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NOTE

From:	General Secretariat of the Council
To:	Delegations
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Subject:	Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law - Presidency compromise text on Title IV

Delegations will find in Annex the fourth revised Presidency compromise proposal on Title IV of the above mentioned directive.

Changes in comparison to the Commission's proposal are indicated in **bold** or ~~strikethrough~~, while changes in comparison with the last version of the compromise text are indicated **in bold and underline** or ~~strikethrough~~.

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

harmonising certain aspects of insolvency law

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee[1],

Having regard to the opinion of the Committee of the Regions[2],

Acting in accordance with the ordinary legislative procedure,

[1] OJ C [...], [...], p. [...]
[2] OJ C [...], [...], p. [...]

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 ~~the~~**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 ~~a~~**include the** sale of the assets of the business piece by piece (piecemeal liquidation).

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(22) It is generally assumed that more value can be recovered in liquidation by selling ~~the~~**a** 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~~**a** business as a going concern **('pre-pack mechanism~~proceedings~~')** before the formal opening of insolvency proceedings~~, so that the~~**. The remaining** assets ~~can~~**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~~for a pre-pack mechanism while allowing for a degree of flexibility of implementation by Members States adapting those standards in existing national insolvency law**. The pre-pack ~~proceedings~~ **mechanism** 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~~should not be made public. 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. It is not precluded that, due to the circumstances of the case, the debtor may continue its business activity after the termination of the liquidation phase that was realised in liquidation or reorganisation type of insolvency proceedings. The liquidation phase should be carried out by means of insolvency proceedings othen 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 that are included in Annex A other than preventive restructuring proceedings.**[3]

[3] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141, 5.6.2015, p. 19).

(22a) The pre-pack mechanism should respect the rights of employees in insolvency proceedings as granted under EU law. Specifically, ~~the pre-pack proceedings~~it 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 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. While t~~T~~he primary aim of the pre-pack ~~proceedings~~ mechanism 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, it can also lead to ~~and~~ preserving~~s~~ employment ~~as far as possible~~. Consequently, when in takes place in winding-up proceedings, the liquidation phase of the pre-pack ~~proceedings~~ mechanism in this Directive is an eligble procedure for the purposes of article 5(1) of Council Directive 2001/23/EC[4].

(22b) The ~~P~~pre-pack ~~proceedings~~ mechanism do~~es~~ not replace national substantive rules, in particular, on the ranking of creditors' claims, the distribution of proceeds, the participation of creditors or the remuneration of the monitor and insolvency practitioner. Neverther~~r~~less, such rules should not run counter to the objectives of the pre-pack ~~proceedings~~mechanism. In the event that a court or competnt 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.

(22c) The pre-pack mechanism set out in this Directive should be applied to debtors that are legal persons. Member States may extend the application of the pre-pack mechanism to natural persons who are entrepreneurs.

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[4] Council Directive2001/23/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).

~~(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.~~

(24) The pre-pack ~~proceedings~~ **mechanism** should ensure that the monitor ~~appointed in the preparation phase might propose~~ **submits for authorisation to the court or competent authority** the best bid obtained during the ~~sale process for authorisation by the court only if it declares that, in its view,~~ **preparation phase. 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, T~~t~~he** going-concern value **of a business** is~~, as a rule,~~ **may be reasonably expected to be** higher than ~~the~~**its** 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 ~~declarations~~**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 may require the monitor to take into account elements other than price, including the public interest or ensuring the viability of a business**. However, ~~an~~**a 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 **that is considered the best** is made by a party who is closely related to the debtor. ~~In such situations, the~~**The** ~~monitor or the insolvency practitioner~~ ~~**concerned**~~ **Such** should **be** reject**ed** ~~the~~**such an** ~~offer~~ if it does not satisfy the best-interest-of-creditors test.

(25) In order to ~~guarantee~~**ensure** that ~~the~~**a** business is sold ~~at~~**for** the best ~~market value~~**price** ~~during~~ **through** the pre-pack ~~proceedings~~**mechanism**, Member States should ~~either~~ ensure **that the sale process in the preparation phase is conducted under** high standards of competitiveness, transparency and fairness ~~of the sale process conducted in the preparation phase~~, or ~~provide~~ that ~~the court runs~~ a ~~brief public auction after the opening of the liquidation phase of the proceedings~~. **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. It is for Member States to decide whether the approval of the creditors is given by the general meeting of creditors or creditors committee.**

(25a) It is not precluded for the Member States to provide that a court or a competent authority that established that the sale process is not competitive, transparent, fair, and meets market standards can decide to proceed with a public auction, or piecemeal liquidation of debtor's assets in insolvency proceeding commenced within pre-pack mechanism.

