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THE PRE-PACK MECHANISM IN INSOLVENCY

Master thesis

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Vilnius, 2026

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LIST OF ABBREVIATIONS

Art. – Article

CJEU – Court of Justice of the European Union

Directive harmonising certain aspects of insolvency law - Directive (EU) 2026/799 of the European Parliament and of the Council of 30 March 2026 harmonising certain aspects of insolvency law

Directive on restructuring and insolvency - Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132

EIR – Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

EU – European Union

Impact Assessment Report accompanying Proposal for a Directive harmonising certain aspects of insolvency law - Commission Staff Working Document Impact Assessment Report accompanying the document Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law SWD/2022/395 final

MS – Member States of the European Union

Para. – Paragraph

Proposal for a Directive harmonising certain aspects of insolvency law - Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law COM/2022/702 final

Rec. - Recital

Reg. – Regulation

SIP 16 - Statement of Insolvency Practice 16

Transfers of Undertakings Directive 2001 - 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

UK – United Kingdom

USA – United States of America

INTRODUCTION

The relevance of the master thesis. In the 21st century the business plays a crucial role in establishing and maintaining the economy in the world. The viability of the companies could be a prioritized goal in some states.

However, the current events are constantly creating the challenges for the companies of different sizes, especially for SMEs. The pandemic of COVID-19, the war in Ukraine, the escalation of conflicts between different countries, inconsistent policy of leading states – all these aspects put the enterprises in difficult situations. Some of them are able to come up with the new plan and strategy to survive, and others – face the state of insolvency. According to the surveillance of the Eurostat cases of insolvency of companies in the EU are increasing every year[1]. In this context, the importance of insolvency law instruments that offer a second chance to businesses becomes clear.

The pre-pack is considered as a restructuring tool in insolvency law[2]. Such progressive country as the UK has already implemented the pre-pack in the legislation which set up more options for companies that are in the zone of insolvency. As for the EU, it should be indicated that Directive on restructuring and insolvency got the ball rolling for establishing the restructuring frameworks: its recitals set the directions for MS to introduce more options for enterprises how to survive the financial difficulties[3]. Some MS have already imposed the pre-pack procedure into their national law[4] or, at least, use the pre-pack, guided by the rules of case law (for example, the Netherlands[5]).

Adopted in March 2026, a Directive harmonizing certain aspects of insolvency law set up new binding regulations for MS. This Directive's main goal is to implement similar norms regarding insolvency, including the regulation of the pre-pack within MS[6]. The legislator believes

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[1]"Quarterly registrations of new businesses and declarations of bankruptcies – statistics," Eurostat, accessed 16 February 2026, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Quarterly_registrations_of_new_businesses_and_declarations_of_bankruptcies_-_statistics

[2] Bolanle Adebola, "Transforming Perceptions: The Development of Pre-pack Regulations in England and Wales," *Oxford Journal of Legal Studies* 43, 1 (2023): 1, 4, https://academic.oup.com/ojls/article/43/1/150/6779857

[3] "Directive on restructuring and insolvency," EUR-Lex, accessed 19 February 2026, Rec. 2, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1023

[4] For example, in Poland: Weronika Kapica and Daniel Radwański, "Insolvency Pre-pack transactions in Poland," *Emerging Market Restructuring Journal* 11 (2021): 1, https://www.clearygottlieb.com/-/media/files/emrj-materials/issue-11-spring-2021/polandarticle_insolvency_prepack_transcactions_in_poland_v3-pdf.pdf

[5]José Carles, Bart Heynickx, and Juliette van de Wiel, "Harmonization within the EU: Spain, Belgium and The Netherlands," *Eurofenix* 94 (2023/2024): 32, https://www.insol-europe.org/publications/eurofenix-past-issues

[6] "Proposal for a Directive harmonising certain aspects of insolvency law," EUR-Lex, accessed 19 February 2026, Chapter 5. Other elements, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0702

that it will contribute into the support of the business continuity and will attract new investors into the EU's market as insolvency aspects would be similar across the EU[7].

The pre-pack mechanism can be considered as a hybrid procedure: it combines some features of informal workouts and includes the formal procedure[8]. This procedure is deemed as a really innovative corporate rescue mechanism[9] which creates "a new window of opportunities" for the companies and fosters the satisfaction of stakeholders. In order to provide the free movement of capital as one of freedoms in the EU, and attracts more investments into the EU, it is crucial to set the rules regarding the above-mentioned procedure which will be applied throughout the EU similarly. The Directive harmonising certain aspects of insolvency law, inter alia, focused on the legal provisions concerning the implementation of the pre-pack mechanism into MS' legislations[10].

It should be highlighted that the trend in restructuring as opposed to liquidation is a relatively recent phenomenon[11]. It was generally believed that the process of bankruptcy contributed more to protecting the interests of those who were involved. However, with businesses becoming more vulnerable, restructuring could be expected to play an important role. In this regard, the pre-packs could be recognized as a considerable part of insolvency law. The objective of this thesis is to look into the pre-pack and its impact on companies and their viability.

In the course of mentioned-above developments, it appears that there is a right time for investigation of the pre-packs and allocation of problematic issues of this procedure to enable the right application of this mechanism, especially in the light of freshly introduced Directive whose one of the covering areas is the pre-pack procedure which will be implemented by MS of the EU.

Scientific research problem. As we have pointed out before, the obligation to legislate the pre-pack mechanism in MS has been recently imposed on the EU level by Directive harmonising certain aspects of insolvency law. The EU legislator aims at introducing the safeguards which will provide the proper mechanism of the application of the pre-pack[12]. However, there are issues which constitute main concerns regarding the application of the pre-pack in real life.

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[7] "Directive harmonising certain aspects of insolvency law," EUR-Lex, accessed 01 April 2026, Rec. 1,2, https://eur-lex.europa.eu/eli/dir/2026/799/oj/eng

[8] Aurelio Gurrea-Martinez, "The Rise of Pre-Packs as a Restructuring Tool: Theory, Evidence and Policy," *European Business Organization Law Review* 24, 1 (2023): 5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3920332

[9] Corina Georgiana Cioroiu and Daniel Lipara, "Pre-Pack Proceeding - A Hybrid and Derogatory Safeguard Tool. Member States' Future Obligation of Integrating a New Mechanism in Their National Insolvency Law*," Ovidius University Annals, Economic Sciences Series* 23 1 (2023): 305, https://ideas.repec.org/a/ovi/oviste/vxxiiiy2023i1p304-310.html

[10] Directive harmonising certain aspects of insolvency law, *op. cit*, Chapter 4.

[11] Bo Xie, "The customisation effect of pre-arranged sales under Anglo-American insolvency law and practice: accountability deficits and possible remedies," *Journal of Corporate Law Studies* 19, 2 (2019): 387, https://www.tandfonline.com/doi/full/10.1080/14735970.2018.1520185

[12] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Chapter 5. Other elements.

It is appropriately to note that level of the satisfaction of creditors' claims, especially so called "junior" creditors whose claims are not supported by collaterals, are in danger during the pre-arranged sale: these creditors have less possibilities to protect their rights[13]. Apart from this, the practice of the pre-packs illustrates that the majority of the transactions in the context of the pre-pack are carried out by the connected parties: management, directors, shareholders are frequently those people who buy out the company. Consequently, such company is further called as "phoenix company" as it restores its operations being discharged of all previous debts[14]. It imposes the problem which is also raised by legal academics regarding the pre-packs. Besides, one of the key issues which relates to pre-pack is also the protection of employees' right during the transfer of the undertaking. The remarkable judgement of the CJEU, named *the Heiploeg case*, changed the understanding about how the employees should be treated during the pre-packs and whether the protective measures, guaranteed by Transfers of Undertakings Directive 2001[15], are applied also to employees during the transfer[16].

These and other matters as the conducting of public auction, the limit of time of the pre-pack and its impact on the effectiveness of the procedure, the viability level of the enterprise which was the object of the pre-pack etc. still raise the concerns among the legal scholars when discussing the effectiveness and reasonableness of the pre-pack. The research of the above-mentioned issues needs to be conducted in order to investigate the situation of the current regulation of the pre-packs in Directive harmonising certain aspects of insolvency law.

In the light of adopting a new legal instrument on the EU level which bind MS to transpose into their national law the provisions concerning the pre-pack procedure, the important question arises: **does the Directive harmonising certain aspects of insolvency law reflects and contains the measures which would be enough to provide the adequate regulation of the pre-pack?** The master's thesis is dedicated to conduct research to give an answer to this question.

The level of the analysis of the research problem. The essence of the pre-pack, its application in practice and its main concerns have been explored and addressed by legal academics. Such scholars in the field of law as Assistant Prof. Aurelio Gurrea-Martinez[17], Dr. Bo Xie[18], Dr.

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[13] Xie, *supra note*, 11: 408-409.
[14] Giuseppe Rizzo, "Phoenix operations in the pre-packaged administration: a rescue for the company or a trap for the creditors?" (dissertation, Queen Mary, University of London, 2013), 20, https://www.academia.edu/7211436/Phoenix_operations_in_the_pre_packaged_administration_a_rescue_for_the_company_or_a_trap_for_the_creditors
[15] "Transfers of Undertakings Directive 2001," EUR-Lex, accessed 20 February 2026, Art. 3-5, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02001L0023-20151009
[16] "Federatie Nederlandse Vakbeweging v Heiploeg Seafood International BV and Heitrans International BV., Case C-237/20," EUR-Lex, accessed 21 February 2026, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020CJ0237
[17] Gurrea-Martinez, *supra note*, 8.
[18] Xie, *supra note*, 11

Mark Wellard and Dr. Peter Walton[19], Associate Prof. Bolanle Adebola[20], Research Fellow Riz Mokal and Assist. Prof. Alfonso Nocilla[21] have already made a huge input into the survey of the pre-packs. Apart from this, such legal researcher as Giuseppe Rizzo[22] also conducted the investigation in this field concerning the problem of "phoenix company" which can come up because of the pre-packs. In the context of this mechanism the famous Graham Report[23] has to be mentioned as this report played a crucial role in highlighting the problematic issues of the pre-packs. It is expedient to touch on the notable preliminary judgements of the CJEU called *the Smallsteps case*[24] and *the Heiploeg case*[25] which illustrate the direction of the court regarding the pre-packs. Although the pre-packs were already the aim of researches of many legal scholars, this mechanism still needs to be investigated, especially in the context of the new Directive harmonising certain aspects of insolvency law of the EU.

Scientific novelty of the master thesis. The issue of the pre-pack mechanism, its prospectives and its significance for business have been already addressed in the context of its regulation in different countries. However, in the light of new Directive harmonising certain aspects of insolvency law whose Title 4 is dedicated to the pre-packs, it is necessary to examine this mechanism on a deeper level and to identify the challenges which MS can encounter while implementing it into real life. By far the pre-pack in the context of Directive harmonising certain aspects of insolvency law has not received enough attention yet, so it is important to reveal all problematic points which may complicate it.

Significance of the final thesis. The legal academics have already dedicated their research to the issue of the pre-pack and its relevance for the survival of the enterprises and business in general. Some of them investigated this procedure in the light of the legislation of different countries or paid attention to the general features and concerns regarding it. However, as Directive harmonising certain aspects of insolvency law was adopted, it is crucial to explore the view of the EU for the proper application of the pre-pack and reveal main problematic matters

[19] Mark Wellard and Peter Walton, "A Comparative Analysis of Anglo-Australian Pre-packs: Can the Means Be Made to Justify the Ends?," *International Insolvency Review* 21, 3 (2012), https://www.semanticscholar.org/paper/A-Comparative-Analysis-of-Anglo-Australian-Can-the-Wellard-Walton/ddd5d0c1f125adcdf4f6d44679c4f44ddf28f347
[20] Adebola, *supra note*, 2.
[21] Riz Mokal and Alfonso Nocilla, "Rehabilitating the U.K. Pre-Pack: A Critical Analysis and Proposals for Reform," *Banking and Finance Law Review* 40, 2 (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4565561
[22] Rizzo, *supra note*, 14.
[23] Teresa Graham, "Graham Review into Pre-pack Administration: Report to the Rt Hon Vince Cable MP," GOV.UK, accessed 22 February 2026, https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration
[24] "Federatie Nederlandse Vakvereniging and Others v Smallsteps BV., Case C-126/16," EUR-Lex, accessed 22 February 2026, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CJ0126
[25] Federatie Nederlandse Vakbeweging v Heiploeg Seafood International BV and Heitrans International BV., Case C-237/20, *supra note*, 16.

which can arise when the mechanism has become the part of the MS' legislations. In this regard, the importance of the further research on the pre-pack and its regulation within the EU appears to be well-timed.

Aim of the research – this Thesis aims to analyze the regulation of the pre-pack procedure adopted on the EU level, identify its core problematic issues and provide suggestions how to make the pre-pack one of the most well-functioning restructuring measures in the insolvency law of MS.

