Harmonization within the EU: Spain, Belgium and The Netherlands

José Carles, Bart Heynickx and Juliette van de Wiel compare the Status of pre-packaged sales in Spain, Belgium and The Netherlands

JOSÉ CARLES
Founding Partner, CARLES | CUESTA Abogados, Spain

BART HEYNICKX
Partner, ALTIUS, Belgium

JULIETTE VAN DE WIEL
Partner, DVDW, The Netherlands

On 7 December 2022, the EU Commission introduced its Proposed Directive on the harmonisation of certain aspects of insolvency law. Regarding Pre-Pack proceedings, the text foresees two phases, the first a "preparation phase" in which the company tries to find an agreement with a buyer with the help of a court-appointed monitor and, during which, it can request protection against creditors.

The second "liquidation phase" is very "debtor and transfer friendly", making it easy to transfer ongoing agreements to an interested third party, even without taking over the associated debts.

The status of prepacks: An overview

In **Spain**, pre-packaged sales have their origin in the practice of the Barcelona Courts during COVID times. They were introduced by statute in September 2022 during the implementation of the Restructuring Directive. Spanish pre-packs follow a two-phase approach: (i) the pre-insolvency stage with the request for a Court appointment of a pre-packer (a silent trustee who receives offers under a competitive process, while the debtor remains in possession); and (ii) a subsequent insolvency petition including a binding offer from a buyer. The pre-packer becomes the Court-appointed insolvency practitioner and issues a report with an opinion on the offer. This report benchmarks the offer against the best interest of creditors' test and, if favourable, is understood as a request to authorise the sale. There is no extra competition at this stage, given that the competition process has taken place under the pre-insolvency phase.

In **Belgium**, formal pre-pack proceedings were introduced on 1 September 2023 as a result of the implementation of the Restructuring Directive. The text, containing a limited number of articles, focuses on the preparation phase, describing how the future bankruptcy receiver has to try to reach an agreement on the sale of the company's assets, which is then executed after formal bankruptcy proceedings have been opened.

In the **Netherlands**, the pre-pack practice is based on case law (since 2012) and still has no statutory basis. The procedure enables a debtor in financial distress and the future bankruptcy trustee to prepare for bankruptcy in a confidential phase. Research from 2015 shows that the preparation phase takes two weeks on average.

The Dutch pre-pack entails that the court, at the debtor's request, specifies whom it will appoint as bankruptcy trustee and as supervisory judge should the debtor file for bankruptcy. During this phase, the debtor is in charge of preparing the transaction. The prospective bankruptcy trustee has no formal powers, but has a role in gathering information to form an opinion on whether the prospective transaction is in the creditors' best interest. Following the preparation phase, the debtor files for bankruptcy and the court appoints the prospective bankruptcy trustee as the actual bankruptcy trustee. If the preparations have been successful, the trustee can finalize and execute the prepared asset transaction soon after appointment because of prior involvement.

Despite being one of the front-runners with regard to the pre-pack, the procedure has rarely been used in the Netherlands since the ECJ's *Smallsteps* ruling in 2017.[1]

Employees and social security claims

In **Spain**, it is now clear that the buyer can "cherry pick" the labour contracts associated with the productive unit. Under Spanish law, the buyer is normally liable for unpaid salaries and social security debts of the workers included within the perimeter of the offer ("*sucesión de empresa*"). However, the buyer may request for an authorization to not assume labour and Social Security claims for the amount covered by the Salary Guarantee Fund.

In **Belgium**, the buyer can also freely choose the employees taken over in the framework of the execution of the Pre-Pack deal. The buyer enters into a new contract with these employees and, in principle, does not take

over the outstanding unpaid salaries and social security debts (an exception made for employment seniority).

