intend to file an avoidance action in an EU context. In essence, the Insolvency Regulation allows an insolvency practitioner to bring an avoidance action before the courts of the Member State within the territory of which the relevant insolvency proceedings have been opened. Also, the laws of the State in which proceedings are opened will determine the rules regarding the voidness, voidability, or unenforceability of legal acts detrimental to the bankrupt's creditors.

However, due to the lack of uniform avoidance rules across the EU, the beneficiary of a detrimental act has certain defences to such actions. In accordance with Article 16 of the Insolvency Regulation, the beneficiary can attempt to demonstrate that the act is subject to the law of another Member State, the laws of which do not permit such act to be challenged in the relevant matrix of facts. Thus, EU insolvency practitioners must consider two (or more) legal systems which may significantly diverge, which brings uncertainty to the process of asset recovery and may lead to the unequal treatment of creditors across the EU.

2. The Proposed Directive will complement the Insolvency Regulation, among others by setting minimum standards for avoidance rules

The Proposed Directive's primary purpose is to increase the transparency and efficacy of insolvency proceedings which, at the EU level, would increase the effectiveness of insolvency proceedings involving more than one EU Member State, rendering such proceedings more predictable and reducing barriers to the free movement of capital. Although the EU legislator has, during the legislative process, concluded that the profound differences in the insolvency regimes and legal traditions of various EU Member States makes full harmonisation of these regimes impossible, an effort was made to establish minimum standards for certain critical aspects of collective proceedings. One of the areas identified as critical for the standardisation of insolvency regimes across the EU is that of avoidance rules for transactions carried out before the opening of formal insolvency proceedings.

The Authors will consider and assess whether the Proposed Directive's contemplated scope could result in the unification of avoidance rules across the EU, consequently reducing the application of Article 16 of the Insolvency Regulation, and preventing insolvency practitioners from being confronted with laws of another Member State which do not permit such act to be challenged.

Further, in light of the broader trend to internationalise trade relations, the Authors have also decided to look beyond the EU's borders and explore the legal regimes of certain non-EU states, such as the UK – which continues to play a significant role in the European market despite Brexit – and Switzerland – which remains a financial driving force in Europe.

3. The Scope of the Proposed Harmonisation with regard to avoidance rules

The proposed regulations regarding avoidance rules are intended to be minimum standards to protect the insolvency estate from the liquidation of assets detrimental to the general body of creditors, performed prior to the opening of bankruptcy proceedings,[3] which, however, do not prevent Member States from maintaining or enacting stricter legal frameworks.

3 Article 5 of the Proposed Directive.

First, the Proposed Directive provides for a general rule that Member States shall ensure that all legal actions (defined as any human behaviour, including omissions), perfected prior to the opening of insolvency proceedings, and causing damage to the general body of creditors, may be set aside, if the minimum standards stated in the Proposed Directive are satisfied (Article 4). One should note that, although not expressly stated in the draft Proposed Directive as published,[4] some provisions suggest that the scope of voidable legal actions could be construed broadly and cover not only the debtor's actions, but also those of a given transaction's counterparties or even third parties.

Detailed claw-back standards are specified in Chapter 2 of the Proposed Directive, which provide that, among others:

> (a) with certain exceptions,[5] actions benefiting a creditor (or group thereof) by satisfaction, collateralisation, or otherwise, should be voidable if perfected:
>> (i) <u>three months</u> prior to the date of the insolvency filing, provided the debtor was unable to pay its mature debts; or
>> (ii) in any case, after the insolvency filing is made, in each case provided that in case of the creditors or those secured in the manner owed, for a transaction concerning a due claim to be voidable, the relevant creditor or the secured party are required to know (or ought to have known) of the debtor's distress (which knowledge is presumed where the parties to a transaction are closely related to the debtor);
>
> (b) except for gifts or donations of symbolic value, the debtor's legal acts made against no or manifestly inadequate consideration are voidable if perfected <u>within one year</u> prior to the insolvency filing or after such filing;
> (c) any actions of the debtor intended to be detrimental to the general body of creditors are voidable if:
>> (i) perfected <u>within four years</u> prior to the insolvency filing or after such filing; and
>> (ii) the other party knew (or ought to have known) of the debtor's intent.

The Proposed Directive also attempts to harmonise the consequences of avoiding such transactions as well as the limitation period for bringing avoidance actions. Regarding the former, local law should prohibit the invocation of claims, rights or obligations arising from annulled transactions against the insolvency estate, while parties benefiting from the transaction shall provide full compensation to the estate for any damage caused to it, without a set-off right against their receivables. Note that bona fide beneficiaries would be entitled to raise the defence that they are no longer enriched by the transaction in question.

Claims for full compensation should also be enforceable against the beneficiary's heirs or legal successors, including individual successors insofar as they acquired the asset for manifestly inadequate consideration, or they knew (or ought to have known) of the circumstances underlying the avoidance (which knowledge is presumed for entities closely related to an avoided transaction's beneficiaries).[6] Furthermore, claims arising from annulled transactions must be brought within three years of the opening of insolvency proceedings.