The objectives of the Master Thesis. To pursue the above-mentioned goal of the Thesis these objectives are to be performed:

1. To analyze the concept and features of the pre-pack mechanism, how it is regulated in other countries and explore the view for the pre-pack in the EU insolvency law;
2. To investigate the essence of the preparatory and liquidation phases of the pre-pack in the light of very recent Directive harmonising certain aspects of insolvency law and identify core problematic issues which can arise while applying this procedure;
3. To figure out the concerns related to common provisions of the pre-pack mentioned in the Directive harmonising certain aspects of insolvency law;
4. To provide the suggestions for improvements of the regulation of the pre-pack procedure within the EU insolvency law.

Research methodology. These methods are to be used in the Thesis to research the scientific issues:

1. Collection of the relevant data – this method is used to gather and observe the necessary literature which relates to the pre-pack procedure in different countries and in the EU as well;
2. Analysis of the information – will be applied in order to single out the essence and main features of the pre-pack procedure, identify the core problems of it and come up with current solutions for them;
3. Comparative analysis – this method is very important to contrast the approaches which are used in legislation of states concerning the pre-pack and to understand which practices are better to deal with its problematic matters;
4. Logical method – will be used in the Thesis to better illustrate main conclusions and insights about the pre-pack procedure and its proper regulation in the EU legislation.
5. Case study – in order to address the issues related to the pre-pack, specifically to the protection of employees, the judicial practice is to be applied which will help to demonstrate the development of different approaches.

The structure of the Thesis. This research paper consists of three parts, which are divided into separate chapters. The first chapter is dedicated to the general essence of the pre-pack: the features of this procedure, its perspectives and regulation in different countries, mostly in the USA and in the UK. The research referred to the pre-pack legislation within MS of the EU is to be conducted. Also, the introduction to new Directive harmonising certain aspects of insolvency law will appear. The second part is focused on the preparation and liquidation stages according to the Directive harmonising certain aspects of insolvency law and its main concerns – in this chapter we will put the emphasize on the issues which constitute elements of these phases and whether their regulation is sufficient to address problematic issues. This chapter will also involve the proposals to Directive harmonising certain aspects of insolvency law concerning the regulation of these stages. In the third chapter we will discuss general provisions of the procedure as the connected parties, the creditors' protection and similar matters which are affected throughout the whole pre-pack. Basing on the identified problematic issues, it will be included into the third chapters the suggestions how to improve the current regulation of the general aspects of the pre-pack.

The defended statements. Master's thesis defends the following statements:

1. Although Directive harmonising certain aspects of insolvency law provides the regulation of the pre-pack proceeding following the minimum harmonisation approach, in order to increase its effectiveness, the legal framework of the pre-pack proceeding on the EU level should be adjusted by enhancing of the employees' protection and providing the clear safeguards for junior creditors.
2. In order to create the well-designed legal regime of the pre-pack proceeding, the company viability assessment should be always considered by the monitor during the preparatory phase.

CHAPTER 1. THE PRE-PACK: A CUTTING-EDGE RESTRUCTURING MECHANISM IN THE INSOLVENCY FIELD

The concept of the pre-pack is part of the insolvency law related to the restructuring mechanisms. A recently adopted Directive harmonising certain aspects of insolvency law imposed an obligation on MS of the EU to implement the pre-pack into their legislation[26]. Therefore, it is quite relevantly to investigate this mechanism and clarify what is the essence of the pre-pack and whether it is useful and efficient for financially distressed companies to apply it.

1.1. The pre-pack as a restructuring tool under Directive harmonising certain aspects of insolvency law

Directive on restructuring and insolvency gave a start for introduction of the mechanisms which target at giving the possibility for enterprises to cope with the financial difficulties[27]. We can observe that the modern legislation framework of the EU seeks to regulate the restructuring procedure in the way which maximize legal flexibility and introduce for the enterprises the procedure which will limit the role of court and foster debtor-creditors negotiations[28].

Whereas the Directive on restructuring and insolvency did not establish the pre-pack mechanism as mandatory one for MS, recently introduced Directive harmonising certain aspects of insolvency law bound them to make the pre-pack a part of national legislation[29]. This legal instrument, adopted on 30 March 2026, for the first time instituted the EU legal framework concerning the pre-pack proceeding. This Directive prescribed that MS should allow the debtor to use a possibility to sale the business as a going concern, so that the business will be able to continue its operations as economically functioning entity[30].

The Directive harmonising certain aspects of insolvency law provides the definition of the pre-pack proceeding, establishing that this procedure consists of two stages, preparation and liquidation ones, which permit the debtor to conduct the sale of the whole or part of the business to the person which seems to propose the best terms for the transaction[31]. We can observe that the understanding of the pre-pack procedure remains the same as it was initially proposed[32].

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[26] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 21.
[27] Directive on restructuring and insolvency, *supra note*, 3: Art. 2.
[28] José Garrido et al.,"Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive," *IMF Working Paper* 152 (2021): 7, https://www.imf.org/en/publications/wp/issues/2021/05/27/restructuring-and-insolvency-in-europe-policy-options-in-the-implementation-of-the-eu-50235
[29] Directive harmonising certain aspects of insolvency law, *op. cit.*, Art. 21.
[30] *Ibid.*, Rec. 29.
[31] *Ibid.*, Art. 1.
[32] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Chapter 5. Other elements.

It is worth noting that the new Directive harmonising certain aspects of insolvency law highlights that piecemeal liquidation is not regarded as the pre-pack proceeding[33]. The piecemeal liquidation does not provide the maximization of the business value. However, the pre-pack mechanism is able to minimize value destruction of the business as the realization of the insolvency estate takes place very fast when the formal proceeding is opened[34]. Therefore, we consider that the Directive harmonising certain aspects of insolvency law aims at providing the legal framework for the pre-pack according to which the business should be sold in the way which will preserve its operability.

Nevertheless, having established the general definition of the pre-pack, the EU legislator emphasizes that although the general standards of the mechanism are laid down, MS should have the possibility to adapt the rules to their own national legislations[35]. It seems that a very-detailed regulation of the pre-pack on the EU level is not provided, so that MS should adhere to main safeguards of the pre-pack but also have discretion to apply national legal traditions.

Title 4 of the Directive harmonising certain aspects of insolvency law which is dedicated specifically to the regulation of the pre-pack proceeding is divided into 4 chapters[36]. Scrutinizing the Directive harmonising certain aspects of insolvency law, we observe that general provisions are firstly mentioned, after the norms concerning preparation and liquidation phases are included, and finally common provisions appear. Prima facie, such structure may seem quite inconsistent as the rationale behind the division of general and common provisions is not apparent. However, having investigated the essence of these chapters, we observe that the general provisions are dedicated to the foundational framework of the pre-pack procedure[37] whilst the common provisions reflect the regulation of the operational mechanics of both stages[38]. Hence, the distinction becomes more understandable.

Directive harmonising certain aspects of insolvency law indicates that MS shall transpose its norms into national legislation by 22 January 2029[39]. It appears that there are approximately 3 years to implement the provisions for MS.

At present, it comes as no surprise that the EU legislator has decided to impose the pre-pack mechanism throughout the EU: many insolvency practitioners believe that selling the company as a going concern within clearly defined time is the most effective way to satisfy the

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[33] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 29.
[34] "Impact Assessment Report accompanying Proposal for a Directive harmonising certain aspects of insolvency law," EUR-lex, accessed 02 March 2026, Para. 5.2.1.1., https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022SC0395
[35] Directive harmonising certain aspects of insolvency law*, op. cit.*, Rec. 30.
[36] *Ibid.*, Title 4.
[37] *Ibid.*, Title 4, Chapter 1.
[38] *Ibid.*, Title 4, Chapter 4.
[39] *Ibid.*, Art. 55.

stakeholders[40]. Additionally, the world's leading powers, the UK and the USA are actively applying the pre-pack procedure during last two decades[41]. Such considerations predispose to the opinion that the pre-pack has proved its real effectiveness for business and, therefore, plays an important role among other restructuring procedures.

Considering all above-mentioned facts, we suggest that the pre-pack is the procedure that is deemed as an effective tool in restructuring proceeding. Its active application in the UK and in the USA illustrates that it should be the part of the insolvency legislation as it can become additional option for the stakeholders. The recently adopted Directive harmonising certain aspects of insolvency law demonstrates that European Commission, having included the regulation of the pre-pack into new legislative instrument, also agreed that this mechanism should be implied on the EU level. So, it is justified to constitute that the pre-pack holds a prominent place among other restructuring mechanisms and, therefore, should be explored more deeply.

1.2. The features of the pre-packs: why the mechanism is gaining momentum nowadays

In order to understand the importance of the pre-pack for business and its rescue, it is expedient to consider and evaluate the main features of this procedure. In this context we would like to clarify that currently the different forms of pre-pack are identified: pre-packaged reorganizations and pre-packaged sales, and both these procedures are generally called "the pre-pack". The pre-packaged reorganization is used, for example, in the Philippines, Singapore as the tool which enables the debtor to negotiate the restructuring plan with its creditors and afterwards request the court to adopt the plan. In comparison, the pre-packaged sale involves the sale of the business as a going concern which is conducted by the specific procedure[42]. Our research targets at investigating the pre-pack in the meaning of the pre-packaged sale.

The pre-pack mechanism is regarded as hybrid procedure in insolvency law: it comprises an informal proceeding and a formal one[43]. The main point of the informal proceeding is that the sale of debtor's assets is negotiated and agreed to be sold before the start of the formal proceeding. That is why this stage is also called as informal workout[44]. We believe that this feature of the pre-pack makes it very specific and useful as such informal negotiations give more opportunities to parties to identify the terms of the sale, the price and similar issues. From the business perspective

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[40] John Michael Wood, "Corporate Rescue: A Critical Analysis of its Fundamentals and Existence," (PhD thesis, University of Leeds, 2013), 184, https://scispace.com/pdf/corporate-rescue-a-critical-analysis-of-its-fundamentals-and-41ttcummvp.pdf

[41] Xie, *supra note*, 11: 388.

[42] Gurrea-Martinez, *supra note*, 8: 5-7.

[43] *Ibid.*, 5.

[44] Eugenio Vaccari, "English pre-packaged corporate rescue procedures: is there a case for propping industry self-regulation and industry-led measures such as the pre-pack pool?," *International Company and Commercial Law Review* 31,3 (2020): 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5983974

it is important that the parties have the freedom to negotiate without significant state authorities' intervention[45].

The second part of the pre-pack mechanism is regarded as a formal proceeding because at this point the organ of state authority is already involved[46]. For example, in the UK the appointment of the administrator takes place after the terms of the company sale was agreed[47]. The role of the administrator is to authorize the pre-arranged sale[48]. Some countries in the EU, as Spain, Belgium, having introduced the pre-pack procedure into their legislation, chose the model that the court, not the administrator, holds the powers to enable the sale of the business as a going concern[49]. Such differences in the procedure demonstrate that countries apply distinct approaches in the pre-pack procedure.

Once the pre-pack sale is authorized by competent organ, the earnings are distributed among the creditors[50]. We understand that in each state creditors are ranked differently. Therefore, the satisfaction of creditors' claims depends on the national legislation, and it can happen that unsecured creditors receive no distribution.

The aforesaid leads to the conclusion that, although there can be some specifics in countries, the essence of the pre-pack mechanism lies in the fact that there are two main stages which have different aims. The first phase focuses on the arranging of the sale of the financially distressed company when the parties to the pre-pack have an opportunity to identify the terms of the purchase and, therefore, determine the potential buyer. We believe that such freedom is able to create the real competitiveness between the bidders, so more value preservation of the business can be achieved in this way.

The second stage of the pre-pack, also regarded as final phase, consists of the official permission of the competent authority to bring into force the sale of the company. It is argued that this part of the procedure may be deemed as a crucial one: the competent authority has to assess whether the sale is in accordance with law[51] and, consequently, approve the sale or reject it. Therefore, this phase has a direct impact on the stakeholders, especially creditors, as the proceeds which are obtained from the sale have to be distributed among them in order to satisfy their claims.

All the above-mentioned information about the pre-pack mechanism gives us a possibility to single out its features as well as its advantages and disadvantages for the business in financial difficulty. The first characteristics of the procedure we would like to mention are the reduced

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[45] Xie, *supra note*, 11: 390.
[46] Gurrea-Martinez, *supra note*, 8: 7.
[47] Xie, *op.cit.,* 396.
[48] Gurrea-Martinez, *op.cit.,* 7.
[49] Carles et al., *supra note*, 5: 32.
[50] Wellard and Walton, *supra note*, 19: 145.
[51] For ex., in Poland, Court is bound to make such review: Kapica and Radwański, *supra note*, 4: 13.

duration of the proceeding as well as lower costs spent for it[52]. It is deemed that the pre-pack is a fast-track procedure because the sale itself is performed much faster when the parties agreed about it before the opening of the formal proceeding[53], so eventually it allows to avoid the tightening of the process. The facts state that in the UK the pre-pack proceeding can be completed within 12 months, while in the USA the length of the procedure is approximately 80 days[54], so these evaluated timeframes prove that the pre-pack is quite fast.

