Mr. drs. M. Moeliker[1]

Tracing assets by insolvency practitioners

TvI 2023/13

In the Proposal,[2] tracing of assets belonging to the insolvency estate is one of the focus areas. As a result of globalisation and the creation of a European single market, the number of cross-border insolvencies and insolvencies with cross-border elements is rapidly increasing. The Proposal provides access for European insolvency practitioners to information on bank accounts and beneficial owners and (improved) access to national asset registers in other Member States. This should enable insolvency practitioners to identify (potential) assets of the debtor easier, faster and against lower costs. The Proposal is expected to maximise the value in insolvency estates, particularly in insolvencies with cross-border elements. This should not only benefit creditors in bankruptcies, but also improve the functioning of the European capital market. This article contains several observations and recommendations further to the title on asset tracing in the Proposal.

1. Introduction

A bankrupt estate comprises of the debtor's assets. Therefore, the Dutch Bankruptcy Act provides that directly after its appointment the insolvency practitioner shall make an inventory of the estate.[3] In the first phase of an insolvency proceeding, in many instances not all assets are yet available or even known to the insolvency practitioner. In such situations asset tracing becomes relevant. Asset tracing can be described as the legal process of identifying and locating misappropriated assets or their proceeds. It includes both the preservation (freezing) of the assets identified and the repatriation thereof if the asset is to be found in another Member State.[4]

Title III of the Proposal focuses on tracing assets belonging to the insolvency estate of the debtor. The targeted rules provide for access for insolvency practitioners to various registers that may contain information on assets belonging to the insolvency estate.[5] Some national electronic registers in Member States are already public or even accessible through a single interconnection platform set up by the European Union, such as the insolvency registers interconnection (IRI).[6] Further to the Proposal, insolvency practitioners appointed in another Member State will have the same access to registers as 'local' insolvency practitioners. The targeted rules improve the options for insolvency practitioners for asset tracing through financial investigations. Each bit of information that becomes available to an insolvency practitioner may provide new leads for further investigations. It is envisaged that the targeted rules will lead to improved chances of recovery of misappropriated funds. The rationale behind Title III of the Proposal is that improving the possibilities of insolvency practitioners to identify and trace assets belonging to the insolvency estate will lead to maximisation of the assets in the bankrupt estate available for distribution.[7]

The remainder of this article is structured as follows. In paragraph 2 I will discuss in more detail the set-up and embedding of the Proposal. In paragraph 3 the access of insolvency practitioners to bank account information will be discussed. Paragraph 4 is about the access to beneficial ownership information and paragraph 5 focuses on the access of insolvency practitioners appointed in another Member State to national asset registers. In paragraph 6, I will share my thoughts on the effectiveness of the Proposal and desired other tools for insolvency practitioners. Paragraph 7 contains the conclusion and certain recommendations for consideration in the European legislative process.

2. Set up and embedding of the Proposal

From an insolvency law perspective, the Proposal will be placed next to the Insolvency Regulation[8] and the Restructuring Directive.[9] The Insolvency Regulation provides for a framework of international private law rules regarding jurisdiction, recognition, enforcement and coordination. The Restructuring Directive is aimed at harmonising preventive restructuring regimes and the discharge of debt for entrepreneurs. The Proposal is an initiative to harmonise substantive aspects of insolvency law in the Member States. As will be seen, there are interconnections between these different projects.

From an asset recovery perspective, the initiative by the European Commission with the part of the Proposal that focuses on tracing assets, is developed simultaneously with the proposal by the European Commission for the Asset Recovery Directive.[10] The Asset Recovery Directive focuses on the tracing and identification, freezing, confiscation, and

1 Please refer to this article as: M. Moeliker, 'Tracing assets by insolvency practitioners', *TvI* 2023/13. M. Moeliker is an attorney-at-law at Florent in Amsterdam and is regularly appointed as bankruptcy trustee by the District Court Amsterdam.

2 The proposal for a directive harmonising certain aspects of insolvency law published by the European Commission on 7 December 2022 (COM/2022/702; the "Proposal").

3 Article 94 of the Dutch Bankruptcy Act.

4 See SWD/2022/395, p. 92.

5 See COM/2022/702, p. 14.

6 See https://e-justice.europa.eu/content_interconnected_insolvency_registers_search-246-en.do. To date, the Dutch insolvency register is still not connected to the IRI.

7 See recitals 13-14 of the Proposal.

8 Regulation (EU) 2015/848 (the "Insolvency Regulation").

9 Directive (EU) 2019/1023 (the "Restructuring Directive").

10 Proposal for a directive on asset recovery and confiscation (COM/2022/245; the "Asset Recovery Directive").

management of property within the framework of proceedings in criminal matters.[11] The Proposal also comes in addition to the European Account Preservation Order, which can be used by creditors to obtain information on bank accounts of creditors.[12]

I note that in respect of asset tracing, the United Nations is also developing frameworks. However, the angle applied by the United Nations is more focused on tracing, freezing, confiscating and returning stolen assets to e.g. the country of origin.[13] One of the sustainable development targets of the United Nations is: "*By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime*".[14] In the most recent sessions, civil asset tracing and recovery was also on the agenda of Working Group V: Insolvency Law of the United Nations Commission on International Trade Law.[15] While the priorities of the European Commission with the Proposal seem to be with the (ever closer) capital markets union,[16] measures leading to an improvement of recovery rates for creditors are of course welcome.

Title III of the Proposal comprises of Articles 13 until and including 18. This makes six articles in total. The title focuses on extended options for insolvency practitioners to trace assets belonging to the insolvency estate, particularly in other Member States of the European Union. As follows from the impact assessment, the online consultation that preceded the Proposal showed broad support by responding stakeholders for full access of insolvency practitioners to property and collateral databases.[17] It furthermore follows from the impact assessment that non-financial businesses and insolvency practitioners had asset tracing options high on their wish lists.[18] In the impact assessment, asset tracing is described as the legal process of identifying and locating misappropriated assets or their proceeds (values) belonging to the debtor's estate, which includes both the preservation (freezing) of the assets identified and the repatriation if the asset is to be found in another Member State.[19] The targeted rules in the Proposal are limited to the process of identifying assets. A more comprehensive harmonisation, which would include further reaching measures on asset seizure and recovery, was to my understanding too controversial and/or costly for the Member States.

