**The Fallacies of Pre-pack Sales under the Proposed Harmonizing Insolvency Directive**

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One of the most important recent developments in the field of European insolvency law is the Commission’s proposal, published in 2022, for a new directive harmonising certain aspects of insolvency law (the ‘Proposal’). The Proposal intends to harmonise the legal framework of Member States on several key aspects of insolvency proceedings with the objective of improving creditor recoveries across the EU, facilitating cross-border investment and improving access to finance for European firms. One of the elements that have proven to be the most noteworthy in the Proposal are the provisions relating to the new pre-pack procedure. The pre-pack is envisaged as a fast-track liquidation proceeding, where the sale of the debtor’s business as a going concern is negotiated and concluded before the formal opening of the insolvency proceedings and is then executed, in a speedy and streamlined manner, following the formal opening of proceedings, under the supervision of the court. In the view of the Commission, the Proposal’s provisions on pre-packs respond to the ECJ’s judgment in *Heiploeg,* while at the same time ensuring that an efficient, fair and transparent procedure for the sale of distressed businesses is available in every Member State. Perhaps unsurprisingly however, the pre-pack procedure has already elicited various responses and has engendered a debate on the merits of its provision.

Although the discourse has so far focused primarily on the benefits of the proposed framework on prepacks, there appear to be several fallacies with the Commission’s approach. First, it seems highly doubtful that the goals expressed in the Proposal’s Preamble, especially the increase in creditor recoveries and the improvement of procedural efficiencies, can reasonably be achieved under the current formulation of the prepack. As a matter of fact, the entire process suffers from several inefficiencies, including the increased but counterproductive formalization of the preparation phase, the diminished role of the court in sanctioning the sale, the rather confusing application of the best-interests-of-creditors test to the auction and the unwarranted limitations that are placed on credit-bidding. In addition to these inefficiencies however, the necessity of a harmonized prepack procedure in the EU, even if properly structured, should also be questioned. The *Heiploeg* judgment*,* whose effect has been highlighted as one of the main drivers of the proposal, seems to call, first and foremost, for a consideration of the divide between the existing European insolvency architecture and restructuring practice, as opposed to the introduction of a new harmonized procedure across Member States. In addition, many of the problems that the Proposal appears keen to tackle, such as the apparent absence of going concern sales for distressed SMEs, can more convincingly be attributed to prevailing macroeconomic and institutional conditions rather than the absence of available legal tools. The above observations can not only provide insight into the issues presented in the context of prepackaged sales but also invite a more conceptual and policy-based discussion on the merits of the recent initiatives undertaken by the European Commission.