(25b) In insolvency systems that are based on the principle of creditor autonomy, Member States should be able to provide that it is for the general meeting of creditors or the creditors' committee to authorise the sale of the debtor's business or part thereof in accordance with national law.

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(26) If a Member State opts to require high standards in the preparation phase, the ~~monitor (subsequently to be appointed as insolvency practitioner in the liquidation phase) should~~**monitor should** be responsible for ensuring that 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 ~~the~~ standard rules and practice on mergers and acquisitions in the Member State concerned, ~~which includes~~**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.

(27) If a Member State opts to ~~provide~~**require** that ~~the court runs~~ a public auction **is run <u>prior or</u>** 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** ~~during the auction. The debtor should be able 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.~~ **It should be possible to offer incentives to the "stalking horse bider" by agreeing, in particular, to expense reimbursements or break up fees in the case a better offer is selected through the public aution.** 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.

(28) **To avoid the mere fact of a business being the subject of under insolvency proceedings depreciating its value, it is important to ensure that operational counterparties, such as suppliers or customers of the debtor concerned, are taken over by the acquirer and not, as a result, affected by insolvency proceedings.** ~~The~~**Therefore, the** opening of insolvency proceedings should not result in the early termination of contracts under which the parties still have obligations to perform ~~(executory contracts)~~**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~~ **through** the pre-pack ~~proceedings~~**mechanism**. It should, therefore, be ensured that ~~those~~**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 ~~those contracts~~**them**. ~~Nonetheless~~**Nevertheless**, there ~~are~~**can be** situations ~~where~~**in which** the assignment of ~~the executory~~**certain obligations under such** contracts cannot be reasonably expected~~, such as when the acquirer is a competitor of the counterparty of the contract~~. ~~Similarly, the court may come to the conclusion in an individual assessment of an executory contract that its termination would serve the interests of the business of the debtor better than its assignment, such as when the assignment of the contract would result in a disproportionate burden for the business.~~ **Therefore, Member States should be able to provide that the consent of the debtor's counterparty or counterparties is required for the assignement of contractual obligations, depending on the type of contract, quality of the parties, or interests of the business concerned.** The court should not be allowed, however, to terminate ~~executory contracts~~**contractual obligations** relating to licenses ~~of~~**for** intellectual and industrial property rights, as they are usually key components of the operations of ~~the business being sold~~**a business being sold.**

(28a) Member States should also be able to introduce an additional safeguard for the protection of the counterparty's legitimate interests by granting the right to the counterparty to terminate the assigned contract upon a notice period of three months.

(28ba) In order to increase the attractiveness of asset deals for potential buyers and, thereby, to achieve higher prices in going-concern sales, Member States should ensure that purchasers ~~should, as a rule,~~ acquire businesses free and clear of debts and~~,~~ liabilities ~~or of any encumbrances~~. Therefore, creditors' claims should 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.

(28cb) The release of security interests or other encumbrances 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~~ provided that a holder of secured claims does not objects~~ to that release. on the justifiable grounds that the transfer in bankruptcy insolvency 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~~.

(28de) 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.

(29) The possibility ~~to enforce~~**of enforcing** pre-emption rights in the course of ~~the~~**a** sale process would distort competition in the pre-pack ~~proceedings~~**mechanism**. Potential bidders might abstain from bidding ~~because of~~**where** rights ~~that would discard~~ **holders could, at** their ~~offers at the holder's~~ discretion, **discard those bids**, irrespective of the time and resources invested and the economic value of the ~~offer.~~**offers concerned.** In order to ensure that ~~the~~ winning ~~offer reflects~~**offers reflect** the best available ~~price~~**prices** on the market, pre-emption rights should not be conceded to bidders, nor should such rights be enforced in the course of the ~~bidding process~~**liquidation phase**. Holders of pre-emption rights that were granted prior to the commencement of ~~the~~ pre-pack proceedings **should**, instead of invoking their option, ~~should~~ be invited to participate in the bidding. **Nevertheless, Member States should be ~~allowed~~ able to enforce ~~legal~~ pre-empation rights under national law ~~in the pre-pack proceedings where it is justifible by public interest~~.**