In order to examine the effect of Title III of the Proposal, it is important to determine which insolvency practitioners will benefit from the targeted rules. In the Proposal several definitions are used. In Article 2(a) of the Proposal, for the defined term 'insolvency practitioner' reference is made to Article 26 of the Restructuring Directive. This article contains policies and qualifications for the appointment as insolvency practitioner.[20] The reason for this choice is not clear to me, also as Article 26 of the Restructuring Directive does not refer to a fixed group of insolvency practitioners.

In this respect, I note that in recital 87 of the Restructuring Directive reference is made to the Insolvency Regulation. This recital provides that insolvency practitioners as defined in the Insolvency Regulation should be included in the scope of the Restructuring Directive. In the explanatory notes to the Proposal, it is also confirmed that Title III of the Proposal should be put "*in context of Regulation (EU) 2015/848, which stipulates that, in principle, insolvency practitioners may exercise also in other Member States the powers conferred on them by the law of the Member State where the main insolvency proceedings have been opened and they have been appointed*".[21] In my view, for the definition of 'insolvency practitioner' the Proposal could refer to Article 2(5) of the Insolvency Regulation. This article in the Insolvency Regulation refers to Annex B of the Insolvency Regulation. For reasons of legal certainty, in view of access to non-public information, it would be preferable to only provide a fixed group of insolvency practitioners with extended access rights to information.

In view of Annex B to the Insolvency Regulation, in a Dutch context the following insolvency practitioners would be equipped with extended access rights under the Proposal:

(i) a bankruptcy trustee (*curator*) in bankruptcy proceedings (*faillissement*);
(ii) an administrator (*bewindvoerder*) in suspension of payment proceedings (*surseance van betaling*);
(iii) an administrator in debt consolidation proceedings for natural persons (*schuldsanering natuurlijke personen*);
(iv) a restructuring expert (*herstructureringsdeskundige*) in proceedings under the act on the confirmation of private restructuring plans (*Wet homologatie onderhands akkoord*; "ACPRP"); and
(v) an observer (*observator*) under the act on the confirmation of private restructuring plans.

For the Netherlands, there is in my opinion no discrepancy between the insolvency practitioners referred to under Article 26 of the Restructuring Directive and the insolvency practitioners above that are listed in Annex B to the

11 See article 1 paragraph 1 of the Asset Recovery Directive.
12 Regulation (EU) 655/2014 (the "EAPO Regulation").
13 See https://www.unodc.org/unodc/en/corruption/asset-recovery.html.
14 See https://sdgs.un.org/goals/goal16, target 16.4.
15 See https://uncitral.un.org/en/working_groups/5/insolvency_law.
16 See J.M.W. Pool, J.M.G.J. Boon & R. Vriesendorp, 'Harmonisation of European Insolvency Law: Operation Patchwork has Commenced, but Where Will it Take Us?', *TvI* 2023/11, for further information on the background of the Proposal and objectives of the European Commission, also in respect of the capital markets union.
17 See SWD/2022/395, p. 82.
18 See SWD/2022/395, p. 92.
19 See SWD/2022/395, p. 172.
20 Which article in the Restructuring Directive has in the Netherlands led to the Guidelines on the appointment of bankruptcy trustees in bankruptcy and administrators in suspension of payment proceedings (*Richtlijn aanstellen curatoren in faillissementen en benoeming bewindvoerders in surseances van betaling*) and the Guidelines on the appointment of restructuring experts and observers under the ACPRP (*Richtlijn aanwijzen en aanstellen herstructureringsdeskundigen en observatoren in de WHOA*), of which the first versions apply as of 1 January 2023.
21 COM/2022/702, p. 14.

Insolvency Regulation. However, this could be different in other Member States.

In relation to asset tracing, the term 'insolvency estate' is used in Article 1 paragraph 1 under (b) of the Proposal to determine the subject matter of the Proposal: "*the tracing of assets belonging to the insolvency estate*". In the Proposal, 'insolvency estate' is, however, not a defined term. It is also not a term frequently used in the Restructuring Directive for a preventing restructuring framework. The term is being used in the Insolvency Regulation, where the understanding of the concept focuses on situations of bankruptcy (here understood as liquidation procedures). The choice in the Proposal for the term 'insolvency estate', also in the title name of Title III of the Proposal, confirms in my view that the extended access rights to information are (mainly) introduced for situations where, in a Dutch context, insolvency practitioners are appointed in bankruptcy proceedings or debt consolidation proceedings for natural persons.

In paragraph 6 below, I will in more detail discuss whether all insolvency practitioners in the Netherlands should be equipped with additional rights to information. In the next three paragraphs I will discuss the specific articles in the Proposal.

3. Access to bank account information

Articles 13 until and including 16 of the Proposal provide for access by a specific court designated by a Member State to the national centralised bank account registry in that Member State and in other Member States and the conditions and safeguards that apply. This procedure will make it easier and faster for insolvency practitioners to identify financial products, including bank accounts, administered in the name of the debtor. It is a tool that comes in addition to other potential sources of information for insolvency practitioners, such as the books and records of the debtor and information obtained from e.g. management or creditors of the debtor or third parties.

A common practice in the Netherlands, at least in my experience, is that shortly after being appointed the bankruptcy trustee sends a general notification e-mail to all Dutch banks and other (foreign) financial institutions, including payment service providers, where the debtor has or may have (had) accounts. This e-mail is generally sent in addition to specific e-mails to banks and payment service providers of which the bankruptcy trustee has been informed by the management of the debtor or for which it has derived from the books and records of the debtor that there is or has been a legal relationship. Examples of documents forming part of the books and records of the debtor where such information can be found are the annual accounts or the trial balance (*kolommenbalans*).

