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Delegations will find in the Annex comments from the Member States on the first Presidency compromise proposal on Title IV (doc. 6853/25) requested by CM 1997/25.

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I. BELGIUM

TITLE IV – PREPACK PROCEEDINGS

General remark

We refer to the previous written comments and restate them in full. The following comments are only supplementary.

Art. 19 (+ recital 22(b))

“Prepack proceedings”

We welcome the new text of Article 19 and its accompanying recital. We like the fact that the text is now consistent with the principle of debtor in possession. It would be even clearer to us if the text of Article 19 reiterated that the liquidation phase is governed entirely by national law (as before), but we can agree with the text as it is now worded.

For us, the clarification that the creditor participation is governed by national law is sufficient so that it does not need to be repeated anywhere else in this title and/or require derogations from this in the title.

Art. 22

“Monitor”

The text is clearer with the reference to national law in the first paragraph. In addition, because of the new paragraph 1a, we continue to question, also following the working group discussions, whether our national prepack procedure is directive-compliant since we impose safeguards before this procedure may be opened. With us, the debtor must demonstrate that this procedure is in the interest of the creditors, that as many jobs as possible are preserved and that the debtor is on the verge of bankruptcy. We suspect that this is directive-compliant, but the literal words of this article may be interpreted differently. We think the text (or recital) should be clarified along these lines.

In addition, in paragraph 1a, last sentence, we suggest inserting “of the preparation” between the words “each step” and “of the sale process.”

Art. 23

“Stay of individual enforcement actions”

We reiterate again that this is an important safeguard in our proceedings (the absence of the stay).

Art. 25

“Appointment of the insolvency practitioner”

Belgium favours the monitor also becoming the insolvency officer in the liquidation phase (this is the case in Belgium, by the way).

Art. 26 + recital

“Principles applicable to the liquidation phase”

Belgium can agree with the current text knowing that the enumeration is not cumulative. It might be clearer here to use 'or' between a), b) and c).

Art. 27 + recital

“Assignment or termination of executory contracts”

These regulations are the basic idea in Belgian law as far as the termination of contracts (article 27, paragraph 1) is concerned. (imperfect transfer of contracts) Belgium can therefore support the principle, in conjunction with the principles in Article 28.

The scope is however still unclear. What is the exact meaning of “the debtors business” and “executory contract which are necessary for the continuation of the debtors business”? Does this also include credit contracts?

With regard to the possibility to assign or transfer assets and liabilities to another entity it also has to be noted that this possibility could also invalidate the effectiveness of netting agreements as risk mitigation instrument where such assignment or transfer would allow for the transfer of some but not all of the assets and liabilities under a netting agreement. This is because such a partial transfer would effectively undermine the single agreement concept of netting agreements whereby all transactions, claims, rights and liabilities under a netting agreements are combined to a single agreement. Perhaps a solution can be found in clarifying that any application of the assignment or transfer tool in respect of assets and liabilities under a netting agreement can only be applied to the netting agreement as a whole. We understand that we can then foresee this nationally.

Article 28

“Debts and liabilities of the business acquired via the pre-pack proceedings”

Belgium understood at the last working group meeting that the deletion of the last sentence of this paragraph is because it should not be regulated in this directive. We can follow this, but we would like confirmation or clarification somewhere in the recitals that such derogation remains possible and is not a violation of Article 28.

We welcome the adjustment in paragraph 1 (‘or any encumbrances’).

Article 30

“Criteria to select the best offer”

For Belgium it is important that member states can select the criteria themselves. Belgium would prefer that the text stops after “set out in national law” and that thus de last part of this article is deleted.

Article 31

“Civil liability of the monitor and the insolvency practitioner”

Once again, Belgium wants to stress that the liability of an insolvency practitioner is already taken care of in national law (since he is part of the liquidation phase only). No need to regulate this here.

Belgium does not support extending liability to equity holders. It is our opinion that this should not be regulated by insolvency law, but by company law. In fact, it only causes confusion, which should be avoided.

Article 32

“Parties closely related to the debtor”

Adding a new paragraph (c) is unnecessary for Belgium and may be deleted because this article needs more flexibility. We want to push for a more flexible approach, in accordance with national law.

It is the Belgian position that the second sentence of the second paragraph is best deleted as it may give the impression that it is only relevant in the case of Article 32.

Article 33

“Measures to maximize the value of the debtor’s business or part thereof”

We believe the current heading no longer fits the content of this article.

- (a) As currently drafted, the relationship between ‘debtor in possession’ and ‘consent’ in this article is not entirely clear. Belgium repeats and refers to previous comments to emphasise the importance of the principle of debtor in possession. Under Belgian law, the monitor takes charge, but nothing happens without the debtor’s consent, subject to exceptions (ex officio by the court if necessary). This system works well and we would like to see this idea reflected in the text.

We now also believe that (a) no longer matches the new article 19 (principle of debtor in possession).

At least, Belgium calls for the words ‘and the insolvency practitioner’ to be deleted as the insolvency practitioner only exists during the liquidation phase, which is governed by national law. Perhaps (a) should be rephrased by softer, more neutral language.

- (b) Belgium supports the deletion of (b).

(c) It is unclear here whether the mention of (c) and its consequences are desirable. For example, the banking industry warns that such rules will make lending more expensive for companies if they are no longer sure whether their security interests will 'survive'. It remains to be seen whether this will increase competitiveness in Europe or just the other way around.... Belgium is pro harmonisation, but mentioning (c) in this way brings little added value as it remains nationally regulated for member states and therefore amounts to no harmonisation.

What is the link between article 33 (c) and recital 28(b) that states that the release of security interests over assets belonging to the debtor's business should be governed by national law?

We still think it is not desirable to put (c) in this article, we would prefer the deletion of it.

Article 33a

“Pre-emption and bidding rights”

We can agree with this article provided the recital explains exactly what is meant by this. Belgium follows the interpretation explained by the Polish Presidency at the March 28, 2025 meeting, being that 33a wanted to exclude those pre-emptive rights established by law of a MS.

Article 34

“Protection of the interests of the creditors”

We welcome the changes in paragraph 1.

Regarding paragraph 4, Belgium nevertheless wants to be cautious and warn about the impact on the banking sector and the consequences for credit to companies in Europe. This may lead to a reduction of access to credit in the EU.

Belgium does not want to change the ranking of creditors, especially not in this direction and at the risk of making credit even more expensive. We do believe that this is still at risk with the current text.

Article 35

“Impact of competition law procedures on the timing or the successful outcome of the bid”

Regarding paragraph 2, last sentence: what is meant by ‘internal procedures’? We propose to change it by ‘guidelines’.

This article is generally overly complex and too difficult to understand. It has to be in line with the debtor in possession principle. Perhaps it would be easier to understand if we add “as set out in national law” after “full confidentiality”.

Art. 2

“Definitions”

We can agree with the member states asking for the deletion of both definitions (pa and pb) since we don't actually use them in the text, it would actually only reap confusion.

II. DENMARK

Firstly, we would like to acknowledge the work put in to the compromise text on Title IV.

As also stated at the bilateral meeting, Denmark is concerned about the content of Article 26, which is not entirely clear. It is important for Denmark that a Member State can choose only to implement the option mentioned in Article 26(1)(c). In other words, that a Member State can choose to require approval by the creditors in all cases. As Article 26(1) is currently drafted it might be read as requiring a Member State to implement both the option in Article 26(1)(a) and in Article 26(1)(c).

III. GERMANY

The text would, in its present form, introduce **severe obstacles to the functioning of the German insolvency system**. Such interferences would not be limited to the procedural framework governing going concern sales (which are also being “pre-packed” in Germany, although with much less formalities), but **affect the coherence of the entire insolvency system**. We believe that it is possible to give effect to the purposes of Title IV, while avoiding said interferences to functioning systems. To this end, more flexibility should be given in respect of the following points:

1. Procedural Design

It should be clarified that Member States are not put under the obligation to establish a completely new and independent set of proceedings. Rather it should also be possible to make amendments to the general framework, such that it allows for the preparation and execution of pre-packs in accordance with the provisions of Title IV (→ *cf.* Article 4(5) Restructuring & Insolvency Directive).

2. “Entry threshold“

A full-fledged entry test appears too burdensome, formalistic and time-consuming. We suggest invoking **indirect “entry thresholds”** by way of defining grounds for the termination of the pre-pack proceeding that can be invoked by the monitor.

The following grounds should justify a termination: (1) cessation of business operations, (2) debtor’s inability to secure its liquidity during the preparation phase and until the expected time of the execution of the sale and (3) incompleteness or deficiency of debtor’s books and records to an extent that makes it impossible to ascertain the debtor’s business and financial situation (*cf.* Article 4(2) and recitals 27, 33 of the Restructuring Directive).

3. Preparation phase

- a) Member States should be allowed to establish a **preliminary creditors’ committee** in order to ensure creditor participation in the preparation phase and the transition to the liquidation phase; such committee should also have a say on the choice of the monitor. The members of the committee could be put under appropriate confidentiality duties.
- b) Member States should be allowed to state explicitly that the preparation phase is to be conducted in a **competitive, transparent and fair way** and that **market standards** are met (*cf.* old Article 24).
- c) Member States should also be allowed to clearly **delineate the responsibilities** between the monitor and the debtor. It should be possible to vest the debtor (i.e. the debtor’s directors) with the task of conducting the sale process or – at least – to put the debtor under an obligation to cooperate with the monitor. In any case, it should be possible to hold the debtor (and its directors) responsible for the duties assigned.
- d) It should be possible to limit the tasks of the monitor to his core functions, thus relieving him from tasks, such as acquiring interim financing *etc.*
- e) Member State should be allowed to **limit the time period available** for the preparation phase (*e.g.* Article 6(6) Restructuring Directive: initial phase not longer than four months (but MS may choose shorter periods)).
- f) The preparation phase should be **terminated** upon request of the monitor, if the debtor does not comply with his duties or if it turns out that the “entry thresholds” (see above, 2) are not met.

4. Governance of proceedings

Member States should be allowed to **abstain from involving a court** in the process of approval of the sale. Instead, it should be possible to merely require an approval by the creditors' committee on the basis of the monitor's certifications.

5. Creditors' Interests

Member States should be allowed to provide that the proceedings are to be conducted in the best interests of the creditors.

To this end, the counterfactual underlying the best interest test should be supplemented (at least at the option of Member States) by a **next best alternative test** (as in the Restructuring and Insolvency Directive), rather than only a piecemeal liquidation scenario.

Also and in particular: Member States should be able to **deny interim financing privileges**, when the effect of such financing would not be in the best interest of creditors, such as when the expected purchase price net of the amount of interim financing falls short of the expected proceeds from a piecemeal liquidation.

6. Insider acquisitions

Member States should be able to require the **consent by the creditors' meeting** as a prerequisite for an approval of a sale to an insider.

7. Interferences with contract and property law

We are **still opposing the transfer of contracts**. As part of an overall compromise we could accept it on condition that (1) Member States have discretion to exempt certain types of contracts or contractual counterparties, (2) netting arrangements are exempted or made subject to the condition that a transfer captures all transactions in the netting set and (3) Member States are able to introduce safeguards to protect counterparty's legitimate interests. Such safeguards should include at least the **counterparty's right to terminate** the contract, subject to a **notice period** not exceeding three months (which would enable the acquirer to substitute the contract).

Member States should be allowed to exempt **netting arrangements** from an automatic transfer (*cf.* Article 7(6) Restructuring and Insolvency Directive). Alternatively, the transfer of contracts subject to netting could be made subject to the condition that all rights and liabilities that are covered by such agreement are transferred (*cf.* Article 77 and 80 of the Bank Recovery and Resolution Directive).

Article 27(3) should be **deleted**, as this provision creates a severe obstacle to pre-pack proceedings and might lead parties to not chose pre-pack proceedings in order to avoid the disadvantages of Article 27(3). It is **essential** that Member States are at least **allowed to deviate** from Article 27(3).

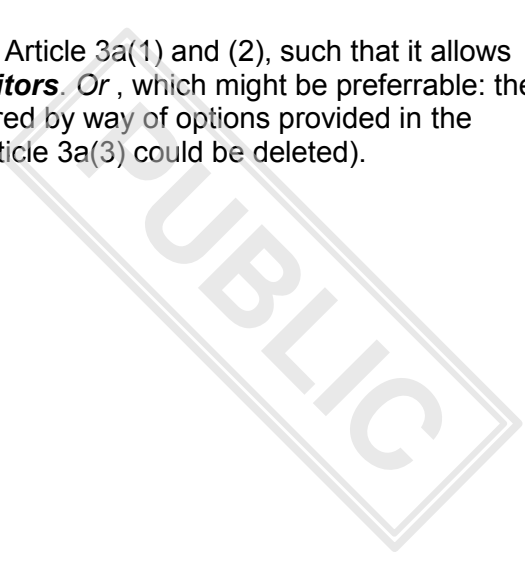
Allow Member States to safeguard the holders of **encumbrances**, including pre-emption rights. Member States should be able to provide that such incumbrances survive the transfer, unless holder's consent to the encumbrance's deletion.

8. Protection of employees' rights

It has to be clarified that collective workers' rights under Union and national labour are not affected by the pre-pack proceedings

9. Revision or deletion of Article 3a(3)

Article 3a(3) should *either* be designed in analogy to Article 3a(1) and (2), such that it allows national provisions that are ***more favorable to creditors***. Or, which might be preferable: the required flexibility of Member States should be ensured by way of options provided in the immediate context of the relevant provisions (and Article 3a(3) could be deleted).



DRAFTING SUGGESTIONS

The following drafting suggestions are based on the Presidency's compromise text. For sake of clearness and simplicity, we have normalized the layout of the Preswhich text by way of deleting strikethrough text and displaying added text as accepted. Our suggestions are marked in **red bold italics** for added text and ~~red strikethrough~~ for text we suggest for deletion. Please note that we display only those parts (Articles, paragraphs) of the Presidency text that we would like to see amended. Omissions of Articles or paragraphs are not meant to be a request for deletion.

Article 2 - Definitions

For the purposes of this Directive, the following definitions apply:

- (h) 'best-interest-of-creditors test' means the test whereby no creditor would be worse off under a liquidation in pre-pack proceedings than ***such a creditor would be in the event of an insolvent piecemeal liquidation or in the event of the next-best-alternative scenario;***

Where there is a next best alternative other than piecemeal liquidation (such as a reorganization or another compromise) and that next best alternative is expected to yield better results to creditors, such alternative must form part of the counterfactual of the test. To hold otherwise would be to say that the pre-pack proceeding should ignore the best interests of creditors.

It cannot be assumed that access to pre-pack proceedings will only be sought by debtors that have no prospect to resolve their distress by way of a restructuring or reorganization. Nothing in Title IV gives a guarantee to that end. Besides, there is quite an overlap between the idealtypical cases for restructuring/reorganization on the one hand and liquidation (through going concern sale) on the other. It is, in particular, not accurate to assume that restructurings are meant to exclusively address debtors in financial distress (i.e. profitable businesses that only require a rearrangement of financial entitlements), while liquidation is meant for debtors that are economically distressed (i.e. not viable): Restructurings regularly need to be flanked by operational restructurings, so as to ensure that the undertaking is profitable again. And candidates for going concern sales must be viable at least in the sense that potential acquire recognize them as an investment opportunity that may, after appropriate adjustments, yield profits. Thus, it is indispensable, to ensure that the best interest test takes account of any and all possible alternatives for the reslution of insolvency. Such test is the reverse side of the next best alternative in restructuring law (Article 2 (1) no. 6 Restructuring Directive)

Finally, including "next best alternatives" in the counterfactual would not put an undue burden on practice: Where there is no prospect for restructuring/reorganization, reasons can be easily given. And where it is not clear whether a restructuring could take place, reasons should definitively be given.

Such test should at least be available at the option of Member States. Drafting is inspired by Article 2(1) no. 6 Restructuring Directive.

~~(p) ‘pre-pack proceedings’ means a expedited liquidation proceedings, comprising a preparation phase and a liquidation phase, that allow for the sale of the business of the debtor, in whole or in part, as a going concern to the best bidder, with a view to the liquidation of the assets of the debtor as a result of the established insolvency of the debtor;~~

~~(pa) ‘preparation phase’ means the phase of the pre-pack proceedings aiming at finding an appropriate buyer for the debtor’s business or part thereof;~~

~~(pb) ‘liquidation phase’ means the phase of the pre-pack proceedings aiming at approving and executing the sale of the debtor’s business or part thereof and at distributing the proceeds to the creditors;~~

The definitions are **unnecessary** (given that Title IV establishes what a pre-pack proceeding, a preparation phase and a liquidation phase is). No proviso in the proposal relies on the definition. Moreover, it seems the definition is **potentially harmful** (as the many discussions in the Working Party illustrates as to tensions between the definition and the content of Title IV).

Moreover and more importantly: Member States should be free to transpose Title IV by way of **amendments to the general framework**, such that debtors are afforded the option of preparing and executing a pre-pack sale in accordance with the provisions of Title IV. It should not be required to establish a separate and independent set of proceedings.

If the definition of “pre-pack proceedings” was to be maintained, it should be amended by replacing “~~expedited liquidation proceedings~~” with “***procedural framework in accordance with Title IV***”

Article 3 – Relevant point in time in relation to close relatedness

The point in time for determining whether a party is closely related to the debtor shall be:

- (a) [...]
- (b) for the purposes of Title IV, the day when the ~~preparation liquidation~~ phase of the pre-pack proceedings starts ~~or~~ **and** during a period falling at least ~~three~~ **six** months prior to ~~the commencement~~ **start of** of the ~~preparation liquidation~~ phase.

In order to avoid circumvention strategies and in order to allow for a clear-cut regime, the relevant point in time should be the time of opening of the insolvency proceedings (i.e. the liquidation phase). As a consequence the look-back period should be extended by the (estimated) average period of a preparation phase.

Article 3a – National law and minimum harmonisation

- ~~Member States may adopt or maintain laws which increase the chances of obtaining a fair market price for the sale of the debtor's business, or part thereof, as a going concern in the context of the pre-pack proceedings provided for in Title IV, provided that such laws do not run counter to the objectives of this Title.~~

In the case of Title IV (and different from any other Title of the Proposal), it is not possible to establish whether additional provisions of national law would have beneficial effects to creditors or not. This is because Title IV contains both, enabling provisions and safeguards that limit the effects of the enabling provisions, while also being designed to benefit creditors.

Consequently, Article 3a(3) should either be designed in analogy to Article 3a(1) and (2), such that it allows national provisions that are more favorable to creditors (→ *cf. EP JURI draft report, recommendation 62*). Or, which might be preferable, the required flexibility of Member States should be ensured by way of **options provided in the immediate context of the relevant provisions**.

Chapter 1

General Provisions

Article 19 – Pre-pack proceedings

- Member States shall ensure that debtors have access to ~~pre-pack proceedings~~ ***a procedural framework that allows debtors to effectuate a pre-packed going concern sale*** in accordance with this Title.

Amendments necessary to indicate that Member States are free to decide whether Title IV is transposed by way of introducing a separate and independent set of proceedings or whether they choose to amend the general framework, such that debtors are afforded an opportunity to effectuate a sale in accordance with Title IV. Amendments would not be necessary, if the definition was amended along the lines of our suggestion above.

Member States shall ensure that debtors who enter into pre-pack proceedings are authorised to undertake at least acts of ordinary management during the preparation phase.

