Opinion on a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of insolvency law - COM(2022) 702

The European Commission published a proposal for a Directive on the harmonisation of certain aspects of insolvency law on 07 December 2022.

As a member of the Insolvency Law Reform Commission at the Federal Ministry of Justice in Austria, the Credit Protection Association of 1870 (Kreditschutzverband von 1870, from here on KSV1870) was invited to comment on this proposal. In its role as a state-privileged creditor protection association, it is of great importance to KSV1870 to present our thoughts on the essential contents of the proposal for a Directive to harmonise certain aspects of insolvency law.

The KSV1870 Group is one of Austria's leading business platforms. As the largest creditor protection association, KSV1870 counts it among its tasks to professionally safeguard the interests of creditors in insolvency proceedings. In this role, KSV1870 enjoys a special position in insolvency proceedings in Austria as a so-called "privileged creditor protection association".

According to § 266 of the Austrian Insolvency Code (Insolvenzordnung, IO), it is the task of a privileged creditor protection association not only to represent affected creditors in the interest of comprehensive and effective protection of creditor interests, but also to support the insolvency courts in their activities. As a creditor protection association, we ensure that insolvencies are comprehensively dealt with and that the economy is cleaned up. KSV1870 currently has over 32,000 voluntary members and has been representing creditor interests for over 150 years. In the past 10 years alone, KSV1870 has represented around 633,000 creditors in approximately 133,000 insolvency proceedings. We negotiate best rates for all creditors and develop viable solutions for companies, including many reorganisations. We represent the interests of creditors at all courts throughout Austria, even when in individual cases the costs of KSV1870 are not covered. Year after year we represent the majority of affected creditors in insolvency proceedings.

KSV1870 is very happy to comment on the proposal for a Directive of the European Parliament and Council on the harmonisation of certain aspects of insolvency law as follows:

I.) Starting Point:

The European Union is specifically paving the way for a standardisation of substantive insolvency law.

With the Directive (2019/1023) on the establishment of preventive restructuring proceedings, for the first time, the Member States were to create national law with which the substantive, pre-insolvency proceedings were to be harmonised throughout Europe.

With the proposal for a Directive of the European Parliament and Council on the harmonisation of certain aspects of insolvency law, published on 7 December 2022, the European Commission has previously seized its role as the driving force of the EU and is thereby pushing for the standardisation of substantive law across Europe.

In our statement, we address all chapters of the proposal, primarily the chapters concerning the "pre-pack procedure" and the "liquidation of micro-enterprises", as these proposed changes would have a huge impact on European and, in particular, Austrian insolvency law. In the other chapters, we briefly touch on the contents, although these are already used in Austrian insolvency law, or in some cases even apply stricter deadlines..

II.) The Pre-Pack Procedure:

1.) The term:

The term pre-pack is not defined in a generally binding way and can be found in the judicial practice of Dutch law. This procedure is also better known in the English legal system under the term "administration" or "pre-packaged insolvency sale".

The ECJ (judgement of 28.04.2022 - C 237/20) has already had to deal with the definition of the term in the "Heiploeg case" in the run-up to the publication of the proposed Directive. In this case, the Heiploeg Group, which consisted of several companies, accumulated losses and was subsequently fined for participating in a cartel. Pre-pack proceedings were initiated. The Dutch Trade Union Confederation fought the opening of the insolvency proceedings that were subsequently opened.

The ECJ ruled as follows regarding the interpretation of the term:

“Article 5(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses must be interpreted as meaning that the condition which it lays down, according to which Articles 3 and 4 of that directive are not to apply to the transfer of an undertaking where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings ‘instituted with a view to the liquidation of the assets of the transferor’, is satisfied where the transfer of all or part of an undertaking is prepared, prior to the institution of insolvency proceedings with a view to the liquidation of the assets of the transferor and in the course of which that transfer is carried out, in the context of a pre-pack procedure which has as its primary aim to enable, in the insolvency proceedings, a liquidation of the undertaking as a going concern which satisfies to the greatest extent possible the claims of all the creditors and preserves employment as far as possible, provided that that pre-pack procedure is governed by statutory or regulatory provisions.

Article 5(1) of Directive 2001/23 must be interpreted as meaning that the condition which it lays down, according to which Articles 3 and 4 of that directive do not apply to the transfer of an undertaking, business or part of an undertaking or business where the bankruptcy proceedings or any analogous insolvency proceedings instituted in respect of the transferor ‘are under the supervision of a competent public authority’, is satisfied where the transfer of all or part of an undertaking is prepared in the context of a pre-pack procedure prior to the declaration of insolvency by a ‘prospective insolvency administrator’, under the supervision of a ‘prospective supervisory judge’, and the agreement concerning that transfer is concluded and performed after the declaration of insolvency with a view to the liquidation of the transferor’s assets, provided that that pre-pack procedure is governed by statutory or regulatory provisions.”

The draft Directive, Title IV, Article 19 et seq. including explanations/recital 25 provides for an identical description of the term:

"In a pre-pack procedure, the debtor's business or part of it is sold as a going concern, based on a contract negotiated confidentially under the supervision of a court-appointed administrator prior to opening, followed by a short insolvency procedure in which the pre-negotiated sale is formally approved and executed".

The challenge in practice - in view of this definition - will be to maintain the transparency with regard to the sale process of the company that is necessary to safeguard the interests of the creditors.
A principle that can only be guaranteed through the participation of creditors - ideally through privileged creditor protection associations - in the sale process. This system has proven itself in Austria for decades.

2.) Two-phase model:

Pursuant to Article 19 (1) in conjunction with Article 28 of the Directive, a distinction must be made between two phases of the sale.

In a first preparatory step, the so-called preparatory phase, a suitable buyer is to be found who will take over the whole or parts of the company free of debt.

Since there is no insolvency yet at this point, one could argue that the creditors do not need to be involved for the time being. However, this is contradicted by the fact that the entire sales process serves to prepare for the upcoming insolvency proceedings and that the " accounts payable" are future creditors who will subsequently have to agree to a debt cut.

According to Article 24 (1), Member States shall ensure that the sale process is value-based, transparent and fair. The fulfilment of these principles is not only guaranteed by the appointment of a trustee/monitor, but also by the participation of accounts payable, at best through creditor protection associations, already at this stage of the procedure.

After all, their legal position is directly affected: without the necessary consent, they are confronted with a new contracting party (Article 27), the potential new acquirer, and enforcement measures can be suspended (Article 23). In the future, they will have to reckon with a loss of accounts receivable, so that the selection of the new purchaser, including the purchase price to be paid, becomes important for the creditors, represented by expert creditor representatives (creditor protection associations) such as KSV1870, already at this stage of the proceedings.