The same reason can serve as an explanation of the fact that the pre-pack saves the money for the parties so that the costs of the proceedings are reduced in comparison with the general insolvency proceeding when the negotiations, the arrangement of the sale are conducted not by the parties of the sale, but it is an insolvency administrator who organizes the whole procedure. The avoidance of the time-consuming and expensive proceeding is another justification for the parties to choose the pre-pack[55]. However, these features are not the sole reasons why this mechanism is gaining momentum nowadays.

Confidentiality is also regarded as the concept which is one of the features of the pre-pack[56]. In comparison with the ordinary insolvency proceeding, during the pre-pack procedure the negotiations around the sale of the company are kept in secret, so its potential customers are not directed by the information regarding the insolvency and, therefore, carry on buying the goods or services. It can be explained by the fact that the information about bad financial situation of the company is not publicly available, so the society keeps dealing with the business. This results in the fact that daily operations are retained, and the company continues to generate revenue. All the above-mentioned circumstances lead to one more significant feature of the pre-pack – the preservation of the value of the business[57].

In the course of the pre-pack the market price of the company is maintained at some degree. We suggest that it can be explained in a way that the business still has an economic value for a society as it is not informed about significant financial difficulties, so in the eyes of its customers the company has the same positions on the market level. Of course, it is the consequences of the confidentiality and the speed of the pre-pack[58]. These aspects serve as the factors which do not allow the leak of the information to the public which can provoke negative consequences for the business as, for example, the reduction of sales, lowering trust to the entity

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[52] Gurrea-Martinez, *supra note*, 8: 8.
[53] Xie, *supra note*, 11: 392.
[54] Gurrea-Martinez, *op.cit.*, 12-13.
[55] Xie, *op.cit.*, 393.
[56] Adebola, *supra note*, 2: 4.
[57] Rizzo, *supra note*, 14: 13-14.
[58] *Ibid.*, 14.

etc. So, it proves that the preservation of business value is real in the pre-pack scenario and that is one of the main features of this mechanism.

In the context of the pre-pack, we would like to indicate one more advantage concerning the issue of transferring of employees while selling the company as a going concern. In a remarkable Graham report it was investigated that the pre-pack mechanism allows to preserve jobs[59]. We consider that this feature is taken into account while choosing this restructuring tool for the company[60]. It can be explained in the way that the business retains its daily activities and, therefore, there is no need for a company to reduce the quantity of employees. That is why job places are saved.

Such characteristic confirms that pre-pack mechanism creates a good environment for companies and for employees as well to restore business activities and to avoid unnecessary losses. It is important to add that there was a case when the court rendered a judgment in favour of the pre-pack sale despite of the creditors' objection to it, based its argumentation that the pre-pack mechanism will save the jobs[61]. The welfare of the employees as a vulnerable group when a company is financially distressed, in our opinion, should be taken into account, so it appears that the pre-pack mechanism is a restructuring tool which enables to fulfill it.

We believe that it is quite difficult to create a legal procedure which would not impose any risks. That is why during investigating the procedure of the pre-pack some concerns were identified which should be regarded while choosing this procedure to apply. First of all, we would like to mention connected parties sale issue which raise many concerns in the legal academics' circle[62]: when a buyer is a party connected to the distressed company, it creates the risk that creditors will not get sufficient guarantees of protection as, for example, managers, shareholders can perform the sale opportunistically, not taking into account creditors' interests.

Additionally, when the management acquires the company, it can create the effect of "phoenix company". It is explained in the way that same people who have ruled the insolvent company, buy out the company, so the purchased entity is reborn and free of old debts at the same time[63]. We consider that this situation can potentially create the doubts about the good faith of the managers or other people involved in this operation in the context of pre-pack procedure.

Apart from this, the speed of the pre-pack procedure reduces the creditors' guarantees as well: less time is dedicated to following the safeguards of the creditors. Specifically, the issue regarding the unsecured creditors occurs as very often this group is deprived while returning the

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[59] Graham, *supra note*, 23: 25.
[60] *Ibid.*, 24.
[61] Rizzo, *supra note*, 14: 13-14.
[62] Adebola, *supra note*, 2: 5.
[63] Rizzo, *op. cit.,* 20.

debts[64]. The empirical research illustrated that during the pre-packs the debts returns of the "junior creditors" are lower rather than during ordinary proceedings[65]. Apart from this, some scholars emphasize that during the pre-pack mechanism there is no proper evaluation of the creditor's protection: it seems that the administrator, whether appointed by the court or not, can disregard the interests of the creditors, especially unsecured ones[66]. Such data proves that pre-pack proceeding poses some risks to its stakeholders which affect their rights and safeguards provided by legislation.

Summing up, we have observed that the pre-pack mechanism has the features which distinguish it from other restructuring procedures known in the field of insolvency law. Main point to single out is that this tool is a hybrid procedure which combine private negotiations of the business sale with its mandatory approval of competent authority. It appears to be quite unusual as, from one side, parties have a freedom to establish its price and be guided by the market economy rules. However, such freedom is limited to the legislative requirements and assessments of the state authority which has to make a final decision.

The speed, confidentiality and expenses reduction are those criteria which encourage the interested parties to apply the pre-pack, and, we agree, that such factors play a crucial role for the struggling business. It is appropriate to note that the satisfaction of creditors' claims is one of the main objectives of insolvency proceedings as well. We believe that the pre-pack could help to achieve it from the following perspective: as the business value is mostly preserved, the price of the company in the market is higher which entail the greater debts returns.

Unconditionally, the pre-pack procedure imposes some risks for the creditors as it reduces their guarantees provided by the ordinary proceeding. Additionally, the connected parties sale raise the concerns among legal scholars. However, despite of this, the pre-pack procedure is applied, and this practice provokes to further investigation of the procedure on a deeper level in other countries.

1.3. The pre-pack legal framework

In the previous sub-chapter, it was referred that the general meaning of the pre-pack is a pre-arranged sale of the company as a going concern with its further approval by competent authority. In order to identify what are the approaches in different countries, especially in MS, it is better to analyze the legal framework more thoroughly.

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[64] Gurrea-Martinez, *supra note*, 8: 9-10.
[65] Adebola, *supra note*, 2: 5.
[66] Anthony Wijaya, "Pre-Pack Administration Sale: a Case of Sub Rosa Debt Restructuring," *International Insolvency Review* 25, 2 (2016):129-130, https://onlinelibrary.wiley.com/doi/epdf/10.1002/iir.1248

1.3.1. The experience of the UK and the USA

The USA is considered as a country where the pre-pack was initially introduced in order to save the company in financial difficulties by means of its sale to the connected party or, even, competitor[67]. The analysis of American bankruptcy legislation showed that the US Bankruptcy Code propose two types of the pre-packaging: the first type of the pre-pack lies in negotiation of the restructuring plan with creditors and getting their votes before the start of formal proceeding, and the second one allows to sell the business without creditors' approval[68].

In the first case, the pre-packaged restructuring process entails that a debtor is authorized to file the reorganization plan already approved by majority of creditors whose rights are affected before the formal proceeding is started. The unanimous acceptance of the reorganization plan by one hundred percents of creditors is not necessary. Thus, the minority dissenting creditors are bound by the terms of the reorganization plan which is supported by majority of creditors[69].

Another type of the pre-pack under American legislation is the pre-packaged sale which is regulated in Section 363 in US Bankruptcy Code. According to this procedure the debtor has a possibility to enter into the sale-purchase agreement with an initial buyer, called "stalking horse". The court is authorized to approve the agreement that creates an opportunity for other bidders to introduce their terms for the purchase. This process is considered as an auction, so usually the judicial body, having handled a special proceeding, chooses the buyer which proposes the highest price for the company and approves the sale-purchase contract. The earnings gained after the completion of the agreement are used to cover the claims of the creditors. It entails the result that a purchaser owns a company which is free of previous debts and the obligations[70].

The above-mentioned pre-pack procedures allow the debtor to have more freedom and more options to deal with the insolvency. However, in the context of the debtor's interests we should not also forget about creditors and the satisfaction of their claims. The pre-pack proceeding related to the restructuring plan involves the guarantees that debtor shall approve the reorganization plan with the majority of the creditors; the pre-packaging under Section 363 in US Bankruptcy Code provides that the notice has to be given to all interested parties before the proposed sale. As in the first case creditors take part more in the procedure, it is deemed that pre-arranged negotiations of reorganization plan provide more protection to creditors' interests rather than sale under section 363 US Bankruptcy Code[71]. Such expedited process creates the problematic

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[67] Vaccari, *supra note*, 44: 4.
[68] "U.S. Code," Law Cornel, accessed 15 March 2026, §§ 1123, 1126, 363, https://www.law.cornell.edu/uscode/text
[69] Business Bankruptcy Committee Leadership, *Reorganizing Failing Businesses: A Comprehensive Review and Analysis of Financial Restructuring and Business Reorganization, Third Edition* (ABA Publishing, 2017), 7-8, https://www.americanbar.org/products/inv/book/278736997/
[70] Xie, *supra note*, 11: 400-401.
[71] *Ibid.*, 400-403.

issues regarding the transparency and guarantees of the creditors as the last ones are less involved into the procedure. When the pre-pack sale under Section 363 takes place, the court is not guided by some standards which navigate if the sale should be approved or not. In some cases, even the hearing is not obligatory for adopting the pre-arranged sale[72].

To compare with, we should also investigate the pre-pack mechanism from the perspective of the legislation of the UK. The pre-pack is regarded as an administrative procedure which combines the features of informal workout and formal insolvency proceeding. This mechanism is handled in the way that the terms of the sale of business as a going concern are negotiated and agreed between the parties before the appointment of the administrator. Once the administrator has been assigned, the sale-purchase agreement is executed quite fast, without the delay. The considerations which are obtained as the result of the sale are allocated by the administrator among the creditors[73]. It appears that parties to a contract are granted the discretion in negotiations the terms and in choosing the appropriate purchaser.

The SIP 16 is not considered as a binding legal act, however, issued by Insolvency practitioners Association in the UK, it introduces main guidelines and principles to the administrator. According to SIP 16 the administrator is obliged to prove that the pre-pack sale is reasonable and provide creditors with the sufficient information required by SIP 16 Statement[74]. Although the SIP 16 is regarded as a soft law, we believe that this act is a useful guidebook for the administrator as it forces them to act reasonably when applying the pre-pack.

Regarding the pre-pack in the UK, it is appropriate to mention about the new Regulation which came into force only in 2021: this Act does not allow to bring into force the connected party pre-pack sale during the first eight weeks after the commencement of the procedure unless the company's creditors have approved the sale or a special report has been received[75]. Such new regulations demonstrate that the pre-pack sale to the connected parties is the problematic issue as the legislator seems to try to limit such sales and to adopt additional protective measures which will be able to prevent the abuse of the advantage which connected parties possess due to their status. We make such conclusion taking into account the content of information which shall be included into the qualifying report[76].

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[72] Xie, *supra note*, 11: 403-404.
[73] "The Art of the Pre-Pack — Edition 3. United Kingdom: Core Elements of a Pre-Pack Administration," Global Restructuring Review, accessed 17 March 2026, https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack/edition-3/article/united-kingdom-core-elements-of-pre-pack-administration?utm_source=GRR&utm_medium=pdf&utm_campaign=The+Art+of+the+Pre-Pack+-+Edition+3
[74] "SIP 16: Pre-packaged Sales in Administrations," Insolvency-Practitioners, accessed 17 March 2026, Para. 5, https://insolvency-practitioners.org.uk/regulation-and-guidance/england-wales/
[75] "The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021," Legislation.Go.UK, accessed 18 March 2026, Reg. 3, https://www.legislation.gov.uk/ukdsi/2021/9780348220421/regulation/3
[76] *Ibid.*, Reg. 6,7.

Although the UK and the USA have some differences in regulation of the pre-pack, both countries consider this mechanism as a hybrid insolvency proceeding which aim at expediting the process and saving the business. Due to the speed and less statutory requirements, the pre-pack appears to be an attractive procedure. However, the same reasons give rise to concerns about sufficient creditors' protection. Hence, the practice of those countries should be taken into consideration.

1.3.2. The development of pre-pack legislation in European countries

It is expedient to conduct the research about the application of the pre-pack mechanism in MS. Directive on restructuring and insolvency, aiming at establishing throughout the EU restructuring tools which will help viable business to overcome financial difficulties[77], enacted the provision about obligatoriness of restructuring tools in the legislation of MS[78]. Hence, MS were compelled to introduce the restructuring tools into their legislation.

Some MS have developed the insolvency legislation concerning the pre-pack earlier: for example, in 2016 the pre-pack procedure was enshrined into Polish legislation[79]. Although the pre-pack is regarded as pre-arranged sale of the business with further judicial approval of the agreement, Polish regulation of the pre-pack can be characterized by the following specific features. Firstly, not only the debtor, but also the creditors are authorized to initiate the pre-pack sale of the assets. Apart from this, the appointed administrator is deemed as the seller as they represent the insolvency estate. Also, the purchaser after concluding the transaction owns the business which is free from any private or public debts.