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4 Recital 6 of the Preamble to the Proposed Directive.
5 See Article 6(3) of the Proposed Directive.
6 Article 11 of the Proposed Directive.

The Proposed Directive also provides for certain means to secure the beneficiaries of avoided transactions, namely:

(i) a beneficiary's claims will revive if they compensate the insolvency estate for the detriment caused; and
(ii) a beneficiary who performed its obligations under the avoided transaction may claim for the value of the counter-performance (if such performance remains part of the estate or continues to enrich it).

Unlike the Insolvency Regulation, the Proposed Directive does not specify which types of insolvency proceedings it shall apply to, raising the question of whether the proposed rules will also apply to restructuring proceedings. Regarding the avoidance rules, they are stated to not affect the application of instruments protecting financing and other restructuring-related transactions subject to Directive 2019/1023. Ideally, this should be clarified in the Proposed Directive's final wording.

4. Belgian transaction avoidance rules

4.1. Pre-insolvency and insolvency avoidance actions

Outside an insolvency context, Belgian law provides that, under certain conditions, a creditor can have a legal act of their debtor declared 'non-opposable'[7] when such act impairs their ability to seek recourse against the debtor's assets (so-called "*actio pauliana*").[8] In addition to the *actio pauliana*, a creditor may bring an action against any person who unlawfully contributed to the impairment of the creditors' ability to seek recourse.

Belgian bankruptcy law also provides for several specific transaction avoidance rules. On the one hand, there is the bankruptcy *pauliana* which is similar to the *actio pauliana* described above. Additionally, in certain cases, it is somewhat easier for a trustee to challenge acts that have impaired the creditors' ability to seek recourse against the debtor's assets.

4.2. Types of avoidable transactions in insolvency and time periods

4.2.1. The so called "suspect period"

A Belgian bankruptcy trustee may challenge transactions that are deemed detrimental to the insolvency creditors and that have taken place prior to the commencement of the bankruptcy proceedings.

The trustee's right to challenge is limited to transactions that occurred during the so-called "suspect period", being the period between the date taken into account for the occurrence of the company's cessation of payments and the date on which bankruptcy proceedings are opened. The date taken into account for the occurrence of the company's cessation of payments may not be more than six months before the date of the bankruptcy order.[9]

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7 I.e., the creditor can act as if the legal act does not exist.

8 Art. 5.243, Belgian Civil Code.

9 Art. XX.105, Code of Economic Law: if the bankruptcy order relates to a company that was dissolved in circumstances suggesting an intent to defraud its creditors, the date of cessation of payments may be determined as being the date of the decision to dissolve the company.

Where fraudulent intent (i.e., the intent to adversely affect the position of the debtor's other creditors) can be shown, the bankruptcy trustee's right to challenge transactions can be extended to cover an unlimited period prior to the opening of the bankruptcy proceedings.

4.2.2. Types of avoidable transactions

All payments, transactions and acts that have taken place on or after the day of the bankruptcy judgment cannot be opposed[10] against the bankruptcy estate. Furthermore, the following transactions, payments and creation of securities can be declared non-opposable if they occurred during the suspect period:[11]

> (a) transactions involving the disposal of assets for free (without consideration);
> (b) transactions, acts and contracts, if the value provided by the bankrupt notably exceeds the value received by them (obvious inadequate consideration);
> (c) all payments towards immature debts;
> (d) all payments of mature debts, where made other than by cash or commercial paper; or
> (e) the establishment of a security interest (pledge, mortgage, or other) to secure a debt in existence prior to the date of the security interest's establishment.

All other payments of mature debts or acts for consideration that occur during the suspect period may be declared non-opposable if the recipient thereof or the transaction's counterparty was aware of the cessation of payments.[12]

Securities registered after the cessation of payments may be declared non-opposable if more than fifteen days have passed between the date of the deed establishing the mortgage or privilege and the registration date.[13] Any payment or transaction entered into by the bankrupt during or prior to the suspect period are not-opposable if made or entered into by the bankrupt with the fraudulent intent of prejudicing the rights of its creditors.[14]

4.3. Potential impact of the Proposed Directive in Belgium

For Belgian insolvency practitioners, the Proposed Directive does not appear to be a Copernican Revolution in avoidance rules. The Belgian avoidance rules meet most of the Directive's minimum requirements and its implementation will mainly involve technical matters or fine-tuning existing rules, such as extending the term for challenging acts made against no or manifestly inadequate consideration from 6 months to 1 year. The avoidance rules, as such, will therefore not pose much of a problem under Belgian law, while the remedies provided for in the Proposed Directive are similar to those currently available to Belgian insolvency practitioners. As far as Belgian law is concerned, several other material issues are not (clearly) answered by the Proposed Directive, for example, the meaning of insolvency proceedings (Belgian avoidance rules only apply in cases of bankruptcy), or whether transactions which took place during a prior (court supervised) restructuring can be challenged.