The Directive provides that this preparatory procedure is usually a confidential procedure. This feature is formulated as an "optional provision" and is therefore not mandatory. Even if confidentiality were to be enshrined in law by the Austrian legislator, the participation of creditors can be ensured by

creditor protection associations and compliance with confidentiality can be ensured by non-disclosure agreements.

The participation of the creditors is even more important due to the fact that during the liquidation phase the confirmation and implementation of the already negotiated sale with the distribution of the proceeds to the creditors is intended.

Here, the status of creditors would be reduced to an observation status, unless the Austrian legislator exhausts the discretion granted to it and deviates from this basic concept in accordance with Article 24 (3). In judicial realisation proceedings, the participation of creditors, mostly represented by creditor protection associations, through the appointment of a creditors' committee is the rule in Austria. This concept has proven its worth over decades.

3.) The divestment:

It is clearly anchored that the recognised guidelines for M&A transactions must be complied with, so that potential investors can carry out due diligence and receive all information.

Here, too, the Directive stipulates that, in accordance with Article 2 in conjunction with Article 30, the overriding principle is that the interests of creditors are safeguarded in the sale procedure. According to the Directive, it should not be permissible for a creditor to be placed in a worse position through the pre-pack procedure than in the context of an individual liquidation.

Article 33(3), in conjunction with recital 30, further provides that secured creditors may bid in the sale procedure.
The Directive thus explicitly stipulates that certain creditors participate in the procedure.

It cannot be assumed that the Directive intended to reduce participation exclusively to secured creditors. Rather, the reverse conclusion is to be drawn that if participation is already provided for secured creditors, participation must all the more also apply to other unsecured accounts payable/creditors. This participation can take place through representation by creditor protection associations.

According to Article 32 (2) in conjunction with recital Article 24, a sale to the familia suspecta shall only be permitted in the context of the sale process if no better offer is made by another interested party. This presupposes that the interested parties have been given sufficient time. This assessment is up

to the court as well as the administrator/monitor, but here too - as provided for in the Austrian Insolvency Code - the sale process should be reviewed in the context of a creditors' committee. The established recourse to creditor protection associations should also be enshrined in law at this stage of the proceedings.

4.) The function of the monitor:

The company concerned applies for the appointment of a monitor in accordance with Article 22 in conjunction with Article 25. The functions/duties of the monitor include, among other things, the recommendation of the best bidder, as well as the justification of whether the principles according to Article 24 have been complied with. From today's perspective, this function must be performed by an insolvency administrator. The scope of duties is also similar to the function of the insolvency administrator in insolvency proceedings with self-administration in the Austrian legal system, in which the entire management of the company remains with the company concerned.

Creditors or their representatives (e.g. creditor protection associations) should also support the monitor in the fulfilment of the tasks assigned to them.
This is all the more important as, with the opening of the liquidation proceedings, the court only has to examine whether the monitor has fulfilled his tasks in accordance with his duties. The concrete parameters according to which this examination is to take place are not anchored in the Directive. This gap can be bridged by the participation of the creditors or creditor protection associations by making them available to the monitor.

Only in this way are the creditors also granted the procedural possibility of being legally adversely affected and of being able to avoidance, as is provided for in Article 33 - albeit only to a limited extent because of the non-suspensive effect.

KSV1870 is of the opinion that the pre-pack procedure, provided that the maximum sales proceeds can actually be achieved in such a procedure, can be to the advantage of the creditors, but only under the aforementioned changes or considerations.
Experience from realisation processes in opened insolvency proceedings shows that the participation of creditors has a particularly positive effect on the realisation proceeds achieved.
This makes the direct participation of creditors even more relevant at this early stage of the proceedings.

III.) The liquidation procedure for micro-enterprises

1.) The background:

The proposed Directive of the European Parliament and Council envisages a special procedure for micro-enterprises.

The objectives to be achieved by the creation of this special liquidation procedure for micro-enterprises are in particular:

- increasing the efficiency of insolvency proceedings
- shortening of the duration of proceedings
- reduction of the processing costs

The intended procedural changes should succeed in improving the prospects of creditors and investors being satisfied. It should be ensured that cross-border investment decisions can be made more easily in the future. The conditions of competition within the EU are to be further aligned on the way to the capital markets union.

The background to the proposed Directive is the assumption at European level that micro-enterprises operate under more difficult conditions on the market. Among other things, it is assumed that micro-entrepreneurs - due to the choice of a certain legal form for their company - can use liability limitations less efficiently than is the case with larger companies.

Due to the limited liability fund of micro-enterprises, lenders would demand corresponding collateral from the personal assets of the micro-entrepreneurs. In the case of larger enterprises, the assumption of liability with assets from the personal sphere for corporate liabilities would be of far less importance. Micro-entrepreneurs are supposedly also at greater risk of insolvency due to higher interest rates must for financing. In addition, the risk of bad debts would have a much greater impact on the liquidity situation in micro-enterprises than in large enterprises. In general, the DIRECTIVE proposal assumes that micro-enterprises struggle with low working capital (a thin equity base).

It is evident that in Austria, but also in Europe in general, the economy is predominantly small-structured. Micro and small enterprises dominate economic activity.

The following table shows how many companies in Austria would be affected by this proposal:

	2022	2021	2020	2019
Total business insolvencies	4.775	3.034	3.034	5.018
Of which are micro-enterprises	4.379	2.754	2.659	4.533
In percent	92%	91%	88%	90%

In the view of KSV1870, the creation of such a procedure would result in a huge change or could lead to a deterioration of Austrian insolvency law, which functions very well even in international comparison.

2.) Planned implementation measures:

a.) The inability to pay:

The proposed Directive envisages the inability to pay as the central reason for the insolvency of micro-enterprises. There is a fear at European level that such businesses do not have proper business records and that private and business spheres - in the case of sole proprietorships - will be mixed. In Austria, the insolvency requirements apply in the case of inability to pay of a sole proprietorship, a registered partnership in which no partner with unlimited liability is a natural person, a legal entity, and an estate. A possible over-indebtedness is not taken into account in the case of sole proprietorships. The legal definition of inability to pay is left to the individual Member States according to the Directive proposal. This foregoing of a uniform definition leads to different definitions of the prerequisites for insolvency in the Member States and contradicts the intention of the proposed Directive, namely the further standardisation of the legal regimes in the European Union.

KSV1870 is extremely concerned that regarding the definition of inability to pay there will be the most diverse approaches in the individual Member States. For a uniform approach throughout Europe, it would be imperative that, in addition to the definition of "micro-enterprises" (Article 2(j) with the reference to the Annex of Recommendation 2003/361/EC), the insolvency requirement of "inability to pay" is also regulated uniformly in all Member States. It would be in line with the aim of unifying the legal regimes if the term "inability to pay", which is very important for insolvency law, were to be defined in Article 2 of the proposed Directive. The attempt to define the term in Article 38 (2) is too vague and leaves too (?) much

leeway for the legal definition of the term "inability to pay" by the respective Member States.