(30) Member States should allow secured creditors to participate in the bidding process in ~~the~~ pre-pack proceedings by offering the amount of their secured claims as consideration for the purchase of the assets over which they hold a security (credit bidding). Credit bidding should not, however, be used in **such** a way ~~that provides~~**as to provide** secured creditors with an undue advantage in the bidding process, such as ~~when~~**where** the amount of their secured claim against ~~the~~**a** debtor's assets is above the market value of ~~the~~**that debtor's** business. **As such, a secured creditor should not be able to bid the whole amount of a claim against the debtor's business that is worth less than the amount of that claim, thereby deterring potential competitors from participating in the bidding process. Therefore, this Directive should restrict the amount that a creditor can bid in cases where there are undersecured or undercollateralised claims. In such cases, a secured creditor should only be allowed to bid an amount that is to be offset against the purchase price, ~~significantly lower than the estimated market value of the debtor's business over which the creditor's security interest was provided~~without exceeding the market value of the business. The restricition on a creditor's ability to bid the value of a secured claim does not mean that that claim loses its security interest in respect of the portion of the claim that cannot be used in the bidding process.**

[…]

Title I
GENERAL PROVISIONS

PUBLIC

Article 1

Subject matter and scope

[…]

4. **The pre-pack proceedings apply to debtors that are legal persons.**

Article 2

Definitions

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

(g) ‘executory contract’ means a contract between a debtor and one or more counterparties under which the parties still have obligations to perform at the time of the opening of insolvency proceedings in the liquidation phase in Title IV;

(h) ‘best-interest-of-creditors test’ means the test whereby no creditor would be worse off under a liquidation in **the context of a** pre-pack ~~proceedings~~ **mechanism** than such a creditor would be if the normal ranking of liquidation priorities were applied in the event of a piecemeal liquidation **or, where Member States so provide, in the event of the next-best-alternative scenario**;

(i) ‘interim financing’ means any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during pre-pack proceedings, and that is reasonable and immediately necessary for the debtor’s business or part thereof to continue operating, or to preserve or enhance the value of that business;

[…]

(p) 'pre-pack ~~proceedings'~~ **mechanism'** means ~~expedited liquidation proceedings~~**a mechanism, 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~~**in the course of insolvency proceedings for the debtor**~~as a result of the established insolvency of the debtor~~;

(pa) 'preparation phase' means the phase of the pre-pack ~~proceedings~~ mechanism 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~~ mechanism aiming at approving and executing the sale of the debtor's business or part thereof and at distributing the proceeds to the creditors;

(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~~ mechanism** starts or **during a period falling at least** three months prior to the ~~start~~**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.**~~

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Title IV

PRE-PACK ~~PROCEEDINGS~~MECHANISM

Chapter 1

General provisions

Article 19

Pre-pack ~~proceedings~~mechanism

1. **Member States shall ensure that debtors have access to the pre-pack ~~proceedings~~ mechanism in accordance with this Title.**

1a. Member States shall ensure that debtors who enter the pre-pack ~~proceedings~~ mechanism are authorised to undertake at least acts of ordinary management during the preparation phase. Member States may provide that that authorisation can be limited or not granted, where debtors have been sentenced for serious breaches of accounting or bookkeeping obligations under national law.

~~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 are compatible with Union law,~~ **provided that such laws ~~do not run counter to~~are consistent with the objectives of this Title.** ~~including the rules laid down in this Title~~.

Article 20

Relationship with other Union legal acts

1. The liquidation phase ~~referred to in Article 19, paragraph 1,~~ shall be **carried out by means of** ~~considered to be an~~ insolvency proceedings **other than preventive restructuring procedures. In Member States where Regulation (EU) 2015/848 applies, the liquidation phase shall be carried out by means of insolvency proceedings** as **set out in Annex A** ~~defined in Article 2, point (4), of~~ **to** Regulation (EU) 2015/848 **other than preventive restructuring proceedings**.

   ~~Monitors referred to in Article 22 may be considered to be insolvency practitioners as defined in Article 2, point (5), of Regulation (EU) 2015/848.~~

2. **This Directive is without prejudice Council Directive 2001/23/EC[5].**

   For the purposes of Article 5(1) of Council Directive 2001/23/EC[6], **when it takes place in winding-up proceedings,** 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.

~~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.~~

[5] 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).