2. National law applies to matters not regulated by this Title, including the ranking of claims, the distribution of proceeds, *the nature, scope and form of* participation of creditors, *the responsibilities and liability of the debtor’s directors*, and the remuneration of the monitor and the insolvency practitioner ~~provided that such laws do not run counter to the objectives of this Title.~~

As to (2): It should also be clear that the governance mechanisms of national laws, in particular such mechanisms that relate to the **procedural involvement of creditors remain unaffected**. Alternatively, we would want to insist on an explicit provision that allows Member States to establish a **(preliminary) creditors’ committee** that would ensure appropriate creditor representation in the preparation phase and the transition to the liquidation phase.

We understand that the current text does not strive to allocate the **specific responsibilities** in the context of the preparation phase. It leaves open, who (the debtor (i.e. the debtor’s directors) or the monitor) are to conduct the marketing/sale process and does not delineate respective responsibilities. **We accept that flexibility**, but deem it necessary that the **final framework** to be created through the national transposition laws provides for a clear allocation and delineation of tasks, responsibilities and, consequently, the liability regime. It should in particular be possible to **vest the debtor (i.e. the debtor’s directors) with the task of conducting the sale process and to hold the debtor (i.e. the debtor’s directors) responsible**. Thus it should be clarified that national law governs “the responsibilities and liability of the debtor’s directors”, it being understood that the monitor’s tasks and responsibilities are already spelled out in the text. **The amendment is not necessary, should our suggestions in relation to Article 31 be adopted.**

There should be no reference to “objectives of this Title”, as it is completely unclear what these objectives are and what their bearings on particular issues could be.

3. *Member States shall ensure that collective workers’ rights under Union and national labour law, including participation of employee representatives in creditors’ committees, are not affected by the pre-pack proceedings.*

The role of worker’s participation should be spelt out explicitly (*cf.* our drafting suggestions on recital 22a)

Article 20 – Relationship with other Union legal acts

- ...
2. For the purposes of Article 5(1) of Council Directive 2001/23/EC, the liquidation phase shall be considered to be bankruptcy **proceedings** or **any analogous** insolvency proceedings instituted with a view to the liquidation of the assets of the transferor under the supervision of a competent public authority.

This Directive is without prejudice to Council Directive 2001/23/EC and national rules implementing it.

There should be no doubt that Member States which – for the sake of the protection of employees – have not made use of the option in Article 5 of Directive 2001/23/EC are allowed to stick to their choice in pre-pack proceedings. It should also be clear that Member States shall be able to apply laws by which that Directive has been validly transposed.

Should this suggestion be adopted, there would be no need for Article 27(6), which could then be deleted.

Chapter 2

Preparation Phase

Article 22 – Monitor

1. The preparation phase shall start when a monitor is appointed. The procedure for the appointment of the monitor shall be set in accordance with national law.

Member States shall ensure that the monitor is independent from the debtor, the debtor's shareholders, the creditors and any other party having a legal or economic interest in the debtor or the debtor's business.

Independency is key in pre-packs, where other procedural safeguards cannot be made available to the same extent as in other situations. *See also draft report of EP JURI, recommendation no. 124.*

- 1a. ~~Member States may provide that the initiation of the preparation phase is excluded for cases where the debtor is generally unable to pay its debts as they fall due in accordance with national law.~~

Paragraph 1a (which conditions access to preparation phase upon the absence of illiquidity) is welcomed, but should be located in a (to be newly introduced) Article 22a that should address the duration and termination of the preparation phase.

As to the substance, two changes should be made: *First*, a **full-fledged entry test seems inappropriate** and irreconcilable with the required swiftness of the process; we suggest to invoke the debtor's inability to pay debts (and other facts) as a ground for termination instead. *Second*, the test should also include situations in which the debtor is **expected to become unable to pay its debts** during the preparation phase.

2. Member States shall ensure that the monitor, if necessary, with the assistance of the debtor **in accordance with national law**:
- (a) justifies **whether and** why it considers that the preparation of the sale process is competitive, transparent, fair and meets market standards;
 - (b) recommends the best bidder as the pre-pack acquirer, in accordance with Article 30;
 - (c) state that **whether and based on what findings** on the basis of its assessment, the best bid does not **prima facie** constitute a breach of the best-interest-of-creditors test.

Modalities should be left to national law.

As to (a): The primary function of the statement is to certify that the process was, in the monitor's estimation, competitive etc. The addition of "whether"

As to (c): The statement/certification should be more than a *prima facie* finding. Since the certification is to be given in relation to a negative fact (absence of breach of best interests test), there is no danger of overwhelming the monitor or exposing him to excessive liability.

The monitor shall document and report each step of the sale process and make the relevant documents and reports available in digital format and in a timely manner to all parties involved in the preparation phase, including any creditors' committee and workers' representatives involved in the preparation phase under national law.

At some point, a clarification must be made that MS may establish (preliminary) creditors' committees and that the involvement of workers' representatives is not excluded. **That point is of great importance to us, although we are open to discuss how this can be ensured.**

2a. Member States may provide that the monitor is not subject to the obligation referred to in paragraph 2, point (a), of this Article, where:

(a) the court or the authority competent for the insolvency proceedings decides that a public auction is to be carried out in the liquidation phase in accordance with Article 26, ~~or~~

~~(b) —the recommendation referred to in paragraph 2, point (b), of this Article is approved by creditors in accordance with national law.~~

Approval by creditors is important, but should not be a reason to relax the certification duties by the monitor. **At the contrary:** creditors have to rely on the information submitted to them and can only form their views on the matter, if provided with appropriate information.

2b. Member States may provide that, *where it is doubtful if the best-interest-of-creditors test is met, in particular where the offer of a party closely related to the debtor is being considered as best offer, a valuation of the sale as going concern is carried out and to be certified by an independent expert.* ~~that upon decision of the court or the competent authority, on its own motion or where a creditor challenges the statement of the monitor referred to in paragraph 2, point (c), on the ground that the best bid does not meet the best interest of creditors test:~~

~~(a) a valuation of the business of the debtor as a going concern is carried out; or~~

~~(b) offers for the sale of the assets of the business in piecemeal liquidation are sought.~~

A valuation should come into play, when it is doubtful that the **best interest test** is met. In particular, there should be a valuation wherever an **insider sale** is being considered (*cf.* the English Administration (Restrictions on Disposal etc. to Connected Persons) Regulations of 2021 that were introduced after a lengthy and intense evaluation of pre-pack practice in the UK).

It should be left open, who has to decide upon the necessity of the valuation. We observe at the same time, that in the early preparation phase the vast majority of creditors will not be involved in the process and, thus, not be in a position to challenge it. We finally note that “offers for piecemeal sales” would not be sought in a pre-pack proceeding, which is defined to be a procedural framework that aims at a going concern sale.

3. Member States shall ensure that only persons who satisfy the eligibility criteria applicable to insolvency practitioners in the Member State where pre-pack proceedings are opened can be appointed as monitor.

Article 22a – Duration; Termination

- 1. The initial duration of the preparation phase shall be limited to a maximum period of no more than three months.***
- 2. Notwithstanding paragraph 1 Member States may provide that the preparation phase is extended in well-defined circumstances.***
- 3. Member States may provide that the preparation phase is terminated upon request by the monitor,***
 - (a) where the debtor is or is expected to become unable to pay its debts as they fall due in the course of the preparation phase;***
 - (b) where the debtor is violation its duties, in particular where he fails to cooperate and provide sufficient and adequate information to the monitor***
 - (c) where the debtor’s books and records are incomplete or deficient to a degree that makes it impossible to ascertain the debtor’s business and financial situation.***

It is necessary to allow for a time limit and to set a maximum period that should not exceed three months, but may be shorter. For the drafting *cf.* Article 6 (5) and (6) of the Restructuring Directive.

Article 23 – Stay of individual enforcement actions

1. Member States may provide that, during the preparation phase, where the debtor is in a situation of likelihood of insolvency or is insolvent in accordance with national law, the debtor can benefit from a stay of individual enforcement actions in accordance with Articles 6 and 7 of Directive (EU) 2019/1023, where that stay facilitates the seamless and effective roll-out of the pre-pack proceedings.

The monitor shall be heard prior to the decision on the stay of individual enforcement actions.

~~Article 23a – Suspension of the opening of the liquidation phase~~

~~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, that opening would not be in the general interest of creditors.~~

This article appears unnecessary and superfluous as a *may*-provision, since the results can already be obtained on the basis of Article 7 of the Restructuring Directive, which the Member States may apply under Article 23.

Article 24 - Principles applicable to the sale process

- ~~1. Member States shall ensure that the sale process carried out during the preparation phase is competitive, transparent, fair and meets market standards.~~ ***Member States shall ensure that the sale process is competitive, transparent, fair and meets market standards.***
- 2. Member States may provide that the sale process is to be carried out in the best interest of creditors.***

Article 24(1) should be kept. There should not be any doubts about the necessity to carry out the process in conformity with the standards and principles mentioned in Article 24(1). The certification duties of the monitor are an expression of this principle, which thus seems to be widely accepted. In our view it is important to spell the principle out explicitly.

As to (2): It should be allowed for Member States to require that the process is to be carried out in the creditors' best interest, in order to ensure that directors also seek and, where appropriate, pursue other alternatives that might be equally beneficial or even more beneficial to creditors (a reorganization or restructuring e.g.). An alternative wording could be: "**to be carried out in the interests of the creditors as a whole**", so as to avoid confusion with the best interest test.

Liquidation Phase

Article 25 - Appointment of the insolvency practitioner

The liquidation phase starts when a decision on the opening of ~~liquidation-insolvency~~ proceedings is taken, and the insolvency practitioner is appointed, in accordance with *the procedures and requirements for the opening of insolvency proceedings under national law*.

The words “liquidation proceedings” should be replaced with “normal insolvency proceedings”. See Article 20(1). In some Member States there are no liquidation proceedings strictu sensu, but only unitary proceedings that allow, among others, for liquidations, while also being open to other forms of insolvency resolutions, such as reorganizations.

It should be clarified that the debtor has to be insolvent in accordance with national law to open the liquidation phase. Otherwise there is no legitimation for special rules governing the sale process.

Article 26 – Principles applicable to the liquidation phase

1. Member States shall ensure that, when the liquidation phase is opened, the court or competent authority authorises the sale of the debtor’s business or part thereof to the acquirer that is:
 - a) proposed by the monitor, provided that the monitor has issued an opinion confirming that the sale process that took place during the preparation phase complied with the requirements laid down in Article [22](#) (2) *and Article 24(1)* and the court or competent authority is satisfied that those requirements are complied with;
 - b)** selected in the public auction, where Member States provide for such an auction in pre-pack proceedings in accordance with referred to in Article 22(2a) point (a); or
 - ~~c) approved by the creditors as referred to in Article 22(2a) point (b).~~

- 1a. Member States may derogate from paragraph 1 where, under national law, the decision on a sale of the business as a whole or parts thereof requires the consent of the creditors.*

As to (1) lit. c and (1a): Court approval should not be mandatory where national law does not foresee a court involvement, but refers matters of importance to the creditors' organs, such as the creditors' committee or meeting. In such case, the authorization of the sale should depend on the outcome of the vote of the creditors. (1) lit. c could be kept, if other delegations find a need to retain it. Our point is: (1) lit. c is not enough.

2. The public auction referred to in Article 22(2a) point (a), shall be initiated within **one month** of the opening of the liquidation phase and shall last no longer than two months. The offer selected by the monitor shall be used as the initial bid in the public auction. Member States shall ensure that the protections granted to the initial bidder in the preparation phase are commensurate and proportionate.

Article 27

Assignment or termination of executory contracts

1. Member States shall ensure that the acquirer of the debtor's business, or part thereof, is, *in accordance with the agreement on the sale*, assigned the executory contracts, *provided that such contracts* are necessary for the continuation of that business, or part thereof, and the suspension of which would lead to a business standstill. The assignment shall not require the consent of the debtor's counterparty or counterparties.

Member States may provide that the transfer without the counterparty's consent does not apply to netting arrangements, including close-out netting arrangements, on financial markets, energy markets and commodity markets if such arrangements are enforceable under national insolvency law.

Member States may *exempt further contracts* ~~provide that the consent of the debtor's counterparty or counterparties is required~~ depending on the type of contract, the quality of the parties, or the interests of the business.

Member States may provide for safeguards that ensure adequate protection of the counterparty's legitimate interests, including counterparty's right to require a deposit, a right of retention and a right terminate the contract subject to a notice period no shorter than [six weeks].

- ~~2. If the acquirer of the debtor's business, or part thereof, is a competitor to the debtor's counterparty or counterparties, the executory contract may be assigned only with the consent of the latter counterparty or counterparties.~~
3. ~~Member States shall ensure that executory contracts relating to licenses of intellectual and industrial property rights, to of which the debtor is the licensor, are not terminated without the consent of the licensee.~~
5. **Without prejudice to this Article, the termination of executory contracts shall be governed by the national law.**
- ~~6. This Article is without prejudice to Council Directive 2001/23/EC and the protection afforded to employees under national laws.~~

We are **still opposing a transfer of contracts that is independent from counterparty's consent**. Such transfer could only be acceptable – as a part of an overall compromise – if

- broad exceptions are available that allow the transposing legislator to take into consideration the legitimate interests of counterparties depending on the type of contract, the quality of the parties, or the interests of the business
- Financial contracts, in particular netting arrangements (cf. Art. 7(6) Restructuring Directive) are exempted
- The counterparty can be provided with safeguards, such as a special termination right to be exercised at a notice of [two] months, so as to allow the acquirer to substitute the respective contract or other safeguards (such a right to claim a deposit or a right of retention).

Article 27(3) should be deleted. It has no relation to pre-pack sale (but would rather put a burden on pre-pack sales). Besides, it is a complex and contentious issue that requires a solid impact assessment.

We finally welcome that the Transfer of Undertakings Directive remains unaffected and that the obligations arising from a contract of employment relations, affected by the sale of business or part thereof, remain in place. In our view, this should, however, be dealt with in Article 20.

Article 28 - Debts and liabilities of the business acquired via the pre-pack proceedings

1. Without prejudice to Article 27 and Article 34 (3) and (4), as well as to ***national rules on*** the obligations arising from a contract of employment relations, ***including claims in connection with occupational pension benefits***, concerned by the sale of business or part thereof, Member States shall ensure that the acquirer acquires the debtor's business, or part thereof, free of debts and liabilities ~~or any encumbrances~~, ***unless the acquirer expressly consents to bear the debts and the liabilities of the business or part thereof.***
2. **Member States may provide that the first paragraph is without prejudice to ~~national environmental law~~ duties arising under a right of property.**

Member States should be in the position to make special provisions on **occupational pension benefits**, which deserve special protections (*cf.* Article 5 lit. a Restructuring Directive exempting “existing or former workers” from the scope of the restructuring framework). It should be possible to require the acquirer to let the pension guarantee Association fund (Pensions-Sicherungs-Verein – PSV) **participate in future earnings** at the level of the acquirer. Practice in Germany has shown and proven that the PSV is reasonable in its demands, as the pension fund has an interest in the acquirer's success and ability to make profit. We are, in particular, concerned that the **safeguards** for PSV (who cannot be affected by a preventive restructuring in accordance with Art. 1(5) lit. a Restructuring Directive and is protected in insolvent reorganization by the requirement that the plan should provide that the PSV is afforded a right to participate in future earnings) could be **circumvented**.

For the same reason, the sentence in recital 28a stating that “[...] claims resulting from executory contracts or contracts of employment transferred to the buyer are excluded from that general rule and remain with the acquirer.” is misleading. It should be clarified in recital 28a that Member States have flexibility, along the lines of “Member States may provide that claims resulting from contracts of employment, including claims to occupational pension benefits, are transferred to the acquirer in accordance with national law”.

Article 29 Suspensive effects of appeals

- 1.—Member States may provide that appeals against decisions ~~of the court or competent authority~~ relating to the authorisation or execution of the sale of the debtor's business or part thereof may have suspensive effects, in accordance with national law.

In our view, the decision is not necessarily taken by the court, see our commentary and suggestions in relation to Article 26, above.

Chapter 4

Common provisions

Article 30

Criteria to select the best offer

Member States shall ensure that the criteria to select the best bid in the pre-pack proceedings are **set out in national law and are** the same as the criteria to **be applied to** select between competing offers in ~~liquidation~~ **normal insolvency** proceedings.

Reference should be to normal insolvency proceedings, as there are Member States that do not have a liquidation proceedings strictu sensu, cf. our commentary on Article 25, above.

Article 31

Civil liability of the monitor and of the insolvency practitioner

Member States shall ensure that the **debtor's directors**, monitor and the insolvency practitioner are liable for the damages caused to creditors ~~or equity holders affected by the pre-pack proceedings~~ by their intentional or negligent failure to comply with their obligations under this.

Article 31 is an important and indispensable element. Liability ensures appropriate discharge of duties that are designed to protect affected parties. Given the accelerated execution of the sale and the resulting limitations to institute *ex ante* safeguards, *ex post* control via civil liability is a necessary and indispensable correlary.

One issue with Article 31 seems to be that it captures situations that could (and arguably should) be distinguished.

Liability towards **shareholders** is justified only on the basis of **corporate law**. So, e.g., absent a duty to file for insolvency, debtor's directors should not enter into pre-pack proceedings without shareholders' consent (or, as the case may be, the consent of the supervisory organ). Failure to do so, is arguable a case for civil liability, but on the basis of normal corporate law rules. It would be useful to clarify (in a recital) that Title IV is without prejudice to corporate law remedies of shareholders against directors, where based on the ground that a surplus value existed as at the time of commencement.

The situation is different, once the pre-pack proceeding has commenced. In that case, the various actors are under an obligation to comply with their duties. Those duties are intended to ensure the legitimacy of the expedited sale in the liquidation phase, which is always an insolvency proceedings. Thus, there is

little room for shareholder's claims. And even if, such claims should be subordinate to creditors' claims.

Once the pre-pack proceeding has commenced, the debtor should be put under an obligation to cooperate at least and to discharge of further duties that Member States impose on the debtor. It is necessary to sanction violations of the associated duties by way of imposing civil liability on the debtor's directors. Because these duties are duty that derive from insolvency and not corporate law.

Article 32

Parties closely related to the debtor

1. Member States shall ensure that parties closely related to the debtor are eligible to acquire the debtor's business or part thereof, provided that all of the following conditions are met:
 - (a) the parties closely related to the debtor disclose in the bid to the monitor their relation to the debtor;
 - (b) parties other than those referred in point (a) receive adequate information on the existence of parties closely related to the debtor and their relation to the latter;
 - (c) a valuation of the business as a going concern **is has been carried** out for the purposes of the statement of the monitor referred to in Article 22(2), point (c).
 - ~~(c) — parties not closely related to the debtor are granted sufficient time to make an offer.~~ **(c) parties not closely related to the debtor are granted sufficient time to make an offer.**

Member States may provide that, where it is proven that a party closely related to the debtor failed to comply with the conditions under the first subparagraph, point (a), the ~~court or competent authority revokes the~~ benefits referred to in Article 28 **can be revoked**.

2. Where the offer made by a party closely related to the debtor is **considered as the best offer**, Member States shall introduce additional safeguards for the authorisation and execution of the sale of the debtor's business or part thereof. ~~Those safeguards shall at least include the duty for the monitor or the court to reject the offer from the party closely related to the debtor if the offer does not satisfy the best interest of creditors test.~~ **Member States may also require that the sale is approved by the creditors' meeting.**

Further safeguards must always be possible where the buyer is closely related to the debtor, regardless of whether this is the only offer. Otherwise, the additional safeguards could easily be circumvented by the buyer enticing a third party to submit an offer, perhaps even at a lower price. Paragraph 2 sentence 2 should be deleted: The monitor should, at least at the option of Member States, have a duty to reject an offer that does not satisfy the best-interest-of-creditors test in all cases, not only as an additional safeguard in the case of an insider deal.