The expected different definition of the term "inability to pay" in the respective Member States heavily impairs the purpose of the proposed Directive, according to which cross-border investors should be able to easily compare the quota returns in insolvency proceedings. If not even the definition of the insolvency requirements is the same in the Member States, a comparison of the expected quota returns in the respective states will have little or no significance. This is because the starting points for special proceedings for micro-enterprises will differ significantly in the Member States.

At what point the inability to pay actually occurs in a company is a question that today in Austria often must be clarified by means of experts. This is particularly the case in connection with the right of avoidance (mostly at the time of the occurrence of the inability to pay). In connection with the opening of insolvency proceedings, there is hardly any discussion in practice in Austria as to whether the inability to pay is a prerequisite for the insolvency of companies. In daily practice insolvency judges can work well with the current Austrian definition of the inability to pay.

However, the perspective on this topic must be different. From the point of view from KSV1870 finding a "simple", generally valid definition of the inability to pay for micro-entrepreneurs, who often only have incomplete business records, will be difficult or even impossible. According to the proposed Directive, the assessment of the inability to pay must be made by the micro-entrepreneur himself and not by a legally trained person at court. Austrian insolvency practice clearly shows that even if the term "inability to pay" is as defined as clearly and simply as possible; if a micro-entrepreneur does not have an overview of their finances, they will only in the rarest of cases regard their business as insolvent and admit to the existence of their inability to pay. KSV1870 knows that especially in the case of micro-enterprises, debtors tend to file insolvency petitions too late rather than too early.

Only if the concept of the inability to pay is uniformly defined in all Member States and its existence is easily and clearly recognisable for micro-entrepreneurs themselves, will we come one step closer to the goal of a capital markets union at the European level. Only then will the conditions for opening insolvency proceedings - and thus the results of the special proceedings for micro-entrepreneurs in terms of quota returns to creditors - be comparable in the respective Member States. The objective of improving transparency for cross-border investments is not consistently pursued by the Directive proposal as it stands today.

b.) The opening of proceedings:

Article 38 (3) and (4) of the proposed Directive takes over a demand that KSV1870 has been making for Austrian insolvency law for years.

This concerns the opening of insolvency proceedings for companies which, at first glance, do not have the necessary assets to cover the costs of the insolvency proceedings. Experience in Austria shows that such situations occur more frequently particularly in connection with micro-enterprises.

KSV1870 has already presented detailed calculations in the past which, in the case of advance financing of costs by creditors under public law (tax authorities, social insurance institutions), comprehensibly demonstrate the economic value of opening proceedings - compared to the rejection of the petition to open insolvency proceedings due to lack of assets to cover costs. In the model advocated by KSV1870, there is no additional burden on the judicial budget. On the contrary, the calculations of KSV1870 show that if proceedings were opened under these conditions, after the repayment of the pre-financed costs of proceedings, usually on average additional amounts would be distributed to the creditors.

However, the goal that KSV1870 has been pursuing for years with its demand for additional proceedings to be opened, which is to create more transparency and ultimately better prospects of satisfaction for creditors, will not be achieved under the framework conditions set out in the Directive proposal. According to the Directive proposal, generally there would be no investigation into the assets of the micro-enterprise by an insolvency administrator. The absence of an insolvency administrator makes it impossible to uncover conduct of the debtors that is in breach of duty and may give rise to personal liability, and to derive claims from this against the persons acting dishonestly.

The proposed Directive provides elsewhere that facts relevant to the avoidance are to be harmonised throughout Europe by means of minimum standards. At the same time, however, the ability to avoidance in the simplified liquidation procedure for micro-entrepreneurs is heavily reduced (see below). Especially in the case of micro-entities with hardly any tangible assets of value, avoidance claims often represent the only relevant value for the insolvency estate. KSV1870 believes that, according to the current proposal for the Directive, the desire for a simple and quick procedure is strongly detrimental to the interests of creditors.

Under the conditions set out in the proposed Directive, it does not make sense from the creditor's point of view to open

insolvency proceedings against companies which at first glance do not have the necessary assets to at least cover the costs of the insolvency proceedings. The framework conditions provided by the proposed Directive virtually prevent a deeper analysis of the company concerned. From the creditors' point of view, there is no added value to be gained from such proceedings under these conditions. KSV1870 allows itself to ask why these proceedings should be conducted at all if the economic processes in the failed company and the asset status communicated by the micro-entrepreneur at the opening of insolvency proceedings are not subject to a detailed examination by an independent person?

In Austria, according to the current legal situation, it is inherent in the handling of insolvency proceedings that the economic conduct of a company is subjected to a detailed examination by an insolvency administrator before insolvency is opened. Especially in the case of micro-enterprises, which have little or no assets - anymore - when insolvency proceedings are opened, these analyses provide a good insight into the reasons for the economic failure. In addition, during the processing of these facts, it regularly happens that various claims of the insolvency estate (for example, due to an avoidance) still come to light. These positive aspects of insolvency proceedings - on which the KSV1870's demand for additional proceedings to be opened is based - are in no way considered in the proposed Directive, which only focuses on inexpensive and quick proceedings for micro-enterprises.

c.) The appointment of the insolvency administrator:

Article 39 of the proposed Directive does not make the appointment of an insolvency administrator in liquidation proceedings for micro-entrepreneurs mandatory. On the contrary, the appointment of an insolvency administrator shall be the exception.

<u>According to KSV1870, the non-appointment of an insolvency administrator, which is to be expected in almost all proceedings, is completely contrary to several key objectives of the proposed Directive: In particular with regard to shortening the duration of proceedings and the tracing assets as efficiently as possible.</u>

As in Austrian insolvency law for private individuals, the power to dispose of assets belonging to the estate should, as a rule, remain with the debtor in the simplified procedure for micro-entrepreneurs. The proposed Directive provides that the court cannot appoint an insolvency administrator on its own initiative. The initiative for an appointment can only come from a creditor, a group of creditors or the debtor.

In practice, the provision in the proposed Directive according to which the creditor side applies for the appointment of an insolvency administrator will be of little significance. An application for an insolvency administrator would probably be intertwined with the obligation of the applying creditor/group of creditors to bear the costs. This already works in private insolvencies in Austria only in exceptional cases (e.g. if the creditor structure has one or two creditors with relatively high claims).