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10 Under Belgian law, avoidable transactions can be declared non-opposable, meaning that the trustee can act as if the avoidable transaction did not take place (e.g. ask for a second payment; treat the asset as if it was still part of the bankrupt's estate; etc.).

11 Art. XX.111, Code of Economic Law.

12 Art. XX.112, Code of Economic Law. Case law has found that the bankruptcy trustee must also establish that the transaction is prejudicial to the other creditors.

13 Art. XX.113, Code of Economic Law.

14 Art. XX.114, Code of Economic Law.

5. German transaction avoidance rules

5.1. Pre-insolvency and insolvency avoidance actions

Under the German Insolvency Code ("**InsO**") a German insolvency administrator may, in principle, contest transactions (as well as omissions, which are deemed to be equivalent) made prior to the opening of insolvency proceedings if they disadvantage[15] the insolvency creditors and they satisfy certain conditions stipulated in the InsO.

5.2. Types of avoidable transactions in insolvency and time periods

Avoidable transactions under the InsO can be split into two broad categories.

5.2.1. Congruent and incongruent coverage

Transactions under which a creditor is granted a security interest (or satisfaction of their claims), or such interest or satisfaction is facilitated, may be contested by the insolvency administrator depending on the transaction's date and the creditor's knowledge at the relevant time. Transactions entered into within the three months immediately preceding the filing of a petition to open insolvency proceedings may be contested if the debtor was already illiquid on the relevant date and the creditor was aware of this fact, while those entered into following the opening of proceedings may be contested if the creditor was aware of the debtor's insolvency or the fact that a petition was filed: (*congruent coverage*).

Note that, if a creditor is not entitled to enjoy such a security interest or satisfaction of their claims (or to enjoy such security or satisfaction on the relevant date, or to enjoy the type of security or satisfaction purportedly granted by the transaction), then the act granting or facilitating such security or satisfaction may be contested by the insolvency administrator if it occurred within either the second or third month preceding the filing date of a petition to open proceedings (if the debtor was already illiquid on the transaction date or the creditor was aware that the transaction would disadvantage[16] the insolvency creditors on the transaction date) or the month immediately preceding this date (in all cases): (*incongruent coverage*).

5.2.2. Wilful disadvantage and gratuitous benefit

If a debtor enters into a transaction within 10 years (or 4 years, where the transaction purports to grant a security interest (or satisfaction of their claims), or facilitate such interest or satisfaction) of filing a petition to open insolvency proceedings with the intent to disadvantage its insolvency creditors, such a transaction may be contested by the insolvency administrator if the other party thereto was aware of the debtor's intention on the transaction date (which will be presumed if such party knew of the debtor's imminent insolvency (or actual insolvency in certain circumstances) and the disadvantage to the debtor's insolvency creditors resulting from

[15] A creditor is disadvantaged if the legal act has increased the debtor's assets or reduced the assets and thereby prevented, impeded or delayed access to the debtor's assets because the possibilities of satisfaction would have been more favourable without this legal act.

[16] Please see footnote 15 above.

the transaction).[17] This also applies to onerous contracts concluded between a debtor and closely related persons,[18] except where the contract was concluded more than two years before the filing date of a petition to open insolvency proceedings or the other party was unaware of the debtor's intention: (*wilful disadvantage*).

An insolvency administrator may also contest gratuitous benefits granted by the debtor other than ordinary gifts of minor value if made less than four years prior to the petition to open insolvency proceedings.

5.3. Potential impact of the Proposed Directive in Germany

In general, the InsO provisions on transaction avoidance already comply with the minimum requirements proposed in the Proposed Directive, while also going beyond them in some respects. However, there are certain areas in which the InsO provisions appear deficient.

Under the Proposed Directive, Member States must ensure that avoidable legal actions "can be declared void".[19] The InsO does not provide for the ability to declare avoidable legal actions void, in the sense of their absolute invalidity. Rather, the legal consequence of contesting a transaction is the creation of a contractual claim for the return of the asset disposed of to the insolvency estate.

Creditor's party to transactions subject to congruent coverage under the InsO are required to have positive knowledge of the debtor's insolvency or their having filed a petition to open insolvency proceedings, whereas, the Proposed Directive indicates that a transaction can be avoided if the creditor "should have known"[20] of such circumstances at the relevant time. Although the German jurisprudence has expanded the circumstances under which a creditor is presumed to have known of a debtor's insolvency almost to the point of encompassing negligent ignorance, recent judgments of the German Federal Supreme Court (BGH) have limited these grounds. Thus, legislative intervention may be required to incorporate negligent ignorance as grounds for avoidance.

The avoidance of gratuitous performances by a debtor under the InsO may also be in doubt since this could violate the Proposed Directive's minimum standards due to potentially being made for "manifestly inadequate consideration", since such performances, according to applicable BGH rulings, do not require any counter-performance from their recipient. Further, the limitation period for contesting such transactions (i.e., four years) may need to be altered to comply with the Proposed Directive's one-year period under Article 7(1).