Article 33 – ~~Measures to maximize the value of the debtor’s business or part thereof~~ Interim financing

1. Where interim financing is needed, Member States shall ensure that:
 - ~~(a)~~ *the debtor*, the monitor or the insolvency practitioner takes the necessary steps to obtain interim financing at the lowest possible cost~~;~~.
2. Member States shall ensure that
 - (a)* security interests over the sale proceeds can be granted to providers of interim financing in order to secure reimbursement
 - ~~(b) and (d)~~ *interim financing is eligible to be set-off against the price to be disbursed under the adjudicated offer, when provided by interested bidders,*
 - (c) interim financing is not declared void, voidable or unenforceable; and*
 - (d) the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.*
3. *Member States may provide that paragraph 2 shall only apply to interim financing which has been subject to ex ante control.*

In its current form, Article 33 deals with interim financing only. Corresponding amendments to the heading should be made.

As to (1): Since (and to the degree that) the debtor is assigned tasks in the conduct of the preparation phase, the debtor should also be responsible for obtaining interim financing.

As to (2): Amendments have been inspired by Article 17(1) of the Restructuring Directive, which seems pertinent to interim financing in pre-packs as well.

As to (3): As in the Restructuring Directive, Member States should have the possibility to deny interim financing the privileges afforded by paragraph 2, when the financing is not in the creditors interest (such as when the expected sales price net of the interim financing is lower than the expected proceeds from a piecemeal liquidation). Thus, there should be a possibility to require ex ante control.

Article 33a – Pre-emption and bidding rights

12. Member States shall ensure that no pre-emption rights are granted to bidders. ~~Member States may provide that statutory pre-emption rights that are not affected by the insolvency of the debtor are maintained.~~
23. Member States shall ensure that, where security interests encumber the business subject to the pre-pack proceedings, creditors who are the beneficiaries of those security interests may offset their claims ~~in their bid~~ *against the purchase price* only provided that the value of those claims is significantly below market value of the business.

We welcome the carve-out for pre-existing pre-emption rights, but are of the view that such carve-out should not be limited to statutory pre-emption rights. As a general principle, pre-insolvency entitlements, when based in *in rem* **rights**, should be respected by insolvency law. Thus, a pre-emption right in an asset that forms part of the business should be considered valid and enforceable.

We agree, however, that pre-emptive rights based on contract should not be enforceable. That, however, should follow from the general principle that the performance of pre-existing contractual obligations

, must not be adhered to, but should be recognized as a basis for claims for damages (to be pursued within insolvency proceedings). Note that the grant of pre-emption rights in the vicinity of insolvency may, and often will, not be enforceable, since it will be subject to avoidance. Thus, there is no need for denying any and all pre-emption right or the provision should be limited to contractual pre-emption rights: When an asset belonging to the business is the subject of pre-emption right

Protection of the interests of the creditors

1. ~~Member States may provide that creditors of, as well as holders of equity in, the debtor's business have the right to be heard by the court or competent authority before the authorisation or the execution of the sale of the debtor's business or part thereof.~~
3. Member States shall ensure that security interests **and other incumbrances** are released in pre-pack proceedings under the same requirements that would apply in the **liquidations normal insolvency** proceedings under national law.
4. Member States whose law requires makes the release of security interests conditional upon the consent of holders of secured claims to the liquidation proceedings may provide that such consent is not required, ~~provided that the security interests relate to assets that are necessary for the continuation of the day-to-day operations of the debtor's business or part thereof and none of the following conditions is fulfilled:~~
 - ~~(a) — creditors of secured claims fail to prove that the pre-pack offer does not satisfy the best-interest-of-creditors test;~~
 - ~~(b) — creditors of secured claims have submitted, (directly or through a third party,) an alternative binding acquisition offer that allows the insolvency estate to obtain a better recovery than that which would be obtained with the proposed pre-pack offer.~~

Paragraph 1, which is now a may-provision, should be deleted, as it might create the impression that stronger forms of procedural participation, such as, in particular, through creditors' committees and through creditors' meetings are problematic. The same applies in relation to the equity holders, as equity holders might have a corporate law entitlement to be involved through a shareholders' meeting as long as the debtor is not yet insolvent.

As to (3): Encumbrances (i.e. in rem rights) should be treated as security interests, cf. our comments on Article 28, above.

As to (4) Paragraph 4 is a may-provision anyway and should be shortened.

Impact of competition law procedures on the timing or the successful outcome of the bid

1. Member States shall ensure that, where there is appreciable risk of a delay ensuing from a procedure based on competition law or of a negative decision by a competition authority in relation to an offer made in the course of the preparation phase, the monitor *or debtor facilitates the presentation of alternative bids shall look for alternative buyers.*
2. Member States shall ensure that the monitor may receive information on the applicable competition law procedures and their outcomes that may affect the timing or the successful outcome of the bid, ~~in particular through the disclosure of information by the bidders or the provision of a waiver to exchange information with competition authorities, where applicable.~~ In that regard, the monitor shall be made subject to a duty of full confidentiality. ~~Member States shall ensure that monitors have in place relevant internal procedures for appropriate management of such confidential information.~~
3. Member States shall ensure that, where an offer entails an appreciable risk of a delay as referred to in paragraph 1, that offer may be disregarded, provided that both of the following conditions apply:
 - (a) such offer is not the only ~~existing~~ offer;
 - (b) the delay in the conclusion of the ~~pre-pack business sale with~~ to the bidder concerned would result in ~~a damage for~~ to the debtor's business or part thereof.

As to (1): Where the process is in the hands of the debtor, the debtor should also be tasked with looking for alternative offers.

As to (2): Provision is clearer when short. It is not clear what confidentiality procedures are required.

no.	Drafting suggestions	Commentary
(22)	<p>It is generally assumed that more value can be recovered in liquidation by Where an insolvent business is viable enough to be considered a profitable investment, selling it or parts of it the a business (, or part thereof), as a going concern rather than by piecemeal liquidation can yield a higher sales price.</p> <p>In order to promote sales of a going concern, national insolvency regimes should provide for a procedural framework mechanism by means of through which a debtor in financial distress, with the help under the supervision of a monitor, can seek interested acquirers and prepare the sale of a business as a going concern (“pre-pack proceedings”) before the formal opening of insolvency proceedings. The remaining assets of that business or part thereof can therefore be quickly realised sold shortly after the opening of the formal insolvency proceedings. This Directive should therefore lay down minimum standards on pre-pack proceedings while allowing for a degree of flexibility of implementation by Member States adapting those standards in to existing national insolvency law. Pre-pack proceedings should consist of two phases, namely a preparation phase and a liquidation phase. The preparation phase should aim at finding an appropriate buyer for the debtor’s business or part thereof and be confidential. The liquidation phase should aim at approving and executing the sale of the debtor’s business or part thereof and at distributing the proceeds to the creditors, in accordance with national law. The liquidation phase should begin with a decision of a judicial body or any other competent body to formally open insolvency proceedings under national law leading to the winding up of the debtor which can end in the liquidation of the debtor. The liquidation phase should be carried out by means of insolvency proceedings other than preventive restructuring procedures. In Member States where Regulation (EU) 2015/848 of the European Parliament and of the Council applies, the liquidation phase should be carried out by means of the insolvency proceedings <i>that are</i> included in Annex A other than preventive restructuring proceedings.</p>	<p>Going concern sales do not “generally” yield higher sales prices, but only where the business is, at its core, viable enough to be considered an investment opportunity for third parties. There is no empirical or statistical evidence that going concern sales are always or even regularly better than piecemeal liquidations or other methods for the resolution of insolvency.</p> <p>“procedural framework ... through which ...”: “Pre-pack proceeding” should not be introduced and understood to stand for an independent and self-contained procedure, distinct from other proceedings; rather, it should be allowed to amend the general frameworks, such that they allow the conduct of going concern sales in accordance with Title IV.</p> <p>remaining assets of that: The residual parts of the business remain with the debtor and are not a concern of the pre-pack proceedings, and no provision in Title IV addresses the residual parts.</p> <p>which can end in the liquidation of the debtor: cf. Art. 7(2) Restructuring Directive which reflects the fact that some systems provide for unitary proceedings that are open to any result and method of insolvency resolution. (Strictu sensu, there is no liquidation proceeding in Germany)</p>

no.	Drafting suggestions	Commentary
(22bis)	<p><i>International jurisdiction for the preparation phase should follow international jurisdiction for the opening of insolvency proceedings in general and of the liquidation phase in particular, regardless of whether the preparation phase is conducted publicly or confidentially.</i></p>	<p>In order to ensure a smooth transition to the liquidation phase, the international jurisdiction for the preparation phase should follow international jurisdiction for the liquidation phase.</p>
(22a)	<p>The pre-pack proceedings should be without prejudice to Union and national law on the rights of employees in insolvency proceedings and on the involvement of employee representatives. The pre-pack mechanism should respect the rights of employees in insolvency proceedings as granted under EU law. Specifically, the pre-pack proceedings should be governed by statutory or regulatory provisions and should be construed in a way where the transfer of all or part of an undertaking is prepared with the assistance of a monitor under the supervision of the court or competent authority, prior to the institution of formal insolvency proceedings that are instituted with a view to the liquidation of the assets of the debtor. The primary aim of the pre-pack proceedings is to enable, in the insolvency proceedings, a liquidation of the debtor's assets by the transfer of all or part of the undertaking as a going concern which satisfies to the greatest extent possible the claims of all the creditors and preserves employment as far as possible. Consequently, Since the liquidation phase of the pre-pack proceedings in this Directive is an eligible procedure for the purposes of article 5(1) of Council Directive 2001/23/EC, Member States that have opted to afford employees the protections of that Directive 2001/23/EC in insolvency proceedings should not be prevented to continue to do so in the context of a pre-pack proceedings.</p>	<p>This recital is redundant and tends to be inconsistent, given that the conclusion (liquidation phase is “eligible procedure for the purposes of Art. 5(1) of Directive 2011/23/EC”) is hard to reconcile with the claim made in the beginning (respect of the rights of employees in insolvency proceedings as granted under EU law), given that Art. 5(1) permits Member States to lower the level of protection in pre-pack proceedings.</p> <p>The essence of this recital is that Title IV is neutral as to the level of protection of employees afforded by Union law and the law transposing these Union laws, and that essence should be spelt out in clear terms.</p> <p>We strongly oppose any language that suggests that the protection of employment belongs to the aims of the pre-pack proceedings (which this recital does, when stating that the pre-pack preserves employment as far as possible). The Directive should stay strictly neutral as to the ultimate goals and the relative weights to be attached to any such goal (cf. Article 30)</p>

no.	Drafting suggestions	Commentary
(22b)	<p>(22b) Pre-pack proceedings do not replace national substantive rules, in particular, on the ranking of creditors' claims, the distribution of proceeds, the <i>the nature, scope and form of</i> participation of creditors, <i>the responsibilities and liability of the debtor's directors and</i> of the remuneration of the monitor and insolvency practitioner. Nevertheless, such rules should not run counter to the objectives of pre-pack proceedings. In the event that a court or competent authority does not authorise the sale of a business, or part thereof, as proposed by the monitor, insolvency proceedings should proceed in accordance with the applicable national insolvency law.</p> <p><i>The opening of the liquidation phase should be subject to the requirements for the opening of insolvency proceedings under national law, such as the presence of a ground for the opening of proceedings and the sufficiency of the debtor's assets for the purpose of covering the costs</i></p>	<p><i>the nature, scope and form of ... the responsibilities and liability of the debtor's directors:</i> See the commentary to our drafting suggestions in relation to 19(2).</p> <p>provided that such laws do not run counter to the objectives of this Title: see our comments on Article 19(2). It is not made clear at any point, what the goals are, in particular which mix of enabling provision and safeguard should be the "ideal" representative of such goal.</p> <p><i>The opening of the liquidation phase should be subject to ...:</i> It should be clarified that the pre-conditions for the opening of insolvency proceedings will not be altered through Title IV or any other part of the Directive.</p>

(24)

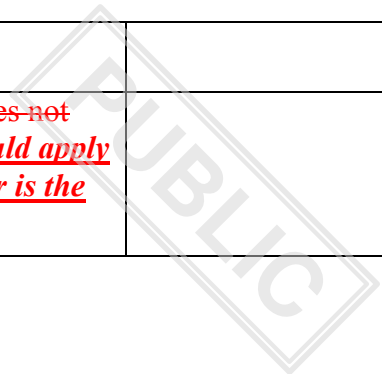
~~Pre-pack proceedings should ensure that the monitor submits for authorisation to the court or competent authority the best bid obtained during the preparation phase is either submitted to the court or competent authority for authorization or to the competent creditors' organ for approval. The monitor should observe and document the preparation of the sales process, so as to provide an appropriate basis for the authorization or approval of the best offer. The statement to be produced by the monitor should include a justification of the monitor's finding that the preparation of the sales process is competitive, transparent, fair and meets market standards. The monitor should also justify that the bid identified as best offer does not put the creditors in a situation worse than they would be in the pursuit of an alternative method of resolving the debtor's insolvency, in particular a piecemeal liquidation, but also, as the case may be, a reorganization or restructuring. It should be possible to require the monitor to assess and state whether the piecemeal liquidation would not recover manifestly more value for creditors than the market price obtained for through the sale of the business (, or part thereof), as a going concern. As a rule, the going concern value of a business is higher than its piecemeal liquidation value because it is based on the assumption that the business will continue its activity with the minimum of disruption, maintain the confidence of financial creditors, shareholders and clients and continue to generate revenue. Therefore, the monitor's statement should not require have to be based on a full-fledged valuation to be carried out in every case. Any sound and fact-based conclusion by the monitor that the going-concern sale price is not significantly lower than the expected proceeds of a piecemeal liquidation or another realistic method to resolve the debtor's insolvency should be duly justified. National law may require the monitor to take into account elements other than price, including the public interest or ensuring the viability of a business. However, a requirement to impose increased scrutiny should apply where the assessment of the monitor or the insolvency practitioner involves a case where the only an offer is made submitted by a party who is closely related to the debtor is considered as the best offer. The monitor or~~

To state that the *monitor* submits the best offer to the court might be correct from a practical point of view, but is misleading from a legal point of view, given that authorization/approval is given only in the liquidation phase, where the monitor has no role (or a role only as insolvency practitioner). Thus, it should be left open who submits the best bid, given also that it is irrelevant for the purpose of this recital.

It should also be mentioned that Member States may choose to have the **sale adopted by the competent creditors' organ** instead of having it approved by the court or the competent authority.

We suggest rewording the recital in order to make clear what the purpose and content of the monitor's statement is.

no.	Drafting suggestions	Commentary
	<p>insolvency practitioner concerned should reject such an offer if it does not satisfy the best interest of creditors test. <u>Additional safeguards should apply at least where the offer made by a party closely related to the debtor is the only existing offer.</u></p>	



no.	Drafting suggestions	Commentary
(25)	<p>In order to ensure that a business is sold for the best price during the pre-pack proceedings, Member States should ensure that the sale process in the preparation phase is conducted under high standards of competitiveness, transparency and fairness. Alternatively, Member States should ensure that, after the opening of the liquidation phase, a public auction is run to select the best bid or the bid recommended by the monitor is approved by the creditors.</p>	<p>The referral of the best bid to the creditors should not be an alternative to the required high standards of competitiveness, transparency and fairness. Creditors' approval should be based on the monitor's statement/certification as the conformity of the preparation process with these standards.</p>
(26)	<p>If a Member State opts to require high standards in the preparation phase, the monitor should be responsible for ensuring that <i>Member States should ensure that</i> the sale process is competitive, transparent, fair and meets market standards. Complying with market standards in this context should require that the process is compatible with standard rules and practice on mergers and acquisitions in the Member State concerned, and include an invitation to potentially interested parties to participate in the sale process, disclosing the same information to potential buyers, enabling the exercise of due diligence by interested acquirers, and obtaining the offers from the interested parties through a structured process.</p>	<p>The allocation and delineation of responsibilities as between the monitor and the debtor (in possession) should be left to the Member States. It should be possible to charge the debtor with the task of conducting and steering the process, while the monitor has to be involved in order to be able to make the certifications he is expected to make. Likewise, it should be possible to assign to the monitor the task of conducting and steering the whole process.</p>

no.	Drafting suggestions	Commentary
(27)	<p>If a Member State opts to require that a public auction is run after the opening of the liquidation phase, the offer selected by the monitor during the preparation phase should be used as an initial bid ('stalking horse bid') for the purposes of the auction. It should be possible, <i>at the option of Member States</i>, to offer incentives to the "stalking horse bidder" by agreeing, in particular, to expense reimbursements or break up fees in the case a better offer is selected through the public auction. Member States should, nevertheless, ensure that such incentives given by the debtors to the 'stalking horse bidders' during the preparation phase are commensurate and do not deter other potentially interested bidders from participating in the public auction in the liquidation phase.</p>	

(28)

To avoid the mere fact of a business being the subject of ~~under~~ insolvency proceedings depreciating its value, ~~it is important to ensure~~ *Member States should be able to provide that contracts essential for the operation of the debtor's business at counterparties*, such as for suppliers or *with key customers of the debtor concerned, are taken over can be assumed* by the acquirer ~~and not, as a result, affected by insolvency proceedings.~~ *Therefore To that extent*, the opening of insolvency proceedings should not result in the early termination of contracts under which the parties still have obligations to perform certain obligations and which are necessary for the continuation of business operations. Such termination would unduly jeopardise the value of the business, or part thereof, to be sold in the pre-pack proceedings. It should, therefore, be ensured that such contracts are assigned to the acquirer of the business of the debtor, or part thereof, even without the consent of the counterparty of the debtor to them. Nevertheless, there ~~can be~~ *are* situations in which the assignment of ~~certain obligations under~~ such contracts cannot be reasonably expected. Therefore, Member States should be able to provide that the consent of the debtor's counterparty or counterparties is required for the assignment of contractual obligations, depending on the type of contract, quality of the parties, or interests of the business concerned. *Member States should also be free to introduce safeguards for the protection of the counterparty's legitimate interests, such as a right to demand a deposit or other security interests or an extraordinary right to terminate the contract. The termination of executory contracts shall be governed by national law. Such safeguards can also be introduced in order to avoid competition distortions that would otherwise derive from the fact that the debtor's position can be improved merely by the fact the debtor is accessing a pre-pack proceeding. The court should not be allowed, however, to terminate contractual obligations relating to licenses for intellectual and industrial property rights, as they are usually key components of the operations of a business being sold.*

We **strongly oppose** the idea of allowing a transfer of executory contracts without counterparty's assent. Such transfers put a burden on the **ease of commerce** in general and on the reliance on the terms of contracts in particular. Transfers to an acquirer will regularly interfere with other **counterparty interests that are worth of protection**, such as to not be bound to a counterparty with unknown trust- and/or creditworthiness or to deal with a party with unverified regulatory or other status. Independent from counterparty's interests, we reject forced transfers of contracts for the **distortive effects** they have, by privileging insolvent debtors over non-insolvent debtors, whereas undistorted markets require that substantive entitlements do not change merely because one party enters an insolvency proceeding.