The legislation of Poland also imposes additional obligations if the buyer is a connected party: the special expert has to be appointed by the court in order to independently assess the value of the business. In such case the transaction is approved only if the estimated price is not lower than the price established by the expert. Additionally, Polish Insolvency law allows to arrange the sale not only the whole business or its part, but also a group of significant assets [80].

Such specific characteristics can create some concerns. The possibility to sell the group of assets seems to be the form of "piecemeal liquidation" which is contrary to objectives of the pre-pack. Furthermore, the fact that creditors are able to file the pre-pack petition can create a chaos as the court and the administrator have to check all proposals rather than to focus on one

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[77] Directive on restructuring and insolvency, *supra note*, 3: Rec. 1.
[78] *Ibid.*, Art. 2, 4, 8.
[79] Kapica and Radwański, *supra note*, 4: 1.
[80] *Ibid.*, 3, 4, 5, 10.

well developed transaction[81]. We suggest that it can create an unnecessary burden on them and also this contradicts to the essence of the pre-pack as such things delay the whole transaction and, as a result, the proceeding can take quite a lot of time.

Spain and Belgium are those MS which adopted special legislation regarding the pre-packs after adoption of the Directive on restructuring and insolvency[82]. In Spain there is two-phases approach of the pre-pack when the first stage is filing the appropriate request to Court to appoint the pre-packer and after that another petition which includes a binding offer from a purchaser is submitted. The pre-packer, a special trustee, is to file special report regarding the buyer's offer, and if it is acceptable, such report is deemed as the request to approve the sale[83]. In Belgium the procedure is quite similar as its legislation mainly regulate the preparation phase, after which the court, having opened the formal proceeding, authorizes the pre-arranged sale[84].

The Netherlands in this context has another approach: there is no special insolvency legislation coordinating the pre-pack mechanism, so the procedure is governed by case law practice. However, the procedure has no significant differences in comparison with Spanish and Belgium legislation: the debtor, having requested the appointment of trustee, prepares the transaction. Having negotiated the deal, debtor files for insolvency to the court which appoints the trustee and, afterwards, concludes the transaction[85].

France also regulated the pre-pack mechanism on the national level. French legislation states that the preparation phase has to be firstly initiated. During this phase the confidential bidding process is to be conducted among potential buyers. After the preparation stage, the formal proceeding is opened and, having chosen the best offer, court approves the sale. It is worth to be mentioned that the formal insolvency proceeding is not binding when, after completion of sale, all creditor's claims are fully satisfied [86].

It is expedient to indicate that the implementation of the pre-pack procedure into the national legislation also has raised some concerns[87]. The German legal framework does not

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[81] Agnieszka Cybulska-Bienioszek, Paweł Kuglarz, and Mateusz Kaliński, "Pre-packs in Poland: How Can We Make Pre-packs Work More Efficiently?," *Eurofenix* 99 (2025): 20–21, https://edition.pagesuite-professional.co.uk/html5/reader/production/default.aspx?pubname=&edid=c08e5809-50db-4d17-a5d2-f448a8d2f9a2
[82] Carles et al., *supra note*, 5: 32.
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*
[86] Anja Droege Gagnier, "The French pre-pack proceedings challenged by the Directive Proposal of the European Parliament and of the Council, harmonising certain aspects of insolvency law: the difficulty of finding the balance between transparency and confidentiality," *Insolvency and Restructuring International* 17, 1 (2023): 26, https://bmhavocats.com/assets/uploads/2023/08/202306-The-French-prepack-proceedings-challenged-Droege-Gagnier.pdf
[87] "Impact of EU "Pre-pack proceedings" directive in Germany pre-pack proceeding vs pre-pack plan," CMS.Law, accessed 20 May 2026, https://cms.law/en/gbr/legal-updates/impact-of-eu-pre-pack-proceedings-directive-in-germany-pre-pack-proceeding-vs-pre-pack-plan

regulate the pre-pack as a pre-arranged sale of the company with its further authorization. Despite this, German insolvency law provides the protective shield procedure. This mechanism grants the possibility for the debtor to negotiate the insolvency plan with creditors, and, inter alia, one of the measures included into the plan may be the sale of the company. Although some practitioners claim it as "German pre-pack", the protective shield procedure should not be considered in this way as this procedure requires the long insolvency plan in order to perform the sale[88]. With the regard to Directive harmonising certain aspects of insolvency law, Germany has questioned the framework of the pre-pack proceeding provided therein, especially in the context of creditors' participation and the assignment of the executory contracts to the company's acquirer[89]. The implementation of the pre-pack proceeding as a pre-arranged sale within the framework of Directive harmonising certain aspects of insolvency law provoked the discussions regarding the adjustment of German insolvency legislation according to the new European legal act and the extent to which it should be made[90]. Therefore, we observe that the obligatoriness of the pre-pack proceeding has created new challenges for the national legislation.

We observe that some MS have implemented the pre-pack procedure into their legislation or apply it on case law basis. The analyze of the regulations proved that the pre-pack proceeding in most cases is used in the way that the sale is negotiated prior to the opening of the formal proceeding and, once the appropriate request has been filed to the court, the satisfying transaction is approved and executed quite fast by relevant authority. It was also researched that Directive on restructuring and insolvency encouraged some countries to implement the pre-packs. Although the introduction of the pre-pack proceeding has raised some concerns, we believe that the pre-pack is a useful restructuring tool which can complement the insolvency legislation of MS.

1.3.3. The EU minimum harmonisation approach for the pre-pack in Directive harmonising certain aspects of insolvency law

In 2022, a new Proposal concerning harmonizing of some aspects of insolvency law of MS was published[91]. It laid the foundation for the recently adopted Directive harmonising certain aspects of insolvency law.

It was identified that divergent insolvency regimes are the factors which limits the freedom of capital movement in the EU. Fragmented insolvency rules create the barriers for the

[88] "Pre-pack sales add to the German restructuring toolbox," CCLA.SMU, accessed 22 May 2026, https://ccla.smu.edu.sg/sgri/blog/2023/08/11/pre-pack-sales-add-german-restructuring-toolbox
[89] Impact of EU "Pre-pack proceedings" directive in Germany pre-pack proceeding vs pre-pack plan, *supra note*, 87.
[90] "The European Commision's proposal to harmonize aspets of insolvency law across the EU," Hogan Lovells, accessed 20 May 2026, https://www.hoganlovells.com/en/publications/the-european-commissions-proposal-to-harmonise-aspects-of-insolvency-law-across-the-eu
[91] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6.

potential investors as the last ones are forced to assess approximately 27 different regimes in order to predict the possible consequences of their investments. Such situation puts the additional burden on the investors because the necessity of learning different legislation entails spending higher information and learning costs. These obstacles reduce potential investments which can be made into the EU capital market. Therefore, the reduction of fragmented insolvency regimes is necessary to attract more financing into the EU[92].

We see that the reasoning of the Proposal for a Directive harmonising certain aspects of insolvency law is mainly explained by the importance of the new investments which are to strengthen the capital market of the EU. The different insolvency regimes demand more time to investigate them and this can influence the decision of the potential investors whether to put money, assets, ideas, time or not. So, in order to facilitate the process of evaluating the potential risks of the investments, the European legislator took a decision to harmonize some aspects of substantive insolvency law.

The pre-pack proceeding is one of the mechanisms which is to be coordinated on the EU level. It is determined in *travaux préparatoires* of a Directive harmonising certain aspects of insolvency law that it should target at providing the maximization of value recovery, the predictability and fair distribution of assets between creditors in MS. The Proposal for a Directive harmonising certain aspects of insolvency law initially established that the pre-pack is regarded as the sale of the business negotiated and arranged before the formal proceeding is commenced. Since the main terms of the transaction is agreed between parties beforehand, the execution of the sale after the opening of formal proceeding is completed faster[93].

We consider that the implementation of the pre-pack mechanism on the EU level is driven by the willingness to impose more restructuring tools as it can contribute to maintaining the financial stability. Having made the research in the previous subchapters, we analyzed that the pre-pack sale is regarded as fast and cost-saved procedure. Also, it helps to preserve the value of the business which potentially increases the sale price of the entity and, consequently, can satisfy more creditors' claims. So, implementing the pre-pack on the EU level can complement the insolvency regime in MS significantly.

The European legislator while choosing the legal instrument settled on the Directive, not Regulation. It was argued that Regulation is not suitable for such legislative act as it does not allow enough flexibility for MS which is necessary for them in order to retain its local legal traditions. Considering different policy preferences, cultures and systems of MS, Directive is appropriate

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[92] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Chapter 1. Context of the Proposal.
[93] *Ibid.*, Chapter 5. Other elements.

legal instrument as it respects the special legal characteristics on the one hand and can provide the coherence of main insolvency provisions on the other hand. Apart from that, it is stated that minimum harmonization approach is followed for substantive insolvency law[94].

It was already singled out that, although the essence of the pre-pack proceeding is quite similar in the countries, special features are imposed in the legislation. As it has been mentioned, Directive harmonising certain aspects of insolvency law aims to keep the uniqueness of legal traditions of countries, hence the flexibility is needed to provide it. At the same time, the key processes within the pre-pack should be harmonized so that the investors would enjoy the harmonized insolvency regime as it can relieve them from the necessity to analyze 27 insolvency regimes.

We consider that the objectives of the proper regulation of the pre-pack mechanism on the EU level are to correctly combine the specific legal culture, allow the enough quantity of flexibility, however, at the same time - to provide that the most important aspects of the pre-pack are well harmonized and the freedom of the capital market is achieved in a proper way. That is why the further investigation should focus on the newly introduced Directive harmonising certain aspects of insolvency law and the detailed analysis of its provisions.

[94] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Chapter 2. Legal basis, Subsidiarity and Proportionality.

CHAPTER 2. THE PREPARATORY AND LIQUIDATION PHASES OF THE PRE-PACKS: FEATURES AND PROBLEMATIC ISSUES

The preparatory and liquidation phases are indicated in Directive harmonising certain aspects of insolvency law as the stages which comprise the whole procedure and are obligatory to be implemented by MS of the EU[95]. This Chapter is dedicated to more thorough research of these phases. The issues of the confidentiality of the pre-pack, the company viability, the public auction, the role of monitor during the pre-pack and other important challenges will be addressed in the context of the recently adopted Directive harmonising certain aspects of insolvency law in Chapter 2.

2.1. The essence of the preparatory stage

The preparatory phase can be considered as a significant element of the pre-pack – it differs it from the ordinary insolvency proceeding where all actions take place when the relevant request is filed with the authorities. Directive harmonising certain aspects of insolvency law sets the provision according to which the pre-pack proceeding shall comprise the preparatory stage: its main aim is to identify the most appropriate purchaser of the whole or part of the business[96]. *Travaux préparatoires* of Directive harmonising certain aspects of insolvency law also emphasizes that during this phase the competitive sale procedure shall be conducted in order to arrange the sale of the business to the person which proposes the highest offer[97]. It establishes that the preparatory stage is to arrange the sale before the formal proceeding is started.

2.1.1. Initiation of the pre-pack proceeding and appointment of the monitor

According to Directive harmonising certain aspects of insolvency law, this stage is considered as commenced one when a monitor is appointed. The likelihood of insolvency is the criteria which allows the debtor to enter the pre-pack[98]. It is expedient to note that the procedure of the appointment of the monitor has to be settled by national legislation[99], thus MS have the discretion in this issue.

In the primary version of Directive harmonising certain aspects of insolvency law, the EU legislator set the provision that only court was authorized to appoint a monitor[100]. However, the adopted version of Directive harmonising certain aspects of insolvency law gives a possibility

[95] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 30.
[96] *Ibid.*, Art. 2.
[97] Impact Assessment Report accompanying Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 34: Annex 5, Para. 2.4.
[98] Directive harmonising certain aspects of insolvency law*, op.cit.*, Art. 21.
[99] *Ibid.*, Art. 23.
[100] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Art. 22.

to MS to address this issue internally. Some MS follow the approach that it is the court's competence to appoint the special person who monitors the sale negotiations[101]. In comparison, the UK legislation gives such powers to the company or its directors[102]. At this point we observe that the EU legislator aims at following the minimum harmonisation approach, so that MS are not limited to a single option.

Directive harmonising certain aspects of insolvency law establishes that the pre-pack proceeding can be commenced by the request of the debtor – no other alternative is provided. Therefore, the creditors or other stakeholders are not authorized to file for the appointment of the monitor. It bears noting that, for example, the Polish legislation allows also the creditors to propose the pre-pack sale[103]. Such approach is criticized by the legal scholars: it is considered that the situation, when the court and administrator are obliged to analyze all the proposals, can arise. As a consequence, the proceeding becomes more time consuming[104]. We agree that it is better for a court to focus on the sole pre-pack petition. Such approach does not impose an unnecessary burden on the authorities to review different proposals; hence, the time spent on it is reduced.

