Title III Tracing assets belonging to the insolvency estate

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1. Powers for insolvency practitioners with regard to asset tracing

1.1. Introduction

1.1.1. For a definition of the term "insolvency practitioner", the Insolvency Proposal refers to Article 26 of the Restructuring Directive, indicating that it is 'a practitioner appointed by a judicial or administrative authority in procedures concerning restructuring, insolvency and discharge of debt.'

1.1.2 Given this definition, a court-appointed insolvency administrator (*faillissementscurator*) under the Dutch Bankruptcy Act (*Faillissementswet*) qualifies as an insolvency practitioner within the meaning of the Insolvency Proposal. To avoid confusion with other insolvency practitioners (and the different powers these officers have), the insolvency administrator will be referred to as "insolvency administrator" hereafter (especially in section 4).

1.2. Access to bank account information (Article 13-16)

1.2.1. This power only indirectly accrues to the insolvency practitioner. After all, the authority to access and search information about bank accounts is specifically vested in the designated courts, at the request of the insolvency practitioner appointed in ongoing insolvency proceedings. Use of the power to access bank account information is further limited only to insolvency courts that have been duly designated, and which designation has been notified to the Commission by the Member States.

1.2.2. The designated courts would have the power to access and search, directly and immediately, bank account information listed in Article 32a(3) of Directive EU 2015/849 and in other Member States available through the "bank account registers" (BAR). The condition for using this power would be that this is "necessary for the purposes of identifying and tracing assets belonging to the insolvency estate of the debtor in those proceedings, including those subject to avoidance actions."

1.2.3. Thereafter, the information requested by the designated courts will be provided to them through an automated mechanism. The log data of the searches must be kept and checked for the purpose of monitoring compliance. The staff of the designated courts must ensure that the high professional standards regarding confidentiality and data protection are maintained, and that the security of that data also meets high technical standards.

1.3. Access to beneficial ownership information (Article 17)

1.3.1. The power to obtain access to information about beneficial ownership ("UBOs") would only be exercisable by the insolvency practitioner with a legitimate interest. This will be the case if the information is "necessary for identifying and tracing assets that are part of the insolvency estate of the debtor in ongoing insolvency proceedings."

1.3.2. This information is held in "the beneficial ownership registers" set up in the Member States in accordance with Directive EU 2015/849. The information is limited to the following: (a) the name, the month, the year of birth, the country of residence and the nationality of the legal owner; (b) the nature and the extent of the beneficial interest held.

1.4. Access to certain national registers (Article 18)

1.4.1. Under this provision, insolvency practitioners have direct and expeditious access to national asset registers located in their territory, or in other Member States (as listed in "the Annex"), as long as these registers are available in the Member State. In that context, it is irrelevant in which Member State the insolvency practitioner has been appointed.

1.4.2. At this moment "the Annex" has not been published yet and it is therefore unclear which registers are referred to. In any case, we expect the following Dutch registers to be included in the appendix: the land register (*Kadaster*) and a register regarding owner information about vehicles (*het RDW*).

1.4.3. The Insolvency Proposal stipulates that an insolvency practitioner who requests access to a national asset register in another Member State may not be subject to different access conditions than the insolvency practitioner appointed in that Member State.

2. Proposal in the context of fundamental rights

2.1. While the aim of the asset tracing provisions is to enhance cross-border cooperation and facilitate effective and efficient asset recovery, the directive should ideally also contain clear rules and safeguards preventing disproportionate interference with fundamental rights, and ensure that the asset tracing and recovery process is fair and proportional.

2.2. One of the fundamental rights that could be affected is the right to privacy. After all, asset tracing and recovery, as envisioned in the Insolvency Proposal, implies broader access to sensitive financial information and personal data. Another fundamental right that could be at stake is the right to property. Asset tracing and recovery may involve the seizure of assets, including assets that (in hindsight) do not belong to the insolvency estate or are otherwise not related to the insolvency proceedings. The asset tracing provisions may also have an impact on the right to a fair trial. The current Insolvency Proposal does not contain harmonised minimum standards ensuring that the rights of the debtor and other parties (not) involved in the insolvency proceedings are protected, and that they have access to an effective remedy in case of any violations.

2.3. The explanatory notes of the Insolvency Proposal state that the Insolvency Proposal is fully in line with the fundamental rights and freedoms enshrined in the Charter of the Fundamental Rights of the European Union (Charter), and that any limitations on these rights are proportionate and justified. However, this blanket statement is not further explained, and the notes fail to address the practical impediments to the expansion of access to restricted registers to insolvency practitioners. Importantly, the notes do not explain in which manner the proposed Directive would relate to the protections set out by the EU General Data Protection Regulation (GDPR).

2.4. While the Insolvency Proposal outlines some abstract measures aimed at protecting personal data, such as the obligation of Member States to implement technical and organisational measures to ensure data security and high professional standards for designated court staff, it is not clear what these measures should entail in practice and therefore whether, and under which standards, they will be sufficient in safeguarding the privacy rights of data subjects, especially in terms of practical implementation by the Member States.

2.5. Additionally, the text suggests that the limitations on privacy and data protection are justified by the need to effectively trace assets in insolvency proceedings, but it is not clear whether less intrusive measures were considered or whether the proposed measures are proportionate to the objective pursued.

2.6. In this context, we finally note that the European Court of Justice (ECJ) recently addressed (somewhat) similar issues in its judgement on the 22nd of November 2022, in the combined cases of WM (C 37/20) and Sovim SA (C 601/20).