The concept would seem acceptable only, if limited to the **minimum necessary in order to fulfil its purpose**, namely to allow for a smooth transition. *First*, there should be **exceptions** available, where the interests of the counterparty outweigh the acquirer's interests. It should be possible to base such exceptions on the three criteria already mentioned in the Presidency's text (type of contract, quality of the parties, or interests of the business concerned). *Second*, the counterparty should be able to **protect itself for unknown credit and insolvency risks**: It should be able to require a deposit or other security interest. And *third*, it should be **able to terminate** the assigned contract, subject to a notice period of no more than three months.

We **strongly oppose** the provision on licences. The issue of licences is **too complex and important to be made subject to a casual provision** such as Art. 27(3). It requires a **solid impact assessment**. We also note that Art. 27(3) would function as an

no.	Drafting suggestions	Commentary
		impediment for pre-pack sales, as the acquirer would be bound to the licences.
(28a)	<p>In order to increase the attractiveness of asset deals for potential buyers and, thereby, to achieve higher prices in going concern sales, P purchasers should, as a rule, acquire <u>businesses</u> free and clear of debts, or liabilities or of any encumbrances. Therefore, creditors' claims should generally be satisfied from the proceeds of sale and not asserted directly against the purchaser of a business. However, claims resulting from executory contracts or contracts of employment transferred to the buyer are excluded from that general rule and remain with the acquirer. Exceptions should apply where this Directive and Directive 2001/23/EC require or allow the transfer of contracts as well where Member States require the acquirer to let the holders of pension claims participate in the future profits of the business.</p>	<p>Legislators should not make any form of transaction or method of resolution particularly “attractive”. Legislators should ensure that provisions are in place on the basis of which legislative purposes can be fulfilled.</p> <p>Encumbrances that are in rem rights should remain unaffected or at least treated like security interests (see Article 34(3)).</p> <p>It should be clarified that acquirer can only assume future claims arising from contracts that were transferred. Pre-existing claims should, as a matter of principle, not be transferred to the acquirer, as such a transfer would violate the equal treatment of creditors. Exceptions to this rule require solid justification, such as the importance of the functioning of the occupational pension fund system. Thus, it should be possible for Member States to provide that pension funds participate to a certain degree in the future profits of the business. Note that pension funds are excluded from the scope of the restructuring directive so that they cannot be affected by a restructuring plan. It is important to prevent circumvention strategies designed to affect pension funds, in particular, but not limited to, sales to insiders</p>

no.	Drafting suggestions	Commentary
(28b)	<p>The release of security interests over assets belonging to the debtor’s business should be governed by national law. Where the law in a Member States requires the express consent of the holder of the security interests for the release of such interest, that Member States should be able to provide for a derogation from that requirement. unless a holder of secured claims objects to that release on the justifiable grounds that the transfer in bankruptcy proceedings proposed in the pre-pack does not meet the best interest of creditors test or that that holder of secured claims has made a purchase offer in auction that is more advantageous than the pre-pack option.</p>	<p>We think that the optional restriction on the consent requirement can be significantly simplified. In its present form it is not really accessible.</p>
(28c)	<p>The best offer should not be disqualified from the preparation phase solely on the basis that it comes from a closely related party to a debtor. Closely related parties to the debtor should, therefore, be on an equal footing with other bidders and allowed to participate in the pre-pack proceedings and benefit from the “free and clear” acquisition of the business concerned. The eligibility of closely related parties to bid should, nevertheless, be balanced with enhanced scrutiny of the bidding process. Providing equal opportunities for other bidders, particularly in relation to access to information, and ensuring information symmetry, facilitates quick and efficient pre-pack proceedings and allows other bidders to prepare their bids. <i>Member States should be able to provide for additional safeguards, such as allowing the creditors to vote on an offer made by a closely related party or to require a valuation by a certified expert.</i></p>	<p>Insiders should not be on an equal footing in that special safeguards and precautions are mandated. There should be equal footing only in the sense that insiders can freely participate and place orders. But that is already being said, when the recital says: “should be allowed to participate ...”.</p> <p>It is important to allow further safeguards to prevent abuse in insider cases. Among the safeguards that can and should be put in place is the requirement to have the body of creditors decide and to require a qualified valuation to be testified by a certified expert.</p>

no.	Drafting suggestions	Commentary
(29)	<p>The possibility of enforcing pre-emption rights in the course of a sale process can would distort competition in pre-pack proceedings. Potential bidders might abstain from bidding where rights holders could, at their discretion, discard those bids, irrespective of the time and resources invested and the economic value of the offers concerned. In order to ensure that winning offers reflect the best available prices on the market, pre-emption rights should not be conceded to bidders, nor should such rights be enforced in the course of the liquidation phase. Holders of pre-emption rights that were granted prior to the commencement of pre-pack proceedings should, instead of invoking their option, be invited to participate in the bidding. Nevertheless, Member States should be allowed to enforce legal pre-emption rights in the pre-pack proceedings where it is justifiable by public interest <i>or based in a right in rem</i>.</p>	<p><i>In re-</i> based pre-emption rights should be enforceable also in pre-pack proceeding. We also welcome the exception for statutory pre-emption rights justified by public interest.</p>

IV. IRELAND

General Comments

IE greatly appreciates the Presidency's efforts to achieve a workable compromise on this Title. IE would also like to use this opportunity to again continue to call for the deletion without replacement of Title VI for the reasons outlined in our most recent set of written comments in order to enable us to focus fully on the other outstanding Titles.

IE is maintaining its scrutiny reservation for the entirety of Title IV at this juncture. Formalised pre-pack procedures are not a feature of the Irish corporate landscape. Whilst sales of businesses as going concerns do occur in an Irish context, they tend to happen on a more ad hoc basis with the sale being concluded shortly after the appointment of an insolvency practitioner and the opening of liquidation proceedings. We remain unconvinced by the level of detail and new measures proposed in this Title which will in fact add to costs and create more of a regulatory and administrative burden for companies in distress and their creditors. IE's preference is for a more principled based approach in this regard.

As per other Member States, we continue to have issues with certain elements of this Title - details of which are outlined further below.

We appreciate the Presidency's efforts to introduce flexibility in relation to the role of the Courts with the introduction of "competent authority" throughout the latest draft. IE is still considering the scope of the pre pack procedure to ensure the process is a fit with our liquidation procedures referenced in Annex A of EU Regulation 2015/848.

IE also remains concerned that Article 27 envisages passing the burden (as well as the benefit) of contracts to a third party without counterparty consent, which is not generally permitted in IE because of the undesirability of compelling a counterparty to accept performance by a third party. We support the calls of other Members States for its deletion.

We continue to welcome the Commission's confirmation that it is not intended to include natural persons in Title IV. However, we understand that some Member State may wish to extend Title IV to particular categories of natural person entrepreneurs. Given this we believe it is essential to keep this extension as a Member State option to the Title's application to legal persons.

IE suggest reinstating in full the bracket text with a minor amendment (in red) as a solution to this. This has the benefit of complimenting the text in Art 1. 3 (h).

*"The pre-pack proceedings apply to debtors that are legal persons. Member States may extend the application of **these** proceedings to natural persons who are entrepreneurs."*

Recitals

Recital 22

Maintaining confidentiality in a prepack process remains problematic for IE. Justice is administered by the courts in public, save in special and limited cases as may be prescribed by law. Thus, under this proposal there is little opportunity for creditors, who in most cases, it appears, will only hear about the sale after it has completed, to apply to the Court to enforce or protect their property rights as the process is to be kept confidential in the preparation phase until the sale of the business or part thereof is agreed (and the liquidation of the company follows immediately often leaving very little time for unsecured creditors in particular to take action).

Recital 22a

In IE, a person can act as a liquidator if they are members of a prescribed regulatory body for accountants or lawyers for instance. It is anticipated that in IE, the monitor would also be expected to be a member of a prescribed regulatory body. Thus, the pre-appointment work that would be carried out by the monitor prior to their appointment as a liquidator would be subject to the rules or guidance issued by the monitor's professional body. Accordingly, IE's drafting suggestion is below.

“Specifically, the pre-pack proceedings should be governed by statutory or regulatory provisions and should be construed in a way where the transfer of all or part of an undertaking is prepared ~~by~~ with the assistance of a monitor under the supervision of the court, professional body or competent authority, prior to the institution of formal insolvency proceedings that are instituted with a view to the liquidation of the assets of the debtor”

Recital 24

In IE's view the assertion in recital 24 that "As a rule, the going concern value of a business is higher than its piecemeal liquidation value" is an overreach. In some cases this may be true, but in others a piecemeal liquidation may be the best outcome for creditors. As such, it should not be described as a "rule" in this recital.

Recital 25

IE welcomes that the Court is no longer required to run a court auction and that it is now at Member State discretion.

Recital 28

It is not clear to IE which type of contracts are being referred to here. We would be grateful for clarification on this point. For our substantive comments on the matter of freedom of contract please see Article 27 below.

Recital 29

It is not clear to IE the intent of this recital. We would appreciate clarity regarding the statement that *“Nevertheless, Member States should be allowed to enforce legal pre-emption rights in the pre-pack proceedings where it is justifiable by public interest.”*

Articles

New Article 3a

National law and minimum harmonisation

It is not clear to IE what the new text **“provided that such laws do not run counter to the objectives of this Title”** means and seeks clarification as to the intention here.

Article 19

Pre-pack proceedings

We appreciate the changes made to Article 19.2 which clarify that national law applies in respect of the participation of creditors in the event of pre-pack proceedings moving to a liquidation phase thus allowing any creditor to object, as would be possible in a court liquidation in Ireland’s corporate insolvency proceedings. However, we believe that the addition of **“provided that such laws do not run counter to the objectives of this Title”** introduces a degree of ambiguity as to what is left to national law and what is not.

Article 20

Relationship with other Union legal acts

IE is still considering the scope of the procedure to ensure the process is a fit with our liquidation procedures referenced in Annex A of EU Regulation 2015/848.

Article 22

The Monitor

Regarding the final paragraph in Article 22.2, IE would welcome clarification on who are the *“parties involved in the preparation phase”* to receive the relevant documents and papers.

IE welcomes the new Article 22.2b(a) as this affords a greater layer of protection for creditors.

Article 23
Stay of individual enforcement actions

IE notes that Article 23 now provides that a Member State *may* provide for a stay of individual enforcement actions.

Article 23a
Suspension of the opening of the liquidation phase

The purpose of Article 23a is not clear to IE and thus we would welcome clarity behind its intent.

Article 26
Principles applicable to the liquidation phase

IE welcomes the wording in Article 26. In IE, the liquidator in a court liquidation is appointed by the Court and is, therefore, an officer of the court and the liquidation proceeds under the supervision of the Court. The liquidator can apply for directions to the court at any point during the liquidation process.

Article 27
Assignment or termination of executory contracts

Under Irish law, freedom of contract, and more generally the requirement for the consent of the counterparty are well established legal principles and IE considers that this issue be dealt with at national level. Thus, while we appreciate the efforts of the Presidency to provide flexibility in relation to this Article, it remains IE's position that this Article should be deleted. It is not a proportional means of achieving the objectives of the proposal.

Article 31
Civil liability of the monitor and of the insolvency practitioner

IE welcomes the changes to this Article which make it clear that liability should only arise in cases of negligence or intent.

Article 32
Parties closely related to the debtor

IE welcomes the new para 1(c). It is vital to ensure this article robustly ensures that fraud or abuse of the pre-pack procedure is prevented and transparency is ensured, particularly in respect of the acquisition of the business by parties closely related to the debtor.

Article 33

Measures to maximize the value of the debtor's business or part thereof

We acknowledge that concerns raised by Member States regarding situations where the debtor is in possession are valid, particularly in relation to how the monitor can secure interim financing in such cases. We remain unclear as to how this article is to operate in practice and feel it would benefit from the text being redrafted.

Article 33a

Pre-emption and bidding rights

IE continues to remain unclear about the proposed operation of this article and would appreciate clarity on the intent regarding the new text added in para 1 "*Member States may provide that statutory pre-emption rights that are not affected by the insolvency of the debtor are maintained*"

In addition, IE continues to believe that the drafting of para 2 is very unclear and should be revised to provide more clarity. This could be complimented by clarifying the accompanying recital.

Article 34

Protection of the interests of the creditors

We remain concerned about how creditors' rights are protected within the pre-pack procedure and consider this issue should be considered more fully and regard had to best practice models to ensure that there is transparency and due regard to creditors' interests. We feel further work is needed within the text of the proposal to more adequately address the misgivings expressed by Member States.

V. SPAIN

Article 19 Pre-pack proceedings:

- ✓ In the current wording of Art 19.1 we consider that should be clear that the liquidation phase will take place in insolvency proceedings. It is necessary to clarify the objective premise of the prepack clearly in accordance with the provision contained in Art. 23 on the suspension of executions in which both situations are foreseen.
- ✓ **Article 19. 1:** "*at least*": It is clear that the debtor is allowed to perform ordinary acts during the pre-pack preparation phase. It does not seem to make sense that acts beyond the ordinary course of action should be carried out in this phase, so that the inclusion of this qualification raises doubts.
- ✓ **Article 19.2:** we understand that it will be difficult to opt out of including the regulation of debt discharge in the pre-pack in the Directive. As a more preferable alternative for Spain, it is proposed to delete this regulation and state here that national rules apply.

Article 22 The monitor

- ✓ **22.1.a** It is not well understood and is not consistent with Art. 23 where, in relation to the stay of execution, it is provided with *likelihood of insolvency* and also with *insolvency*. Member States are allowed to exclude the preparation phase with respect to insolvent companies, which is as much as excluding the prepack in any case.
As we have underlined in Article 19, it is necessary to establish what is the objective premise of the companies that can resort to a prepack.

- ✓ **22.2.** We insist to establish a precaution with regard to the obligation of the acquirer to continue the activity for a certain period of time, in the style of the provisions of domestic legislation, such as Article 224 bis of the TRLC, which establishes: '*Request for tender with presentation of a bid for the acquisition of one or several production units.*

1. The debtor may submit, together with the application for the declaration of insolvency proceedings, a binding written proposal from the creditor or third party for the acquisition of one or several production units.

In the proposal, the creditor or third party must undertake to continue or restart the activity with the production unit or units to which it refers for a minimum of three years. Failure to comply with this commitment shall give rise to any affected party being able to claim compensation from the purchaser for the damages caused."

Allowing the sale of production units with the cleaning of debts and without establishing an obligation of continuity for a certain period it makes difficult to understand, as it does not achieve the effect of the survival of the activity and provokes an incentive to fraud, as it would be an easy way out to avoid liability.

In the event that it would not be feasible to establish this obligation, it should at least be indicated that one of the issues to be assessed in the sale process is that the bidder should make a commitment to continue, with a penalty if he does not comply with it.

- ✓ **22. 2.a** There should be no exceptions to a competitive and transparent process from the initial phase. The fact that certain conditions are fulfilled at a later stage does not preclude these conditions from being fulfilled beforehand.

Therefore, it seems that although there was a prior competitive preparatory process, it can then be decided to hold an auction in the court proceedings and therefore it is allowed to opt for the French model. What are the criteria by which the competent authority will determine this insolvency auction? Are they freely determined by each Member State?

The Member States may decide on a French model with an insolvency auction, but the fact that it is the competent authority for the insolvency proceedings that decides this is not understandable if there are no fixed criteria for this?

- ✓ **22.2. b** Creditors should not be restricted to objecting only in cases where the best interests of creditors test is not met. Additional safeguards should be added for cases where fraudulent indications can be asserted in the transaction in cases where the aim is to achieve continuation of the business and generate new profits for the shareholders at the expense of creditors' claims.

- ✓ **22.2. d)** *A valuation of the business as a going concern out for the purposes of the statement referred to in c).*

This assessment is essential in order to be able to assess the best-interest-of-creditors-test. And this assessment is in fact referred to in Art. 32 in relation to the acquirer who is a person specially related to the debtor, which seems to be necessary ex lege this assessment of the best interest.

▪ **Article 25 Appointment of the insolvency practitioner**

It is understood that the liquidation takes place in the context of insolvency proceedings, which are opened for this purpose, so it is necessary to add this:

*The liquidation phase starts when a decision on the opening of the liquidation **proceedings is madetaken in the framework of an insolvency proceeding** , and the insolvency practitioner is appointed, in accordance with national law.*

▪ **Article 27 Assignment or termination of executory contracts.**

- ✓ We consider the continuity of the activity of the production unit being sold to be essential, as it generates well-known advantages. In particular, the transfer of contracts pending execution provides legal certainty.
- ✓ We asked for limited flexibility, and now it is enormous, but we understand that the Member States may need it, so we hope that the Member States will be flexible in other parts of the text.
- ✓ In para.1 to include public authorities can be included in c. 28.
- ✓ In favour of 27.3
- ✓ If p.4 is deleted, we interpret it as meaning that the purchaser does not value contracts that can be rescinded and that the judicial body can do so.

▪ **Article 28 Debts and liabilities of the business acquired via the pre-pack proceedings**

- ✓ **28.1:** The reintroduction of the possibility for the purchaser to take over the payment of debts on a voluntary basis is to be welcomed.

On the other hand, the inclusion of encumbrances in the possible exclusion set out in the article is negatively assessed.

In connection with this article, we are also concerned about c.28 a). It is vital to introduce limitations to the rule that purchasers shall as a general rule acquire the business free of debts and encumbrances. It is absolutely necessary to introduce the obligation to pay claims not satisfied by the insolvent party before the transfer in several cases: 1. when the acquirer has expressly assumed the obligation; 2. when it is provided for by a legal obligation; 3. in cases of company succession, labour claims and so on. If this obligation is not introduced, it should be expressly stated that the harmonisation of the directive in this area is minimal and that the Member States can extend the cases excluded from the acquisition free of debts, liabilities and encumbrances.

Another aspect that concerns us and to which we will return in Article 32 is that the situation of acquirers related to the debtor must be taken into account: in these cases there must also be an obligation to pay. In any case, the aim is to avoid situations of fraud and abuse.

- ✓ **28.2:** it is inexplicable that this precaution is introduced (the provisions of the first paragraph are without prejudice to national environmental law) and not others that protect equally protectable values, such as public interests or equality in the support of public expenditure.

▪ **Article 32 Parties closely related to the debtor in the sale process**

- ✓ **Article 32.1** last paragraph: By definition, a party closely linked to the debtor should not have access to the benefit of generally acquiring the business free of debts, charges and encumbrances, as the treatment should be identical to that of the debtor's own continued activity.

- ✓ **Article 32. 2º and c. 24 and 28 c):** This is one of the most sensitive issues in the proposal for a Directive for the interests of creditors, particularly in Spain, where sales of production units to persons related to the debtor are becoming widespread in order to defraud creditors, usually using front men and nominee companies to avoid the application of the rules that imply the assumption of the debts by the acquirer. Some of them are currently the subject of criminal proceedings for punishable insolvency.

Legitimising or encouraging these operations would lead to an exponential increase in these operations, and would seriously harm creditors, by allowing them to obtain exoneration of unsatisfied liabilities in the sphere of legal persons, without being subject to the requirements, limits or control of exoneration for natural persons.

We insist on not exonerating debts if the acquirer is related, guarantees must be added. In addition, when it is the only offer, it is necessary to contemplate as a safeguard an obligation to provide an individualised valuation of assets, in order to be able to compare with the price offered. In addition, other measures could be envisaged, such as the obligation for the acquirer to continue the activity for a longer period of time than if it is not a related party.