The Proposal will enable insolvency practitioners to submit a general request with the designated court that covers the banks and other payment service providers where the debtor has or had a legal relationship with. This may limit the amount of (unnecessary) work for banks and payment service providers, as general mailings by insolvency practitioners may become redundant. However, there are certain important limitations as to the parties included in the register. I will discuss these limitations in the next alinea.

In the Netherlands, the national centralised bank account registry has been implemented through the Act Register Bank Account Information (*Wet verwijzingsportaal bankgegevens*).[22] The obligation for banks and other payment service providers to be linked and provide data to a central electronic system administered by the Minister of Justice and Security (*Verwijzingsportaal bankgegevens*) is limited to:

(i) banks and other payment service providers that offer accounts with an IBAN code with the Dutch country code 'NL';[23] and
(ii) banks offering vault services (*kluizen*) in the Netherlands.

These banks and other payment service providers are required to include in the central electronic system (identifying) data about their customers, persons purporting to act on behalf of the customers, the ultimate beneficiaries of the customers and the opening and closure of accounts with an IBAN code with the Dutch country code 'NL' or a vault.

The Netherlands have not used the option provided in Article 32a paragraph 4 of AMLD4 to require to be included in the central electronic system other information deemed essential for investigative authorities, such as financial intelligence units (FIUs). Based on Article 2:267i paragraph 2 of the Financial Supervision Act (*Wet op het financieel toezicht*), more information should be included in the central electronic system than only IBAN bank accounts or vaults. Information on financial products taken out by customers should be provided. This includes information on bank and securities accounts, credit cards, consumptive credit, business credit, digital wallets and insurance policies. The central electronic system contains information on, *inter alia*, the name, address, products and status of the product (date of opening and, if applicable, closure).[24] In the central electronic system, searches can be performed on unique identification numbers of:

(i) customer-account holders;

22 See *Stb.* 2020/151, p. 2-3. It concerns the implementation of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (*de vierde anti-witwasrichtlijn*; "AMLD4"), which is amended by Directive (EU) 2018/843 (*de vijfde anti-witwasrichtlijn*; "AMLD5"). Article 32a of AMLD4 is laid down in article 3:267i of the Financial Supervision Act (*Wet op het financieel toezicht*).

23 As provided for in Regulation (EU) 2012/260 on single euro payments area (SEPA).

24 See for more detail on the information available for natural persons and legal entities article 2 of the Decree register bank account information (*Besluit verwijzingsportaal bankgegevens*).

(ii) any person purporting to act on behalf of the customer; or
(iii) the beneficial owners of the customer account holder.

The central electronic system does not contain information on the actual use of the relevant products (e.g. the balance of the account and account statements specifying transactions). For obtaining such information the investigative authorities should rely on other procedures.[25] The obligation to have a national centralised bank account registry is maintained in the proposal for AMLD6,[26] which also introduces the set up of a single access point.

The Proposal does certainly simplify and improves the process of identifying bank accounts and other financial products of debtors in Member States. Therefore, the simple and swift access for insolvency practitioners to bank account information in all Member States is to be welcomed. However, the Proposal does not provide for situations where there is a legal relationship between the debtor and a services provider that offers similar services or accounts without an IBAN code. Examples of such service providers are ICS, Paypal, Klarna and Stripe. Claims vis-à-vis such service providers could also be important assets belonging to the insolvency estate of the debtor. The same applies to crypto-asset service providers, where substantial assets of the debtor could be held or administered.

To my knowledge, there are no central registers based on European legislation that are similar to the central electronic system on bank account information. Therefore, I admit that it will be difficult to include such service providers in the scope of the Proposal. In practice, this will be an important limitation as assets of the debtor located with services providers outside the scope of the Proposal will remain concealed for insolvency practitioners. Still, any information on bank accounts or other potential assets of the debtor that becomes available to the insolvency practitioner can generate new leads for investigations. For example, bank account statements of a bank account in another Member State that are obtained by the insolvency practitioner can show transactions with other accounts, services providers or third parties.

The European Commission recognises the risks of money laundering and terrorist financing in the electronic money issuing, payment services and the crypto-assets service providing industry. This has led to the provision in AMLD6 that Member States can require parties that are active via agents in another Member State to appoint a central point of contact in their territory. The exact scope of this obligation needs to be determined by the anti-money laundering authority (AMLA). AMLA is to be created further to the action plan of the European Commission presented on 7 May 2020 for a comprehensive European Union policy on preventing money laundering and terrorist financing.[27] Specifically for crypto-assets, MiCA[28] will be discussed in the European Parliament in April 2023.[29] MiCA, *inter alia*:

(i) provides for specific powers of national competent authorities, the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA);
(ii) imposes authorisation and operating conditions on crypto-asset service providers;
(iii) regulates offerings and marketing to the public of crypto-assets; and
(iv) puts in place prohibitions and requirements to prevent market abuse involving crypto-assets.