When analyzing Directive harmonising certain aspects of insolvency law, it becomes apparent that the role of the monitor is a pivotal one: this person is responsible for supervising of the sale arranging of the business during the preparatory phase[105]. Therefore, the requirements to this position are established: the monitor shall be independent from the debtor and its closely related parties, and the monitor can be only a person who meets the criteria of insolvency practitioner in MS of the EU[106]. In comparison, the independence of the monitor from other stakeholders, especially creditors, is not an obligatory requirement to be followed by MS[107]. We make this conclusion, based on the formulation of the provisions as the EU legislator use the verb "shall" when indicating the independence from debtor and its connected parties whilst the verb "may" is used for independence from others.

Travaux préparatoires specify that the position of the debtor should not be prioritized during the pre-pack proceeding as it is the creditors who have to take the advantages from the fast realization of the assets[108]. This argumentation could serve as the explanation of such formulation of the monitor's independence from parties. The maximization of creditors' claims satisfaction is

[101] For ex., in the Netherlands, Spain: Carles et al., *supra note*, 5: 32.
[102] "Insolvency Act 1986", Legislation.Go.UK, accessed 10 April 2026, Schedule B1, Para. 14, 22, https://www.legislation.gov.uk/ukpga/1986/45/schedule/B1
[103] Kapica and Radwański, *supra note*, 4: 5.
[104] Cybulska-Bienioszek, Kuglarz and Kaliński, *supra note,* 81: 21.
[105] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 24.
[106] *Ibid.*, Art. 23.
[107] *Ibid.*
[108] Impact Assessment Report accompanying Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 34: Annex 5, Para. 2.4.

one of the main objectives of the insolvency proceeding, and its achievement proves that the insolvency regime is well-designed[109]. In our opinion, the ensuring of the monitor's independence from the debtor and its connected parties should be guaranteed in all MS as otherwise this could potentially create the situations when the debtor, which already failed to meet the obligations to creditors, benefits more than others. We understand that the debtor has to assist the monitor with arranging the negotiations and sale of the business[110]. Therefore, if the monitor is not independent from the debtor, there is a possibility that the monitor and the debtor will act according to their interests, not taking into account the interests of the creditors. We presume that it may entail the inadequate disclosure of the information, the endorsement of undervalued asset valuations which would prejudice the creditors. That is why, we agree that the independence of the monitor from the debtor and its closely related parties is essential provision in the context of the pre-pack proceeding.

In the context of monitor's requirements for conducting the pre-pack proceeding, we see that only those who have the qualification of the insolvency practitioner can be elected as a monitor[111]. It is indicated that the person who is appointed as a monitor shall have the appropriate experience, education, other necessary skills in order to properly navigate the arrangement of the sale[112]. Furthermore, Directive harmonising certain aspects of insolvency law while giving the definition of the insolvency practitioner refers us to the EIR and Directive on restructuring and insolvency[113]. We understand that the requirements to the insolvency practitioners in MS are different, hence, taking into account the minimum harmonization approach of a new Directive harmonising certain aspects of insolvency law, the establishment of the unified criteria for monitor would contradict to such approach. However, we agree that the monitor shall be a real professional in insolvency law. The Directive harmonising certain aspects of insolvency law sets the duties for the monitor the essence of which lies in the control of negotiations and arrangement of the sale[114]. Therefore, in our point of view, in order to properly perform such functions, the person for this role should fulfil all the requirements for the insolvency practitioners.

2.1.2. Standards of the sale process and the role of confidentiality

Directive harmonising certain aspects of insolvency law does not provide the precise details how the arrangement of the business sale should be conducted. However, its main principles

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[109] Mokal and Nocilla, *supra note*, 21: 6, 8.
[110] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 24.
[111] *Ibid.,* Art. 23.
[112] Impact Assessment Report accompanying Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 34: Annex 5, Para. 2.4.
[113] Directive harmonising certain aspects of insolvency law, *op.cit.*, Art. 2.
[114] *Ibid.*, Art. 24.

are established[115]. MS while transposing the provisions of Directive harmonising certain aspects of insolvency law must implement them in the way that the transparency, competitiveness and fairness are followed. Additionally, it shall be ensured that the sale is in accordance with market standards. The sale process is a central point of the preparatory phase. Its appropriate conduct has a direct impact on the creditors as the proceeds of the sale are distributed among them[116]. Hence, the lower the revenue realized from the sale, the smaller number of creditors would be satisfied.

The concerns regarding accountability and transparency of the pre-pack mechanism have been already raised by legal scholars[117]. The transparency issue appears as the creditors do not take a direct part during the sale process, hence they have less possibilities to influence it. The recital of Directive harmonising certain aspects of insolvency law emphasizes that the above-mentioned principles should be implemented as their following will ensure the best price of the sale[118]. We believe that these standards can provide the appropriate terms of the sale. It is worth to note that the establishment of such principles could help to arrange the sale process as it would take place on a free market for the solvent company[119]. Therefore, the best price may be achieved.

Although the above-mentioned principles seem to create better conditions for the sale arrangement, there are some issues regarding the confidentiality of the pre-pack in such case[120]. The confidentiality, as it was investigated in the previous chapter, is one of the main advantages of the pre-pack: it can be explained in the way that the company insolvency is not revealed publicly, so that the trust towards it is not affected. However, in case the principles of competitiveness, fairness and transparency are followed, it can entail the disclosure of information concerning the company's financial situation and negative consequences for its reputation. The debtor's business partners could also reduce the cooperation with the company in such case.

In our opinion, MS while imposing these standards into national legislation, should find the balance between the confidentiality safeguards and the following of the principles. For example, in France the person who takes part in the bidding process is bound by the confidentiality requirements[121]. We consider that this approach aims at preserving non-disclosure of the debtor's financial situation to the public, therefore company continue its operations in the usual manner.

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[115] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 24.
[116] Impact Assessment Report accompanying Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 34: Annex 5, Para. 2.4.
[117] Vaccari, *supra note*, 44: 6.
[118] Directive harmonising certain aspects of insolvency law, *op.cit.*, Rec. 40.
[119] Gagnier, *supra note*, 86: 27.
[120] *Ibid.*
[121] "Code de Commerce," LegiFrance, accessed 13 April 2026, Art. L611-15, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000005634379/LEGISCTA000006146095/#LEGISCTA000006146095

The confidentiality is one of the advantages of the pre-pack which attracts the debtor[122]. The EU legislator while arguing the necessity to introduce the pre-pack proceeding in all MS indicates that this tool can enhance the value recovery for creditors[123]. We suggest that confidentiality contributes to such outcome as the customers, business partners, other stakeholders continue to purchase the goods, services or cooperate with the company because its reputation is not affected. As a consequence, the business value remains high, hence the sale proceeds would be higher as well. In such case, creditors are able to get more satisfaction of their claims.

Furthermore, we should pay attention to the Recital of Directive harmonising certain aspects of insolvency law which mentions that the going-concern value could be reasonably expected to provide higher proceeding during the sale as the operations' disruption is minimized, confidence of creditors and customers is preserved[124]. In light of this, we observe that these factors provoke the maintenance of the business value. However, if the confidentiality requirement is not appropriately addressed, the confidence of the stakeholders and the minimization of operations' perturbation effect may be called into doubt. Consequently, the value of the business is reduced which theoretically could put the payments to creditors at risk, especially unsecured ones.

In this regard, the Thesis argues that the pre-pack proceeding could lose its attractiveness. The high purchase price of the business could not be achieved if the public is acknowledged about financial difficulties of the company, and, as a result, the creditors will not get the real advantages of this procedure.

The recently adopted Directive harmonising certain aspects of insolvency law establishes that it is the monitor who shall bear the same duties concerning the confidentiality requirements as the insolvency practitioners do[125]. As for the other parties, involved into the sale process, there are no specific obligations for them regarding the maintenance of the confidentiality. Directive harmonising certain aspects of insolvency law points out that the preparation stage of the pre-pack proceeding should be confidential[126]. However, no particular provisions are found in the context to the potential buyers which will get the information regarding the company's insolvency. We suggest that it could potentially create the situation of the leak of information to the public. Hence, the business reputation would be at stake, and its value on the market can be reduced.

Taking into account all the above-mentioned, we consider that the confidentiality should not be disregarded while applying the principles of competitiveness, fairness and transparency to

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[122] Rizzo, *supra note*, 14: 13.
[123] Impact Assessment Report accompanying Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 34: Para. 4.2.
[124] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 40.
[125] *Ibid.*, Art. 24.
[126] *Ibid.*, Rec. 31.

the sale process. We agree that it is crucial to provide that the sale process during the preparatory phase has to take place in accordance with the high standards, so higher purchase price could be achieved. However, it is important to look at it from the other perspective and not to forget the core advantages of the pre-pack proceeding.

The confidentiality is considered as the feature which creates the favourable environment for the business. It helps to preserve the business value and, consequently, the higher price can be established. Therefore, we consider, MS in order to achieve this goal should address this issue in their national legislation and preserve the balance between the confidentiality feature and maintaining the sufficient level of transparency, fairness and competitiveness.

One more requirement to the sale process, indicated in Directive harmonising certain aspects of insolvency law, is the market standards which must be adhered during it[127]. The Recitals shed further light on the matter, noting that meeting market standards means that the sale process should:

1. Align with the requirements applied during mergers and acquisitions in MS;
2. Be arranged in the way that potential purchasers are acknowledged about the process;
3. Ensure that the adequate and sufficient information is provided to the buyers, based on which the due diligence can be carried out;
4. Be structured and ensure that the relevant rules are prescribed for the bidding process[128].

The clarification concerning the market standards is, in our opinion, useful. While not specifying the rules for the sale process, the legislator provides the benchmarks for MS which should be considered when transposing the provisions of Directive harmonising certain aspects of insolvency law into the national legislation. We believe that it will help to create the harmonization throughout the EU.

However, in this context, it should be recalled that the challenges regarding confidentiality maintaining could be encountered while applying the above-mentioned safeguards. Our concerns arise from the fact that it is not apparent how to acknowledge the potential buyers while preserving the confidentiality of the process. It seems that it may be reasonable for MS to find the way how to approach the purchasers and limit the disclosure of information regarding the pre-pack proceeding at the same time.

In our point of view, the possible solution in this issue could be that it is a monitor as a person responsible for arranging of the sale process could explore and select the potential buyer,

[127] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 24.
[128] *Ibid.*, Rec. 44.

and consequently, inform them about it. However, those who got the information, should be required to preserve the confidentiality about the process. We understand that Directive harmonising certain aspects of insolvency law grants to MS the discretion to address such issues internally and minimum harmonization approach shall be maintained. However, in order to make the pre-pack proceeding more attractive and efficient, it may contribute to the pre-pack effectiveness if MS consider the preservation of the confidentiality while applying the standards of Directive harmonising certain aspects of insolvency law.

2.1.3. Duties of the monitor: conduct, oversight and viability considerations

During the preparatory phase the monitor must perform specific obligations: to provide the justification that the chosen bid meets the requirements of transparency, fairness, competitiveness and meets market standards, to recommend the appropriate bidder and to provide the special report which confirms that the best-interest-of-creditors test is not breached[129]. It appears that MS are not limited to imposing additional duties on the monitor during the preparatory stage. However, having explored the monitor's obligations set out by Directive harmonising certain aspects of insolvency law, it is possible to identify that its main tasks are to provide the justification that the selected purchaser can be objectively considered as the most appropriate one.

Directive harmonising certain aspects of insolvency law defines the best-interest-of-creditors test and indicates that this test is deemed to have been met in case the creditors' position during the pre-pack proceeding is not worse than their position in the piecemeal liquidation or other better alternative scenario[130]. The primary proposal of Directive harmonising certain aspects of insolvency law established that the other possible legal frameworks for the debtor, besides the piecemeal liquidation, is not mandatory to be considered[131]. However, during the legislative process one of MS raised concerns regarding the creditors' protection and proposed that the next-best-alternative scenario should be taken into account[132]. The EU legislator finally included it in the final version of Directive harmonising certain aspects of insolvency law. We agree that the best-interest-of-creditors test should not be limited only to the piecemeal liquidation comparison. The implementation of more safeguards for creditors' protection only strengthens their position.

The recommendation of the monitor concerning the best bidder must meet the selection criteria specifically settled by MS[133]. We understand that the monitor is not authorized to choose

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[129] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 24.
[130] *Ibid.,* Art. 2.
[131] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Art. 2.
[132] "Statement by the Czech Republic on Item 7 b): Directive harmonising certain aspects of insolvency law - General approach, ST 9257/25," Data.Consilium.Europa, accessed 15 April 2026, https://data.consilium.europa.eu/doc/document/ST-9257-2025-ADD-1/en/pdf
[133] Directive harmonising certain aspects of insolvency law, *op.cit.*, Art. 24, 33.

the best purchaser, based on their own subjective criteria: MS must internally establish the legal rules which enumerate the necessary in their points of view requirements for the bidder. We consider that this provision of Directive harmonising certain aspects of insolvency law can help to provide more independence and objectivity in the selection of the purchaser. Furthermore, Directive harmonising certain aspects of insolvency law states the aforementioned criteria must be the same as in the standard insolvency proceeding[134]. It appears that the EU legislator aims to provide creditors' protection in the way that no reduced requirements for the best bidder can be established in the pre-pack proceeding. Hence, the level of creditors' safeguards is expected to be similar to that one used in ordinary insolvency proceeding.