- ✓ **Recital 28c:** There cannot be equality between connected and unrelated acquirers of the debtor as regards the transfer of outstanding claims. The presumptions provided for in the entire legal system for connected persons must remain in force, as there is little benefit for the functioning of the business and the avoidance of unfair competition if a mechanism for clearing debts is made too easy by the mere fact of placing a connected person in charge. We see many risks. There is a very serious danger of fraud, as has already happened on several occasions. Article 224.2 TRLC ('The provisions of the previous paragraph shall not apply - The transfer of a production unit shall not entail any obligation to pay the credits not satisfied by the insolvent party prior to the transfer, whether they are insolvency or against the mass, except in the following cases - when the acquirers of the production units are persons especially related to the insolvent party') is the mirror to follow. The use of related front/straw men is favoured in order to maintain control of the productive unit, clearing it of debts, we insist as we have expressed before.

▪ **Article 34 Protection of the interests of the creditors.**

- ✓ Firstly, we would like to confirm that the removal of the creditors' consent to the release of security is optional and not mandatory. We believe it is, in view of c. 28 b), but we need reassurance.
- ✓ Secondly, in the event that the suppression is mandatory, we consider more appropriate a regime such as the one provided for in Article 214 TRLC ("Article 214.1. In any case, if the assets and rights of the active mass affected by credits with special privilege are included in the establishments, holdings or any other productive units that are sold as a whole, the following rules shall apply:

1. If they are transferred without subsistence of the guarantee, the privileged creditors shall be entitled to the proportional part of the price obtained equivalent to the value that the asset or right on which the guarantee has been constituted represents with respect to the overall value of the production unit transferred.

If the price to be received is less than the value of the collateral, the transfer must be agreed to by the special privileged creditors who have the right of separate execution, provided that they represent at least seventy-five per cent of the class of special privileged liabilities affected by the transfer. The part of the secured claim that is not satisfied shall be recognised in the insolvency proceedings with the corresponding classification.

If the price to be received is equal to or greater than the value of the guarantee, the consent of the privileged creditors affected shall not be required.

2. If they are transferred with subsistence of the guarantee, the acquirer being subrogated to the obligation of payment to be charged to the active mass, the consent of the privileged creditor shall not be necessary, the credit being excluded from the passive mass. The judge shall ensure that the acquirer has the financial solvency and the necessary means to assume the obligation being transferred.

3. In the case of tax and social security claims, the acquirer shall not be subrogated even though the guarantee subsists").

- ✓ Alternatively, Spain proposes the addition of a point c) with the following content: 'c) *The price of the sale does not cover the value of the guarantee*'.

VI. LATVIA

Title IV

PRE-PACK PROCEEDINGS

Latvia welcomes the revised wording of the proposal, in particular the clarifications introduced in Article 20(1), which clearly establish that pre-pack proceedings apply to insolvency procedures, excluding preventive restructuring procedures. Previously, this issue was not clearly defined; therefore, the clarification enhances legal certainty.

At the same time, Article 20(1) appears to suggest that a liquidation procedure can be carried out as a restructuring procedure. However, this seems to contradict Recital 22 of the preamble, which states that “The liquidation phase should begin with a decision of a judicial body or any other competent body to formally open insolvency proceedings under national law leading to the winding up of the debtor.”

In this context, we kindly request clarification on whether the liquidation phase can be carried out as a restructuring procedure.

VII. LITHUANIA

Article 19(1) states: “*Member States shall ensure that debtors who enter into pre-pack proceedings are authorised to undertake at least acts of ordinary management during the preparatory phase*”. However, the role of the monitor is not entirely clear: is the monitor responsible for the organization of the sale or is he or she just a supporting figure with a monitoring function? Consideration should be given to the inclusion of a provision of principle in this Article or in the Recitals.

Article 22

The text of the Directive lacks clarity regarding the conditions under which the preparatory phase may be initiated. Article 22(1) does not specify these conditions, only noting in Recital 22 that financial distress is a factor. This implies that a pre-pack procedure could be initiated in the case of the likelihood of insolvency. However, it is important to consider that if a company could be solvent during the preparatory phase but insolvent during the liquidation phase, a situation may arise where, at the end of the preparatory phase, the company does not meet the criteria for insolvency and, as a result, would not be able to proceed to the liquidation phase. In this context, it would be highly beneficial to provide further clarification in the text.

Article 23a provides for the possibility of suspension of the opening of the liquidation phase. However, the possibility of relaunching the liquidation phase is not clear, it is therefore suggested to clarify this in the text. Also, it is stated: “*taking into account the circumstances of the case*“, it would be useful to include examples of such circumstances in the Recitals.

Article 23

Considering that enforcement actions are suspended in court, the question arises as to how the confidentiality requirement of the preparatory phase can be effectively maintained under these circumstances. Moreover, the confidentiality clause for the preparatory phase is derived from the Recitals. It may be questioned whether this reference to the confidentiality alone provides sufficient clarity for Member States to implement the confidentiality requirement.

Article 26(1) has been improved and clarified as regards the role of the court, however, it does not refer to the consequences if a court or competent authority does not validate the contract. The same issue arises in cases where a public auction is not organized within the 2-month period mentioned in Article 26(2).

Article 33a states: “*Member States shall ensure that, where security interests encumber the business subject to the pre-pack proceedings, creditors who are the beneficiaries of those security interests may offset their claims in their bid only provided that the value of those claims is significantly below market value of the business*”. It remains unclear what constitutes “significantly below market value.” It would be greatly helpful if the criteria for such an assessment could be clarified in the Recitals.

VIII. HUNGARY

<p>A magyar delegáció véleménye az irányelvtervezet IV. A pre-pack eljárás címe harmadik elnökségi kompromisszumos szövegjavaslatával kapcsolatban:</p>	<p>Comments by the Hungarian delegation on the third Presidency compromise text on Title IV. Pre-pack proceedings of the proposed Directive:</p>
<p>Magyarország köszönetét fejezi ki a lengyel elnökségnek az írásbeli véleményezési határidő meghosszabbításáért.</p>	<p>Hungary thanks the Polish Presidency for extending the deadline for written comments.</p>
<p>Általános észrevételek a IV. A pre-pack eljárás cím harmadik elnökségi kompromisszumos szövegjavaslatával kapcsolatban:</p>	<p>General comments on the third Presidency compromise text on Title IV. Pre-pack proceedings:</p>
<p>1. Magyarország ebben a formájában nem tudja támogatni a IV. címet.</p>	<p>1. Hungary cannot support Title IV in this form.</p>
<p>2. Ezzel együtt a pre-pack eljárás bevezetésének célját – működő vállalkozás értékesítéséből magasabb bevétel elérése – előremutatónak tartjuk.</p>	<p>2. Nevertheless, we consider the objective of introducing the pre-pack proceedings - to achieve higher purchase price from the sale as a going concern an objective that we can support.</p>
<p>3. Ugyanakkor a jelenlegi szabályozás álláspontunk szerint túlzottan részletes, véleményünk szerint az irányelvben csak a főbb elveket kellene keretjelleggel meghatározni, a többi a tagállami jogalkotásra kellene hagyni, ezzel megfelelő rugalmasságot biztosítva a tagállamok számára.</p>	<p>3. However, we believe that the current text is too detailed and that the directive should only set out the main principles as framework, leaving the rest to Member State legislation, thus giving sufficient flexibility.</p>
<p>4. A szabályozás általános vezérelveként csak annyit javasolunk szabályozni, hogy a tagállamok kötelesek bevezetni olyan mechanizmusokat, amelyek támogatják akár a fizetéseképtelenségi eljárás megindítását megelőzően vagy azt követően bírói vagy hatósági kontroll mellett a működő üzemenként való értékesítést.</p>	<p>4. The general guiding principle we propose to solely state that Member States should be obliged to put in place mechanisms to support the sale as a going concern either before or after the opening of insolvency proceedings under judicial or administrative control.</p>
<p>5. A magyar jogalkotó szándékában áll, hogy egy új fizetéseképtelenségi törvényt fogadjon el. Az új jogszabály egy egységes eljárásrendet tervez bevezetni, amelyben jelentős hangsúly kerülne a reorganizáció lehetőségének a biztosítására. A pre-pack eljárás ilyen részletes szabályozása az új magyar szabályozás jogdogmatikai rendszerébe nem illeszkedik.</p>	<p>5. The Hungarian legislator intends to adopt a new insolvency statute. The new legislation envisages the introduction of a unified procedure, with a strong emphasis on the possibility of reorganisation. Such detailed rules of the pre-pack proceedings would not fit into the legal-dogmatic scheme of the new Hungarian legislation..</p>
<p>6. A pre-pack eljárás tervezett irányelvi szabályozása valójában nem egy szolvencia alatt megindított kvázi megelőző eljárás, hanem egy</p>	<p>6. The proposed Directive's regulation of the pre-pack proceedings is not in fact a quasi-preventive procedure opened during solvency,</p>

<p>inszolvenciát követő eljárás, azaz valójában nem válik el élesen a fizetési képtelenségi eljárásoktól, holott épp az volna az eljárás célja, hogy még a társaság szolvens szakaszában biztosítsa az újjászervezés lehetőségét.</p>	<p>but a post-insolvency procedure, i.e. it is not in fact separated from insolvency proceedings, although the purpose of the procedure would be to ensure the possibility of reorganisation while the company is still in the solvent phase.</p>
<p>7. A pre-pack eljárás céljával ellentétes a tervezett uniós szabályozás, hiszen az eljárás céljának épp az kellene lennie, hogy az adós társaság a legnagyobb szabadságot kapja. Az állami szabályozásnak ebben a szakaszban kizárólag arra kellene korlátozódnia, hogy a társaság a pre-pack-t követően szabályozott keretek között kerüljön felszámolásra.</p>	<p>7. The proposed EU legislation is contrary to the purpose of the pre-pack proceedings, which should be to give the debtor company the greatest freedom. At this stage, state rules should be limited to ensuring that the company is liquidated under a regulated framework after the pre-pack.</p>

<p>Konkrét észrevételek a IV. A pre-pack eljárás cím harmadik elnökségi kompromisszumos szövegjavaslatával kapcsolatban.</p> <p>Az észrevételek szívésségi angol fordítása a magyar szöveg alatt dőlt betűvel található.</p>	<p>Specific comments on the third Presidency compromise text under Title IV - The pre-pack procedure.</p> <p>The courtesy English translation of the comments is in italics below the Hungarian text.</p>
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Whereas:

[...]

- (21) In the context of insolvent liquidation, national insolvency laws should allow for the realisation of the assets of ~~the~~ **a** business to occur through the sale of the business or part thereof as a going concern. ‘Sale as a going concern’ should **be understood to mean, in for the purpose of this context Directive**, the transfer of ~~the~~ **a** business, in whole or in part, to an acquirer in **such** a way that ~~that~~ **that** business ~~(, or part thereof) may,~~ **can** continue to operate as an economically productive unit. ~~Sale as a going concern and~~ **should not** be understood as ~~opposed to~~ **include the** sale of the assets of the business piece by piece (piecemeal liquidation).

- (22) It is generally assumed that more value can be recovered in liquidation by selling the business (, or part thereof), as a going concern rather than by piecemeal liquidation. In order to promote **sales of a going concern**—~~sales in liquidation~~, national insolvency regimes should ~~include a pre-pack~~ **provide for a mechanism** proceeding, where ~~the~~ **by means of which** a debtor in financial distress, with the help of a “monitor”, ~~seeks possible~~, **can seek** interested acquirers and ~~prepares~~ **prepare** the sale of the business as a going concern (**‘pre-pack proceedings’**) before the formal opening of insolvency proceedings, ~~so that the~~. **The remaining assets of that business can therefore** be quickly realised shortly after the opening of the formal insolvency proceedings. **This Directive should therefore lay down minimum standards on pre-pack proceedings while allowing for a degree of flexibility of implementation by Members States adapting those standards in existing national insolvency law.**

- (22a) The pre-pack mechanism should respect the rights of employees in insolvency proceedings as granted under EU law. Specifically, the pre-pack proceedings should be governed by statutory or regulatory provisions and should be construed in a way where the transfer of all or part of an undertaking is prepared under the supervision of the court or competent authority, prior to the institution of formal insolvency proceedings that are instituted with a view to the liquidation of the assets of the debtor. The primary aim of the pre-pack proceedings is to enable, in the insolvency proceedings, a liquidation of the debtor's assets by the transfer of all or part of the undertaking as a going concern which satisfies to the greatest extent possible the claims of all the creditors and preserves employment as far as possible. Consequently, the liquidation phase of the pre-pack proceedings in this Directive is an eligible procedure for the purposes of article 5(1) of Council Directive 2001/23/EC².
- (22b) Pre-pack proceedings do not replace national substantive rules, in particular, on the ranking of creditors' claims, or on the distribution of proceeds, the participation of creditors or the remuneration of the insolvency practitioner. Nevertheless, such rules should not run counter to the objectives of pre-pack proceedings. In the event that a court or competent authority does not authorise the sale of a business, or part thereof, as proposed by the monitor, insolvency proceedings should proceed in accordance with the applicable national insolvency law.
- ~~(23) For the effective management of the pre-pack proceedings, the court before which such proceedings are brought should also have the power to decide on issues closely related to the pre-pack sale of the business or part thereof.~~

² Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

(24) ~~The pre~~**Pre**-pack proceedings should ensure that ~~appointed in the preparation phase might propose~~ **submits for authorisation to the court or competent authority** the best bid obtained ~~sale process for authorisation by the court only if it declares that, in its view,~~ **It should be possible to require the monitor to assess and state whether the** piecemeal liquidation would ~~not~~ recover manifestly more value for creditors than the market price obtained ~~for~~ **through the sale of** the business (, or part thereof), as a going concern. ~~The~~ **As a rule, the** going-concern value **of a business** is, ~~as a rule,~~ higher than ~~theits~~ piecemeal liquidation value because it is based on the assumption that the business ~~continues~~**will continue** its activity with the minimum of disruption, ~~has~~**maintain** the confidence of financial creditors, shareholders and clients and ~~continues~~**continue** to generate ~~revenues~~**revenue**. Therefore, the monitor's ~~declaration~~**statement** should not require a valuation ~~being made to~~ **be carried out** in every case. ~~The~~**Any conclusion by the** monitor should only reasonably ~~conclude~~ that the **going-concern** sale price is not significantly lower than the proceeds ~~that could be recovered through~~ **of** a piecemeal liquidation **should be duly justified. National law should may require the monitor to take into account elements other than price, including the public interest or ensuring the viability of a business.** However, ~~ana~~ **requirement to impose** increased scrutiny should ~~be required from~~ **apply where the assessment of** the monitor or the insolvency practitioner ~~in cases~~**involves a case** where the only-existing offer is made by a party who is closely related to the debtor. ~~In such situations, the~~**The** monitor or the insolvency practitioner **concerned** should reject ~~the~~**such an** offer if it does not satisfy the best-interest-of-creditors test.

(25)

(26)

(27)



(28)

PUBLIC

(28a)

(28b)

(28c)

PUBLIC

(29)

(30)

[...]



Title I

GENERAL PROVISIONS

Article 1

Subject matter and scope

[...]

4. **The pre-pack proceedings apply to debtors that are legal persons. ~~Member States may extend the application of those proceedings to natural persons who are entrepreneurs.~~**

Article 2

Definitions

For the purposes of this Directive, the following definitions apply:

[...]

- (p) ‘pre-pack proceedings’ means a preventive procedure carried out under judicial or administrative control that allow for the sale of the business of the debtor, in whole or in part, as a going-concern to the best bidder, with a view to resolve the debtor's liquidity problems ;

(pa)

(pb)

(q) ‘party closely related to the debtor’ means:

(a) **for the purposes of Title II, the following:**

[...]

(b) **for the purposes of Title IV, the persons listed under point (a) and any other persons, including legal persons, with preferential access to non-public information on the affairs of the debtor.**

Article 3

Relevant point in time in relation to close relatedness

The point in time for determining whether a party is closely related to the debtor shall be:

(a) [...]

(b) **for the purposes of Title IV, the day when the preparation phase of the pre-pack proceedings referred to in Article 19 (1) starts or during a period falling at least three months prior to the start of commencement of the preparation phase.**

Article 3a

National law and minimum harmonisation

[...]

3. Member States may adopt or maintain laws which increase the chances of obtaining a fair market price for the sale of the debtor’s business, or part thereof, as a going concern in the context of the pre-pack proceedings provided for in Title IV, provided that such laws do not run counter to the objectives of this Title.

Title IV
PRE-PACK PROCEEDINGS
Chapter 1
General provisions

Article 19

Pre-pack proceedings

1. **Member States shall ensure that debtors have access to pre-pack proceedings in accordance with this Title.** ~~The preparation phase of pre-pack proceedings shall be followed by a liquidation phase that shall be conducted in accordance with national law.~~

Member States ~~may~~ shall ensure that debtors who ~~access~~ enter into pre-pack proceedings are authorised to undertake at least acts of ordinary management.

~~Member States shall ensure that pre-pack proceedings are composed of the following two consecutive phases:~~

- (a) ~~the preparation phase, which aims at finding an appropriate buyer for the debtor's business or part thereof;~~
- (b) ~~the liquidation phase, which aims at approving and executing the sale of the debtor's business or part thereof and at distributing the proceeds to the creditors.~~

2. ~~Pre-pack proceedings shall comply with the conditions set out in this Title. National law applies to~~ **As regards all other matters not regulated by this Title, including the ranking of claims, and the rules on the distribution of proceeds, the participation of creditors and the remuneration of the monitor and the insolvency practitioner,** ~~Member States shall apply national provisions on winding-up proceedings, provided that they~~ **it is** ~~are compatible with Union law, provided that such laws do not run counter to the objectives of this Title.~~ **including the rules laid down in this Title.**

Article 20

Relationship with other Union legal acts

1.

~~Monitors referred to in Article [22](#) may be considered to be insolvency practitioners as defined set out in Article 2, point (5), Annex B of to Regulation (EU) 2015/848.~~

2.

Article 21

Jurisdiction in pre-pack proceedings

~~The court having jurisdiction in pre-pack proceedings shall have exclusive jurisdiction in matters relating to the scope and effects of the sale of the debtor's business or a part thereof in pre-pack proceedings on the debts and liabilities, as referred to in Article [28](#).~~

Chapter 2

Preparation Phase



PUBLIC

4. ~~Member States shall ensure that, in the course of the preparation phase, the debtor remains in control of its assets and the day to day operation of the business.~~
5. ~~Member States shall ensure that the remuneration of the monitor is:~~
- ~~(a) by the debtor where no subsequent liquidation phase ensues;~~
 - ~~(b) by the insolvency estate as a preferential administrative expense where the liquidation phase ensues.~~
- 5a. ~~Member States shall ensure that the monitor is liable for the damages caused to creditors and third parties by its failure to comply with the obligations set out in paragraph 2.~~**

Article 23

Stay of individual enforcement actions

Article 23a

Suspension of the opening of the liquidation phase

Article 24

Principles applicable to the sale process

1. Member States shall ensure that the sale process carried out during the preparation phase is competitive, transparent, fair and meets market standards.
2. Where the sale process only produces one binding offer, that offer shall be deemed to reflect the business market price.
3. Member States may depart from paragraph 1 only where the court runs a public auction in the liquidation phase in accordance with Article [26](#). In this case, Article [22](#)(2), point (b) shall not apply.