MiCA furthermore provides for a register of crypto-asset service providers to be maintained by ESMA.[30] For crypto-asset service providers authorised for the custody and administration of crypto-assets, MiCA also provides for a register of positions of its clients.[31] However, it seems that such registers will not be interconnected, e.g. with the competent authorities, which would make registers searchable for competent authorities in the way the national centralised bank account registry will be accessible through a single access point.[32] While AMLD4, further to its amendment by AMLD5, applies to custodian wallet providers that safeguard private cryptographic keys on behalf of its customers in order to hold, store and transfer virtual currencies, coherence with anti-money laundering legislation was one of the recommended improvements in the impact assessment of MiCA.[33]

In the Proposal, the actual access to and searches of bank account information is entrusted to designated courts. Pursuant to Article 13 of the Proposal, these will be the courts designated by the Member States to be competent to hear cases related to procedures in restructuring, insolvency or discharge of debt. Therefore, the designated courts will be courts competent in matters under the Restructuring Directive. It is unclear to me why the courts under the Restructuring Directive have been selected. I note that Article 2 under (6) of the Insolvency Regulation also provides for a definition of courts in Member States. Tracing assets will in my expectation be more relevant in traditional insolvency

25 F.E.J. Beekhoven van den Boezem and B. Bierens, red., *Geld in beweging: actualiteiten geld en betalingsverkeer (Onderneming en recht nr. 131)*, Deventer: Wolters Kluwer 2022, par. 7.5.3.

26 Proposal for a directive on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (*de zesde anti-witwasrichtlijn*; COM/2021/423; "AMLD6"). See article 14 of AMLD6 in respect to the national centralised bank account registry.

27 See C/2020/2800, Communication from the Commission on an action plan for a comprehensive Union policy on preventing money laundering and terrorist financing, for the full action plan consisting of six pillars and that is being worked out in multiple regulations and directives, including AMLD6.

28 Proposal for a regulation on markets in crypto-assets (COM/2020/593; "MiCA").

29 With the caveat that this is the envisaged timing at the moment of finalisation of this article.

30 Article 57 of MiCA.

31 Article 67 of MiCA.

32 The single access point for bank account information will be set up pursuant to article 14 paragraph 5 of AMLD6.

33 See COM/2020/265, p. 7.

proceedings than it will be in preventive restructuring proceedings, particularly where the debtor is in possession. Therefore, it appears more logical to designate the court authorised to open regular insolvency proceedings as the competent court.

In the Netherlands, this would in practice not make a difference, as the same courts are competent to hear cases for bankruptcy proceedings, suspension of payments, debt consolidation proceedings for natural persons and the ACPRP (the Dutch preventive restructuring procedure). However, this could be different in other Member States. In the Netherlands it would in my view make sense to designate the eleven courts of first instance spread over the Netherlands, also as supervisory judges from these eleven courts are appointed in bankruptcy proceedings, suspension of payments and debt consolidation proceedings for natural persons.

Further to its first reading, the Dutch government suggested that insolvency practitioners should have *direct* access to the central electronic system.[34] Of the insolvency practitioners in the Netherlands listed in paragraph 2 above, the insolvency practitioners appointed in bankruptcy proceedings,[35] suspension of payments proceedings[36] and debt consolidation proceedings for natural persons[37] operate under the supervision of a supervisory judge. This brings along that, in spite of the possibility to have a restructuring expert or observer dismissed by the court,[38] the restructuring expert and observer do not operate under the supervision of a supervisory judge or similar court official. It is in, my view, undesirable to grant insolvency practitioners, which are private practitioners in the Netherlands, direct access to databases such as the central bank account register. This *a fortiori* applies where insolvency practitioners do not operate under the supervision of a supervisory judge. Also in view of data protection laws (including GDPR), it is undesirable to provide insolvency practitioners of all Member States unlimited and unrestricted access to the central electronic systems with bank account information of all Member States. There is only a (theoretical) subsequent verification whether access by the insolvency practitioner was justified. Lastly, also for practical reasons, it will be difficult to grant a varying group of insolvency practitioners direct access to the central electronic system.

Alternatively, if access by designated courts would in view of practical limitations not be feasible,[39] it could be considered by the European legislature that Member States can appoint a (governmental) authority that has access to the central bank account register. In practice, the access to the central electronic system and the provision of information to insolvency practitioners is a rather administrative task. In the Netherlands Dienst Justis, which is part of the Ministry of Justice and Security, could be considered as a suitable authority to have access to the central electronic system. Dienst Justis also carries out the Guarantee settlement for bankruptcy trustees (*Garantstellingsregeling Curatoren*). This would, in my view, provide a feasible solution where it concerns the provision of bank account information concerning the debtor.

The absence of a judicial review is in my view not desirable where it concerns bank account information regarding a third party. In this respect, I note that Article 14 paragraphs 1 and 2 of the Proposal provide that bank account information can also be requested by an insolvency practitioner for the purposes of identifying and tracing assets belonging to the insolvency estate of the debtor where these relate to avoidance actions. The subordinate clause in these paragraphs "*including those subject to avoidance actions*" implicates that an insolvency practitioner cannot only request the designated court to search for and provide information regarding the debtor itself. Bank account information can also be requested for parties that could be targeted by insolvency practitioners as part of potential avoidance actions. In the explanatory memorandum to the Proposal, the following is included: "*This proposal aims to maximise the recovery of value from the insolvent company for creditors. To this end, the provisions on avoidance actions and asset tracing mutually reinforce each other.*"[40] It, therefore, seems a deliberate choice in the Proposal to not limit the access of insolvency practitioners to bank account information to the debtor.

In practice, this would enable insolvency practitioners to identify potential assets for recourse on claims against third parties based on avoidance actions. In view of Articles 42 *et seq.* of the Dutch Bankruptcy Act on transaction avoidance, in a Dutch context this option seems reserved for bankruptcy trustees. There could be situations where the avoidance action targets a bank account of a third party (e.g. where a bank transfer for no consideration (a gift) has been made into the bank account of a third party).[41] However, a substantial part of the matters where avoidance actions

34 See for this view taken by the Dutch government, through the working group assessment of proposals of the European Commission, page 8 of attachment 3 to the letter of the Minister of Foreign Affairs, Mr. W.B. Hoekstra, to the chairperson of the House of Representatives dated 3 February 2023, 22 112, nr. 3598.

35 See article 14, paragraph 1 of the Dutch Bankruptcy Act.

36 See article 223a, paragraph 1 of the Dutch Bankruptcy Act.

37 See article 287, paragraph 3 of the Dutch Bankruptcy Act.

38 See article 371, paragraph 13 of the Dutch Bankruptcy Act in respect of the restructuring expert, which also applies to the observer through article 380, paragraph 4 of the Dutch Bankruptcy Act.