Regarding transactions with parties closely related to the debtor, the minimum intent requirements stated in the Proposed Directive are well beyond those applicable under German law, due to imposing a presumption that a closely related person knew of the debtor's intent to disadvantage creditors. Under the InsO, such knowledge is presumed only where a contract

17 An "onerous contract" means any contract in which the benefits of the parties remain with each other in a relationship of mutual interest. The concept of an "onerous contract" is understood broadly in the context of Section 133 (4) of InsO. It includes contracts under the law of obligations, property law or company law, as well as agreements under the law of property or pure performance transactions. A contract is deemed to be for valuable consideration if a compensatory counter-performance is to be rendered for the debtor's performance.

18 As defined in Section 138 *Persons with close relationship to debtor*, InsO.

19 Articles 4, 6-11 of the Proposed Directive.

20 Article 6(2)(1)(b) of the Proposed Directive.

(interpreted broadly, but excluding unilateral legal acts) results in a direct disadvantage to the insolvency creditors (i.e., it impairs the possibility of their satisfaction from the debtor's assets, absent other circumstances) and the contract was concluded within two years of the petition for the opening of insolvency proceedings. Since the presumption imposed by the Proposed Directive also covers indirect disadvantages and applies to transactions entered into during a period almost double that stated in the InsO, German law does not appear to meet the Proposed Directive's minimum requirements and will likely require amendments unless these minimum standards are not adjusted in their final form.

The InsO could require further amendments to bring it into conformity with the minimum requirements of the Proposed Directive governing the general consequences of avoidance actions. In particular, German law has no equivalent of the prohibition stated in Article 9(5) of the Proposed Directive, whereby beneficiaries of a voided act shall not set off debts owed to the insolvency estate against their claims against the estate. Note that the BGH has ruled that a set off against the insolvency is excluded, but has not expressed a view on claims against the estate itself. This may be problematic due to the Proposed Directive's silence on this distinction.

Finally, the InsO lacks a provision similar to Article 9(6) of the Proposed Directive, according to which avoidance actions are clearly stated to not affect actions based on general civil and commercial law for compensation of damages suffered by creditors. Under German law, transaction avoidance rules are assumed to be in a special relationship with the general provisions of law applicable to actions for compensation and standard tort law can also apply in addition to the InsO's avoidance rules if the constituent elements of the tort going beyond the requirements of the avoidance rules are met.

6. Polish transaction avoidance rules

6.1. Pre-insolvency and insolvency avoidance actions

Similar to Belgian law, Polish law allows creditors to bring *actio pauliana* where a debtor's legal action, performed to the creditors' detriment, resulted in a third party gaining a property-related benefit, provided that at the relevant time the debtor was aware of the detriment and the third party knew of it, or could have learned of it had they exercised due diligence.[21] The debtor's acts are presumed to be to the creditors' detriment if they resulted in or increased the degree of the debtor's insolvency. The limitation period for claw-back claims is 5 years.

Additionally, Polish bankruptcy law provides for separate avoidance rules for the debtor's actions performed within a specified period prior to the bankruptcy petition's filing date and ending on the date preceding the declaration of bankruptcy. Under both an *actio pauliana* and the bankruptcy avoidance rules, a successful claim renders a given action ineffective towards the creditor making the claim or the bankruptcy estate respectively.[22] The remarks below are limited solely to the bankruptcy avoidance regime.

21 Article 527, Polish Civil Code.

22 Under Polish law, a distinction needs to be made between the acts that are void and the ones that become or can be declared ineffective. The ineffectiveness towards either a creditor or the bankruptcy estate does not result in a given transaction being universally void with the effect towards all third parties. An act found or declared ineffective is deemed non-existent only towards a given creditor or the bankruptcy estate (the total body of the creditors taking part in the insolvency proceedings) (the inter *partes effect*). Thus, for clarity, the description of the Polish law avoidance actions regime will refer to the ineffectiveness of the legal acts.

6.2. Types of avoidable transactions in insolvency and time periods

The bankruptcy avoidance rules specify that the following transactions performed by a debtor declared bankrupt are automatically deemed ineffective towards the bankruptcy estate:

> (a) gratuitous acts, or acts where the bankrupt's benefit was grossly lower than the other party's benefit, performed by the bankrupt **within one year** preceding the bankruptcy filing, under which the bankrupt disposed of their assets (including settlements or waivers of claims);
> (b) the bankrupt's establishment of a security interest to secure as yet immature claims if established within the six months preceding the bankruptcy filing (however, the interest's beneficiary may apply to the court to find such interest nonetheless effective towards the bankruptcy estate, if the beneficiary was unaware that grounds existed for a declaration of bankruptcy at the time of the interest's establishment); and
> (c) the assignment of future claims (arising after a declaration of bankruptcy) by way of security, unless the assignment agreement was executed (in qualified written form) more than six months prior to the bankruptcy filing.