Chapter 3 Liquidation Phase

Article 25

Appointment of the insolvency practitioner

~~Member States shall ensure that, when the liquidation phase is opened, the court appoints the monitor referred to in Article 22 as insolvency practitioner.~~

Article 26

~~**Authorisation of the sale of the debtor's business or part thereof**~~

Principles applicable to the liquidation phase

~~—The court shall not authorise the sale where the requirements laid down in Article 22(2) and (3) and Article 24(1) and (2) are not met. Member States shall ensure that, in the latter case, the court continues with the insolvency proceedings.~~

2.

Article 27

Assignment or termination of executory contracts

~~1. Member States shall ensure that the acquirer of the debtor's business or part thereof is assigned the executory contracts which are necessary for the continuation of the debtor's business and the suspension of which would lead to a business standstill. The assignment shall not require the consent of the debtor's counterparty or counterparties.~~

~~The first subparagraph shall not apply if the acquirer of the debtor's business or part thereof is a competitor to the debtor's counterparty or counterparties.~~

~~2. Member States shall ensure that the court may decide to terminate the executory contracts referred to in paragraph 1, first subparagraph, provided that one of the following conditions applies:~~

~~(a) the termination is in the interest of the debtor's business or part thereof;~~

~~(b) the executory contract contains public service obligations for which the counterparty is a public authority and the acquirer of the debtor's business or part thereof does not meet the technical and legal obligations to carry out the services provided for in such contract.~~

~~Point (a) of the first subparagraph shall not apply to executory contracts relating to licenses of intellectual and industrial property rights.~~

~~3.— The law applicable to the assignment or to the termination of executory contracts shall be the law of the Member State where the liquidation phase has been opened.~~

~~4.— Member States shall ensure that the offer on the sale of the business or part thereof provides a list of the executory contracts that the acquirer deems necessary, and those which shall be terminated.~~

Article 28
Debts and liabilities of the business acquired via the pre-pack proceedings

Article 29

Specific rules on the suspensive effects of appeals

~~2. Member States shall ensure that the court hearing the appeal has discretion to exempt a natural person appellant, totally or partially, from the provision of a security if it considers such exemption appropriate in light of the circumstances of the given case.~~

Chapter 4

Common p~~Provisions relevant to both phases of the pre-pack proceedings~~

Article 30

Criteria to select the best offer

Member States shall ensure that the criteria to select the best bid in the pre-pack proceedings are **set out in national law and are** the same as the criteria ~~used to be applied to~~ select between competing offers in ~~winding-up~~ **liquidation** proceedings.

Article 31

Civil liability of the monitor and of the insolvency practitioner

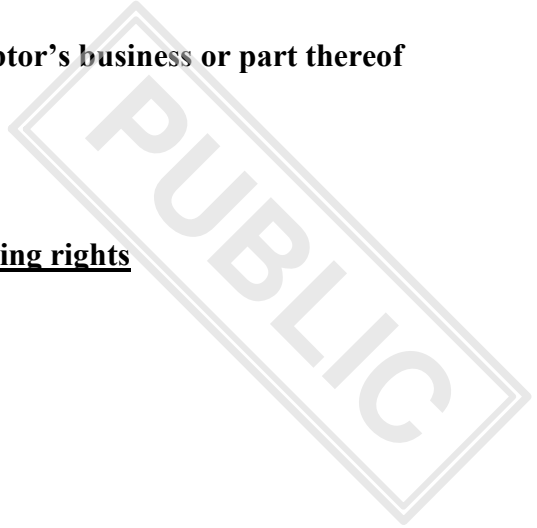
Article 32
Parties closely related to the debtor in the sale process



Article 33
Measures to maximize the value of the debtor's business or part thereof

Article 33a

Pre-emption and bidding rights



Article 34
Protection of the interests of the creditors

1. Member States ~~may~~ ~~shall ensure~~ **provide** that creditors **of**, as well as holders of equity ~~of~~ **in**, the debtor's business have ~~at least~~ the right to be heard by the court **or competent authority** before the authorisation or the execution of the sale of the debtor's business or part thereof.

~~Member States shall lay down detailed rules in order to ensure the effectiveness of the right to be heard under the first subparagraph.~~

- ~~2. By way of derogation from paragraph 1, Member States may by law not grant the right to be heard to:~~

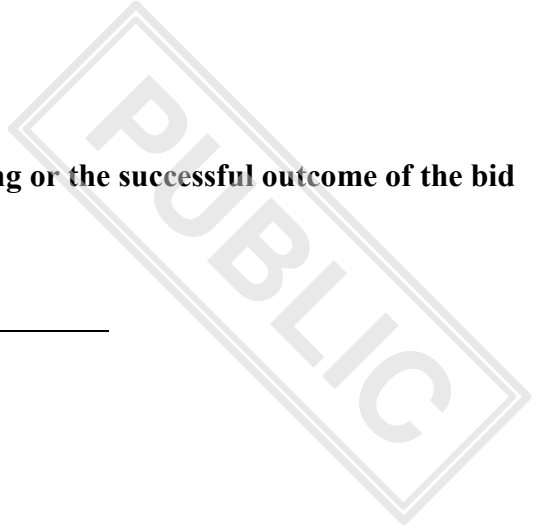
- ~~(a) the creditors or holders of equity who would not receive any payment or keep any interest according to the normal ranking of liquidation priorities under national law;~~
- ~~(b) the creditors of executory contracts whose claims against the debtor arose before the authorisation of the sale of the debtor's business or part thereof and are supposed to be paid in full under the terms of the pre-pack offer.~~

3.

(b)

Article 35

Impact of competition law procedures on the timing or the successful outcome of the bid



IX. NETHERLANDS

Title IV – Pre-pack proceedings

General comments Revised text Title IV

- The Netherlands welcomes the proposal to regulate pre-pack proceedings.
- Pre-pack proceedings are known in the Netherlands for years as a national practice derived from case-law. In our experience, pre-pack proceedings are an effective means to realize a going-concern sale in liquidation and, consequently, to allow for the recovery of more value for creditors compared to a piecemeal sale. Attached you will find a document that contains the most important aspects of the Dutch pre-pack proceedings. Therefore, we believe Title IV may offer a real contribution to the objective to facilitate cross-border investments and the capital markets union.
- We think the revised texts contains improvements and clarifications. On some points the Netherlands thinks further flexibility is necessary. Furthermore, the Netherlands wants to stress the importance of the confidentiality of the preparation phase.

Title I – General provisions

Article 3a – National law and minimum harmonisation

- Article 3a states that Member States may adopt or maintain laws which increase the chances in obtaining a fair market price of the debtor's business, as long as those laws do not run counter the objectives of this title. We question how this relates to for example article 22 paragraph 2 sub b. Do the national laws have to provide in a system where a preparation phase is competitive, transparent, fair and meets market standards to come to a fair market price? How can we know whether a national law complies with this? And does that mean that Member States can deviate from Title IV? We would like some clarification about this.

Chapter 1 – General provisions

Article 19; recital 22 – Pre-packproceedings

- In our view, maintaining that the preparation phase is confidential and/or silent, is important to maintain and maximise the value for the business. Of course, proper safeguards should exist, for example an entry test to start the preparation phase and appointing a monitor to act in the interests of joint creditors. In that light, we are happy that the revised recital 22 clarifies that the preparation phase is confidential. That the preparation phase is confidential is key for maximizing the value of the insolvent estate and preserving employment. For these reasons it is important to us that the preparation phase is and remains silent/confidential. Also the proposal seems to mainly focus on achieving a sale of the business, whereas the pre-pack, as it is known in the Netherlands, is actually also open in cases where the company will not be able to continue. During the preparation phase The pre-pack method is then mainly used to be able to ensure a "soft landing" of the company in bankruptcy. So the damage to creditors, employees and costumers involved can be minimised.
 - For example, the debtor might initially have asked have to open a pre-packproceedings, in the hope that a sale can be achieved, but during the preparation phase it may turn out that a restart is not possible after all. In that case, a continuation of preparation of a bankruptcy may still be desirable. If the preparation allows the company to enter the bankruptcy with a "soft landing", this may reduce the damage resulting from the bankruptcy to creditors and other stakeholders.

- We believe this method is beyond the scope of this proposal and that this method is allowed under this proposal. From the discussion at the working party of 9 January 2025 we understood that this method is still possible under this proposal. We are in favour of clarifying this in recital 21.
- While the preparation phase will usually be followed by the liquidation phase, there may be exceptions where this is not the case. Therefore, we welcome the deletion of the second sentence of paragraph 1.

Article 20; recital 22, 22a, 22b – Relationship with other Union legal acts

- Regarding to Article 20 the relationship between the Directive on Transfers of Undertakings (2001/23/EG) and this proposal remains somewhat unclear.
 - According to the case law of the European court of justice, it should be verified in every specific case whether a particular proceedings qualifies as a bankruptcy proceedings or any analogous insolvency proceedings instituted with a view to liquidation. It is not sufficient that the *statutory* objective of the insolvency proceedings is liquidation.
 - We question if it is the intention of Article 20 paragraph 2 to deviate from this case law and to provide *in general* that the liquidation phase will qualify as insolvency proceedings instituted with a view to liquidation in the sense of Article 5 (1) of the Directive on Transfers of Undertakings. A test for each specific case would then no longer be necessary.
 - From the previous discussions, we understood this was the intention, but Recital 22a still states that the pre-pack mechanism should respect the rights of employees in insolvency proceedings as granted under EU law. This should be clarified in this recital.

Article 21; recital 23

- Now article 21 was deleted, we welcome the deletion of the corresponding recital 23.

Chapter 2 – Preparation phase

Article 22 – Monitor

Paragraph 1

- We favour the possibility for Member States to set conditions in national law for the appointment of a monitor. This gives Member States the flexibility they needed in adopting these provisions into their national law. This fits within a more principle based approach which we are in favour of. Along that line we are in favour of the revised text article 22.
- However, the current wording of paragraph 1 and 1a is somewhat unclear. Paragraph 1a states that the procedure for the appointment of the monitor, and therefore the start of the pre-pack proceeding, shall be set in accordance to national law. Based on this we understand that it is up to Member States to determine in which circumstances pre-pack proceedings can be opened. In this interpretation correct? In that case the addition of paragraph 1a seems unnecessary, because in that case Member States could decide by themselves in which circumstance a pre-pack proceedings can be opened.
- We think it is important that Member States have the possibility to introduce an entry test for the preparation phase. The preparation phase is confidential, so Member States should be able to verify that this confidentiality is justified in a particular case.
- In line with this, Member States should also be able to limit the duration of the preparation phase and be able to provide that the preparation phase will end in certain circumstances, for example if the monitor is of the opinion that the sales process is not fair and transparent. The text of the Directive should explicitly say Member States have this possibility.

Paragraph 2

- In the Netherlands the monitor is independent and acts in the interests of joint creditors during the preparation phase, and also during the liquidation phase. In line with a more principle based approach our suggestion is to include this in Article 22 or in the recitals.
- According to paragraph 2 sub b and recital 26, it is still somewhat unclear what is meant by “competitive, transparant, fair and meets market standard”. What exactly is expected from the monitor in that case? Examples are listed in recital 26, but this list does not seem to be exhaustive. Any more guidance on this point would be appreciated.
- According to Article 22 paragraph 2 under c the monitor shall document and report each step of the sale process and make relevant documents and reports in a timely manner to all parties involved in the preparation phase. The current text does not make clear who the parties involved are. This should be clarified in the text of the article.
- It is still unclear how this relates to the fact that the preparation phase is confidential. This should be clarified, for example in the recitals.

Paragraph 2a

- Furthermore, we understand that under sub b the creditors have to approve the recommendation of the monitor during the preparation phase. How does this relates to the confidentiality of the preparation phase?
- Since the monitor (at least in the Netherlands) already acts in the interests of joint creditors, we understand that the monitor does not have to separately seek consent from the creditors. Is that interpretation correct? Given that the preparation phase is confidential, we think our interpretation will be a good solution. The preparation phase will then remain silent. As mentioned at paragraph 2, our suggestion is to include in the text of article 22 or in the recitals that the monitor is independent and acts in the interest of joint creditors.

Paragraph 2b

- Paragraph 2b suggests that a creditor can challenge the assessment of the monitor. We question how this relates to the confidentiality of the preparation phase. How does the creditor finds out about the assessment of the monitor? We would like to emphasize again the importance of the confidentiality of the preparation phase of the pre-packproceedings.

Paragraph 5a

- We support the deletion of paragraph 5a as article 31 also provides in liability of the monitor and the insolvency practitioner. We will reiterate our objections according to the liability of the monitor and insolvency practitioner at article 31.

Article 23 – Stay of individual enforcement actions

- We welcome the amendment to article 23 because making the stay optional for Member States fits within a more principle based approach which we are in favour of.
- When a stay of individual enforcement actions is declared in the Netherlands during bankruptcy, creditors affected by it are informed. This goes against the principle that the preparation phase is confidential, which is a key element for the pre-pack. It should be clarified how the declaration of the stay of individual enforcement actions, which is public, relates to the principle that the preparation phase is confidential.

Chapter 3 – Liquidation phase

Article 25

- We are in favour of appointing the monitor as a insolvency practitioner. This is in most cases (cost-)efficient, as he is well-prepared to carry out the liquidation phase.

Article 26; recital 25 – Principles applicable tot the liquidation phase

Paragraph 1

- We are in favour of a more principle based approach according to the authorisation of the sale as mentioned in article 26. We believe a more flexible approach could for example offer Member States the possibility to introduce additional criteria for authorisation. This gives Member States the flexibility they need when adopting this provision into national law.
- Furthermore, we welcome the possibility that the court could authorise the sale if the creditors approve the recommendation of the monitor regarding the best bidder. As said at article 22, we would like to see some clarification in the text about the relationship with the confidentiality of the preparation phase.
- Besides, the proposal does not regulate the consequences if the court does not authorize the sale of the debtor’s business. If this is up to national law, this should be clarified.

Article 27; recital (27), 28 – Assignment or termination of executory contracts

Paragraph 1

- The Netherlands was previously concerned about this article, but the new compromise texts strike the right balance and the Netherlands can support this article, and the flexibility it provides through exceptions based on the type of contract, the quality of the parties and the interests of the business. However, it is not completely clear what exact exceptions are allowed. This could be clarified in the recital.

Paragraph 4

- We support the deletion of paragraph 4, because the construction stated in paragraph 4 was susceptible for abuse. The acquirer could decide that every contract is necessary, which is not always the case.

Paragraph 5

- We are in favour of the addition of paragraph 5. In line with a more flexible approach we can support that it is up to Member States themselves to determine in which circumstances executory contracts can be terminated. However, we question how this relates to legal systems that allow ipso facto clauses. Does this article prevent contracts from being terminated in case of bankruptcy? And can these clauses also be invoked against the acquirer in that case?

Paragraph 6

- We think it is an improvement that paragraph 5 clarifies the relation between the Directive on Transfers of Undertakings and this proposal. In that way it is clear that the effects of the sale for employment contract is exclusively regulated by the Directive on Transfer of Undertakings.

Article 28; recital 28a – Debts and liabilities of the business via the pre-pack proceedings

- We think it is important to consider employees’ rights in prepack proceedings.
- Therefore, we are happy that the revised article 28 paragraph 1 and recital 28a clarify that claims resulting from contracts of employment are excluded from the general rule that the acquire acquires a business free of debts and liabilities.
- The effects of the sale for employment contract should exclusively be regulated by the Directive on Transfers of Undertakings. This could be added to recital 28a.

- Furthermore, we fear that article 28 could be abused.
 - An example is an asbestos company, that may risk a lot of future claims of injured parties, since parties may get ill many years after they have been in contact with asbestos. In that situation, the transfer of the business during pre-pack proceedings becomes a very attractive option, because the acquirer would be able to acquire the business free of debts and liabilities. These could be susceptible for abuse. To prevent this abuse, we would like to make the following proposals, which maintain the main rule that debts remain with the selling party, but give Member States space to deviate from this in specific situations.
 - To prevent abuse, we suggest to include in the text that Member States can derogate from paragraph 1 for imperative reasons of public interest. For example in case of environmental damage or if it concerns asbestos victims.
 - Another option is to include in the text of the recital 28a that article 28 does not preclude the possibility that, in assessing the acquirer's liability, conduct of his legal predecessor is taken into account if that conduct is imputable to him under national law.
 - As an alternative, Member States should have the option to limit this provision to debts that may be submitted in the liquidation proceedings. This could be a more general provision which states that Member States have the option to limit this provision to debts that may be submitted in the liquidation proceedings.
 - If any of the above options are provided, the current second paragraph of article 28 could be deleted.

Article 29 – Suspensive effects of appeal

- We are happy with the more flexible approach of article 29. The revised text gives Member States more room when implementing this provision into national law.

Chapter 4 – Provisions relevant to both phases of the pre-pack proceedings

Article 30; recital 24 – Criteria to select the best offer

- We are happy that the revised Recital 24 clarifies that to select the best bid, the monitor can also take into account elements other than the (highest) price, such as public interest or ensuring the viability of the business.
- Furthermore, we think it is an improvement that it is up to Member States to determine the criteria to select the best bid in the pre-pack proceedings. This is in line with a more principle based and flexible which we are in favour of.

Article 31 – Civil liability of the monitor and the insolvency practitioner

- We think it is important for the insolvency practitioner to have a broad margin of appreciation in performing his duties. We favour a flexible approach, that leaves room for a liability that is more in line with the existing liability regimes for insolvency practitioners in national laws, or, if this should be harmonised, only liability in case of gross neglect or fault. In that light we welcome the revised text of article 31.
- However, we question why equity holders are included in the text of the article. Now that monitor and/or insolvency practitioner acts in the interests of the creditors, we don't see why equity holders should be able to hold the monitor and/or insolvency practitioner liable. Therefore we doubt the addition of equity holders to article 31.

Article 32; recital 28c – Parties closely related to the debtor

Paragraph 1

- We have concerns regarding the definition of a "closely related party", since we fear that it may lead to much discussions and legal uncertainty. We prefer a clear, exhaustive list of parties that are closely related.

- Under article 32 sub c, a valuation of the business must be made when a party closely related to the debtor wants to acquire the business. We would like to know at what time such valuation should take place. We would like to see some clarification on this point.

Recital 28c

- Recital 28c seems to suggest that the bidding process needs to ensure complete equal opportunities for closely related parties and other bidders and information symmetry. We are wondering whether this is possible, especially within the limited time there is available to prepare for the sale in a situation of financial distress. We question if it is required from Member States to ensure perfect information symmetry and how it will be possible to achieve this. Any guidance on this point would be appreciated.

Article 33 – Measures to maximize the value of the debtor’s business or part thereof

- We support the deletion of point b.
- However, we believe the text is still too detailed. If the intention is to offer a similar protection for interim financing as is included in the Restructuring Directive, the Article should be drafted more in line with the Restructuring Directive.
- Furthermore, it should be clarified in the text that it is not the monitor or insolvency practitioner himself that obtains the interim financing, but he will only “monitor” the process.

Article 33a; recital 29, 30 – Pre-emption and bidding rights

- We believe this provision is too detailed and is not necessary for the objective of the proposal. We prefer to delete this article or make it optional for Member States.
- We believe Recital 30 is confusing. We think the intention of the proposal is only to limit the amount of the claim that a secured creditor may offset in their bid. Recital 30 seems to suggest that this proposal limits the actual amount of the bid itself, even if the secured creditor plans to pay the actual amount and does not intend to offset his claim in the bid.

Article 34 – Protection of the interests of the creditors

Paragraph 1 and 2

- We support the amendment of paragraph 1 and the deletion of paragraph 2. We think it is appropriate that this provision is optional for Member States, since this allows Member States to make a choice that fits their national regimes best.