39 See the reservations of the Dutch government in this respect, through the working group assessment of proposals of the European Commission, page 8 of attachment 3 to the letter of the Minister of Foreign Affairs, Mr. W.B. Hoekstra, to the chairperson of the House of Representatives dated 3 February 2023, 22 112, nr. 3598.

40 Explanatory memorandum to the Proposal, under 5. Other Elements, p. 12.

41 The relevant bank account of the third party will then be traceable via the bank account statements. However, the bank account information in the central bank account register can be much broader then solely the bank account into which the relevant payment has been made.

are instituted will concern the dissipation of assets that were previously in the debtor's possession. The wording of Title III of the Proposal, 'tracing assets belonging to the insolvency estate', does not relate well to the access to information on recourse against third parties for claims based on avoidance actions. For bankruptcy trustees and other insolvency practitioners this would be a helpful tool when instituting claims against third parties in connection with transaction avoidance. For example, when assets of the debtor have been sold against a steep discount or when assets have simply been given away to a third party, the insolvency practitioner can via the central electronic register obtain information on (potential) assets of that third party. This would be in line with the overall objective of the Proposal, being to maximise the recovery of value from the insolvent company for creditors.

The Proposal does not (yet) require insolvency practitioners to substantiate a request for bank account information submitted to the designated court. It is to be seen whether courts, based on the wording "*where necessary*" in Article 14 paragraphs 1 and 2 of the Proposal, will require a substantiation of requests. This would in any case make sense where it concerns bank account information regarding third parties in connection with a (potential) claim based on transaction avoidance. Absent such substantiation requirement, insolvency practitioners could in practice have access to the bank account information of a very substantial number of enterprises and citizens in the European Union, e.g. where these have a legal relationship with the debtor as customer, supplier, landlord, etc. If a different (governmental) authority or other persons would be entrusted with access to the central electronic system, the procedure would lack a judicial review. In my view, a judicial review would, where it concerns bank account information of parties other than the debtor, be desirable.

Also with an additional layer verifying upfront whether access to bank account information is justified, access to the central electronic system with bank account information will in my expectation be a useful tool for insolvency practitioners to quickly identify and chart the assets of the debtor. This particularly applies in situations where a debtor is not willing or able to cooperate. It is in my view likely that in practice, a standard procedure will develop whereby insolvency practitioners will request information from the designated court or (governmental) authority on the debtor. This would increase the burden of work for courts. However, it will become more difficult for debtors (or their beneficiaries) to conceal assets within the European Union. This is of course different for funds or other assets brought outside the European Union, which is an important limitation to the effectiveness of the Proposal. I will discuss this and other limitations in paragraph 6 below.

Lastly, a technical drafting note is that the European legislature may elect to define 'designated courts' in Article 1 of the Proposal instead of introducing a definition in Article 13 paragraph 1 of the Proposal.

4. Access to beneficial ownership information

In Article 17 of the Proposal, provisions are laid down on the access of insolvency practitioners to beneficial ownership information registers. The proposed provision concerns improved access for insolvency practitioners to information on the ultimate beneficial owner registered for the debtor. This should provide insolvency practitioners with a better overview and insights into the group structure and the interests of affiliated parties and persons.

The legal basis for the beneficial ownership information registers is set out in AMLD4.[42] This will be maintained in AMLD6.[43] The national beneficial ownership information registers of the Member States are interconnected based on AMLD4. In the Netherlands, the beneficial ownership information register is implemented in the Trade Register Law 2007 (*Handelsregisterwet 2007*).

An important question is how access for insolvency practitioners to information on beneficial ownership in the Proposal relates to recent case law of the Court of Justice of the European Union (CJEU).[44] The CJEU ordered that the general public's access to information on beneficial ownership constitutes an interference with the rights guaranteed in Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter of Fundamental Rights of the European Union (*Handvest van de grondrechten van de Europese Unie*).

Under AMLD4 persons or organisations capable of demonstrating a 'legitimate interest' had access to the beneficial ownership information register. AMLD5 provides for the general public's access to certain information on beneficial ownership, including personal details of the legal owner and the nature and extent of the beneficial interest held. Article 21 of the Trade Register Law 2007 currently provides that the general public has access to the basic information on beneficial ownership included in the register. According to the CJEU, the broader access to the beneficial ownership information register under AMLD5 does *not* demonstrate a proper balance between either the objective of general interest pursued and the fundamental rights in the abovementioned Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, or the existence of sufficient safeguards enabling data subjects included in the beneficial ownership register to protect their personal data effectively against the risks of abuse.

On 22 November 2022, the date of the CJEU judgment referred to above, the Netherlands ceased all access to its

42 Article 30 paragraph 3 and article 31 paragraph 3a of AMLD4.
43 Article 10 of AMLD6.
44 See the judgment of 22 November 2022 in cases C-37/20 and C-601/20, CJEU 22 November 2022, ECLI:EU:C:2022:912.

beneficial ownership information register. On 20 January 2023, the Minister of Justice and Security informed the House of Representatives that, although AMLD4 requires minimum harmonisation rules, Article 21 of the Trade Register Law 2007 needs to be amended.[45] The access to the national beneficial ownership information register by the Dutch authorities (including the Dutch Tax Authority) and the FIU has been restored. The access by other parties, including banks and insurers that have to perform anti-money laundering checks, is still being investigated. It is envisaged that objective indicators will be defined for determining a right of access to the national beneficial ownership information register.

