# Pre-pack plans: What's new on the side of the European Union?

Gabriela Custodio and Georges-Louis Harang write about the impact of the discussions on a common pre-pack procedure as proposed in the 2022 Directive proposal harmonising certain aspects of insolvency law

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**In a European insolvency landscape marked by reforms, new legislation, challenges arising from the diversity of national insolvency regimes with differing cultures, and various initiatives aimed at harmonising the insolvency framework, what could a common regime for "pre-pack" look like?**

Within the span of five years, the European Commission has been actively working on common legislation concerning insolvency proceedings, addressing all aspects of national laws with a shared objective: a unified regime to better navigate the complexities of the common European market and the challenges of a shared European economy.

Following the 2022 Directive proposal harmonising certain aspects of insolvency law (the "**Directive**") followed by the adoption of a partial general approach in December 2024 by the Council, the Council has now agreed its negotiation position on the Directive published on 12 June 2025 (the "**General Approach**").[1] The General Approach focused on the titles that were not examined in the partial general approach, part of which are the pre-pack proceedings, covered under Title IV.

What is the status of this discussion and its impact on a common pre-pack procedure?

In the Directive, what remains unchanged in the General Approach, the pre-pack procedure is being considered in two phases:

(i) the preparation phase, under the supervision of a "monitor", dedicated to preparing the sale of the debtor's business (or part of it); and
(ii) the liquidation phase to implement the sale of the debtor's business.

The liquidation phase under the pre-pack sale is deemed to be considered as an insolvency proceeding instituted with a view to the liquidation of the assets of the transferor and is under the supervision of a competent public authority, resulting in the application of Article 5(1) of Directive 2001/23/EC (which permits a derogation, in the context of insolvency proceedings, from the rules set out in Articles 3 and 4, providing for an automatic transfer of contracts to the transferee and prohibit dismissals on economic grounds).

Once the General Approach and the proposed modifications to the Directive were reviewed, some key points emerged as followed, and while some might consider these a step forward, others may view them as new challenges in implementing this instrument, which is intended to facilitate the transfer of distressed businesses.

## The preparation phase

Among other "approaches", the role of the Monitor has been updated, now involving more responsibilities and duties, particularly in safeguarding the interests of creditors.

Thus, Article 22a (2) of the General Approach sets the role of the Monitor, among other "new" duties, who shall notably:

- state why s/he considers that the sale process is a competitive, transparent and fair and meets market standards;
- state, on the basis of its assessment, that the best bid does not constitute a breach of the best-interest-of-creditors test; and
- document and report each step of the sale process.

What stands out is the fact that the creditor's interests are considered throughout the various stages of this preparation phase, like a guiding thread that the Council has deliberately chosen to follow in the General Approach.

As such, of note is the fact that:

- Article 22a (4) sets out a recommendation for the best bidder to be submitted to the creditors. Should the recommendation for the best bidder be approved by the creditors in accordance with National laws (see Article 19), Member States may derogate from the principle that the sale process is competitive, transparent, fair, and meets market standards and that the Monitor shall justify why s/he considers such requirements to be met (Article 22a, (4));
- Member States may provide that a public auction be conducted prior to or at the beginning of the liquidation phase. In such a case, Member States may decide that the

Monitor is not required to comply with the same requirements as the ones infringed when the recommendation for the best bidder is approved by the creditors (Article 22a, (3)). The public auction shall last no longer than three months, which is longer than the four-week long public auction set by the text published in December 2022.

- Member States may provide that when a creditor files for insolvency during the preparation phase, the opening of the liquidation phase can be suspended if, taking into account the circumstances of the case, an opening would not be in the general interest of creditors (Article 23a).

This could give the creditor a leading role in the preparation phase either to influence in its favour the sale process or to block such a process.

Whereas the Directive did not consider the event that could lead to the termination of the preparation phase, Article 23b in the General Approach provides a list of events that could lead Member States to consider the termination of the preparation phase:

- the debtor does not provide the monitor with the necessary assistance to conduct his/her tasks;
- the debtor fails to conduct the preparation phase with due diligence; or
- the preparation phase does not have any reasonable prospects of success.

One remains, however, doubtful about the exact content of such a possibility, as it is not specified who will be responsible for monitoring the debtor's obligations, nor what is meant by "reasonable prospects of success". Such proposals risk creating disparities in the regimes of different Member States, and greater clarity on this point would be advisable.

## Liquidation phase

This second phase of the pre-pack mechanism has been significantly redesigned with the aim of ensuring the continuation of the business for sale while safeguarding the creditors' interests.

In this context, once the liquidation phase is opened, the Court or competent authority shall authorise the sale of the debtor's business, provided that the requirements set in Article 22a have been met, i.e.:

- the acquirer is proposed by the Monitor, the latter having issued an opinion confirming that the sale process that took place during the preparation phase complied with the requirements set under Article 22a (1) and the court or

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competent authority is satisfied that the requirements under Article 22a (1) and (2) are complied with;
- the acquirer is selected in public auction, if applicable; and
- the sale to the acquirer is approved by the creditors as referred to in Article 22a (4).

The General Approach goes even further when considering that, where, under national law, the sale of the debtor's business or part thereof requires the consent of the creditors, Member States may provide that the decision authorizing the sale of the debtor's business can be taken by the creditors without any intervention of the court or competent authority (Article 26a (3)).

To ensure the effectiveness of the transfer of the business, the General Approach provides that the buyer is automatically assigned the contracts necessary for the continuity of the business. This affirmation is however immediately nuanced, as:

- Member States may provide that the consent of counterparties could be required based on certain criteria (Article 27 (1a));
- the termination of the assigned contract is also considered, with a particular focus on licenses of intellectual and industrial property rights (Article 27 (1b) and (2)).

The General Approach also introduces a limitation on the amount for which bids may be submitted by creditors and stipulates that such creditors should not be allowed to offset the total amount of their claim against the debtor's business if the market value of the business is less than the total amount of the claim (Article 33a(2)).

## And... in the near future?

Between the lines of the General Approach, practitioners (particularly French ones) from Member States already familiar with pre-pack proceedings may identify similarities with their own processes. However, this new approach to the Directive raises questions about the decision to prioritise creditor interests, whereas French law, for instance, equally values the protection of jobs and the continuation of business activity. Similarly, questions arise regarding the restriction of the pre-pack mechanism to certain insolvency procedures, without considering preventive procedures, whereas French law favours such processes as part of preventive measures, particularly during conciliation proceedings (relying on the confidentiality of these procedures). That said, and fortunately, it is now possible to use a pre-pack without being formally "insolvent" but rather in a state of probable insolvency.

Nonetheless, as the Directive is further debated, it increasingly appears rooted in a desire to secure creditor interests, whereas the broader objective of ensuring the stability of the common economic market and its key players—businesses—might encourage a focus on maintaining business activity and the jobs tied to it, which contribute to the company's value.

The prospect of transposing the Directive in its current form, particularly in France, where the pre-pack mechanism has been in practice for over 10 years, could prove challenging for the French legislator. It remains to be seen whether the next stages of the Directive's discussions will confirm the General Approach or temper it to strike a balance between creditor interests and the interests of business continuity and employment... stay tuned! ■

**Footnote:**

1 See: https://www.consilium.europa.eu/en/press/press-releases/2025/06/12/eu-insolvency-law-member-states-agree-position-on-bringing-national-insolvency-standards-closer/; https://data.consilium.europa.eu/doc/document/ST-9257-2025-INIT/en/pdf .