Paragraph 3

- Paragraph 3 states that Member States shall ensure that security interests are released in pre-pack proceedings under the same requirements that would apply in the liquidation proceedings. In the Netherlands some security interests are not released during liquidation proceedings. For example pledge and mortgage holders can exercise their rights in bankruptcy as if there was no bankruptcy. With a view on a good financing practice, we think it is necessary that this is possible in pre-pack proceedings. In this light we welcome the addition of the phrase “under national law” in paragraph 3.
- Furthermore, we welcome the clarification of recital 28b which states that the release of security interests over assets belonging to the debtor’s business should be governed by national law.

NL experience silent preparation phase pre-pack procedure

The preparation phase of the pre-pack procedure

During the discussion on Title IV (Pre-pack procedure) of the Commission's proposal for a Directive harmonizing certain aspects of insolvency law (COM(2022) 702), **various questions** were raised by Member States about the **envisaged (confidential) nature** of the **preparation phase** of the pre-pack procedure.

The Netherlands (NL) has **many years of experience** with pre-pack proceedings since their introduction in the Dutch legal system over a decade ago. These proceedings have **proven to be effective** in increasing the chances of a going-concern sale in liquidation. Consequently, they allow for the recovery of more value for creditors and the preservation of more jobs in comparison to a piecemeal sale.

The silent preparation phase in the NL

An **essential part** of the Dutch pre-pack proceedings is the **silent preparation phase**. This phase is followed by traditional bankruptcy proceedings in which the sale is concluded. We would like to facilitate future discussions on the Commission's proposal by **outlining** in this note the **specifics** of the silent preparation phase in the NL. This includes its **broader embedment** in the insolvency system and the **various safeguards** that protect the interests of parties involved, especially creditors.

NB: The pre-pack proceedings in the Netherlands are a national practice derived from case law. There's a draft bill in parliament that formalizes and codifies this practice. The below is based on the draft bill.

Should you have any queries regarding this topic, please do not hesitate to contact us through our Permanent Representation (coen.brouwer@minbuza.nl).

NL regular bankruptcy proceedings

Regular bankruptcy proceedings are at the centre of Dutch pre-pack proceedings. The objective of Dutch bankruptcy proceedings is liquidation: all assets of the debtor are realized in order to recover as much value as possible for the body of creditors.

This task is entrusted to a **court appointed trustee** (*curator*, who qualifies as an Insolvency Practitioner as mentioned in the proposal). From a property law perspective, the debtor is still owner of the assets, but has no power of disposal anymore. The trustee primarily **represents the body of creditors**, but takes **collective interests** into account as well, such as the safeguarding of employment. Creditors' committees do occur, but creditors usually leave it to the trustee.

The trustee is overseen by a **supervisory judge** (*rechter-commissaris*), who **verifies** that the trustee fulfils his or her task properly. All important decisions that a trustee has to make, should be **approved** by the supervisory judge, including a going concern or piecemeal sale of the company.

NL Pre-pack proceedings

Subject to criteria tested in court

In case of pre-pack proceedings, the bankruptcy proceedings are preceded by a silent preparation phase. These proceedings are only open to companies whose insolvency is unavoidable and who can show that the preparation phase **increases the chances** of a scenario in which the **stakeholders are better off**, i.e. when:

- (i) the chances of a going concern sale are increased (**maximizing value**); or
- (ii) it makes **damage mitigation** possible (which is no part of the proposed directive).

NL experience silent preparation phase pre-pack procedure

NB: Damage mitigation is particularly relevant for companies whose activities have impact on a societal level, such as hospitals, schools and energy companies. The preparation phase allows the trustee to identify problems at an early stage, so they can be addressed quickly once the bankruptcy proceedings have commenced.

Access to **pre-pack proceedings** in the NL is **subject to these criteria**. They legitimize the confidential nature of the preparation phase. Companies who want access to pre-pack proceedings should submit a **request to the Court** showing that these criteria are met.

Confidential only at the start

The company's request for pre-pack proceedings is heard by the Court **behind closed doors** (similar to requests for bankruptcy proceedings). It is considered that in these cases the **interest of the debtor** justifies an exception to the main rule of a public hearing.

In general a **Court decision** in the NL is **made public**, by making it available in writing at the Courts registry at a date that has been announced in advance to the parties (this is based on general case law). At that date the parties, as well as any third party, can get a copy of the Court decision. Pleadings and other documents that have been submitted by parties are not made public.

However, decisions in cases that are heard behind closed doors will only be provided to **third parties** in **anonymous form**. This applies to the decision of the Court on a **request for pre-pack proceedings**. That a Court has granted a company access to pre-pack proceedings will therefore generally not be known to third parties by access to the Court's decision.

Because the bankruptcy of the company is imminent once the **preparation phase** commences, this phase **does not take long**. Usually the court allows a preparation phase of two weeks, but an extension is possible.

Safeguarded by independent supervision

If the request for pre-pack proceedings is granted, the Court appoints a '**prospective trustee**' and '**prospective supervisory judge**'. When the company is subsequently declared bankrupt, the same persons are generally appointed as the trustee and the supervisory judge.

When the objective of the pre-pack is to increase the chances of a going concern sale, the **company prepares** this **sale** during the preparation phase under the **watchful eye** of the **prospective trustee** and prospective supervisory judge. Any **statutory employees council** or employee representative body must be **involved** in the preparations of the sale.

Preparations of the sale consist of *i.a.* approaching potential bidders, negotiating agreements etc. Because the bankruptcy of the company is imminent, the preparations of the sale take place under time pressure. The elements of an M&A process are there, but the process is characterized by short timelines, a demarcated information package and (as the sale is concluded in bankruptcy by the trustee) limited to no contractual representations and warranties.

Embedded in normal bankruptcy proceedings

During the preparation phase, the **prospective trustee** is tasked with **observing and advising** the **company** and **keeping informed** the **prospective supervisory judge**. Accordingly, when performing their duties during the preparation phase, the prospective trustee and supervisory judge **take into account** the **legal tasks** under the **normal bankruptcy procedure** (as described above) that they will perform

NL experience silent preparation phase pre-pack procedure

after the declaration of bankruptcy. They can end the preparation phase, for example when the sales process is not due in their view or when the access criteria for the pre-pack proceedings are no longer met.

Transparency

The preparation phase is confidential, but not 'secret'. The confidential nature allows the company to prepare the sale relatively undisturbed, as opposed to the public bankruptcy proceedings. As discussed during the working parties, bankruptcy proceedings generally have a disruptive effect on companies. After the bankruptcy declaration they are often (briefly) shut down, which decreases or even rules out the possibility of a going concern sale.

If the preparation proceedings are successful they lead to a(n) (almost) finished draft agreement with a prospective buyer. This **sales agreement** is not to be **concluded and executed** until **after** the **declaration of insolvency**, when the trustee and the supervisory judge have their legal powers.

The trustee is the one who is authorized to sell the company, after approval of the supervisory judge. When the company is declared bankrupt, the **trustee** and **supervisory judge** are – regardless of the extent of their involvement in the preparation phase – required to **assess** whether the draft sales agreement meets the **creditor's interest**, taking **collective interests** into account as well. If the trustee and the supervisory judge for example do not think that the sale is in the best interest of creditors, because the sales process during the preparation phase has not been due, the sale will not take place.

Because they were involved in the preparation phase, the trustee and the supervisory judge are **fully informed** and able to **assess quickly** whether this is the case. This enhances the chances of a successful going concern sale, because short timelines are of the essence when selling a business in a financial distress situation.

The **trustee** will publish a **report** on the preparation phase, **publicly accessible** through the national insolvency register, within one week after his appointment as prospective trustee has ended (usually when the bankruptcy starts). By doing that, transparency is provided about the sales process in a timely manner.

X. AUSTRIA

Austria thanks the presidency for the opportunity to submit written comments regarding the latest Presidency compromise proposal on the Title mentioned above. We appreciate that the presidency has extended the deadline for submitting comments by one week.

We want to point out that the following comments are not exhaustive and may be supplemented during further discussions. Failure to mention a provision does not imply its general approval. Further comments will be reserved for the final version of the draft.

General remarks

Austria has no experience with Pre-pack proceedings; we do not have this instrument in our insolvency system so far.

We understand the objective that the European Commission aims to achieve with this title. We want to support it constructively. We can imagine implementing Pre-pack proceedings into our national insolvency law.

However, further discussions are necessary to ensure that the provisions are clear and understandable and that the Member States have sufficient flexibility when implementing the Title. Only then can it be ensured that the European Commission's goal remains in focus during the implementation of the directive into national law.

- We are pleased that it has been clarified that Member States only need to implement one of the three criteria (high standards in the preparation phase, public auction, or approval by creditors or the creditors' committee). This must be added accordingly in several parts of the text to ensure consistency.
- In addition we kindly ask to add in the text that – beside the approval of the creditors - the approval of the creditors' committee be optionally sufficient. In proceedings involving more than 500 creditors, it is not feasible to obtain the consent of all creditors in a timely manner. This concerns the text in Recital 25, Article 22 para 2a b) and Article 26 para 1 c) as well as in Article 34 para 1.
- We support that the debtor stays in possession during the preparation phase and that the monitor merely assists the debtor and only supervises the preparation phase.

In the discussions in the working party group, we understood that the monitor should not have the authority to make decisions regarding the debtor's business. However, in some parts of the text, the monitor is asked to do more than merely supervise, which is not feasible as the debtor stays in possession.

We see a partial contradiction here that can only be resolved by the Member States if sufficient flexibility is ensured for the Member States.

We welcome the wording in Article 22 para 2 as it acknowledges that the monitor does not have any influence over the preparation phase. This wording should also be reflected in other parts of the text where the monitor's obligations are addressed, eg Recital 24 and Article 26.

- As already written in our comments from 30 January, we believe that a provision regarding the termination of the preparation phase is necessary. This could also be optional for the member states.

We believe that the monitor should be able to terminate the preparation phase if the debtor does not cooperate and does not conduct the preparation phase promptly and in accordance with the provisions.

We consider it essential to prevent the abuse of Pre-pack proceedings. We therefore propose again an additional Article on the termination of the preparation phase, see below our suggestion for a new Article 22a.

Article 2 + Recital 22

We welcome the wording in Article 2 point (pa).

Recital 22 also includes this definition but adds that the preparation phase should remain confidential.

This has been discussed multiple times in the meetings. It is challenging to conduct the preparation phase with all the requirements outlined in the draft while maintaining confidentiality.

We propose replacing the phrase

"...and be confidential."

with

"...and should not be made public."

in Recital 22.

We believe that this wording makes clear that the preparation phase must not be disclosed but still allows to identify and address potential buyers in order to determine the best market price and to involve interested creditors accordingly.

Article 3a

Article 3a para (3) in its current form must be deleted.

We understand the intention of the presidency with this paragraph; however, we find the current wording unclear and impractical, as the objectives of this Title are not clearly defined. Therefore, we prefer the deletion of this paragraph and the addition of more flexibility for Member States within the respective Articles.

We believe this would provide much greater clarity.

If, however, a provision on Pre-pack proceedings in Article 3a is still desired, wording similar to that already used in Article 3a para (1) and para (2) of the partial general approach (*doc 16283/24*) should be adopted.

We can also agree with the proposal of the European Parliament in its draft report dated 20 March 2025, that Title IV should be supplemented in Article 3a para 1.

Article 19 para 1

Regarding para 1 subpara 1, we prefer the previous wording.

We suggest a "*may*" provision instead of a "*shall*" provision so that the Member States have enough flexibility when implementing the debtor in possession.

Article 19 para 2

The reference to the objective of this Title is unclear, as the objective of this Title is not defined. We therefore propose deleting the addition in the last sentence, specifically the last part of the sentence, so para 2 states:

“2. National law applies to matters not regulated by this Title, including the ranking of claims, and the distribution of proceeds, the participation of creditors and the remuneration of the monitor and the insolvency practitioner ~~provided that such laws do not run counter to the objectives of this Title.~~”

Article 21

As already discussed orally during the meeting, we remain unconvinced, despite the opposing opinions of the presidency and the European Commission, that a regulation is not necessary to prevent insolvency proceedings from being opened in one Member State while a preparation phase is already ongoing in another Member State, given that the latter is not publicly disclosed.

Article 22 para 1a

We appreciate that this is an optional provision for the Member States.

However, we consider the addition necessary that it pertains to the entire duration of the preparation phase.

Article 22 para 2

First of all, we kindly ask for the addition of a reference to national law regarding the debtor's assistance in order to give the Member States enough flexibility to define the assistance of the debtor. The first sentence in Article 22 para 2 should read as follows:

*“2. Member States shall ensure that the monitor, if necessary, with the assistance of the debtor **according to the national law.**”*

Secondly, we welcome and appreciate the amendments to Article 22 para 2. We are pleased that the previous wording has been reinstated.

The current wording in Article 22 para 2 acknowledges that the monitor does not have any influence over the preparation phase. This wording should also be reflected in other parts of the text where the monitor's obligations are addressed:

Recital 24

We basically agree with the additions in Recital 24, as they also only oblige the monitor to provide justification and statements.

However, the first sentence in Recital 24 must be deleted, as it imposes an obligation on the monitor that cannot be fulfilled.

Therefore, the first sentence of Recital 24 should read:

“(24) Pre-pack proceedings should ensure that the ~~monitor submits for authorisation to the court or competent authority the best bid~~ is obtained during the preparation phase. It should be possible to require the monitor to assess and state whether the piecemeal liquidation would recover manifestly more value for creditors than the market price obtained through the sale of the business, or part thereof, as a going concern. As a rule, the going-concern value...”

Article 26

We believe that - under the current provisions in the draft (debtor in possession!) – the monitor is not capable of fulfilling Article 26 para 1 (a).

However, since the three criteria listed in Article 26 para 1 are presented as alternatives (Recital 25), this must also be reflected in Article 26 para 1.

Therefore, it is necessary to add the word

“or”

between points a) and b) as it is added between points b) and c).

Article 32 para 1

As outlined in Article 32 para 1, all three criteria (points a, b, and c) currently need to be met.

While we agree with the points a and b, we disagree with point c, as Member States are not required to implement the statement of the monitor in Article 22 para 2 (c).

Point c must be removed.

Article 33 para 1 a)

Since the debtor stays in possession the monitor does not have the authority to obtain interim financing or to make any payments. Therefore, the monitor must be removed in Article 33 para 1 a).

Article 22 para 2a (b) + Recital 25

We greatly appreciate the clarification in Article 22 para 2a (b) and Recital 25 that Member States are only required to implement one of the mentioned criteria.

As previously mentioned, we kindly request the addition of the creditors' committee alongside the creditors, so that the phrasing reads as follows:

Recital 25 – last sentence

*“... Alternatively, Member States should ensure that, after the opening of the liquidation phase, a public auction is run to select the best bid or the bid recommended by the monitor is approved by the creditors **or the creditors’ committee**.”*

Article 22 para 2a (b)

*“(b) the recommendation referred to in paragraph 2, point (b), of this Article is approved by creditors **or the creditors’ committee** in accordance with national law.”*

Article 22 para 2b

We appreciate that Member States can implement a review option for the courts.

However, we are of the opinion that the enumeration should not be exhaustive and that Member States should also have the ability to provide for additional measures.

This should be clarified here.

New Article 22a

The aim of the preparation phase is the thorough and careful preparation of a sale by the debtor with the help of the monitor. But the question arises of to how to proceed if this objective is not reached; i.e. the preparation phase has not been successfully completed.

As we already pointed out in our written statement at the end of January, provisions regarding the termination of the preparation phase are mandatory.

Furthermore, there is a potential risk of misuse of the Pre-pack proceedings when the debtor in financial distress is under no pressure to continue with the proceedings. Under the guise of the Pre-pack proceedings the debtor can continue operating his business. He might continue with entering into (more) commitments which he cannot fulfil and which are detrimental for the creditors.

Therefore, we believe that safeguards against misuse must be added. We also believe that the preparation phase should be time-limited.

For all of these reasons we ask for the addition of a new Article about the termination of the preparation phase that could be optional for the Member States.

We suggest the following wording in a new Article:

Article 22a

Termination of the preparation phase

1. *Member States may provide for a time limit on the preparation phase.*
2. *Member States may provide that the preparation phase shall be deemed concluded*
 - a) *upon the initiation of insolvency proceedings in accordance with Article 20 paragraph 1 or*
 - b) *if these insolvency proceedings are not opened within the time limit set pursuant to paragraph 1.*
3. *Member States may provide that the monitor can terminate the preparatory phase if the debtor*
 - a) *fails to provide the necessary assistance in accordance with Art 22 paragraph 2 or*
 - b) *fails to conduct the preparatory phase with due diligence.*

Article 23a

Without prejudice to Article 23a, it should be clarified that the preparation phase ends upon the initiation of insolvency proceedings.

We have taken this into account in our proposal for the new provision in Article 22a about the termination of the preparation phase (see above).

Article 26

As already mentioned above, we believe that - under the current provisions in the draft (debtor in possession!) – the monitor is not capable of fulfilling Article 26 para 1 (a).

However, since the three criteria listed in Article 26 para 1 are presented as alternatives (Recital 25), this must also be reflected in Article 26 para 1.

Therefore, it is necessary to add the word

"or"

between points a) and b) as it is added between points b) and c).

Article 26 para 1 a)

In the reference to Article 22 para 2, point (a) must be added, as Article 26 para 1 a) refers to the statement of the monitor under Article 22 para 2 point (a).

Additionally, it is unclear why a different wording was used in Article 26 para 1 a) compared to Article 22 para 2 (c). We prefer the wording in Article 22 para 2 (c).

Article 26 para 1 c)

As previously mentioned, we kindly request the addition of the creditors' committee alongside the creditors, so that the phrasing reads as follows:

*“c) approved by the creditors **or the creditors' committee** as referred to in Article 22 paragraph 2a point (b).”*

Article 27 + Recital 28

We believe that greater flexibility for the Member States is necessary in Article 27. Member States should be able to provide for safeguards in their national law.

Recital 28 still refers to the court in connection with the termination of contracts. We appreciate that Article 27 no longer relies on the court. Recital 28 must also be phrased more openly—similar to Article 27—and the court must be removed in Recital 28.

Article 27 para 1

Member States also need the flexibility to exempt contracts from this provision. Exceptions in national law must be made possible. We reject the new wording of the last sentence in paragraph 1 and request the wording in the previous draft.

Article 27 para 3

We advocate for the deletion of para 3. We consider license agreements to be a very sensitive matter that should not be addressed in this directive.

Article 31

We oppose the inclusion of "*equity holders*" in Article 31.

Insolvency law is centered on the interests of the creditors; the insolvency practitioner is accountable solely to the creditors and must act in their interests.

Extending liability of the insolvency practitioner to shareholders goes too far and contradicts the principles of insolvency law.

We cannot accept insolvency practitioner liability toward shareholders. This addition must be removed.

Article 32

Article 32 requires more flexibility for the Member States.

It is essential that Member States have the flexibility to decide whether or not to impose stricter criteria for parties closely related to the debtor.

Article 32 para 1

As outlined in para 1, all three criteria (points a, b, and c) currently need to be met.

While we agree with points a and b, we disagree with point c, as Member States are not required to implement the statement of the monitor in Article 22 para 2 (c).

Point c must be removed.

Article 32 para 2

Austria does not impose stricter criteria for the sale of the debtor's business to parties closely related to the debtor. Even if it is the only offer. The sale of a business always requires the approval of the creditors' committee and the insolvency court.