In view of the abovementioned judgment of the CJEU, it will be required that access to information that was intended to be publicly accessible further to AMLD5 is specially provided for. Article 17 of the Proposal, to be implemented in the laws of the Member States, will in my view then provide for a legitimate interest when information on beneficial ownership is sought by an insolvency practitioner in view of identifying and tracing assets. The description in Article 17 of the Proposal for which purposes the access by the insolvency practitioner is allowed, is limited to "*necessary for identifying and tracing assets belonging to the insolvency estate of the debtor in ongoing insolvency proceedings*". It is furthermore limited to certain information on, in short, certain (personal) details and the nature and extent of the beneficial interest held. The information listed in Article 17 of the Proposal should, whether or not in conjunction with information from other public and non-public sources, generally be sufficient for insolvency practitioners to be able to trace and contact such persons.

As will be discussed in more detail in paragraph 5 below, in the Netherlands bankruptcy trustees have the possibility to request with Dienst Justis a network diagram (*netwerktekening*) that contains all relationships of legal entities and natural persons that are in some way involved and/or connected with the bankrupt debtor. This network diagram is limited to information known to the Dutch authorities and comes in addition to the information that is publicly available in the Dutch Chamber of Commerce (*Kamer van Koophandel*). The provision on access to beneficial ownership information registers is still a valuable addition as insolvency practitioners appointed in another Member State will likely not have access to information to be collected and combined by Dienst Justis. Also, insolvency practitioners appointed in the Netherlands will in other Member States probably not have the same access to such information as insolvency practitioners appointed in that Member State.

Further to its first reading of the Proposal, the Dutch government announced that it will ask questions why the access to beneficial ownership information registers is included in the Proposal and not in AMLD6.[46] In my view, the intended effect of the proposed article in the Proposal, which is to provide insolvency practitioners with access to beneficial ownership information registers, is broader than only anti-money laundering and counter-terrorism. In the interest of creditors, the Proposal aims to maximise the recovery of value, for which purpose (improved) access to information for tracing assets belonging to the insolvency estate are introduced. Noting the civil and commercial purpose of the Proposal, this is in my view the right place to embed these access rights to information for insolvency practitioners.

5. Access to national asset registers

The improved access of insolvency practitioners to national asset registers in all Member States is provided for in Article 18 of the Proposal. National asset registers are a valuable source of information for insolvency practitioners as they may reveal assets that are (potentially) part of the insolvency estate of the debtor. While some registers do not particularly register ownership,[47] a registry in the name of the debtor is usually an important indication of title to an asset. Currently, access to foreign asset registers and the sale of assets in other Member States usually takes place with the assistance of a lawyer or other advisor in that Member State with local knowledge. This can be time-consuming and costly. In the Netherlands, in view of the Recofa Guidelines for bankruptcies and suspensions of payment (*Recofa Richtlijn voor faillissementen en surseances van betaling*),[48] a bankruptcy trustee is under the obligation to upfront request permission to incur costs for engaging (foreign) experts up front. Such barriers may lead to assets being dissipated further away from the bankrupt estate of the debtor. An overview of all national asset registers for all Member States makes it easier for insolvency practitioners to navigate their way to and access asset registers in other Member States.

As Schuijling has rightly pointed out, the improved access to national asset registers is not particularly a harmonisation of national insolvency laws of the Member States.[49] Nonetheless this provision will be welcomed by insolvency practitioners in all Member States as it will make identifying assets easier and more efficient.

Article 18 of the Proposal provides that regardless of the Member State where the insolvency practitioner is appointed, the insolvency practitioner should have direct and expeditious access to the national asset registers to be

45 See the letter of the Minister of Justice and Security, Ms S.A.M. Kaag, to the chairperson of the House of Representatives dated 20 January 2023, 31 477, nr. 85.

46 See the view taken by the Dutch government, through the working group assessment of proposals of the European Commission, page 8 of attachment 3 to the letter of the Minister of Foreign Affairs, Mr W.B. Hoekstra, to the chairperson of the House of Representatives dated 3 February 2023, 22 112, nr. 3598.

47 E.g. the Netherlands Vehicle Authority does not register ownership of vehicles, but merely the holder of a vehicle.

48 To be specific, article 6.7 under d. of the Recofa Guidelines of 15 April 2021.

49 B.A. Schuijling, '2. Het commissievoorstel voor een nieuwe insolventierichtlijn', *FIP* 2023/1, p. 14.

included in the annex to the Proposal. This access should be under *de jure* and *de facto* the same conditions as insolvency practitioners appointed in the Member State where the national asset register is kept. The following national asset registers are included in the annex to the Proposal:

(1) Cadastral registers;
(2) Land registers;
(3) Movable property registers including registers of vehicles, ships and aircrafts and registers of weapons;
(4) Register of donations;
(5) Mortgage registers;
(6) Other security registers, including securities depository registers and book-entry registers;
(7) Registers of pledges including lease agreements and sale-purchase agreements with retention of title;
(8) Registers containing property seizure acts;
(9) Probate registers;
(10) Registers of intellectual property rights, including patent and trademark registers;
(11) Registers of internet domains; and
(12) Register of General Terms and Conditions.

For the Netherlands, the registers that could be considered for placement on the list in the annex to the Proposal in my view include:

(1) the immovable property and vessel registers, including mortgage rights and seizures/attachments, kept by the Netherlands' Cadastre, Land Registry and Mapping Agency (*Kadaster*);
(2) the aircraft register, including mortgage rights and seizures/attachments, kept by the Human Environment and Transport Inspectorate (*Inspectie Leefomgeving en Transport*);
(3) the vehicle register kept by the Netherlands Vehicle Authority (*Dienst Wegverkeer*; *RDW*);
(4) the internet domains register kept by Stichting Internet Domeinregistratie Nederland;
(5) the intellectual property registers for trademarks and designs kept by Benelux Office for Intellectual Property (*Benelux-Bureau voor de Intellectuele Eigendom*; *BOIP*);
(6) the patent register kept by the Netherlands Patent Office (*Octrooicentrum Nederland*);
(7) the plant varieties register kept by the Board for Plant Varieties (*Raad voor plantenrassen*);
(8) the register for weapons kept by the chief of police (*korpschef*);
(9) the register for general terms and conditions kept by the Judicial system Netherlands (*De Rechtspraak*);
(10) the central register of wills (*Centraal Testamentenregister*) kept by the Royal Dutch Association of Civil-law Notaries (*Koninkelijke Notariële Beroepsorganisatie*); and
(11) the securities depository register kept by Nederlands Centraal Instituut voor Giraal Effectenverkeer B.V. (Euroclear Nederland).