Particularly in insolvency proceedings of small companies, the creditor structure is often fragmented. Many creditors with similar claim amounts file in these very small proceedings. This fact speaks heavily against the assumption that a single creditor applies to the court for the appointment of a liquidator and subsequently pays an advance on costs. The individual creditor has a high cost-risk with a limited individual return expected. It can also be assumed that the individual creditor does not have the necessary information regarding the financial situation of the micro-enterprise to be able to seriously assess whether the application for an insolvency administrator - with the corresponding obligation to bear the costs - makes economic sense for them. The assumption that several - small - creditors coordinate among themselves and jointly apply to the court for the appointment of an insolvency administrator is also far removed from practice. The coordination effort required from the individual creditors behind such a procedure alone speaks against any economic efficiency of such an application.

The proposed Directive also provides that the debtor themself can apply for the appointment of an insolvency administrator. The debtor's interest in the appointment of an insolvency administrator will be extremely limited. This is because an independent person will relentlessly analyse the economic conduct of the micro-entrepreneur in the past and confront them with it. At most, an insolvency administrator will uncover conduct in breach of duty and subsequently personal liabilities of the persons acting in the company. It is also conceivable that an insolvency administrator will disclose information relevant to a possible avoidance in connection with persons close to the micro-enterprise. All these points indicate that a debtor will refrain from applying for the appointment of an insolvency administrator - in order to protect their own interests.

In insolvency practice, it is very often the case that micro-enterprises have completely lost track of their asset situation. The existence of a complete list of assets at the opening of proceedings is purely wishful thinking. According to Article 48 of the proposed Directive, the court should draw up a statement of assets and liabilities based on the information provided by the debtor and its own investigations. The proposed Directive therefore intends for the court to conduct its own research in

this direction, however far-reaching this may be. KSV1870 is concerned that the courts would soon reach their capacity limits. As a consequence, it is to be expected that such judicial examinations would be interpreted as a mere formal act without any weight. The proposed Directive does not intend for creditors to be able to check the debtor's information regarding his financial situation.

Currently, one of the main tasks of an insolvency administrator - especially within the first weeks after the opening of insolvency proceedings - is to draw up an inventory. If this task - as envisaged in the proposed Directive - falls under the responsibility of the courts, they will have hardly any resources available for it. From the point of view of KSV1870, a shift of the inventory activity in the direction of the courts will not bring about an acceleration of the proceedings. The opposite is to be expected.

As a rule, the micro-entrepreneur has no interest in all assets being traced, avoidance claims being pursued, and liability claims being asserted against the responsible individuals in the company. The assumption in the proposed Directive that the micro-entrepreneur will be highly motived and actively participate in the preparation of an inventory in the course of the proceedings remains rather the exception in Austrian insolvency experience - despite all the legally provided duties of the debtor to cooperate. In practice, it is often the case that micro-entrepreneurs have emotionally distanced themselves from their business when insolvency proceedings are opened and show little or no cooperation during the proceedings.

The support of the courts by the microentrepreneur will thus remain limited. This is also because the liquidation of one's own business has little or nothing in common with the micro-entrepreneur's operational activities. It can also be assumed that the micro-entrepreneur will be overwhelmed with the liquidation of his business. As a rule, they do not have the required knowledge and qualifications to carry out the necessary steps - also of a legal nature - for the liquidation of the enterprise.

One of the main objectives of the proposed Directive, which is pursued by not appointing an insolvency administrator, is to reduce the costs of proceedings. Spain has already created a special liquidation procedure for micro-entrepreneurs – usually without the appointment of an insolvency administrator. It is significant that in Spain insolvent micro-entrepreneurs must be accompanied by a legally qualified person.

In Austria, there is no compulsory legal representation in insolvency proceedings and there is obviously a "shift" of costs in Spain - in comparison with the current Austrian system. The

costs do not arise in the insolvency proceedings, but in the sphere of the debtor instead. From the point of view of KSV1870, neither the debtor nor the creditors gain anything from the shifting of costs.

From an economic point of view, the costs of the current remuneration system in Austria are borne by the creditors, as the costs of the insolvency administrator are paid from the assets in advance. If the insolvency administrator is dispensed with and at the same time the debtor is forced to use a legal representative, the costs will have to be borne by the debtor. It can be assumed that persons with legal expertise who accompany the debtor in the proceedings will already claim their fees from the debtor before the opening of insolvency proceedings.

For years, attempts have been made at European level and in the respective Member States to encourage insolvent companies to file for insolvency quickly. Shifting the costs to the sphere of the debtor will have exactly the opposite effect. From the point of view of KSV1870, the disadvantage for creditors of filing for insolvency later far outweighs the advantage of shifting the costs to the debtor.

The remuneration of an insolvency administrator is governed by statutory provisions and is consequently subject to judicial supervision. The costs of a representative of the debtor, on the other hand, are largely exempt from judicial supervision. It should be noted at this point that the costs of an insolvency administrator in small-scale proceedings in Austria are reasonable. In liquidation proceedings - without long-term continuation of a business - the majority of the costs are based on the percentage of the inflow of assets achieved by the insolvency administrator. If there is a low inflow of assets, the costs of the insolvency administrator are also low.

d.) Communication in the proceedings:

Article 40 of the proposed Directive is intended to promote the use of electronic means of communication for all correspondence between the debtor, the court and the creditor in insolvency proceedings involving micro-enterprises. The purpose of this provision is a purely digital - virtually paperless - handling of insolvency proceedings. The plan by the proposed Directive of handling communication via digital channels is correct and important. The extent to which this purely digital exchange can actually work in practice is, in the view of KSV1870, at least doubtful.

Especially in micro-enterprises, the IT requirements are more than limited in practice. The actual design of the envisaged electronic means of communication, which must be accessible to

everyone - in line with a functioning legal protection – without any major prerequisites and functional in both directions, is completely up in the air. Currently, Austrian courts do not even accept e-mail communication.

In Austria, communication between the insolvency administrator, who in the vast majority of cases is a lawyer, and the courts takes place by means of web-based electronic legal communication (WebERV). All initial and subsequent submissions, including attachments, can be transmitted and received electronically and securely to the Austrian courts and public prosecutors' offices (only initial submissions) via the electronic legal communications of the judiciary. The participants in electronic legal communications submit their submissions electronically to the court or the public prosecutor's offices via a verified provider. However, the service of transmission requires a registration with a verified provider.

Participants are charged a basic fee and fees for each transmission made to the transmitting agency. Consequently, communication from the court to the participant takes place exclusively via this electronic channel. (Source: https://www.oesterreich.gv.at/themen/dokumente_und_recht/elektronischer_rechtsverkehr_erv.html).

The creditor protection associations and bank creditors are also integrated into this system. Thus, important parties to the proceedings already participate in an electronic exchange of information (in both directions). The integration of the debtor, on the other hand, is problematic, since in practice there are hardly any digital possibilities of this kind. In addition to the debtor's lack of hardware, the lack of liquidity at the opening of insolvency proceedings often plays an important role. Experience shows that telecommunications providers are one of the first companies in Austria to discontinue services if they are not paid for.