Of particular interest is the fact that the preservation of the employment can also be settled as the criterion for the best bidder[135], but it is not mandatory for MS. The Recital also indicates that pre-pack proceeding, inter alia, can be used as a tool to preserve the employment[136]. Therefore, we observe that Directive harmonising certain aspects of insolvency law similarly pays attention to the employees' rights while regulating the pre-pack proceeding.

As it has been investigated, the monitor has particular responsibilities during the preparatory phase. Directive harmonising certain aspects of insolvency law imposes an obligation on the monitor to define whether the sale of the business in pre-pack proceeding is able to recover more values for creditors rather than during its piecemeal liquidation. In order to properly address this issue MS are authorized to settle additional requirements for the monitor to take into account: the public interest or the viability of the company. Such increased control should be applied when the potential bid is the connected party to the debtor[137]. We consider that the viability of the company is the requirement of special significance while establishing the criteria which monitor have to consider during the arrangement of the sale.

The companies which are likely to become insolvent or already faced the insolvency can be divided into economically distressed companies and financially distressed ones. Whilst the first category involves those entities whose financial difficulties are mostly connected to the reduced demand to their products or services on the market, the financially distressed companies produce the goods for which there is still market demand. Hence, it could be considered that for their stakeholders, especially creditors, it is better to preserve the business as it can potentially generate more revenue because the market still needs it[138]. We agree with this opinion as the business activity could be considered as a risky one which highly depends on the market demands.

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134 Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 33.
135 *Ibid.*
136 *Ibid.*, Rec. 32.
137 *Ibid.*, Rec. 38.
138 Mokal and Nocilla, *supra note*, 21: 7.

Therefore, when the business continues to meet market needs, we believe, it is better to give it the second chance.

In the context of the pre-pack mechanism the following position was expressed by scholars. It was mentioned that the well-designed insolvency regime aims to maximize the value of the business, inter alia, by separating the economically distressed companies and financially distressed ones. The negative consequence of the failing to assess this can result in the circumstances in which neither creditors get the appropriate claims' satisfaction, nor the other businesses are fairly treated as the newly created company continues its operations at the expense of the old company[139].

We support this approach and that is why, we consider, that the viability requirement should be always considered by the monitor, not only in case the potential purchaser is the connected party. The sale as going concern of the business which is economically distressed, i.e. unviable one, is not considered as an appropriate way to address the insolvency state. In our opinion, it is relevant to support this argument from the following perspective. The unviable company which is sold as a going concern can theoretically transform into a new company, free of debts and liabilities. However, if the business produces the goods which are not in demand on the market, it could potentially become insolvent again and there could be new creditors whose claims satisfaction would be put at stake. Therefore, we believe that in order to prevent it, the viability of the company should be duly considered by the monitor during the preparatory stage.

Another duty imposed on the monitor is to document the sale process[140]. Directive harmonising certain aspects of insolvency law defines that such report should be available in written and in digital form in a timely manner[141]. It is argued that the sale preparation documenting is essential in order to justify before the court authorization or creditors' approval that the selected purchaser is the best one. We consider that this obligation can help to make the sale arrangement transparent as the monitor's justification will be duly documented.

We observe that the monitor's duties are quite extensive and only their appropriate performance could help to achieve the success of the pre-pack proceeding.

2.1.4. Protective tools of the preparation phase under Directive harmonising certain aspects of insolvency law

Directive harmonising certain aspects of insolvency law provides the special mechanism according to which the creditors temporarily are not authorized to take the appropriate steps to

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[139] Mokal and Nocilla, *supra note*, 21: 7.
[140] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 38, 46.
[141] *Ibid.*, Art. 24.

satisfy their claims[142]. The provision directs us to Directive on restructuring and insolvency specifying that the stay of individual enforcement actions shall be provided in accordance with it. We can single out the requirements which allow to enforce this mechanism:

1. The debtor is likely to become insolvent or is already insolvent;
2. The debtor continues to exercise the total or partial control over the business and its daily operations;
3. The aim is to sale the business as a going concern[143].

The fulfilment of all conditions creates the possibility for the debtor to benefit from the stay of individual enforcement actions. The Articles 6 and 7 of Directive on restructuring and insolvency reveal main aspects of this tool and how it should be appropriately applied[144]. It provides the special provisions regarding the requirement to cover all types of claims, the maximum period of the stay which can't be more than 4 months and in exceptional circumstances may be extended, the consequences of the stay etc. In our point of view, the EU legislator aims in this way to follow the similar rules concerning the stay of individual enforcement actions. We support this approach as it provides not only the harmonization among MS, but also the compatibility between the legal acts of the EU. It allows to avoid the contradictions between them.

We believe that the tool serves a purely supportive function in the pre-pack, especially during the preparation phase. If the creditors were able to enforce debts, it would prejudice the sale arrangement and, in the end, could entail the piecemeal liquidation. Therefore, the stay of individual enforcement actions can help to arrange the sale process properly.

Another protective measure, provided by Directive harmonising certain aspects of insolvency law, is the possibility for MS to suspend the opening of the liquidation phase when the creditor files for insolvency[145].The provision indicates that this is the right of MS to transpose this norm or not. The first worth mentioning point is that nor the provision neither the Recitals define or give the examples of the circumstances which point out whether it is better to suspend the opening of the proceeding or not. We consider that it would be beneficial to lay down the guiding factors in order to assess whether the suspension of the opening of the liquidation phase is justified while implementing this norm. Otherwise, the subjectivity of the justifications could be questioned. In our point of view, such benchmarks may include, inter alia, the stage of the sale arrangement, the quantity of the involved potential bidders and the proportion of the connected parties within them, the conduct of the debtor and its good faith. We consider that these factors have the impact on the possibility to achieve the highest purchase price and on the efficiency of

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[142] Directive harmonising certain aspects of insolvency law*, supra note, 7:* Art. 25.
[143] *Ibid*.
[144] Directive on restructuring and insolvency, *supra note*, 3: Art. 6,7.
[145] Directive harmonising certain aspects of insolvency law, *op. cit.,*Art. 26.

the sale process, hence, they may help to determine whether the suspension of the opening of the proceeding would be beneficial or not.

The tool also raises the issue of the balance preservation between the individual creditor's right to file a claim and the collective interest of the creditor body in maximizing value recovery through the sale as a going concern rather liquidation[146]. This could create a challenge for the competent authority to appropriately define what should be followed in case-by-case situation.

Another mechanism which protects from unjustified continuation of the preparatory phase[147], is imposition of a time limit of the preparatory stage[148]. The EU legislator points out that the duration should not be more than the length of the stay of individual enforcement actions imposed by Directive on restructuring and insolvency[149]. It is worth noting that during the legislative process of Directive harmonising certain aspects of insolvency law Czech Republic mentioned that it is important to require the debtor's honesty during the pre-pack and settle the possibility to terminate it in case of debtor's inappropriate conduct[150].

We observe that the time limitation of the preparatory stage was introduced by Directive harmonising certain aspects of insolvency law as well as debtor's actions which can be considered as its dishonest intentions[151]: debtor's failure to provide assistance or to act with due diligence. Another reason to terminate the preparatory stage is the absence of objective prospects demonstrating the success of the pre-pack. The Recital specifies that when the debtor's records and books are not sufficient to figure out the company's financial situation, it may be considered that the pre-pack's objectives cannot be achieved[152].

The ability to cease the preparatory stage is deemed to be established under the discretion of MS: it is not obligatory to impose it[153]. We believe that the implementation of such norm into the national legislation would serve as an additional protective measure for creditors. It can be argued in the way that this safeguard helps to prevent the prolongation of the procedure which became futile because of debtor's misconduct and, eventually, to avert the devaluation of the company's assets. Therefore, if the debtor's actions demonstrate its dishonesty, there would be the mechanism how to end the pre-pack and, for example, start the ordinary insolvency proceeding.

Additionally, we presume that in case the possibility to terminate the preparation phase was introduced, the monitor would be more protected because of the following. Directive

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[146] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 26.
[147] *Ibid.*, Rec. 39.
[148] *Ibid.*, Art. 27.
[149] *Ibid.*, Rec. 39.
[150] Statement by the Czech Republic on Item 7 b): Directive harmonising certain aspects of insolvency law - General approach, ST 9257/25, *supra note*, 132.
[151] Directive harmonising certain aspects of insolvency law, *op. cit.,* Art. 27.
[152] *Ibid.*, Rec. 39.
[153] *Ibid.*, Art. 27.

harmonising certain aspects of insolvency law indicates that in case of monitor's intentional or negligent failure to carry out their obligations, they bear the responsibility for the damage caused to creditors[154]. In case of debtor's dishonesty, the monitor is vulnerable as it renders the proper performance of their obligations quite difficult[155]. Hence, the possibility to terminate the preparatory stage enables the monitor to exit the situation in which they can theoretically be exposed to liability for circumstances beyond their control. Therefore, we believe that the mechanism provided by MS which enables the preparatory stage's cessation would create additional safeguards for creditors as well as for the monitor.

2.2. The main aspects of liquidation stage

The liquidation phase has three main targets: to approve the company's sale, to execute it and to distribute the realized sums to creditors[156]. Therefore, we would like to explore deeper its main principles and standards as their outcome has a direct impact on the creditor's claims satisfaction and the further fate of the company.

2.2.1. The initiation of the liquidation phase and sale approval

The liquidation stage is considered commenced when the court rendered the judgement to open the insolvency proceeding[157]. Directive harmonising certain aspects of insolvency law emphasizes that MS, except Denmark, have to refer to EIR when choosing the means of the insolvency proceedings for the opening of the liquidation phase and such means shall not be regarded as preventive restructuring proceedings[158].

We consider it appropriate to highlight that although Directive harmonising certain aspects of insolvency law indicates that the pre-pack should be regarded in the context of the liquidation[159], we consider this mechanism as a rescue tool for the company. The restructuring mechanisms are created in order to give the company the second chance. The theory defines that the rescue process lies in maintaining the going concern surplus that is considered as an additional value of the company which is believed to be obtained if the business is sold in its entirety. Such surplus can be generated, inter alia, if the business and its assets are sold as a going concern to a new owner. Although it can't be deemed as a company rescue, this is the additional option for the rescue of the business[160].

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[154] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 34.
[155] We argue it as the debtor is obliged to cooperate with the monitor during the sale arrangement: *Ibid.*, Rec. 34.
[156] *Ibid.*, Art. 2, Rec. 31.
[157] *Ibid.*, Art. 28.
[158] *Ibid.*, Art. 22.
[159] *Ibid.*,
[160] Xie, *supra note*, 11: 388.

Directive harmonising certain aspects of insolvency law explicitly indicates that the pre-pack proceeding is the mechanism of the company sale as a going concern[161]. Taking into consideration the above-mentioned statements, we regard that the pre-pack is a restructuring mechanism in the sense that it constitutes a business rescue tool. It was investigated that the liquidation proceeding may serve as a basis for the restructuring[162]. Therefore, we believe that the pre-pack should be regarded as a business rescue procedure despite Directive harmonising certain aspects of insolvency law regards it in the liquidation scenario.

It should be noted that in the initial version of Directive harmonising certain aspects of insolvency law it was provided that the monitor should be appointed as an insolvency practitioner in the liquidation phase[163]. However, the adopted variant does not bind MS to follow this provision. Hence, we assume that the monitor which arranged the sale process may not take part in the further proceeding.

Directive harmonising certain aspects of insolvency law enumerates three cases when the court or another authorized organ shall approve the company's sale:

1. Creditors have approved the sale if such possibility is provided by national legislation;
2. The buyer is chosen in public auction, if the national law allows such auction and its conduct is coherent with Directive harmonising certain aspects of insolvency law;
3. The monitor proposed the acquirer and the court or other competent authority are convinced that the proposition meets the requirements provided by Directive harmonising certain aspects of insolvency law[164].

MS are allowed to provide other situations when the sale must be approved, but the listed above cases are obligatory to be implemented into national legislation. We agree with such approach of Directive harmonising certain aspects of insolvency law as it will help to establish the real harmonization within the EU. Furthermore, one of main aims of Directive harmonising certain aspects of insolvency law is to minimize the obstacles which reduce the investor's contribution into the European market[165]. We consider that the provisions regarding the cases where the sale must be approved would provide the precise indicators for them when they can be assured in such authorization.

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[161] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 29.
[162] International Monetary Fund, *Orderly and Effective Insolvency Procedures* (International Monetary Fund, 1999), 13, https://www.elibrary.imf.org/display/book/9781557758200/ch02.xml
[163] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Art. 25.
[164] Directive harmonising certain aspects of insolvency law, *op. cit.*, Art. 29.
[165] Proposal for a Directive harmonising certain aspects of insolvency law, *op.cit.*, Chapter 1. Context of the Proposal.