For a buyer of assets in a bankruptcy *not* preceded by a pre-pack, the situation in the **Netherlands** is similar to the Belgian situation. However, different rules apply in case of a pre-packaged transaction. In the 2017 *Smallsteps* ruling, the ECJ held that the exception to a transfer of undertaking does not apply to a sale prepared in a Dutch pre-pack. As a result, all employment agreements will automatically transfer to the buyer. This ruling was more or less reversed in the 2022 *Heiploeg* case.[2] The ECJ, however, also ruled that, in order for the exception to transfer of undertaking to apply, the pre-pack must be governed through statutory provisions, which is still not the case in the Netherlands. Therefore, all eyes are currently on the Dutch legislator.

Transfer of supply or customer contracts

Under **Spanish** law, the buyer assumes the position of the debtor in contracts that are expressly included within the offer (excluding public contracts). If the premises are included in the offer, this also applies to licenses and administrative authorizations. This operates *ex lege*, which means there is no need for the counterparty's consent. However, this does not mean that the outstanding claims arising from those contracts have to be paid by the buyer. In fact, the buyer assumes no obligation in this regard (unless they expressly decide to do so).

In **Belgium**, contractual consent on both sides is still needed. As a result, the implementation of the Proposed Directive would have a major impact on Belgian law. However, in the framework of reorganisation proceedings, the buyer can identify contracts necessary for the continuation of the business and an automatic transfer of these contracts (with all the associated debts and claims) can be achieved, even without the contractual counterparty's consent.

Freedom of contract is one of the major principles of **Dutch** contract law. Any transfer of an agreement requires the contracting party's agreement, also in insolvency proceedings. There is only one (very strict) exception for rental contracts of shops and restaurants. The extensive possibility of a forced contract take-over in the Proposed Directive interferes with this principle. The Dutch legislator has already identified this provision as problematic.

Secured claims

In **Spain**, if the sale of the productive unit foresees that the security interest subsists, there is no need to obtain the consent of the secured creditors. The secured claim and the asset just "disappear" from the debtor's liabilities and estate.

If the sale of the productive unit happens with no release of the security, secured claims have the right to repayment taking into account the proportion of value of the secured asset within the total value of the total price paid. Usually, the offer expressly states the value of the secured assets within the total value of the price paid. If it covers the whole amount of the secured claim, there is no need to obtain the consent of secured creditors. However, if the price for the business unit does not cover the value of the security in full, at least 75% of secured creditors need to consent.

In **Belgium**, the assets sold in the bankruptcy proceedings are "liberated" from the security that were previously attached to these assets. The secured creditors' claims are transfered to the price of the sold goods. Regarding the sale of real estate, the secured creditors can request the court to set a minimum price.

Secured creditors are a major factor in **Dutch** insolvency proceedings. The insolvency practitioner cannot sell secured assets without the security holder's consent. Furthermore, under Dutch law, it is possible to establish security rights on almost all types of assets. The 'goodwill' of the company is one of the few exceptions, as in legal terms this is not actually a thing or right. This means that the insolvency practitioner and the secured creditor generally need each other to achieve a sale of the business as going concern.

Connected persons

In **Spain**, connected persons are allowed to buy a productive unit under a pre-packaged sale. However, they do not benefit from any debt release (outstanding debt with suppliers, employees, social security, tax claims, etc.), which could be a clear disincentive for these sales.

The **Belgian** legal system does not provide for a specific mechanism regarding connected persons.

There are no specific rules for a sale to related parties in the **Netherlands**. Case law does not forbid such a sale. However, the general consensus is that the prospective bankruptcy trustee should exercise extra diligence in such cases, especially if the debtor has not contacted other potential buyers.

Conclusion

The Proposed Directive includes some very good ideas and is well drafted. Criticism can be voiced that the proceedings are conducted exclusively through self-administration, do not require a likelihood of insolvency and are capable of massively interfering with employee and creditor's rights, especially when it comes to the transfer of ongoing contracts. ■

Footnotes:

1 Judgment of the European Court of Justice, 22 June 2017, C-126/16 (*FNV v Smallsteps*).

2 Judgment of the European Court of Justice, 28 April 2022, C-237/20 (*FNV v Heiploeg*).

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