Furthermore, the judge-commissioner may declare (*ex officio* or at the receiver's request) the following legal act(s) of a bankrupt ineffective towards the bankruptcy estate:

> (a) related-party transactions (whether gratuitous or for consideration) occurring within the six months preceding the bankruptcy filing, which includes, in particular, transactions with:
>> (i) shareholders;
>> (ii) partners;
>> (iii) representatives (of the bankrupt or its stakeholders); and
>> (iv) the bankrupt's dominant entities or subsidiaries, in each case provided that the other party (benefiting from the action) cannot prove that the transaction was not detrimental to the bankrupt's creditors;
>
> (b) remuneration payable to the bankrupt's representatives or managers for a period of no more than the six months preceding the bankruptcy filing, if significantly higher than the average remuneration for like work or services and it is not warranted by the labour involved; and
> (c) encumbrances (mortgages, civil pledges, registered pledges, or maritime pledges) established over the bankrupt's assets if the bankrupt was not the secured creditor's personal debtor and the encumbrance was established within the year preceding the bankruptcy filing (in the case of transactions between non-related parties, only insofar as the bankrupt did not obtain any benefit from the security interest or the encumbrance was established for a benefit of grossly lower value than that of the interest).

6.3. Potential impact of the Proposed Directive in Poland

For Polish insolvency practitioners, the Proposed Directive's avoidance rules are not novel innovations since Polish law already protects creditors' interests to an equal or greater extent through detailed provisions preventing the liquidation of a debtor's assets.

However, regarding the Proposed Directive's minimum time limits, Polish law will need to be aligned in two significant ways. First, with respect to transactions between a bankrupt and their spouse, cohabitant, or relatives, the catchment period to declare an action ineffective will need to be extended from six months to four years, since the Proposed Directive does not differentiate such actions and so Article 8 thereof will apply to them. Second, the statute of limitations in which actions to declare an act ineffective will also need to be extended. Under current Polish law this period is two years (unless a claim is extinguished earlier pursuant to the Civil Code), while the Proposed Directive would extend this to three years following the opening of insolvency proceedings.

The most significant change facing Polish insolvency law following the Proposed Directive's adoption appears to be the significant expansion of the personal scope of avoidance rules. Under current Polish law, these rules only apply to acts performed by the bankrupt, while the proposed rules would also apply to include the bankrupt's counterparties to such acts and, in some cases, even third-parties.

7. Slovak transaction avoidance rules

7.1. Avoidance actions regimes in Slovakia

There are two avoidance action regimes in Slovakia – those under the Slovak Civil Code and those under the Slovak Bankruptcy and Restructuring Act. Although seemingly complementary, these are two distinct regimes with similar characteristics, but separate rules. The Bankruptcy and Restructuring Act regime applies to all forms of insolvency matters, while the Civil Code regime applies primarily to non-insolvency cases. Under certain circumstances the Civil Code avoidance regime may be applied to some insolvency cases, such as low-value bankruptcies or personal bankruptcy, where even creditors can file avoidance actions on their own behalf under the Civil Code. Avoidance actions of this type are admissible where the contested act occurred within the three years preceding the opening of bankruptcy proceedings. The remarks below are limited solely to the Bankruptcy and Restructuring Act avoidance regime.

7.2. Types of avoidable transactions in insolvency and time periods

If an insolvency practitioner intends to file an avoidance action, they must first fulfil the procedural condition of filing the action with the relevant court within one year of the declaration of bankruptcy. Failure to do so extinguishes the right to challenge an act. A practitioner must then legally qualify the type of act being challenged under the action. According to the Bankruptcy and Restructuring Act, avoidance actions are admissible if:

> (a) in case of inadequate consideration – the act challenged occurred within the year preceding the initiation of insolvency proceedings (three years for related-party transactions);
> (b) in case of an advantageous act[23] – the act challenged occurred within the year preceding the initiation of insolvency proceedings (three years for related-party transactions); or
> (c) in case of a defrauding act[24] – the act challenged occurred within the five years preceding the initiation of insolvency proceedings. In certain cases, the debtor's intent to disadvantage its creditors must also be proven (while this intent is presumed to exist where the counterparty is a related party).

23 An "advantageous act" means an act unjustifiably favouring one creditor over other creditors.
24 A "defrauding act" will be found to have occurred if the debtor intended to defraud its creditors, and that intention was known or ought to have been known to the other party to the act.

Note that Slovakian law also provides for special cases where avoidance actions may be brought, but these apply to specific factual circumstances (e.g., permitting avoidance actions against acts performed during restricting proceedings without the insolvency practitioner's consent).

7.3. Where avoidance actions in insolvency often fail

Under the Bankruptcy and Restructuring Act, avoidance actions will only be successful if the claimant proves that, as at the date of the challenged act, the act itself resulted in at least one registered claim being diminished. This means that claimant must prove that the challenged act, performed prior to the bankruptcy, was detrimental to at least one creditor at the relevant time and thereby reduced the satisfaction of said creditor's claim. This is extremely difficult to prove in practice and often leads to the avoidance action's failure. Anecdotally, almost all avoidance actions filed in one region of Slovakia have failed, due to the competent court adopting an exceedingly strict view of the obligation to successfully prove the diminishment of at least one creditor claim. In the author's opinion, if a challenged act, performed prior to the bankruptcy, does not deprive at least one creditor of their registered claim, then Slovakian law will not provide a remedy to challenge said act. In such cases, Article 16(b) of the Insolvency Regulation can then be applied to provide some remedy.