[6] ~~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).~~

Chapter 2

Preparation Phase

Article 22

~~The m~~Appointment of the m~~M~~onitor

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.**

~~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.~~

~~2b. Member States may provide 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 valuation of the business of the debtor as a going concern is carried out; or~~

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

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2~~3~~. Member States shall ensure that only ~~those~~ persons who ~~fulfil both of the following conditions can be appointed as monitor:~~

~~(a) they~~ satisfy the eligibility criteria applicable to insolvency practitioners in the Member State where the pre-pack ~~proceedings~~ **mechanism** ~~are opened~~**is used**~~;~~ **can be appointed as monitor.**

~~(b) they may be actually appointed as insolvency practitioners in the subsequent liquidation phase.~~

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Article 22a

Principles of the preparation phase

1. Member States shall ensure that the sale process is competitive, transparent, fair, and meets market standards.

2. Member States shall ensure that the monitor**, if necessary with the assistance of the debtor:**

~~(a) documents and reports each step of the sale process;~~

(**a**~~b~~) justifies why it considers that the **preparation of the** sale **process** ~~is competitive, transparent, fair and meets market standards~~**requirement under paragraph 1 is fulfilled**;

(**be**) recommend~~s~~ the best bidder as the pre-pack acquirer, in accordance with Article 30;

(**c**~~d~~) state~~s~~ ~~whether it considers~~ that**, on the basis of its assesment,** the best bid does not **prima facie** constitute a ~~manifest~~ breach of the best-interest-of-creditors test.

~~Actions by the monitor listed in the first subparagraph shall be done in writing, be made available in digital format and in a timely manner to all parties involved in the preparation phase.~~

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.

3. Member States may provide that a public auction be conducted prior to, or at the beginning of, the liquidation phase in order to ensure the realisation of a fair market price. In that case, Member States shall ensure that the obligations set out in paragraph 1 and paragraph 2, point (a), do not apply to the monitor.

4. Member States may provide that, where the recommendation referred to in paragraph 2, point (b), is approved by creditors in accordance with national law, paragraph 1 and paragraph 2, point (a), do not apply.

5. Member States may provide that ~~the initiation of~~ the preparation phase not be initiated ~~is excluded for~~ in cases where the debtor is generally unable to pay its debts as they fall due in accordance with national law.

6. Member States may provide that the preparation phase can be initiated only when the debtor is in a state of likelihood of insolvency in accordance with national law.

~~Member States shall provide that, upon request of the debtor, the court appoints a monitor.~~

~~The appointment of the monitor shall start the preparation phase referred to in Article 19, paragraph 1.~~

~~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.~~

PUBLIC

Article 23

Stay of individual enforcement actions

1. Member States ~~shall~~ **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 ~~it~~ **that stay** facilitates the seamless and effective roll-out of the pre-pack ~~proceedings~~**mechanism**.

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

Article 23a

Suspension of the opening of the liquidaiton 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.

Article 23b

Termination of the preparation phase

1. Member States may provide that the preparation phase is limited in time.

2. Member States may provide that the preparatory phase can be terminated if:

a) the debtor fails to provide the necessary assistance in accordance with Article 22 (2);

b) the debtor fails to conduct the preparation phase with due diligence; or

c) the preparation phase does not have any reasonable prospects of success.

PUBLIC

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.

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Chapter 3

Liquidation Phase

Article 25

Appointment of the insolvency practitioner

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

~~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

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:** ~~proposed by the monitor, provided that~~

   a) proposed by the monitor, provided that the ~~latter~~ **monitor** has issued an opinion confirming that the sale process ~~run~~ **that took place** during the preparation phase complied with the requirements laid down in Article 22**a** (~~2~~**1**) ~~and (3), and Article 24 (1) and (2)~~ **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 the pre-pack ~~proceedings~~ mechanism in accordance with ~~referred to in~~ Article 22a (3~~2~~a) ~~point (a)~~; or

   c) approved by the creditors as reffered to in Article 22a (4~~2~~a)~~, point (b)~~.

1a. Member States may provide that the sale of the debtor's business or part thereof under paragraph 1 point c) is approved by the creditors without the authorisation of the court or competent authority where, under national law, the sale of the debtor's business or part thereof requires the consent of the creditors.

~~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. ~~In case Member States apply Article 24(3), t~~**T**he public auction referred to in **Article 22**a **(3~~2~~a) ~~point (a),~~** ~~that provision shall last no longer than four weeks and shall be initiated within two weeks~~**one month** ~~as of the opening of the liquidation phase~~ **and ~~shall last no longer than two~~ three 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~~, such as expense reimbursement or break-up fees,~~ are commensurate and proportionate~~, and do not deter potentially interested parties from bidding in the liquidation phase.~~

3. Member States may provide 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 Article 22a, paragraph 2, point (c), on the ground that the best bid does not meet the best-interests-of-creditor-test, a valuation of the business of the debtor as a going concern shall be carried out.

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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.

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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 that 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.

1a. Member States may 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.

1b. Member States may provide that the counterparty or counterparties can terminate the assigned contract under paragraph 1 subject to a notice period no shorter than three months of the assignment.