While considering the sale approval mechanism, it is relevantly to examine the creditors' role in the sale authorization[166]. The Recital indicates that in those MS whose insolvency regime is built on the creditors' autonomy, there may be a possibility to impose that creditors have sufficient powers to authorize the business sale[167]. It appears that the EU legislator aims to provide additional protections to the creditors' body and allow it to decide whether the sale may be approved or not. Although such mechanism could be considered as a helpful one, we consider that it may potentially create the gap within the EU legal acts.

The current version of EIR provides the automatic recognition of the judgments rendered in the context of the opened insolvency proceeding[168]. MS shall not review or challenge the decisions which are taken by the court of another state. Therefore, in case the court has approved the sale of the business in the pre-pack proceeding, such decision is recognized in all MS without any additional actions. However, if it is the creditors' committee or general meetings of creditors which would be authorized for taking such decision[169] without any judicial involvement, it may potentially create the additional burden for the company's acquirer to prove its legitimate right to the assets located in other MS.

We understand that the Directive aims to follow the minimum harmonization approach and imposes only main standards to the pre-pack procedure[170]. However, we believe that MS should take into account this issue and address it in the way which would not impose additional obligations to the company's purchaser.

2.2.2. Public auction: an optional mechanism for MS

The important provision in the context of the liquidation phase is the possibility for MS to implement the public auction regulation in order to ensure that the sale is arranged in accordance with the competitiveness, transparency, fairness and fair market price[171]. Having analyzed the provisions of Directive harmonising certain aspects of insolvency law, we can observe that it grants the possibility for MS to impose that the court or another competent authority is able to initiate the public auction[172] or the creditor can launch such auction if they have doubts regarding the best purchase price[173]. It is relevantly to emphasize that it is upon the discretion of MS whether to provide such powers to the creditors or the court, another competent authority or not.

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[166] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 29.
[167] *Ibid.*, Rec. 43.
[168] "EIR," EUR-Lex, accessed 19 April 2026, Art. 32, https://eur-lex.europa.eu/eli/reg/2015/848/oj/eng
[169] Directive harmonising certain aspects of insolvency law, *op. cit.*, Rec. 43.
[170] *Ibid.*, Rec. 30.
[171] *Ibid.*, Rec. 40, Art. 24.
[172] *Ibid.*, Rec. 41, Art. 29.
[173] *Ibid.*, Art. 24.

In our point of view, although the conduct of public auction can supplement the protective measures for creditors, this may jeopardize the confidentiality of the pre-pack proceeding. As it was mentioned in the previous subchapter, the confidentiality is the attractive feature of the pre-pack. In case the public auction is carried out, the information about the company's financial difficulties may be revealed to the third parties which can potentially entail the business value reduction. Therefore, we consider that it would be preferable to address the tension between the confidentiality and public auction by those MS which want to enforce this legal institution into legislation.

While providing the discretion to impose the public auction or not, Directive harmonising certain aspects of insolvency law sets the particular requirements to its procedure[174]. The maximum duration of the auction shall not exceed 3 months. Furthermore, it is established that the bid selected by the monitor shall be considered as a stalking horse bid[175]. The stalking horse bidder is the initial bidder, and its role is to set the floor for other bidders regarding the value of the business which would be exposed on the auction. It stimulates the bidding process and helps to attract other potential purchasers[176]. We agree that the bidder selected by the monitor should perform such role in order to settle the appropriate auction procedure. Additionally, it was stated that the provision which requires to regard the chosen purchaser as a stalking horse bidder would prevent the possibility to underbid the already established price[177].

Although the break-up fee or compensation for expenses to the initial bidder may be provided by MS[178], it shall be proportionate and commensurate and not to discourage other potential purchasers to take part in the auction[179].

Following the minimum harmonization approach, Directive harmonising certain aspects of insolvency law proposes the public auction as an additional tool to provide transparency, fairness and competitiveness. Although its process is not detailed, the requirements regarding time limitation and stalking horse bidder implementation are obligatory. We believe that the public auction may be helpful to ensure the adherence to the above-mentioned standards.

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[174] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 29.
[175] *Ibid.*, Rec. 45.
[176] Zachary R. Frimet, "Reward the stalking horse or preserve the estate: determining the appropriate standard of review for awarding break-up fees in § 363 sales," *Fordham Journal of Corporate & Financial Law* 20, 2 (2015): 469, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1407&context=jcfl
[177] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Chapter 5. Other elements.
[178] Directive harmonising certain aspects of insolvency law, *op.cit.*, Rec. 45.
[179] *Ibid.*, Rec. 45, Art. 29.

2.2.3. Acquirer protections under Directive harmonising certain aspects of insolvency law

The important tool to address the issue concerning the business depreciation and the continuation of its operations during the pre-pack proceeding is the assignment of the contracts to the acquirer[180]. Directive harmonising certain aspects of insolvency law establishes that those contracts which are necessary to prevent the business standstill must be assigned to the acquirer and no counterparties' consents shall be required to provide it[181]. It is expedient to emphasize that this rule applies to the contracts which are essential for the business continuation. It seems that the EU legislator targets to ensure that day-to-day operations will be carried on. The exception to such rule is the situation when the acquirer is the competitor of the debtor's counterparties[182].

It is worth mentioning that the initial proposal of Directive harmonising certain aspects of insolvency law did not provide the possibility for counterparties to terminate the contract and the situations when their consents could be potentially required: it was the court which was authorized for such actions[183]. The concern regarding the balance between the freedom of contracts and the efficiency of the pre-pack proceeding was raised during the legislation process[184]. It was discussed that the freedom of contract is the crucial one in the EU, hence there should be provided the exceptions to the rule regarding the contract assignment to the buyer.

As a result, the adopted Directive harmonising certain aspects of insolvency law contains the rule which allows MS to require the counterparties' consent depending on contract type, nature of the parties and interest of the business[185]. Furthermore, there is a possibility for counterparties to terminate the contract[186]. In order to apply this, we have singled out the following requirements: the relevant notice is provided at least 3 months before the termination, and it is proved that the further continuation of contractual relationships would unfairly prejudice the counterparties. It is clarified that burden of proof that the contract assignment would be detrimental to the counterparty should be addressed under national law[187].

Directive harmonising certain aspects of insolvency law also ensures another safeguard for the counterparties having established that counterparties are not deprived of their rights to terminate the contract in case of non-performance of the established obligations[188]. This approach

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[180] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 47.
[181] *Ibid.*, Art. 30.
[182] *Ibid*.
[183] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Art. 27.
[184] "Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law - Policy debate 2022/0408(COD)," Europa.eu, accessed 19 April 2026, Assignment of contracts in pre-pack proceedings, https://www.consilium.europa.eu/en/documents/public-register/document-details/?ImmcIdentifier=ST-6266-2025-INIT&DocumentLanguage=EN
[185] Directive harmonising certain aspects of insolvency law, *op.cit.*, Art. 30.
[186] *Ibid.*
[187] *Ibid.*, Rec. 49.
[188] *Ibid.*, Rec. 48.

shows that the EU legislator aims to keep the standard rights of the counterparties and preserve the freedom of contract.

We support the approach of Directive harmonising certain aspects of insolvency law regarding the assignment of the contracts to the acquirer. This provision may contribute into the continuation of the business which consequently could preserve its high value. In such situation the proceeds distributed among creditors would be higher. Furthermore, it seems that the EU legislator took into consideration the freedom of contract and granted to MS the possibility to provide exceptions for such assignment. We believe that it will provide the appropriate flexibility in such issue and balance the interests of the acquirer with the legitimate rights of the counterparties.

Another safeguard for the acquirer in the pre-pack proceeding is the relief from debts and liabilities of the purchased company[189]. It is considered that it may attract more potential buyers and increase the higher business value[190], hence, the creditors would be able to obtain more satisfaction of their claims. We agree with this approach and consider that it may increase the interest within the purchasers to obtain the business.

It is also provided that the acquirer can bear the debts and liabilities if their consent is expressed[191]. In our point of view, it may guarantee more freedom for the purchaser. It bears noting that the rule regarding the relief of debts and liability is obligatory: MS are not provided with the option to transpose it or not. Therefore, the attractiveness of the sale and the harmonization will be provided throughout the EU.

We would like to highlight that the above-mentioned provision is subject to the following exceptions: the obligations performance under the assigned contracts, the satisfaction of the secured claims and the duties arising under employment obligations cannot be disregarded by the acquirer[192]. The obligation to fulfill them is transferred to the purchaser. For example, the acquirer is obliged to perform the obligation concerning occupational pension entitlements which arise from the employment relationships[193]. Such exceptions are important to ensure that the parties affected by the sale are well protected, therefore, it is significant that Directive harmonising certain aspects of insolvency law implies such safeguards.

Another exception to the rule is that Directive harmonising certain aspects of insolvency law does not limit MS to take into account the debtor's conduct while assessing the acquirer's liability for damages in case such conduct can be attributed to the acquirer according to national

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[189] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 31.
[190] *Ibid.*, Rec. 50.
[191] *Ibid.*, Art. 31.
[192] *Ibid.*
[193] *Ibid.*, Rec. 50.

legislation[194]. For instance, the damages defined by environmental law or damages which occurred due to the ownership or control of the undertaking may be transferred to the purchaser[195].

The primary variant of Directive harmonising certain aspects of insolvency law did not establish the above-mentioned exception[196]. However, we believe that taking into account the different legal traditions and standards of MS, it is better to provide such provision. The exception from the debts and liabilities relief may help to appropriately address the balance between the attractiveness of the pre-pack proceeding for the buyers and the public interests of states.

Furthermore, it should be mentioned that in the context of the environmental law on the EU level there is an imposed duty of the legal person to take the remedial measures when the environmental damage has been caused[197]. Hence, it is important to ensure that such damages would be recovered even if the company was purchased through the pre-pack mechanism.

We support the approach of Directive harmonising certain aspects of insolvency law that provides the possibility of transfer of some debts and liabilities types to the acquirer as it could ensure the protection of the public welfare.

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[194] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 31.
[195] *Ibid.*, Rec. 50.
[196] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Art. 28.
[197] "Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage," EUR-Lex, accessed 19 April 2026, Art. 2, 6, https://eur-lex.europa.eu/eli/dir/2004/35/oj/eng

CHAPTER 3. COMMON PROVISIONS FOR BOTH PHASES OF THE PRE-PACK MECHANISM

Directive harmonising certain aspects of insolvency law in Title 4 Chapter 4 provides the norms which are related to both stages of the pre-pack proceeding[198]: the issue regarding the connected party bidders, the protection of the creditors, the employment safeguards and other matters are reflected in the Chapter. We consider that it is expedient to explore these provisions as their application is viewed throughout the pre-pack. Therefore, the Thesis in Chapter 3 targets at investigating the common provisions more scrupulously.

3.1. Connected party sales in the pre-pack: key concerns

The first issue we would like to focus on during the investigation is the parties closely related to the debtor which take part in the sale process as bidders. It is explicitly mentioned that such connected persons are allowed to purchase the debtor's business, and this provision is obligatory to be imposed by MS[199]. The Recital also highlights that in case the best bid is submitted by the party closely related to the debtor, it should not be rejected only on the basis that there is a connection between the debtor and the bidder: the closely related parties should be able to acquire the business relieved from previous debts and liabilities similarly to other bidders[200]. We observe that the EU legislator does not want to exclude the parties closely related to the debtor from the circle of potential purchasers and provides them with the possibility to participate in the bidding sale process.

Although the connected parties are permitted to submit their bids, it is worth to note that the additional safeguards and scrutiny are prescribed for them[201]. It is relevantly to firstly identify who is considered as a party closely related the debtor according to the new Directive harmonising certain aspects of insolvency law. The legal act provides quite an extensive list of those who shall be regarded as connected parties[202]. As the pre-pack proceeding is binding to be available for the debtors which are legal persons and for natural person, it should be decided internally by MS[203], we would like to single out the criteria applicable for legal persons.

The following persons shall be treated as parties closely related to the debtor according to Directive harmonising certain aspects of insolvency law: the member of the governance bodies of the debtor, the debtor's controlling interest holders and any person who is not the member of

[198] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Title 4, Chapter 4.
[199] *Ibid.*, Art. 34.
[200] *Ibid.*, Rec. 52.
[201] *Ibid.*
[202] *Ibid.,* Art. 3.
[203] *Ibid.,* Rec. 36.

the debtor's administrative, management or supervisory bodies, however, carry out the similar functions[204]. Additionally, close relatives to the above-mentioned persons or others who have the access to non-public information regarding the debtor's matters are also included into the category of the connected persons to the debtor[205].

The foregoing demonstrates that the EU legislator provides quite an excessive circle of natural and legal persons which shall be deemed as persons closely related to the debtor. We support such approach and consider that the detailed list of such persons may help to avoid the ambiguity of the connected party's notion and legal certainty in this matter would be established. Apart from this, we suggest, it may contribute to prevent the circumvention of norms which define the connected parties. We argue it from the perspective that in case the connected party's definition would be more general and not precise, there potentially could be the possibility for the interested parties to structure the relationships in the way to fall outside the scope of the provision. Hence, we agree with the norm of Directive harmonising certain aspects of insolvency law.