7.4. Potential impact of the Proposed Directive in Slovakia

If enacted in its current form, the Proposed Directive will necessitate the modification of the time limits to file avoidance actions. For example, Article 8 of the Proposed Directive provides for a four-year period, while Slovakian law provides for a three-year limit in some cases. It is important to note that the Proposed Directive does not set standards for avoidance actions *in toto*, rather it provides a framework within which Member States may continue to impose additional conditions to file and pursue avoidance actions under their domestic law. While establishing the same standards regarding the time limits in which one can bring an avoidance action is a beneficial development, if a Member State's domestic law incorporates additional obstacles to bring such action, such obstacles may make it difficult (or even impossible) to effectively bring avoidance actions in particular cases.

8. Swiss transaction avoidance rules

8.1. Pre-insolvency and insolvency avoidance actions

Besides the ordinary rules on the avoidance of a contract based on vitiating factors and the restitution of payments as set out in the Swiss Code of Obligations, Swiss law[25] only provides for claw-back claims within the framework of insolvency proceedings.[26] Indeed, if a company with its seat in Switzerland were declared bankrupt, only the bankruptcy estate or creditors who requested the assignment of such rights would have standing to file an avoidance action.

[25] Specifically, the Debt Collection and Bankruptcy Act (DEBA), available in German, French and Italian at: <https://www.fedlex.admin.ch/eli/cc/11/529_488_529/de>.

[26] Claw-back actions are also possible in enforcement proceedings against individuals and in (certain) composition proceedings; however, for the sake of clarity, this Article will focus on bankruptcy proceedings.

8.2. Types of avoidable transactions in insolvency and time periods

In principle, only the acts or omissions of the debtor may be subject to avoidance actions. Moreover, such actions require the act to have been detrimental to the creditors (provided the action is causal to the detriment of the creditor(s) and that such creditor(s) would not have suffered any losses if the act had not been performed), which is presumed according to the case law of the Swiss Federal Supreme Court.

Swiss law provides for three kinds of avoidance action:

> (a) All gifts and gratuitous dispositions made by the debtor (except for customary occasional gifts) within the year preceding the opening of bankruptcy proceedings are voidable. Certain transactions qualify as gifts by law, e.g., where consideration paid to the debtor was inadequate (i.e., its value was lower than the value of the debtor's performance). If the act was made in favour of a related party (including group companies) of the debtor, the related party shall bear the burden of proving that the performance and consideration were proportionate;[27]
> (b) Providing security for pre-existing debts which the debtor was not previously obliged to secure, or discharging a debt by means other than payment in cash or other customary means of payment, or discharging a debt that is not due, can be subject to claw-back claims, provided the act was performed within the year preceding the opening of bankruptcy proceedings and the debtor was already over-indebted when the act was performed. The respondent may only be granted relief if they can establish that they did not know (or ought to have known) of the debtor's over-indebtedness;[28] and
> (c) All legal acts performed by the debtor within the five years preceding the opening of bankruptcy proceedings with the intention – recognizable to the other party – of disadvantaging their creditors, or favouring individual creditors to the detriment of others, are voidable. If the act was made in favour of a related party (including group companies) of the debtor, the related party shall bear the burden of proving that they did not know (or ought to have known) of the debtor's intent to disadvantage the other creditors.[29]

All of the above types of avoidance actions are subject to a three-year statute of limitations, which starts running from the day on which the company was declared bankrupt.[30] Avoidance actions must be filed against the debtor's contractual counterparty, or the act's beneficiary, or their heirs or successors, or against a third party acting in bad faith.[31] The respondent acquiring the debtor's assets by means of a voidable legal act is obliged to return such assets, while the consideration paid by the respondent shall be reimbursed, insofar as said consideration remains in the debtor's possession or continues to enrich the debtor. If the voidable legal act consisted of the payment (including set-off) of respondent's claim, such claim shall be reinstated upon the reimbursement of what was received. If restitution *in natura* is not possible, the respondent must make restitution in an equivalent amount to the claimant. *Bona fide* recipients of gifts are only obliged to make restitution up to the value of their enrichment.[32]

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27 Art. 286, DEBA.
28 Art. 287, DEBA.
29 Art. 288, DEBA.
30 Art. 292, DEBA (prior to 1 January 2020, the statute of limitation was two years).
31 Art. 290, DEBA.
32 Art. 291, DEBA.

8.4. Potential impact of the Proposed Directive in Switzerland

From the practical perspective, the Proposed Directive will only have any impact (either direct or indirect) in Switzerland, if:

(a) an EU avoidance judgment must be recognised and enforced in Switzerland (since the decision applying minimum standards will be enforced in Switzerland); or
(b) a Swiss court applies the national law of an EU Member State.