The debtor's diversion via a legal representative who is connected to the WebERV system leads to increasing costs for the debtor, which is precisely what the Directive proposal aims to prevent. From the point of view of KSV1870, many of the difficulties to be expected in practice in connection with the mutual digital exchange between the court and the debtor would be avoided by appointing an insolvency administrator. Such an administrator could act as a digital communication hub between the court and the debtor company without much additional effort.

The proposed Directive stipulates that communication with all parties should run in all directions (i.e. from the court to the respective recipient and back) via this - to be newly created - electronic means of communication. In Austria, this requires a great deal of consideration in connection with the Delivery of

Documents Act (ZustG) and the possibility of publishing essential file contents in the edict file as a web-based platform of the Federal Ministry of Justice. From the creditor's point of view, the question of how to involve the creditors in this electronic exchange will be interesting. In the sense of effective legal protection, it must be discussed which technical hurdles a creditor can justifiably be expected to overcome when asserting his claims. The proposed Directive seems to have completely ignored the fact that the parties to the proceedings could be international creditors who are also based in third countries and naturally have no knowledge of this platform, let alone access to WebERV.

e.) The opening of proceedings:

The opening of special proceedings for micro-entities can, according to the proposed Directive, be based on an application by the debtor (Article 41 (1)) or a creditor (Article 41 (2)). A standard form is to be made available to the micro-entrepreneur to simplify the application. The content of this form is governed by Article 41 (4).

The aim of the proposed Directive to standardise the opening of insolvency proceedings at the debtor's request is to be welcomed. The standardisation of the application process is intended to provide a debtor with a simple means of filing an application. The reduction of formal obstacles is intended to promote the timely (early) filing of an insolvency petition by the debtor. KSV1870 assumes - despite every support for the actual goal - that filing an application by means of a form can only function to a limited extent in insolvency practice.

It is likely that an insolvency petition by the debtor will often fail due to the content requirements of the form. People with experience know that in the vast majority of micro-insolvencies there is no correct and complete asset status in the business (Article 41 (4) lit c).

It is also contrary to the experience of KSV1870 that micro-enterprises (i) know all their creditors or (ii) know the amount of their outstanding claims including interest and costs. If the application were filed using a form and the content requirements set out in the proposed Directive (Article 41 (4)), the micro-entrepreneur would be forced to conduct extensive surveys of the current asset status prior to filing for insolvency. Company-specific, daily key figures or reconciled lists of balances are hardly ever available for micro-enterprises.

In these cases, we are not infrequently talking about companies without bookkeeping and people without any overview of the financial situation of the business. It is obvious that both the

asset status as well as the list of creditors would be incorrect or at least incomplete in the vast majority of cases.

Even in Article 41 (6), the wording in the proposed Directive is "...where available". It is therefore already assumed in the proposed Directive that the information of the micro-enterprise will be incomplete. Subsequently, there will be no appointment of an insolvency administrator - this is supposed to be an exception - and it will be the task of the court to conduct the relevant investigations. From the point of view of KSV1870, a start to insolvency proceedings based on sound data looks very different. A loss of efficiency compared to the Austrian status quo is to be expected. This can neither be in the interest of all parties involved, nor in the interest of a functioning economy.

Due to the far-reaching information that the micro-entrepreneur is to already submit when filing for proceedings, an earlier filing of insolvent debtors is not to be expected. On the contrary, it is precisely those formalities required in the proposed Directive that will discourage debtors from filing for insolvency earlier.

Micro-enterprises mostly have assets not registered in any public registers. Here, the introduction of a formalised insolvency filing coupled with a lack of control by an independent person opens the door to abuse to the detriment of creditors. It is not realistic that the courts will develop a search process - comparable to the efforts of an executor- especially since the executor in the current Austrian insolvency proceedings is usually very interested in collecting all valuable assets (be they tangible or intangible) from a debtor and bringing them to a sale due to the structure of his reward claims.

The courts, on the other hand, will very quickly reach their quantitative limits with the investigative tasks now assigned to them. Be it in terms of the resources of the judiciary or the qualifications of the acting persons required for these tasks.

Article 42 of the proposed Directive states that upon receipt of an insolvency petition, the courts must make a decision on the petition within two weeks. Article 42 of the proposed Directive makes no distinction as to whether the petition is filed by the debtor or by a creditor. If the application is made by a creditor, the debtor has the option of agreeing or objecting to the application. KSV1870 expects that even if the creditor's application is complete in terms of content, it will not be possible to obtain the debtor's statement, to check the plausibility and conclusiveness of the creditor's and debtor's information by the court and ultimately to reach a decision within the deadline set by the proposed Directive.

If the documents are submitted in full by the micro-entrepreneur as part of a self-petition, the Austrian courts have no difficulty in reaching a decision on the opening of insolvency proceedings within 14 days under the current legal situation. The proposed Directive does not specify to what extent the court has to question and verify the information provided by the debtor. From the point of view of KSV1870, the court's enquiries should go beyond a rudimentary conclusiveness check of the debtor's statements, especially in view of the fact that an insolvency administrator is only appointed in exceptional cases. Article 42 (2) of the proposed Directive regulates the grounds for refusal in connection with the opening of simplified liquidation proceedings. These grounds for refusal in the proposed Directive are very narrowly defined. In the opinion of KSV1870, the grounds for refusal in the case of an unclear financial situation in the micro-enterprise are definitely missing in the proposed Directive. The same must apply if it can be assumed that the information on the status of liabilities is obviously incomplete.

f.) The debtor in self-administration:

Article 43 of the proposed Directive stipulates that self-administration (control over the assets and daily operation of the company) may only be withdrawn from the debtor by the court after a case-by-case examination and in exceptional cases. The individual Member States are encouraged to determine the circumstances that justify a withdrawal of self-administration. Naturally the conditions under which self-administration is withdrawn will differ in the respective Member States. This contradicts the standardisation of the procedures in the respective Member States as the goal of the proposed Directive.

The provision of Article 43 should be read in conjunction with Article 39 of the proposed Directive. A decision on the withdrawal of self-administration and the simultaneous appointment of an insolvency administrator will only be possible following a request by the debtor, a creditor, or a group of creditors. The proposed Directive does not provide for the insolvency court to withdraw self-administration and appoint an insolvency administrator at the same time.

In the DIRECTIVE proposal, the debtor's self-administration also includes the continued daily operation of the business. Even though the debtor was not in a position to manage their business economically in the run-up to the opening of insolvency proceedings. In order to prevent further disadvantages for the creditors during the continuation of the business, KSV1870 believes that the debtor must be closely monitored during this continuation of operations. KSV1870 could envisage a legal structure for monitoring the continuation of operations similar

to the Austrian restructuring procedures with self-administration, which means that the debtor operates the business but with limited monitoring. The assumption that the insolvency courts can exercise effective control over a large number of proceedings - in comparison to the activity of a restructuring administrator with a small caseload of restructuring proceedings with self-administration - is far removed from practice.