2.7. In these cases, the ECJ struck down a provision of the Fifth Anti-Money Laundering Directive pursuant to which Member States had to ensure public access to information, including personal data contained in the ultimate beneficial owner (UBO) register. The UBO register was established as part of the effort to combat money laundering and terrorist financing (Fourth Anti-Money Laundering Directive), and as a way to allow competent authorities to identify the natural persons who ultimately own or control legal entities. In short, the ECJ held that the UBO register is a necessary and proportionate measure for achieving the legitimate aim of preventing money laundering and terrorist financing, and that the processing of personal data in the register is compatible with the GDPR. However, the ECJ also noted that the processing of personal data must be subject to appropriate safeguards, including limitations on access to the data, the purposes for which the data is processed, and the duration of its retention. The ECJ has furthermore emphasized the importance of ensuring that the data subjects are informed about the processing of their personal data and have the right to access, rectify, and erase their data. General access by the public to such data, however, results in an interference with fundamental rights that is neither limited to what is *strictly necessary* nor *proportionate to the pursued objective*, according to the ECJ.

2.8. This judgement and the limitations set out by the ECJ, therein, may provide some guidance on interpreting the proposed provisions on asset tracing and recovery. An unanswered but nonetheless important question is whether the Insolvency Proposal's aim of further integrating the Capital Markets Union is actually an aim that would justify the broadening of access to restricted registers containing personal data to insolvency practitioners, and the resulting (potential) interference with fundamental rights as enshrined in the Charter and as protected by, for example, the GDPR.

2.9. While the Insolvency Proposal specifies the purposes for processing personal data and obliges Member States to ensure that the staff of the designated courts maintains high professional standards of data protection, compatibility with fundamental rights will, in our view, depend on whether (i) appropriate (digital) safety measures can realistically be put in place in each Member State, and (ii) the processing of personal data will (in practice) be limited to what is strictly necessary for the purposes of asset tracing in insolvency proceedings. The intricacies of such a system might in reality prove a far cry from the "fast and easy" (cross-border) access by insolvency practitioners to relevant databases within the Member States as envisioned by the authors of the Insolvency Proposal.

3. Our view on the Insolvency Proposal

3.1. Given our experience with court appointments in insolvency proceedings (particularly as an insolvency administrator (*curator*)), this contribution is concluded with a number of observations that we believe may be relevant to Dutch insolvency practitioners.

3.2. Firstly, the power under (a) 'access to bank account information' is discussed. At present, it is not always easy for the insolvency administrator to obtain bank account information of the debtor or the estate from the banks, despite the fact that there is a statutory basis for this. On the basis of Article 105(2)(a) and (b) (in conjunction with Article 106 in the case of the bankruptcy of a legal entity) of the Dutch Bankruptcy Act (*Faillissementswet*), the debtor is obliged to provide the insolvency administrator with information about foreign assets, including bank balances, and, if necessary, a power of attorney to allow the insolvency administrator to dispose of those assets. However, such a signed power of attorney rarely produces a desired result.

3.3. In practice, in our experience as insolvency lawyers, this is often due to:

i. the assets belonging to the bankruptcy estate are deposited in non-EU countries (for example Switzerland, Panama or the British Virgin Islands);

ii. assets not being automatically available to the insolvency administrator, despite their location in a Member State and the insolvency administrator's success, in spite of all the obstacles, in getting sight of the assets. Consider, for example, difficulties in attaching preservation orders due to different procedures/rules in the relevant Member State and the costs involved;

iii. it is a time - consuming process, whereas speed is of the essence when it comes to asset tracing. The provisions in the Insolvency Proposal do not immediately remove the existing problems, as it is only a matter of obtaining information on the existence of a certain asset (and not the access to or disposal thereof). We do recognise the advantages of transmitting bank information via an automatic mechanism to the designated courts, although it remains to be seen whether the appointment of a designated court will increase the speed of the process. It is, however, possible that fewer discussions may arise with banks about the permissibility of sharing that information with a "third party," if the information can only be accessed by those designated courts.

3.4. We also note that it would be somewhat confusing from an international perspective that this power of attorney may be needed, despite the fact that the insolvency practitioner would derive his authority from the powers introduced by the Insolvency Proposal. In practice, a notary or a bank in another Member State, for example, might still need a power of attorney, despite the fact that it is not formally required, unless this contingency (and others like it) would be provided for in the national legislation of each Member State implementing the Directive.

3.5. Secondly, the power under (b) ‘access to beneficial ownership information’ is discussed. The Fourth European Anti-Money Laundering Regulation already provides for individuals and organisations with a legitimate interest to have access to UBO register data, as set out in Article 17(2) of the Insolvency Proposal (the provision of the Fifth European Anti-Money Laundering Regulation expanding the scope to “any member of the general public” has been declared invalid by the European Court of Justice). The Insolvency Proposal provides for the fulfilment of the criterion of a legitimate interest, by providing that it exists if the information is necessary for identifying and tracing of assets belonging to the insolvency estate. This, however, is not necessarily a helpful addition (see above under paragraph 3).

3.6. Finally, the power under (c) ‘access to certain national registers’ is discussed. As already noted, the Annex referred to above has not (yet) been published. It is therefore sufficient, at this point, to note that the Insolvency Proposal would ensure equal treatment of insolvency practitioners. This would mean, for example, that the insolvency administrator appointed by a Dutch court should have access to the Italian land register under the same conditions as an insolvency administrator appointed by the Italian court. Whether this will in practice lead to a relaxation of the applicable access possibilities, is – again – something that remains to be seen.