In principle, a company with its seat in Switzerland can only be declared bankrupt by the Swiss court competent for the company's seat, while avoidance actions in a Swiss company's bankruptcy proceedings must be filed in Switzerland, at the defendant's domicile (if domiciled in Switzerland) or the place where the bankruptcy judgment was issued (if not domiciled in Switzerland),[33] and Swiss substantive law will apply to the avoidance action itself. As Switzerland is not an EU Member State, respondents in avoidance proceedings may not rely on Article 16 of the Insolvency Regulation and are also precluded from invoking more favourable foreign legislation. Consequently, the Proposed Directive should not impact the Swiss domestic avoidance rules since Swiss domestic law will continue to apply.

If a "non-Swiss" company holds assets located in Switzerland, the relevant "non-Swiss" bankruptcy trustee must file for the recognition of the foreign bankruptcy decree in Switzerland to gain access to assets deemed to be located in Switzerland.[34] In this context, avoidance actions may come into play in two different scenarios:

(a) a foreign court (i.e., outside Switzerland) issued an avoidance judgment against a respondent not domiciled in Switzerland at the time of the action's initiation – in which case, the judgment may be recognised in Switzerland (upon the recognition of the foreign bankruptcy decree), provided that the avoidance judgment was rendered in the same state as the bankruptcy decree was issued, or the avoidance judgment was recognised in such state,[35] and the other prerequisites for the recognition of foreign judgments under Swiss law are met;[36]
(b) in the absence of a foreign avoidance judgment, – the appropriate jurisdiction for avoidance actions will depend on whether the subject matter thereof is deemed to be located in Switzerland or not. Note that this qualification remains controversial among Swiss legal scholars and the question has not yet been resolved by the Swiss Federal Supreme Court.

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33 Art. 289, DEBA.

34 Art. 166 of the Private International Law Act (PILA), available in German, French and Italian at: <https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/de>. Upon recognition of the foreign bankruptcy decree, the foreign bankruptcy estate may access the assets either through ancillary bankruptcy proceedings in Switzerland (in which certain creditors are privileged) or directly, under specific conditions.

35 Art. 171, PILA.

36 Inter alia: the decision is final or not subject to ordinary judicial remedy; the decision does not violate Swiss public policy; the act introducing the proceedings was duly notified to the respondent; the matter has not been already subject of a foreign decision that can be recognized in Switzerland; the matter has not already been subject of Swiss court proceedings that was initiated first; the matter has not already been decided by a Swiss court first (i.e. prior to the foreign decision).

In principle:

(i) where the avoidance claims are deemed to be located in Switzerland – Swiss courts will have jurisdiction and Swiss law will apply;[37]

(ii) where avoidance claims are deemed to be located outside Switzerland, but are to be filed against a respondent domiciled in Switzerland – Swiss courts may have jurisdiction in accordance with general private international law principles, and the predominant view is that Swiss courts will apply the *lex fori concursus* to the avoidance action itself. Consequently, the Proposed Directive may have an impact in the latter case, since Swiss courts would apply the national legislation of the EU Member State in which bankruptcy proceedings were opened, including any provisions implementing the Proposed Directive.

9. English transaction avoidance rules

9.1. Pre-insolvency and insolvency avoidance actions

In England and Wales, when a company has entered a formal insolvency process, certain transactions that were entered into by the company before the commencement of the insolvency may be attacked under the provisions of the Insolvency Act 1986 (**"Act"**). Whilst this paper adopts the term *"transaction avoidance rules",* in England and Wales these are more commonly referred to as *"reviewable transactions"* or *"antecedent transactions"*.

The focus in this paper is on reviewable transactions in the context of corporate insolvency only, although a trustee in bankruptcy, who is an officeholder in England and Wales that deals with insolvent individuals, has similar powers to challenge transactions entered into by an individual before the commencement of the bankruptcy.

9.2. Types of avoidable transactions in corporate insolvency and time periods

Principally, only an administrator or liquidator of a company may bring a claim attacking a reviewable transaction, save that a claim of transactions defrauding creditors (under section 423 of the Act) may be made by any party that is a victim of the transaction, that is:

> "a person who is, or is capable of being, prejudiced by it".[38]

The provisions of the Act provide various grounds on which reviewable transactions entered into before insolvency may be attacked and these, together with some of the key mechanics of these provisions, are summarized as follows:

9.2.1. Transactions at an undervalue[39]

These are claims that an administrator or liquidator could bring if a company transferred an asset to a third party for no consideration, or for significantly less consideration than the asset's true value, and the company was insolvent at the time of the transaction or became insolvent because of the transaction. This provision applies to any transaction that took place two years before the onset of insolvency and the relevant limitation period is:

[37] Art. 171, PILA.
[38] Section 423(5) of the Act.
[39] Section 238 of the Act.