If there is no application for the appointment of an insolvency administrator according to Article 39 of the proposed Directive and the court nevertheless considers the withdrawal of self-administration to be appropriate, the court itself must - in the absence of an insolvency administrator - perform a variety of tasks. In doing so, the court has the option of transferring the right to manage and dispose of the debtor's assets to a creditor. As with the application for the appointment of an insolvency administrator (Article 39), only in exceptional cases will a creditor be found to take on these extensive tasks - which of course involve considerable liability risks for the creditor. KSV1870 expects that, as a rule, no creditor will agree to take on these extensive tasks pro bono.

In the case of such a transfer of tasks to a creditor, the court would also have to carry out extensive checks in advance (with regard to the creditor's qualifications, independence, seriousness, etc.). With such elaborate checks at this point, it must be permissible to ask as to how the insolvency proceedings are supposed to advance more quickly. In Austria - according to the current legal situation - the insolvency court appoints an insolvency administrator who must be registered in the insolvency administrator list. Consequently, the court can assume that the appointed person meets certain minimum standards of know-how necessary for insolvency processing. The situation is completely different if a creditor is entrusted with liquidation tasks by the court. The amount of work required by the court to examine each individual case is enormous. The question of the creditor's independence in connection with the most diverse issues (e.g. in the context of possible legal challenges) cannot be answered or can only be answered after complex investigations by the insolvency court.

If self-administration is withdrawn from the debtor, no insolvency administrator is appointed and the right to manage and dispose of the assets is not transferred to a creditor, the court must approve decisions of the debtor in connection with the management and disposal of the assets according to Article 43 (4) lit a of the Directive proposal. KSV1870 assumes that the withdrawal of self-administration is in fact equivalent to a reservation of consent by the court. From KSV1870's point of view, a Directive must in any case stipulate that a complete withdrawal of self-administration is possible, so that the

debtor is no longer involved in the administration and sale of assets. In practice, this means - regardless of whether one assumes a reservation of consent or a complete withdrawal of self-administration - that the courts will have to monitor or deal with far-reaching areas of business management (calculations, planning, personnel decisions, tax issues, etc.). Many decisions on individual cases are required, and it cannot be ruled out that detailed investigations and research will have to be carried out by the court before a decision can be made. The court employees are neither trained for this nor does the judiciary have the necessary personnel.

g.) The assertion of creditor claims:

In the proposed Directive (Article 45 (2)), the concept of the assertion of claims in insolvency proceedings by creditors is reversed in comparison to the procedure existing in Austria today.

According to the proposal, the debtor provides a list of his liabilities (for the expected quality/completeness of this list, see the comments on the opening of proceedings). If the creditor remains inactive, he participates in the proceedings with that claim which the debtor has recorded in his list with the respective amount. The creditor recorded in the schedule must intervene if the amount of his claim was incorrectly recorded. If the creditor is missing from the debtor's list at all, he also has 30 days to actively file his claims. KSV1870 knows from experience that especially micro-entrepreneurs have often completely lost track of their economic situation. The - complex - concept developed by the Directive proposal does not bring any improvements compared to the current Austrian procedure.

In Austria, in contrast to other European countries, the filing of claims in insolvency proceedings by creditors is already organised very efficiently. Creditors can make use of privileged creditor protection associations, which provide highly professional advice to creditors and offer low-cost filing in the proceedings. This will lead to a massive reduction in the workload of the insolvency courts and insolvency administrators in this area. It is to be feared that if this practice, which has been practised in Austria for decades, were to be changed, a very well-functioning process would be undermined and replaced by a far more complex filing procedure, which would be at the expense of a speedy insolvency settlement.

In a detailed analysis of the filing process envisaged by the RL proposal, KSV1870 questions whether the debtor - without first reconciling the balance with each individual creditor - can even know the current status of the claim with each creditor. Often measures for appropriate enforcement incur costs for the

creditor. The debtor will definitely not be able to correctly reflect these costs in the list he has to submit without consulting the creditor first.

The current proposal for a Directive does not contain any requirements for the respective Member States on the treatment of different types of claims. This is despite the fact that there is great potential for harmonisation in this area (equal treatment of claims from shareholder loans, claims with collateral), which would facilitate cross-border investment decisions. In this area, KSV1870 sees a missed opportunity to tackle harmonisation at the European level. It is not clear from the proposed Directive how the debtor must proceed if there are different types of claims or circumstances relevant to avoidance - which may have an impact on the creditor's position or the amount of the claim.

In the opinion of KSV1870, the planned change of system facilitates the abuse of insolvency proceedings by the debtor. Creditors who are to the debtor’s liking are more likely to be included in the list than creditors who are a nuisance to the debtor. It is to be feared that precisely those creditors who regularly made representations to the debtor in the run-up to the opening of insolvency proceedings within the framework of efficient debtor management will be regarded by the debtor as jointly responsible for his economic failure. Accordingly, the debtor will be more sceptical of these creditors than of those from his immediate surroundings. According to the proposed Directive, the claims included by the debtor in the list as per Article 46 (1) are not subject to any further check. Only those claims which are asserted by creditors in amendment of the debtor's list are subject to verification. The proposed Directive thus allows that claims that remain unchallenged are deemed to be recognised.

If no insolvency administrator has been appointed - and this will be the norm - the court must, according to Art 46 (4), examine the changes requested by the creditors and ultimately recognise the claim as rightfully existing or dispute it. Thus, another classic task of the insolvency administrator moves to the insolvency court. This fact will also place an additional burden on the courts' capacities.

In addition, KSV1870 has concerns that creditors who have remained passive are automatically included in the registration list due to the registration of their claim by the debtor. It must be left to the private autonomy of the creditor whether he participates in a procedure or not. This is particularly important in view of the fact that according to the proposed Directive - and also the procedure currently in use in Austria - creditors can also be subject to obligations in the course of insolvency proceedings.

h.) The avoidance:

In insolvencies of micro-enterprises, avoidance claims often constitute the essential part of the assets. Article 39 of the proposed Directive only provides for the appointment of a liquidator in special proceedings for micro-entrepreneurs in exceptional cases. Looking at Article 47, it quickly becomes clear that under the present Directive proposal, avoidance is to be pushed back as far as possible. KSV1870 sees this as a curtailment of creditors' rights, which it does not approve of.