1a. Member States may provide that the consent of the counterparty or counterparties is required for netting arrangements, including close-out netting arrangements, on financial markets, energy markets and commodity markets if such arrangements are enforceable under national insolvency law.

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 counterparty or counterparties.

3. Member States shall ensure that executory contracts relating to licenses of intellectual and industrial property rights, 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.

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Article 28

Debts and liabilities of the business acquired via the pre-pack ~~proceedings~~mechanism

1. **Without prejudice to A~~a~~rticle 27 and Article 34 (3) and (4), as well as to the obligations arising from a contract of employment relations, 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 rules on libility for environmental damages.** **~~to national environmental law.~~**

Article 29

S~~pecific rules on the~~ suspensive effects of appeals

~~1.~~ Member States ~~shall~~ **may** ~~ensure~~ **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** ~~only subject to the provision by the appellant of a security that is adequate to cover the potential damages caused by the stay of the realisation of the sale~~.

~~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.~~

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Chapter 4

Common p~~P~~rovisions ~~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~~ **mechanism** 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** **insolvency** proceedings.

Article 31

Civil liability of the monitor and of the insolvency practitioner

Member States shall ensure that the monitor and the insolvency practitioner are liable for the damages ~~that~~ **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 Title ~~causes to creditors and third parties affected by the pre-pack proceedings~~.

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Article 32

Parties closely related to the debtor ~~in the sale process~~

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**~~they~~ disclose **in the bid** ~~in a timely manner~~ to the monitor ~~and to the court~~ their relation to the debtor;

   (b) ~~other~~ parties **other than those reffered in point (a)** ~~to the sale process~~ receive adequate information on the existence of parties closely related to the debtor and their relation to the latter~~;~~**.**

   (c) <u>in the case under article 26(1), point (a),</u> a valuation of the business as a going concern is <u>carried</u> 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.~~

   Member States may provide that**,** where it is prove~~d~~**nd** that **a party closely related to the debtor failed to comply with the conditions** ~~the disclosure duty referred to in~~**under** the first subparagraph, point (a)~~, was breached~~, the court **or competent authority** revokes the benefits referred to in Article 28.

2. Where the offer made by a party closely related to the debtor is ~~the only~~**<u>considered as the best</u>** ~~existing~~ offer, Member States ~~shall~~ **<u>may</u>** introduce additional safeguards for the authorisation and execution of the sale of the debtor's business or part thereof. ~~These safeguards shall at least include the duty for the monitor and the insolvency practitioner to reject the offer from the party closely related to the debtor if the offer does not satisfy the best-interest-of-creditors test.~~

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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 monitor or the insolvency practitioner takes the necessary steps to obtain interim financing at the lowest possible cost;~~

~~(b) grantors of interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims;~~

(**a**~~e~~) security interests over the sale proceeds ~~may~~ **can** be granted to providers of interim financing in order to secure reimbursement;

(**b**~~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 interim financing do not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless national law provides for other grounds for such liability.

2. Member States may provide that paragraph 1 only applies to interim financing which has been subject to *ex ante* control.

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Article 33a

Pre-emption rights and credit bidding ~~rights~~

1~~2~~. Member States shall ensure that no pre-emption rights are ~~conceded~~ **granted** to bidders. **Member States may provide that ~~statutory~~ pre-emption rights established under national law that are not affected by the insolvency of the debtor are mantained.**

2~~3~~. Member States shall ensure that, where security interests encumber the business subject to the pre-pack ~~proceedings~~**mechanism**, creditors who are the beneficiaries of those security interests may offset their claims **against the purchase price** ~~in their bid~~ only **to a an amount not exceeding** ~~provided that the value of those claims is significantly below~~ **the** market value of the business.

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 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. Member States shall ensure that security interests **or other encumbrances** are released in **the course of the** pre-pack ~~proceedings~~ **mechanism** under the same requirements that would apply in ~~winding-up~~ **the ~~liquidations~~ insolvency** proceedings **under national law**.

4. Member States **whose law makes the release of security interests conditional upon the** ~~in which~~ consent ~~from~~ **of** holders of secured claims ~~is required in~~ **to the liquidation** ~~winding-up~~ proceedings ~~for the release of security interests~~ may ~~depart from requiring~~ **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 one 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 not **submitted**filed**,** (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.~~

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Article 35

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

1. Member States shall ensure that, where there is an 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 **takes appropriate steps to** ~~shall facilitates the~~ presentat~~sion of~~ alternative bids.

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 **in accordance with national law**. ~~**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.

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