(a) six years from the company going into administration or liquidation, if the claim is for a sum of money;[40] or
(b) otherwise, 12 years.[41]

9.2.2. Preferences[42]

These are claims that an administrator or liquidator could bring if the company enters into a transaction that puts a creditor in a better position than it would have otherwise been on the company's insolvency, the company was influenced by a desire to prefer that creditor and the company was insolvent at the time of the transaction or became insolvent because of the transaction. Such intention is presumed where the transaction was with a *"connected person"*.[43] This provision applies to any transaction that took place six months before the onset of insolvency, or two years before the onset of insolvency if the transaction is with a *"connected person"*. The relevant limitation period is:

(a) six years from the company going into administration or liquidation, if the claim is for a sum of money;[44] or
(b) otherwise, 12 years.[45]

9.2.3. Extortionate credit transactions[46]

These are claims that an administrator or liquidator could bring if it transpires that the terms of any credit transaction entered into by the company before its insolvency were on terms that require the company to make *"grossly exorbitant payments"* or the transaction *"otherwise grossly contravened ordinary principles of fair dealing"*. This provision applies to any credit transaction made three years before the administration, or liquidation. The relevant limitation period is:

(a) six years from the company going into administration or liquidation, if the claim is for a sum of money;[47] or
(b) otherwise, 12 years.[48]

9.2.4. Avoidance of floating charges[49]

These are automatic invalidation rights available to an administrator or liquidator, if the company was insolvent at the time it granted a floating charge or became insolvent as a result. The presumption of insolvency applies if the charge is granted to a *"connected person"*. This provision applies to any floating charge made one year before the onset of insolvency, or two years before the onset of insolvency if the floating charge is made in favour of a *"connected person"*.

40 Section 9 of the Limitation Act 1980 (**"LA 1980"**).
41 Section 8 of the LA 1980.
42 Section 239 of the Act.
43 Section 249 of the Act.
44 Section 9 of the LA 1980.
45 Section 8 of the LA 1980.
46 Section 244 of the Act.
47 Section 9 of the LA 1980.
48 Section 8 of the LA 1980.
49 Section 245 of the Act.

9.2.5. Transactions defrauding creditors[50]

These are claims that an administrator, liquidator, any victim of the transaction, the Financial Services Authority or the Pensions Regulator could bring where the company entered into a transaction at an undervalue for the purpose of putting assets beyond the reach of creditors, and thereby hindering an actual or potential claim that the creditor has against the company. This provision applies to any such transaction and the relevant limitation is:

(a) six years from the company going into administration or liquidation, if the claim is for a sum of money;[51] or
(b) otherwise, 12 years.[52]

If any of the above-mentioned antecedent transactions (excluding avoidance of floating charges) are ultimately successful, then the Courts of England and Wales have various options at their disposal. For example, the Court may: (a) require any property or proceeds of sale be returned to the company, (b) release or discharge any security given by the company, or (c) require any party receiving a financial benefit from the company to repay it.

9.3. Potential impact of the Proposed Directive in England and Wales

As the UK is no longer an EU Member State, it will not be required to implement the Proposed Directive in England and Wales. However, the UK insolvency landscape, particularly in relation to reviewable transactions, already includes many of the key elements of the Proposed Directive in any event, and these will continue to apply.

Given the existing commonality between these provisions and those in the Proposed Directive concerning avoidable transactions, the impact of the Proposed Directive in England and Wales is likely to be negligible. However, the Proposed Directive will provide some further comfort to UK investors and other stakeholders with interests in EU Member States should those companies, through which such interests are held, become insolvent.

10. Conclusions

Although the attempt to harmonize the insolvency laws across Europe seems to be a step in the right direction, the question remains as to whether the institutions provided in the Proposed Directive will be sufficient to attain the ambitious goals of the EU legislator to reduce a gap between European local laws?

Firstly, the fact that the provisions of the Proposed Directive will need to be transposed to the local legal systems and, thus, at first interpreted in the light of the very distinct local insolvency frameworks by the local legislative, poses certain doubts as to whether such a harmonization tool will minimize discrepancies between various European insolvency avoidance rules in any material respect other than the uniform claw back periods. The harmonization of the preventive restructuring framework shows that only this first step may be a significant obstacle in achieving the desired result of unification of certain aspects of insolvency laws.

50 Section 423 of the Act.
51 Section 9 of the LA 1980.
52 Section 8 of the LA 1980.

Secondly, given that the Proposed Directive sets only the minimal standards of harmonization of avoidance rules it is likely that many member states will uphold their more stringent rules thereon. Thus, even if uniformly interpreted, the Proposed Directive might not be a sufficient drive for a profound approximation of claw-back regulations. Lastly, the selective choice of insolvency process aspects to be standardized, leaving aside the most critical aspect of the insolvency definition not unified across Europe, might marginalize the importance of the entire act.

Will these concerns materialize? Does the Proposed Directive have a potential to reduce the application of Article 16 of the Insolvency Regulation and prevent insolvency practitioners from being confronted with avoidance rules of another Member State which enable by-passing the claw back rules of the main insolvency jurisdiction? This is yet to be seen, but first the European insolvency practitioners will need hold their breath for an extended period of time to see if the EU Member States agree on a common approach to these selected aspects of insolvencies regulated in the Proposed Directive draft.