In the list, above I have included the Benelux Office for Intellectual Property, which may technically not be seen as a national asset register as the office has been incorporated further to the Benelux-treaty on trademarks (*Benelux-Verdrag inzake de warenmerken*) concluded by and between the Netherlands, Belgium and the Netherlands, which treaty was in 2006 replaced by the Benelux-treaty on intellectual property (*Benelux-verdrag inzake de intellectuele eigendom*) between the same countries. As a shared national asset register for intellectual property, insolvency practitioners from other Member States should in my view have direct and expeditious access to the registers kept by the Benelux Office for Intellectual Property. In addition, the Benelux Office for Intellectual Property has its offices in The Hague, the Netherlands, which brings along that it could be argued that the registers of the Benelux Office for Intellectual Property are located in the territory of the Netherlands. In practice, the accessibility of this register for foreign insolvency practitioners will not be a problem as the register is publicly accessible.

The provision in Article 18 paragraph 2 of the Proposal that access conditions for insolvency practitioners appointed in another Member State should *de jure* or *de facto* not be less favourable than the conditions granted to insolvency practitioners in the Member State where the register is kept, should in my view not be interpreted that access to national asset registers should under all circumstances be without limitations or costs, but that a level playing field applies in all Member States of the European Union. In the Netherlands, some registers can be accessed without incurring costs (e.g. the intellectual property registers for trademarks and designs kept by Benelux Office for Intellectual Property) while other registers do charge costs for providing extracts (e.g. the immovable property and vessel registers, including mortgage rights and seizures/attachments, kept by the Netherlands' Cadastre, Land Registry and Mapping Agency). For registers without an access portal, such as the register for weapons, it will be both Dutch insolvency practitioners and insolvency practitioners appointed in another Member State that will be required to send a request for access and/or information.

Also, in view of the list of potential Dutch national asset registers compiled by me, I am not aware of access conditions in respect of these registers that would currently be less favourable for insolvency practitioners in other Member States compared to insolvency practitioners appointed in the Netherlands. However, the Proposal may provide insolvency practitioners with additional rights in other Member States. This may e.g. apply in Member States where insolvency practitioners are government officials and have access, or more comprehensive access or access on different terms (such as free of charges[50]), to certain asset registers. Based on the implementation of the Proposal, I expect that

50 See by way of example A/CN.9/WG.V/WP.182/Add.1 – Inventory of civil asset tracing and recovery tools used in insolvency proceedings, p. 14, where it is mentioned that access to public registers in Hungary is free of charge.

it will become easier for insolvency practitioners to request and receive access to registers in other Member States.

Based on the current list in the Annex referred to in Article 18 of the Proposal, insolvency practitioners appointed in other Member States will in my view not have access to information commonly provided to Dutch bankruptcy trustees by Dienst Justis and the Dutch Tax Authorities (*Belastingdienst*). As briefly mentioned in paragraph 4 above, a network drawing (*netwerktekening*) can be requested by a Dutch bankruptcy trustee with Dienst Justis based on the Act on the check of legal entities (*Wet controle op rechtspersonen*).[51] Such network drawing shows all relationships of legal entities and natural persons that are in some way involved and/or connected with the bankrupt debtor. The network diagram is limited to information known to the Dutch authorities. This is however not a central register which can be accessed by bankruptcy trustees and investigating agencies, but information that is to be collected and combined upon the request of an applicant (in this case the bankruptcy trustee).

Based on the Guidelines Recovery (*Leidraad Invordering*) for the Dutch Tax Authorities, if and insofar there is a fiscal claim a bankruptcy trustee may request information from the Dutch Tax Authorities on the assets of directors and supervisory members of a bankrupt entity in view of (potential) liability claims.[52] In my opinion, for this request the same applies as for a request for a network drawing with Dienst Justis. It would be justified to hold this information outside the scope of the Proposal, as this information is (primarily) useful for insolvency practitioners for identifying (potential) assets for recourse on claims against directors, supervisory members or other third parties. Hence, the Proposal is aimed at gathering information on (potential) assets that belong or should belong to the bankrupt estate.

6. Reflection on Title III of the Proposal and other desired tools for insolvency practitioners

In my expectation, the Proposal will particularly be of importance in bankruptcies and debt consolidation proceedings for natural persons where the debtor (or its representative) cannot be located or is unwilling or unable to cooperate. If debtors (or their representatives) are cooperating well, it will normally not be an issue for the insolvency practitioner to locate (potential) assets such as bank or securities accounts. In most bankruptcies, such accounts can be quite easily derived from the books and records of the debtor. I do not expect that in such situations the provisions in the Proposal will materially speed up the process of locating or tracing assets by the insolvency practitioner.

If the debtor (or its representative) cannot be located or is unwilling or unable to cooperate, the additional tools in the toolbox of the insolvency practitioner can be useful if (potential) assets are located in the European Union. In bankruptcies with fraud elements, in my experience more advanced fraudsters tend to (also) use jurisdictions outside the European Union. Also, after implementation of the Proposal this may lead to a dead end in the investigations of the insolvency practitioner. In view of the territorial jurisdiction of the European Union this is not a limitation that can be addressed, but it is something to keep in mind.