Under the proposed Directive, executing avoidance challenges is no longer mandatory. If an insolvency administrator has not been appointed, it is at the discretion of the creditors whether a avoidance is to be carried out or not. KSV1870 points out that the creditors can never have the necessary level of information to contest a possibly disadvantageous legal transaction. This requires - in addition to extensive legal knowledge - detailed checks in advance by an executor. The matter of avoidance is a complex area of law. In the opinion of KSV1870, placing the assessment of whether a situation relevant to avoidance exists in the hands of the creditors concerned is tantamount to abolishing avoidances in the special procedure for microentrepreneurs. For a avoidance would then only be a special situation, rather than the norm it is today.

From the creditor's point of view, this development is very concerning, especially as in micro-insolvency proceedings avoidance claims are often the only valuable assets of the company. It also protects a debtor who has favoured individual creditors close to them in the run-up to the opening of insolvency proceedings. The simplified liquidation procedure virtually invites the micro-entrepreneur to move assets in directions that are convenient for them shortly before the opening of the insolvency proceedings. If the present proposal for the Directive were to be implemented, debtors would no longer have anything to fear from an avoidance, which would otherwise serve as a corrective measure.

i.) The realisation process:

According to the present Directive proposal the realisation of assets belonging to the estate is carried out by the court. The means of first choice is the ONLINE auction. Other means of realisation can only be considered if it is appropriate in the circumstances.
KSV1870 points out that solely placing the assets belonging to the enterprise on a digital platform is not sufficient to be considered a revenue-optimised realisation of assets.

A quick realisation of the existing assets is required in many proceedings, as claims of the insolvency estate (e.g. fees for rented space) accrue in the background. The quicker the realisation process is completed, the fewer claims on the estate have to be paid. As part of the liquidation process there are a number of tasks (dismantling, transport, storage, etc.) that have to be completed in advance of the actual sales process. In the opinion of KSV1870, it is important here - also in the future - to maintain a maximum of flexibility in the proceedings. It remains to be seen whether the courts can build up and develop corresponding competences here. In Austria, the experience so far has been that in the course of execution proceedings, individual assets are sold by means of an ONLINE auction. This individual sale is not comparable to the handling of an extensive realisation process in insolvency proceedings (even if it is a micro-enterprise).

The proposed Directive also provides that assets of micro-enterprises are to be sold in the context of a "going concern" assessment. KSV1870 expresses concerns about the insolvency court's ability to provide the necessary support during a due diligence review of a potential acquirer due to a lack of available resources. In general, doubts are expressed at this point that the realisation of "living companies" can be carried out within the framework of a standardised sales process. Here, external advisors will probably be necessary again, with whom regular coordination will be required, which, as already stated several times, could not be carried out by the courts.

In the course of the special proceedings for micro-entrepreneurs, the court may conclude that a realisation of the assets of a business is not appropriate at all. There will be no economically relevant quota for the creditors in this configuration. Without the appointment of a liquidator, the economic conduct of the micro-enterprise before the opening of insolvency proceedings will not be subject to a detailed examination. From the creditor's point of view, the benefit of such proceedings remains hidden.

<u>KSV1870 is generally opposed to the special procedure for micro-entrepreneurs.</u>

When examining the present proposal for a Directive of the European Parliament and Council, the intention of the planned creation of a special procedure for micro-enterprises quickly becomes clear. The primary goal is to handle insolvency proceedings as quickly as possible - and based on standardised processes. To achieve this, the regulatory function of insolvency proceedings for the economy as a whole is dispensed with in many areas. Likewise, the interests of creditors are only considered to a limited extent. Within the framework of the submitted proposal for a Directive in its entirety, the aim

should be to improve the creditors' prospects of satisfaction. With the creation of a special procedure for micro-enterprises according to the present proposal of the Directive, this goal is virtually thwarted.

From the point of view of KSV1870, there are hardly any measures in the present Directive proposal Directive that would lead to an increase in efficiency compared to the legal situation currently in force in Austria. The shift of responsibilities alone (away from the liquidator to the insolvency court) does not result in an improvement of the existing insolvency law processes, which have so far proven themselves in Austria.

IV.) Avoidance:

The aim of the rules on avoidance actions set out in Articles 4 to 12 is to protect the value of the insolvency estate for the creditors.

The regulations are minimum standards (Article 5), which are already realised in many points in the provisions of either §§ 27ff of the Austrian Insolvency Code (IO) or Austrian law contains even stricter provisions.

The provisions of Article 6 correspond to a large extent to sections 30 and 31 IO. The time limits critical to avoidance are longer in the IO, at 6 and 12 months respectively, compared to the three months in Article 6. In contrast to the Austrian provisions, however, these are not linked to the opening of insolvency proceedings, but to the application to open insolvency proceedings. As already mentioned, (Chapter III), it is noticeable that Article 6, in contrast to the IO, only refers to the existence of insolvency and does not include inability to pay, which often occurs much earlier.
KSV1870 is critical of a softening of the existing stricter Austrian regulations.

Article 7 is largely covered by § 29 IO. In § 29 IO, an avoidance against gratuitous and equivalent legal acts up to two years before the opening of the insolvency proceedings is permitted. In Article 7, avoidance is only possible within one year of the filing of the insolvency petition.

The content of Article 8 is reflected in the IO in § 28. However, the time limits set in § 28 IO, which are critical to avoidance, only conform to the proposed Directive in § 28 (1) line 1 IO, and the time limit of ten years is stricter than the four years suggested in the draft. Pursuant to section 28 (1) no. 2 IO, legal acts can only be contested for up to two years before the

opening of insolvency proceedings if the opponent of the avoidance must have been aware of the debtor's intention to disadvantage but did not know it. If the EU Directive is implemented, this period would have to be increased to at least four years.

Articles 9 to 12 focus in particular on the consequences of the judicial assertion of avoidance claims. These provisions essentially correspond to §§ 38 to 43 IO.

The statute of limitations of three years for contestable claims from the opening of insolvency proceedings provided for in the proposed Directive (Article 9 (3)) is significantly longer than the period of one year generally stipulated in the IO. Pursuant to § 43 (2) IO, it is also possible to extend the one-year period to a further three months in agreement with the opposing party. The experience of KSV1870 insolvency practice shows that the statute of limitations stipulated in the Austrian insolvency Code (IO)is sufficient to be able to deal with even complex, avoidance-relevant factors in a timely manner.

From the point of view of KSV1870, it should also be mentioned that an extension of the limitation period is also associated with an economically burdensome legal uncertainty for the potential opposing party, which should not be underestimated.

V.) The obligation to file for insolvency and the liability of the management of a legal entity in the event of its violation

According to the provisions of Articles 36 to 38 of the proposed Directive, the management of a legal entity is obliged to file a petition for the opening of insolvency proceedings within three months of knowledge or negligent ignorance of the inability to pay. In the event of a breach of the obligation to file a petition, the company management is to be held liable according to civil law for the damage caused to the creditors by the delayed petition.