Therefore, we need flexibility in this matter to retain our regulations. Member States should be able to decide whether and which additional criteria they wish to establish for the acquisition by parties closely related to the debtor.

We therefore request that para 2 be made an optional provision, reading as follows:

*“2. Where the offer made by a party closely related to the debtor is the only offer, Member States ~~shall~~ **may** introduce additional safeguards for the authorisation and execution of the sale of the debtor’s business or part thereof. Those safeguards...”*

Recital 28c

Recital 28c refers to the acquisition by parties closely related to the debtor. The Recital mentions *“enhanced scrutiny of the bidding process.”*

As stated above, each Member State should independently decide how to regulate acquisitions by parties closely related to the debtor.

Therefore, we reject this sentence in Recital 28c and request its removal, so that Recital 28c reads as follows:

“(28c) The best offer should not be disqualified from the preparation phase solely on the basis that it comes from a closely related party to a debtor. Closely related parties to the debtor should, therefore, be on an equal footing with other bidders and allowed to participate in the pre-pack proceedings and benefit from the “free and clear” acquisition of the business concerned. ~~The eligibility of closely related parties to bid should, nevertheless, be balanced with enhanced scrutiny of the bidding process.~~ Providing equal opportunities for other bidders, particularly in relation to access to information, and ensuring information symmetry, facilitates quick and efficient pre-pack proceedings and allows other bidders to prepare their bids.”

Article 33

In the draft of the European Commission, Article 33 also had a para 2 on pre-emption rights and a para 3 on credit bidding.

However, since this Article now only deals with interim financing, we consider the heading

“Interim Financing”

to be more appropriate.

The paragraph designation “1.” can be deleted.

Article 33 para 1 a)

As already mentioned above, the monitor does not have the authority to obtain interim financing or to make payments. Therefore, the monitor must be removed in Article 33 para 1 a).

Article 33a

It is still unclear what is meant by "*significantly below*".

Since we haven't received any comment, we raise the question again: When is the value "*significantly below*"? Who determines this?

Article 34

Recital 28b refers to Article 34.

The Recitals should be listed in the order of the Articles. In our view, Recital 28b should be moved after Recital 30 on credit bidding so that the order of the Recitals corresponds to the order of the Articles.

Article 34 para 1

As previously mentioned, we kindly request the addition of the creditors' committee alongside the creditors, so that Article 34 para 1 reads as follows:

*"1. Member States may provide that **creditors, the creditors' committee and holders of equity in** the debtor's business have the right to be heard by the court or competent authority before the authorisation or the execution of the sale of the debtor's business or part thereof."*

Article 35

We find Article 35 unclear and contradictory and advocate for its deletion for the following reasons:

Article 35 para 1

In the preparation phase, the debtor stays in possession and the monitor only supervises the phase, as intended by the European Commission.

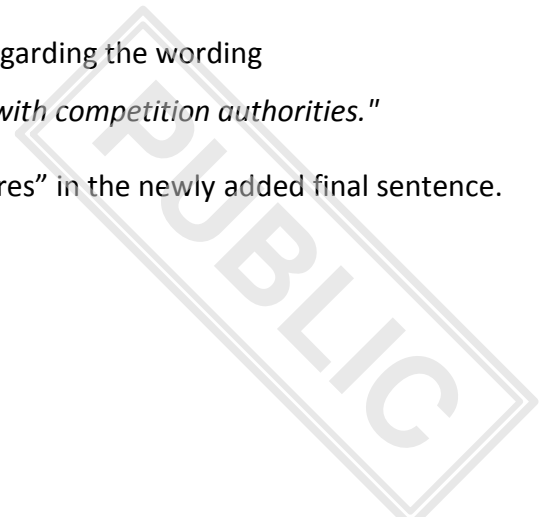
It is therefore unclear how the monitor is expected to facilitate the participation of alternative bids, as required in Article 35 para 1.

Article 35 para 2

Article 35 para 2 remains unclear, particularly regarding the wording

"waiver of information exchange with competition authorities."

It is further unclear what is meant by "internal procedures" in the newly added final sentence.



XI. PORTUGAL

Portugal welcomes the opportunity to submit comments on Title IV, with a view to continuing negotiations on this Directive under the Polish Presidency. Title IV is highly relevant to the Portuguese legal system, as it introduces legal innovations and a new approach to the insolvency judicial system. Portugal also takes this opportunity to thank the Presidency for all the efforts in the construction of a new wording of the title.

*

Title IV (doc. 6853/25)

Article 31

- The terms of the civil liability of the supervisor and the insolvency practitioner must be defined by national law.

Article 32

- We consider the regime for parties closely related to the debtor understandable and relevant. However, we must emphasise the importance of guaranteeing equal opportunities for parties not closely related to the debtor, as provided for in the previous wording in terms of sufficient time to submit a proposal.

Article 33

- In paragraph 1(a), regarding measures to enhance the value of the business, it states that the monitor takes the necessary steps to obtain interim financing. According to the article, this obligation appears to apply to both phases.
- The need for financing will most likely arise in the preparation phase. However, at this stage, the monitor cannot be required to take the necessary steps for the debtor to obtain interim financing at the lowest possible cost. At the very least, since this is a potentially significant act for the continuity of the debtor's company and the interests of creditors, the monitor should be required to make a statement and provide the necessary cooperation. Given that not all creditors, or a significant portion of them, are involved, it is only reasonable that, upon the debtor's request, the court should authorize such an important act, including obtaining interim financing and granting guarantees.

Article 33 A

- The position of secured creditors must be ensured based on the value of the collateral. It is misleading to claim that a secured creditor has nothing left to lose. A secured creditor's position should be determined by the value of their security, not by the overall value of the secured company.
- This provision should be eliminated, as it risks undermining the value of securities and harming companies' access to financing. We believe that this provision distorts the normal outcome of a bid made by a secured creditor, ultimately disrupting the established legal framework for security interests and their ranking.

Article 34

- It is important that the creditors are heard by the court, before the authorisation and also before the execution of the sale.
- The participation of creditors at this stage is, from the outset, very relevant so that the best interests test can be discussed, and it is not enough that the monitor has declared that the best interest test has been met. The creditors affected must have this possibility.

XII. ROMANIA

We appreciate the Presidency's efforts in drafting a new compromise text of Title IV, in order to try to accommodate MS comments. We deem that while some articles have acquired a much-requested flexibility, other provisions still need further consideration. Overall, the text is yet to be finalised, as important matters are up for debate.

In particular, we note that, among others, the following aspects require an in-depth analysis in relation to the revised Title IV (doc. 6853/25):

1. the risk of indirect regulation of other aspects than those provided for in Title IV (e.g. ranking of claims, distribution of proceeds, participation of creditors) by including the clause that these national level rules must not run counter to the objectives of Title IV;
2. the relation between the confidentiality of the preparation phase and the transparency feature that needs to be justified by the monitor, as well as the level of creditors' potential involvement at this stage;
3. the need to clarify the scenario where a partial sale takes place;
4. the corroboration between the liquidation phase being an insolvency proceeding according to Regulation (EU) 2015/848 and the minimal harmonisation objective of the Proposal, which should entail that the proposed provisions have to be integrated in the national insolvency framework;
5. the necessary clarifications in respect of a series of aspects, e.g. the entry test, the identity of all the parties involved in the preparation phase, the moment when a creditor can challenge the monitor's statement (only in the preparation phase or even after the opening of the liquidation phase – art. 22 (2b) -, the suspension of the opening of the liquidation phase;
6. setting a fixed time limit for the liquidation phase, a judicial procedure, which can be governed by the principle of efficiency; in our judicial system, it is highly uncommon to provide a deadline for a judicial procedure;

7. providing, as a rule, the absence of the co-contractor's consent for the assignment of the contract, which is still an important concern for us, since the Romanian Insolvency Law does not depart from the general regime of assignment of contracts;
8. the restriction of the criteria to select the best bid in the pre-pack proceedings; the Romanian Insolvency Law does not provide for criteria as regards the sale of assets in liquidation, the method and procedure being established by the creditors.
9. the incentives provided for interim financing, which substantially differ from the regime of interim financing in the Romanian Insolvency Law; such different rules will stir the opposition of creditors who would face a diminished protection;
10. the regulation of the treatment of pre-emption rights, which should be left to national law.

XIII. SLOVENIA

We thank the Presidency for providing the opportunity to present written comments. Please find below comments from the Slovenian delegation on the Titles IV. The comments refer to the text of the document 6853/25.

Article 3a(3) states that the Member States may adopt or maintain laws which increase the chances of obtaining a fair market price.

It is and it will remain dubious what measures adopted by the national laws may increase chances of obtaining a fair market price. We however think that a better solution would be to allow member states to adopt national laws which would better protect creditors. That at least is a concept that is intelligible, therefore manageable and complies with the principle of the minimal harmonization.

The addition of **Article 22(1a)** created a major progress in the text of the whole Title IV. We thank the Polish presidency for that amendment to the text. The Member States may provide that the initiation of the preparation phase is excluded if the debtor is unable to pay its debts as they fall due. However, the ability to pay for the debts as they fall due should not only be an option that may be introduced but a requirement in all cases. The text can be easily amended by replacing the verb “may” with “shall”.

However, this would not suffice. The preparation phase would incur costs for the proceedings in the court. Finally, the court fees should be paid. This should be also provided by Article 22(1a) as additional condition for the initiation of the preparation phase, i. e. the debtor should not be insolvent, and he should have still enough property to cover the costs of the proceedings.

Article 22(2a) and (2b): not only the creditors should have rights provided by those provisions but also the creditors’ committee. The creditors’ committee is a useful aide for the judges and a body that protects the creditors’ interests. As it is more agile than the creditors as a group it is more likely that it will protect their interests.

Article 26(2): deadlines provided by the text of the draft are not feasible. After the initiation of the liquidation phase the creditors shall have some time to inform the court that they have claims and on details of the claims (amount and the type of claims etc.). This takes time, and it is only fair that there is sufficient time for doing this as a creditor might be from abroad. Additionally, claims might be disputed, and the avoidance actions might be initiated to clarify if a creditor has a claim at all. As long as it is not established who are the creditors, the creditors cannot protect their own interests. A court may refer a question to the ECJ. Some other actions must be taken that might take time. It would be impossible to do all that in the very short deadlines of Article 26(2).

The assignment of executory contracts without the consent of the counterparty in **Article 27(1)** has already been discussed many times. We still think that it is not acceptable to assign any executory contract without the consent of the debtors’ counterparty.

Article 28 provides that the Member States shall ensure that the acquirer of the debtor's business acquires the debtor's business or a part of it free of debts, liabilities and all encumbrances. This applies to the civil law liabilities the public law liabilities and encumbrances alike, with one exception in paragraph 2.

This provision does not consider that not all of liabilities and encumbrances are linked with the insolvency. The servitudes for instance, are such encumbrances and we cannot find any justification to exonerate the buyer from servitudes or other unrelated liabilities and encumbrances. The provision as it is now needs to be carefully redrafted.

The Member States should ensure that the monitor, and the insolvency practitioner are liable (**Article 31**). In principle, that is correct. However, there is no reason why the equity holders could claim damages. Both the monitor and the insolvency practitioners are aides of the court and should act in the interest of creditors. They (both) have no duties in relation the equity holders. We propose to delete from the text the equity holders as those who may claim damages from monitor or insolvency practitioner.

Article 34(3) provides that "security interests are released in pre-pack proceedings under the same requirements that would apply in the liquidation proceedings under national law."

At the end of a liquidation proceedings an insolvent debtor ceases to operate and if the debtor is a legal person, ceases to exist. This simplifies the insolvency proceedings in many ways. The assets that were encumbered are sold in the piecemeal manner: each one separately to the best bidder. The owner of the security interest however knows exactly how much he will receive from the sale: the price of the best bid for the particular asset, minus the costs of the sale. That works well as the price offered is considered a fair market price. This is important as the market prices are mostly difficult to assess by, for instance, an expert and in quite many cases, this is virtually impossible (e. g. assets which have no clear market value to compare with). The distribution of the price is also easy to do, and it is also fair to the debtor and the creditors alike.

Slovenia believes that this concept is used in several member states, and possibly in a vast majority of member states.

However, the concept of the pre-pack proceedings as to the sale price is different. One sale price should be offered for a part of the business or the whole business and therefore for several assets so that there will be no price determined for any and each asset separately. If those assets are encumbered already, the security interests should be released. How can after the sale the court decide how much of a (single) sale price should be paid to a specific owner of a security interest? Given the fact that the security interest shall be released "under the same requirements that would apply in the liquidation proceedings" (see Article 34(3)) we do not think this is feasible for very practical reasons we described *infra* so that the text of the directive should either offer the release under different requirements or an explanation should be given in the working party how to distribute the sale price of the business or a part of it.

XIV. SLOVAK REPUBLIC

1. General comment

First of all, Slovakia would like to express its gratitude to the Polish Presidency for providing the revised document and for giving us the opportunity to present our observations.

Given that Slovakia does not yet provide for pre-pack proceedings in the national law, we support the harmonization. We have few minor suggestions for amendment.

2. Specific text amendments

Article 3a (3)

Although Slovakia acknowledges that this provision was introduced to achieve a compromise among all Member States, we fail to perceive its benefits and therefore propose that it be removed.

Article 19 (2)

We suggest deleting the last part of the sentence ("*provided that such laws do not run counter the objectives of this Title*"), as the practical application of it is not clear - the objectives of Title IV are not defined and since pre-pack is a new regulation, we don't know who and how would decide if the national regulation runs counter the objectives. We believe that such a provision (only the last part of the sentence) is unnecessary and difficult to apply, therefore we propose its deletion.

Recital 22

We propose to add the following (or an alternative), after the words, that the preparation phase should be confidential: "*transparency in relation to financing creditors should be maintained/guaranteed*". Involvement and awareness of creditors (and thus their overall protection) in the preparatory phase is very important to us. We understand and support the reasons why should the preparation phase be confidential and for this reason we propose some kind of "informational hybrid" - where the financing creditors are informed about the debtor's situation but confidentiality between creditors about the debtor's situation is guaranteed.

Article 34 (3)

We understand that in a pre-pack proceeding the debtor, with assistance from a monitor, assesses and determines the valuation of the business and secured assets (for the best interests of creditors test). The secured creditor retains the right to challenge these valuations by providing his own assessments, in accordance with Article 34 para 4. It is unclear to us to which situation provision of Article 34 para 3 applies to. Within our system, the secured creditor assumes a significant role in the liquidation of the secured property. However, as the secured property is not subject to liquidation in this instance, we are uncertain as to which requirements would be applicable in this context.

XV. SWEDEN

We would like to thank the Presidency for the opportunity to provide written comments on the third compromise proposal on title IV of the proposal for a directive harmonising certain aspects of insolvency law (doc. 6853/25).

First, let us express our gratitude for the flexibility given in the current text when it comes to the courts' involvement. We appreciate that it is now left to Member States to decide which authority or body that shall be involved in the various stages of the pre-pack proceeding.

Also, we would like to reiterate our previous remarks regarding the confidential state of the preparation phase. We have no objection to the current text in this regard, which we understand gives flexibility for Member States. But if it is to be expressly prescribed in the directive that the preparation phase shall be confidential, it must be up to the Member States to decide *how* to regulate such confidentiality. The matter of confidentiality is closely connected to constitutional issues, so it is necessary to give room for national adaptations.

Please find below our further comments on some of the articles in Title IV.

Article 22.1a

We think that Member States must have the possibility to set out further material requirements in national law for the initiation of the preparation phase. The pre-pack proceedings are meant for companies with financial difficulties. It is a formalised procedure, leading into an insolvency proceeding and the winding-up of the debtor. Therefore, it must be possible for Member States to limit access to the proceedings to companies which fulfil certain conditions. In other words, it should not be enough that the debtor merely *wants* to start a pre-pack proceeding.

In our view, it is not logical to only allow one requirement, that the debtor can pay its debts as they fall due. Considering the nature of the pre-pack proceeding, which will lead to the winding-up of the debtor, it would be equally sensible to require that the debtor has a certain level of financial difficulties, for instance that there is a likelihood of insolvency.

We suggest that article 22.1a is amended as follows.

1a. Member States may provide that the initiation of the preparation phase is subject to conditions set out in national law, for instance that the debtor is in a situation of likelihood of insolvency or that the initiation is excluded for cases where the debtor is generally unable to pay its debts as they fall due in accordance with national law.

Article 23a

We question whether this provision is necessary, since there is a possibility to provide for a stay of individual enforcement actions (including the suspension of an application for bankruptcy) in accordance with article 23. It is the Member States' choice whether debtors shall benefit from a stay during the preparation phase, or not. The current text in article 23a may give the impression that the main rule is that the pre-pack proceedings shall continue even if a creditor files for bankruptcy during the preparation phase.

We prefer to delete article 23a from the directive. If it is kept, it should be clarified how it relates to article 23. Is article 23a to be applied only when there are no national rules on a stay in accordance with article 23a?

Article 27

As expressed at the political level in JHA Council on 7 March 2025, we maintain our position that the potential transfer of the debtor's contracts in pre-pack proceedings should not be included in the directive, but regulated by national law instead. This means that our preferred option is the deletion of article 27. It is very problematic that the assignment of executory contracts shall not require the consent of the debtor's counterparty (as a main rule). How a debtor's contracts are handled in the scope of insolvency, including in a pre-pack procedure, is a delicate issue that is closely linked to other areas of law that have not been harmonised, such as contract law. In effect, it should be up to Member States to decide if and how this matter shall be regulated.

Article 32.2

The text in article 32.2 should be adjusted so that it is expressed that also a competent authority can reject the offer. We have the following drafting suggestion.

Where the offer made by a party closely related to the debtor is the only offer, Member States shall introduce additional safeguards for the authorisation and execution of the sale of the debtor's business or part thereof. Those safeguards shall at least include the duty for the monitor, ~~or the court~~ or the competent authority to reject the offer from the party closely related to the debtor if the offer does not satisfy the best-interest-of-creditors test.

Article 34.1

We note that the words “at least” have been deleted, and understand that this is due to the fact that the article is a may-provision. However, we would like to be ensured that Member States are allowed to add further safeguards for the creditors in the pre-pack proceedings. Such a protection measure could, for instance, be a right for the creditors to be heard already during the preparation phase.

We ask that this possibility is clarified in the text, and have the following drafting suggestion for article 34.1.

Member States may provide that creditors of, as well as holders of equity in, the debtor’s business have the right to be included in the pre-pack proceedings, for instance by being heard by the court or competent authority before the authorisation or the execution of the sale of the debtor’s business or part thereof.

Article 35.2

In paragraph 2 it is stated that the monitor shall be made subject to a duty of “full” confidentiality in regard to certain information about competition law procedures. We object to regulating the level of confidentiality in the directive. This should be up to Member States to set out in national law. The meaning of the term “full confidentiality” can vary between different Member States. Also, since the monitor could have a legal obligation to reveal information in some cases, for instance where there is suspicion of crime, we do not think it is appropriate to state that the monitor shall be subject to a duty of “full” confidentiality.

We suggest that article 35.2 is amended as follows.

Member States shall ensure that the monitor may receive information on the applicable competition law procedures and their outcomes that may affect the timing or the successful outcome of the bid, in particular through the disclosure of information by the bidders or the provision of a waiver to exchange information with competition authorities, where applicable. In that regard, the monitor shall be made subject to a duty of ~~full~~ confidentiality in accordance with national law. Member States shall ensure that monitors have in place relevant internal procedures for appropriate management of such confidential information.

Should you have any questions regarding our remarks, we are available for further discussions at your convenience.