Another important limitation is that service providers that do not offer accounts with an IBAN code or vaults fall outside the scope of the Proposal. Insolvency practitioners will, therefore, not have access to information on the accounts of the debtor with service providers such as ICS, Paypal, Klarna and Stripe. I admit that there does not seem to be an easy way to bring these types of assets under the scope of the Proposal. Such limitations do, however, undermine the beneficial effect of the Proposal as mainly the 'new economy' assets will not be covered by the scope of the Proposal.

Still, any additional information obtained as a result of the additional access rights to information under the Proposal may provide insolvency practitioners with new leads for further investigations. In the Dutch bankruptcy practice, also in situations where new clues are found, Articles 105 *et seq.* of the Dutch Bankruptcy Act are of major importance. These articles provide for an obligation on debtors, including current and former directors and supervisory board members, to on its own initiative and at the request of the bankruptcy trustee provide all information that is relevant for the settlement of the Dutch bankruptcy. All books and records of the debtor should be forthwith handed over to the bankruptcy trustee. In the absence of cooperation, judicial assistance can be requested. The bankruptcy trustee furthermore has the possibility to, based on Article 105b of the Dutch Bankruptcy Act, demand from third parties, including auditors and software as service providers, the delivery of all documents that are part of the books and records of the debtor. Such third parties may not invoke a right of retention vis-à-vis the bankruptcy trustee. This is a powerful tool to obtain information on (potential) assets of the debtor where a debtor is not cooperating. It may be worthwhile to investigate whether harmonisation within the European Union of such obligations on debtors, their (former) directors and supervisory board members and third parties would be feasible.

Now, I will address the question which insolvency practitioners should be equipped with additional access rights to information. There is in my view no specific need to also provide (i) the administrator in suspension of payment proceedings (where a plan should be presented by the debtor) and (ii) the restructuring expert under the ACPRP (as debtor in possession proceeding) with additional rights to information on potential assets belonging to the insolvency

51 See article 6 under d. of the Decree on the check of legal entities (*Besluit controle op rechtspersonen*).

52 See article 36.2 of the Guidelines Recovery (*Leidraad Invordering*).

estate. If e.g. the debtor that is subject to proceedings under the ACPRP is not willing or able to provide sufficient information on (potential) assets to the restructuring expert, there will likely be a confidence gap resulting in the restructuring expert informing the court that a restructuring plan that can be confirmed by the court is no longer an option.[53] An argument to include the administrator and restructuring expert as insolvency practitioners eligible to have or request access to registers will be that they can check registers for any 'concealed' assets and report about their findings to stakeholders of the debtor, such as creditors. Also, in view of the limitations regarding the information that can be obtained (see e.g. paragraph 3 above on the access to bank account information), I expect that for these types of proceedings, the importance of these additional tools will be marginal. As set out in paragraph 2 above, the terminology used in the Proposal (e.g. 'insolvency estate') also seems to indicate that it is written for situations where bankruptcy has been declared.

The position of the observer under the ACPRP is in my view a bit different. The observer is specifically entrusted with the interests of the joint creditors of the debtor that is subject to proceedings under the ACPRP.[54] In order to fulfil its tasks as observer, it could be necessary to have access to information on (potential) assets other than via the debtor itself.[55] In spite of the limitations regarding the information that can be obtained, with this additional rights the observer could e.g. follow up on signals or information received from creditors or other third parties.

Where these observations on which insolvency practitioners should fall under the scope of the Proposal are limited to a Dutch context, the same questions could apply in other Member States. This question requires a thorough review by the European legislator.

7. Conclusion and recommendations

The Proposal equips insolvency practitioners with additional rights to information and access to registers. While from a Dutch perspective this will likely aid certain insolvency practitioners (e.g. a bankruptcy trustee in bankruptcy proceedings) more than others and the scope of the Proposal as to which insolvency practitioners benefit from the additional access rights to information should be further reviewed, the initiative by the European legislature is to be welcomed.

As regards the access to bank account information, there are considerable limitations to the information that can be obtained as service providers not offering accounts with an IBAN code or vaults fall outside the scope of the Proposal. This excludes e.g. certain payment service providers and crypto service providers. While entrusting designated courts with access to the central electronic system is a logical choice, it is to be seen whether this is practically feasible for courts. In view of the administrative character of retrieving information from the central electronic system, other (governmental) authorities such as the Netherlands Dienst Justis could also be considered. It also is to be seen in which way and how thoroughly requests for information will be judged, particularly where it concerns bank account information of parties other than the debtor. In the latter case, a judicial review would in my view be desirable. Guidance on the conditions for access to bank account information where it does not concern the debtor itself, e.g. for the purpose of claims based on avoidance actions, is desirable.

For access to beneficial ownership information, the Proposal in my view provides for a legitimate interest for insolvency practitioners to access information in beneficial ownership information registers. In view of recent case law of the CJEU, a specific right for insolvency practitioners to access information could be considered by the European legislature.

The access to national asset registers, besides creating a useful overview of asset registers in all Member States, is expected to improve and facilitate access of insolvency practitioners to these registers. The Proposal also facilitates access to asset registers that were previously not accessible for insolvency practitioners appointed in another Member State.

To conclude, while the Proposal improves the access to information for insolvency practitioners in Member States, it is limited to access rights to information for tracing assets and does not provide insolvency practitioners with new instruments to recover assets belonging to the insolvency estate. Potentially this was too controversial for the Member States. In terms of further improvements on the subject of asset tracing, harmonising the right to receive information and documents from (former) directors and supervisory board members and from third parties (including auditors and software as service providers) could be considered. In any case, the Proposal equips insolvency practitioners with new tools to trace assets, which is positive news for both creditors and the fight against (organised) crime.

This article was completed on 13 March 2023.

53 Article 371, paragraph 12 of the Dutch Bankruptcy Act.
54 Article 380, paragraph 1 of the Dutch Bankruptcy Act.
55 Via article 371, paragraph 7 of the Dutch Bankruptcy Act, which also applies to the observer through article 380, paragraph 4 of the Dutch Bankruptcy Act.