The regulations are minimum standards (Article 37 (2)), which therefore do not exclude stricter national regulations.

The Austrian Insolvency Code obliges debtor companies (including natural persons) to file for insolvency within a period of 60 days. In contrast to Article 36, § 69 (2) of the Austrian Insolvency Code (IO) explicitly states that an insolvency petition must be filed without culpable delay and that the 60 days must be understood as the maximum period. This is not clear from the provisions of Article 36 et seq. and, from the point of

view of KSV1870, the provision should not be interpreted to mean that the managing director of a company has three months to file an insolvency petition in any case but must do so immediately after the occurrence of the inability to pay. A clarification in this respect would be helpful.

In contrast to the provisions of the IO, it is not clear from the provision of Article 37 whether the civil liability is directly against the creditors concerned or whether the liability claims are to be asserted by the insolvency administrator.

Overall, from the KSV1870 perspective, there is no need to change the existing Austrian provisions.

VI.) The creditors' committee

Articles 58 to 67 contain provisions on the creditors' committee. The establishment of a creditors' committee is intended to ensure that the position of creditors in insolvency proceedings is strengthened and that their interests are adequately protected. The provisions contain rules on the appointment of members, the composition of the committee and the role or rights and obligations of the creditors' committee and its members. The personal liability and remuneration of the members are also regulated.

By and large, the provisions are not alien to the Austrian Insolvency Code (in particular §§ 88 to 90 IO) and have already been implemented and successfully put into practice. As a creditor protection association, KSV1870 welcomes all EU efforts to strengthen creditor protection. To ensure that the interests of all creditors can be protected as well as possible, the composition of the creditors' committee should be as balanced as possible. In this context, KSV1870 considers it expedient that the decision on the composition of the creditors' committee should lie with the insolvency court.

Furthermore, there is no clarification that the members of the creditors' committee may also be physical or legal persons who have no creditor position in the insolvency proceedings as well as departments of public law entities, as provided for in section 88 (2) IO.

With the provision of § 266 IO, creditors in Austrian insolvency proceedings receive special protection. The establishment of privileged creditor protection associations significantly strengthens the position of creditors in insolvency proceedings.

This model of organised creditor protection, which is unique in Europe, not only represents the interests of creditors in the best possible way, but also relieves the insolvency courts and supports the insolvency administrators in their activities. As a result, insolvency proceedings in Austria are handled efficiently and cost-effectively. The high proportion of successful reorganisations in insolvency proceedings (reorganisation rate of over 25%) compared to the rest of Europe is proof of the success of this model.

VII.) The tracing of assets belonging to the insolvency estate

Articles 13 to 18 of the proposed Directive are intended to extend the scope of registers accessible to insolvency administrator to some registers not accessible to the public.

The provisions of the proposed Directive are intended to enable or facilitate access by insolvency administrator to various non-public registers containing relevant information on assets of debtor companies. It would also require all EU Member States to grant foreign insolvency administrator direct and rapid access to certain registers.
KSV1870 is generally in favour of the efforts, especially in view of the fact that the number of insolvency proceedings with a foreign connection is increasing.

It will have to be clarified whether the proposed regulations are compatible in particular with the provisions of the Austrian Banking Act (BWG) as well as existing regulations under data protection law.

VIII.) Summary

KSV1870 is critical of the present proposal for a Directive on the harmonisation of certain aspects of insolvency law as a whole.

Individual points (e.g. avoidance, additional measures to trace the insolvency estate, role of the creditors' committee), which are already to a large extent part of the Austrian Insolvency Code, are welcomed by KSV1870.

From the point of view of a state-privileged creditor protection association, the participation of creditors in insolvency proceedings as well as in pre-pack proceedings included in the proposed Directive is an essential cornerstone for the

protection of the legal and economic interests of creditors. In the pre-pack procedure, KSV1870 sees this principle realised only to a very limited extent. However, these interests would have to be heavily expanded in the pre-pack procedure if it were to become a successful model. Apart from that, we are convinced that a successful pre-pack procedure can only work for larger companies if such a procedure has been prepared accordingly and the most important stakeholders are also included in this procedure in a timely manner.

From the creditor's point of view, the intended introduction of a special procedure for micro-enterprises is viewed particularly critically. This virtually counteracts the actual objectives of the proposed Directive (increasing the efficiency of insolvency proceedings, shortening the duration of proceedings, reducing the costs of proceedings, comparability of individual insolvency proceedings in the Member States for potential investors, etc.). Moreover, the cornerstone, a uniform definition of the inability to pay as a prerequisite for insolvency that is valid for all Member States is clearly missing.

In Austria, the economy is very small-structured. Consequently, most companies in economic difficulties fall under the parameters set by the Directive proposal for micro-enterprises (10 employees, € 2 million turnover, € 2 million balance sheet in total). For Austria, this would mean that up to 90 percent of insolvency proceedings would have to be handled as special proceedings for micro-entrepreneurs. Therefore, KSV1870 strongly suggests that the size definitions of micro-enterprises be reconsidered and adjusted accordingly.

The KSV1870 is also critical of the lack of any regulatory function in the special procedure for micro-entrepreneurs. Under the guise of saving costs and time in the proceedings, the review of the debtor's economic conduct - except in certain cases - by an insolvency administrator is abandoned. It is to be feared that without an insolvency administrator a complete and correct statement of assets and liabilities will not be prepared, the liabilities participating in the proceedings will not be objectively examined and possible claims of the estate, of whatever kind, will not be pursued with appropriate commitment. With the absence of the insolvency administrator, there is no independent body equipped with legal expertise to act as a link between the debtor, the court and the creditors.

As a state-privileged creditor protection association, KSV1870 is extremely sceptical about the changes to the procedural process, also with regard to the assertion of creditors' claims, the realisation of assets belonging to the estate via digital platforms or the exclusive procedural communication via web-based solutions. Here, procedural principles that work well in

Austria are replaced by complex processes - which change the efficient, existing insolvency practice. Neither a reduction in the costs of the proceedings, nor an increase in quota returns to creditors, nor a saving in time will be achieved.

KSV1870 welcomes in principle the noble intentions behind this proposal for a Directive, however we are concerned that the proposed path will not lead to the intended goal. In addition to changing the definition of "micro-enterprises", an independent body (which could continue to be the insolvency administrator) should take over the responsibility of the liquidation, but with a low minimum remuneration and a corresponding variable remuneration (incentivisation according to the Austrian model) for those proceedings where assets are actually brought into the mass (as is currently the case mostly through avoidances). This would bring to light the insolvencies that originally would not even have been opened due to a lack of cost-covering assets. This could (unexpectedly) partially satisfy the creditors and also serve as a warning to some unethical businesspeople that such actions will no longer be tolerated in the future.

Vienna, 2023, March 14th

KSV1870

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