It is also established that in order to determine if the person is deemed as a connected party, it shall be referred to the start day of the liquidation phase or a time period not less than 6 months before this stage is commenced[206]. It is relevantly to indicate that the primary version of Directive harmonising certain aspects of insolvency law set the time period of 3 months prior to the start of preparation phase[207] in order to determine the party closely related to the debtor. However, as we have observed, this consideration was changed in the current variant. We stand in favour of the adopted version. The liquidation phase is the officially started insolvency proceeding[208], hence the time from which the period for connected parties' determination should be counted may be more precise. Moreover, the extension of time period may enhance the prevention of circumvention of norms which define the parties closely related to the debtor. Therefore, the approach of Directive harmonising certain aspects of insolvency law seems to address these issues.

The determination of the person as the party closely related to the debtor entails imposing the additional conditions upon them which shall be met in order to be entitled to take part in the sale process:

1. The disclosure to the monitor the fact that a person is a closely related party to the debtor in a timely manner;

[204] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 3.
[205] *Ibid.*
[206] *Ibid.*
[207] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Art. 3.
[208] Directive harmonising certain aspects of insolvency law, *op.cit.*, Art. 28.

2. The bidders who are not connected parties are acquainted with the information that such person exists in the process;

3. In case the connected party bidder is proposed upon the monitor's recommendation, the valuation of the business as a going concern shall be made in order to constitute the best-interest-of-creditors test is not violated;

4. Bidders other than parties closely related to the debtor have sufficient time to take part in the sale process[209].

Having analyzed the conditions for the connected to the debtor parties, we can observe that mainly they involve the obligations to properly disclose the information, to prove that the creditors rights are preserved and enable for other bidders to participate in the sale arrangement. Such additional measures can be explained due to the following facts.

The connected parties sales are criticized by the creditors, especially unsecured ones, as the empirical research illustrates that their claims are less satisfied in comparison with the cases when the business is purchased by non-connected bidders[210]. Another investigation also has demonstrated that when the business is sold to the person closely related to the debtor, the proceeds are much lower rather than the realisations obtained in unconnected sales[211]. As it is regarded that this is the creditors who should benefit more from the pre-pack proceeding and get the effective value recovery[212], the above-mentioned empirical studies raise the concerns regarding the real effectiveness of the pre-pack mechanism in case the connected party is the selected purchaser.

Another issue which should be discussed concerning the connected parties sale is the continuity of the business operations of the purchased company. The notable Graham report showed that within 3 years after the pre-pack 16% of businesses which were purchased by non-connected parties failed whilst when the buyers were connected parties, the percentage of distressed companies constituted almost 30%[213]. Directive harmonising certain aspects of insolvency law indicates that the sale of the business as a going concern means that the company is able to exist as an economically productive unit[214]. Hence, we presume that the EU legislator regards that the pre-pack proceeding should, inter alia, help to preserve the business itself. The data presented in the evidence-based investigation illustrate that in case connected parties are the purchasers of the company, the further viability of the company may be put at stake. Therefore,

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209 Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 35.
210 Adebola, *supra note*, 2: 5.
211 Mokal and Nocilla, *supra note*, 21: 29.
212 Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Chapter 5. Other elements.
213 Graham, *supra note*, 23: 39-40.
214 Directive harmonising certain aspects of insolvency law, *op.cit.*, Rec. 29.

the concerns regarding the connected parties sales are triggered by the evidence that the company may not survive after the pre-pack proceeding.

Another issue which should be addressed in the context of the connected party sale is the 'phoenix pre-pack'[215]. It has been researched that the business is often bought out by the management. Consequently, it creates the effect that the company purchased by the shareholders or management is born anew, and, for example, the same directors carry on governing the free of debts business[216]. Such situation may give rise to the unfair competition and, furthermore, provoke the abuse from the side of management or shareholders who had accumulated the debts, however, thanks to the pre-pack mechanism, obtained the free of debts business afterwards[217]. Another concern, raised by the scholars in such case, is that the highest purchase price may not be achieved if the directors are the acquirers in the pre-pack procedure, hence the creditors' rights to the proper satisfaction are disregarded[218]. We agree with such considerations.

The directors and shareholders who are usually responsible for acting in good faith and taking the relevant measures in order to maintain the company financial stability may potentially benefit from the pre-pack proceeding: it gives them the second chance to rule the free of debts company which could be accrued because of their actions. As a result, if the management whose actions could be the reason that the company had faced the insolvency estate purchases the company, it may create the undue benefits for such buyer. Additionally, the further continuation of the company may be called into question. We argue it in the way that if the persons who led the company to insolvency continue to manage the business, their skills, qualifications and ability to take the sound business decisions can be doubted. Consequently, the rescue of the business would be more difficult to achieve. The above-mentioned facts have already illustrated that the percentage of the business failure is higher when it is acquired by the parties closely related to the debtor.

Another matter is that the company may be undervalued when the connected party purchases it during the pre-pack. We understand that the management and shareholders possess more internal information about company's financial situation and its assets. Consequently, it may allow to such connected parties to use such information in order to reduce the real market price of the business. As a result, the creditors, especially unsecured ones, may obtain less satisfaction due to the lower proceeds after the pre-pack sale.

Taking into the consideration the foregoing, it is necessary to impose additional requirements and conditions on the connected parties when participating in the pre-pack sale.

[215] Rizzo, *supra note*, 14: 20.
[216] *Ibid.*
[217] *Ibid.*, 20, 31.
[218] *Ibid.*, 32.

Therefore, in our opinion, the norms of Directive harmonising certain aspects of insolvency law are found appropriate.

It is worth to mention that there is a special provision concerning the parties closely related to the debtor which establishes the obligation not to apply the discharge of debts and liabilities principle during the pre-pack if the connected party does not disclose their status to the monitor[219]. We regard that this norm is fit for purpose to address the concerns in the context of the connected party sale and set additional safeguards.

It is expedient to note that MS are not limited to impose more protective tools when the party closely related to the debtor is a potential acquirer[220]: it is indicated that more control should be imposed in such cases in order to provide the fair opportunities for all bidders and provide that the information is disclosed equally[221]. Furthermore, MS are encouraged to establish additional requirements which should be considered by the monitor when the best bidder is a connected party to the debtor as, for instance, the viability of the business or the public interest[222].

We observe that the EU legislator set more criteria and conditions to the pre-pack sale when the connected party is a potential acquirer of the business. We believe that such safeguards may help to address the phoenix company issue, the undervaluation of the company and the matter regarding the continuity of the business operations after the completion of the pre-pack sale.

3.2. Employees in the pre-pack proceeding: framework of Directive harmonising certain aspects of insolvency law and connected party concerns

In the light of common provisions of the pre-pack, we would like to consider the employment issue and how employees' rights are protected. On the EU level there is the general rule which constitute the transfer of employees' rights and obligations in case the transfer of undertaking or its part from one party to another and prohibition of the workers' dismissal on the grounds of such transfer[223]. However, the exception to such transfer is provided and states that in case the undertaking or its part has been placed into insolvency proceeding aimed at liquidation, the above-mentioned employees' protection are not applied[224]. Hence, the workers are protected on the EU level, however, if the proceeding with a view to liquidation takes place, the safeguards are not provided.

Directive harmonising certain aspects of insolvency law explicitly indicates that the workers' rights should not be disregarded, especially those which guarantee the participation of

[219] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 35.
[220] *Ibid.*
[221] *Ibid.,* Rec. 52.
[222] *Ibid.,* Rec. 38.
[223] Transfers of Undertakings Directive 2001, *supra note*, 15: Art. 3-4.
[224] *Ibid.*, Art. 5.

employees' representatives and the relevant measures ensuring the proper notification and consultation of such representatives[225]. We observe that the employment safeguards are not left unaddressed.

However, with the regard to the pre-pack mechanism, Directive harmonising certain aspects of insolvency law establishes that the liquidation phase is considered as the bankruptcy proceeding for the purpose of the liquidation of assets of the debtor which is conducted under the control of the authorized public organ[226]. This provision allows us to make a conclusion that the liquidation phase of the pre-pack proceeding is considered as an exception of the safeguards, provided by Transfers of Undertakings Directive 2001. Hence, the workers' rights and obligations are not automatically transferred to the acquirer of the company.

It seems expedient to address to the relevant case law by the CJEU which considered the pre-pack and the employment relationships under it. Rendering the judgment in *the Smallsteps case* the court pointed out that the essence and objectives of the pre-pack, inter alia, consist in enabling the smooth continuation of the undertaking's business operations and preservation of its viable units despite of the fact that the company's insolvency was officially declared. The judges stated that although the bankruptcy proceeding was filed with the judicial authority, the pre-pack did not entail the liquidation of the debtor's assets. Moreover, it was indicated in the court ruling that the negotiations and adoption of the company's sale was not supervised by the public authority. Therefore, at that time the CJEU delivered a judgment having held that the pre-pack sale shall not be considered as a bankruptcy proceeding with a view to the liquidation of the undertaking's assets and supervised by the competent state authority; as a result, the employees' transfer guarantees had to be preserved[227].

We observe from the above-mentioned case that the CJEU argued its decision having based on the principle "substance over form". We present such considerations as although the bankruptcy proceeding formally took place, the court indicated the essence of the pre-pack and explained that the business itself and its operational character were preserved. Hence, the liquidation of the assets did not take place and, consequently, protective measures under Transfers of Undertakings Directive 2001 shall be followed. We would like also to draw the attention to the fact that the acquirer of the business was connected party to the debtor – a sister company of its main shareholder[228]. We suggest that this fact could also serve as an argument that the pre-pack sale in *the Smallsteps case* had been arranged in order to minimize the disruption of the business

[225] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 32, Art. 5.
[226] *Ibid.*, Art. 22.
[227] Federatie Nederlandse Vakvereniging and Others v Smallsteps BV., Case C-126/16, *supra note*, 24: Para. 47-50, 53-57.
[228] *Ibid.*, Para. 20.

operations after the insolvency of the company had been established. Therefore, the employees' rights to the transfer during the pre-pack had been declared by the CJEU.

Although the CJEU addressed the issue of workers' rights during the pre-pack proceeding in *the Smallsteps case*, another view on this matter was presented in *the Heiploeg case* which was rendered later. In this case the company decided to use the pre-pack procedure, however, after the sale of the undertaking the less favourable working conditions were proposed to the transferred employees. Hence, it was questioned whether the workers' safeguards provided by Transfers of Undertakings Directive 2001 are preserved. The CJEU stressed out that the pre-pack mechanism falls under the exception which does not oblige the transferor to transfer the employees to the transferee. First of all, the judges pointed out that the insolvency was inevitable for the company. Furthermore, the pre-pack proceeding was targeted at liquidating of the assets as its primary objective was to satisfy the creditors' claims to the greatest possible extent. It was emphasized that the sale of the business as a going concern served as the tool to enable the higher revenue to the creditors' body. It is worth noting that the CJEU highlighted that it is important to verify whether the pre-pack is conducted with a view to the assets' liquidation or it is the way to reorganize the company. Although the CJEU found that the pre-pack mechanism may contribute to the employment preservation, the final opinion was that the pre-pack procedure falls within the scope of the exception of Transfers of Undertakings Directive 2001 which provides that it is not obligatory to transfer the employees when the proceeding is carried out with a view to the assets' liquidation[229].

Directive harmonising certain aspects of insolvency law includes the Recital which mentions that the CJEU's opinion in *the Heiploeg case* is considered, hence the main goal of the pre-pack procedure is to obtain the highest possible return for the creditors whilst the preservation of employment should be taken into consideration insofar as possible[230]. It is evident that the CJEU changed its view on the pre-pack procedure and the employees' safeguards. It was singled out that the pre-pack is mainly targeted to satisfy the creditors' claims as much as possible via the specific mechanism to sell the company as a going concern. Hence, the preservation of the continuation of the business operations was not the primary aim of the procedure, especially taking into account that the bankruptcy had been unavoidable for the debtor. As we observe, Directive harmonising certain aspects of insolvency law took the approach of *the Heiploeg case* and established that it is not mandatory to preserve the workers' rights and obligations when the transfer during the pre-pack takes place.

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[229] Federatie Nederlandse Vakbeweging v Heiploeg Seafood International BV and Heitrans International BV., Case C-237/20, *supra note*, 16: Para. 26, 30, 37, 46-50, 52-53.

[230] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 33.

The legal scholars, Rolef de Weijs and Johan Zwemmer, expressed their opinions regarding such approach[231]. It was pointed out that in case the pre-pack liquidation phase is covered by Art. 5 of Transfers of Undertakings Directive 2001, the protection of employees is prejudiced. The researchers specifically highlighted that the significant part of the acquirers of the undertaking during the pre-pack are the former shareholders. The shareholders may opportunistically use the pre-pack strategy in order to obtain the free of debts company and be relieved in such way from the obligations arising from the employment relationship. It was considered that this issue creates concerns around the connected parties pre-pack: in case the liquidation phase is regarded as a bankruptcy proceeding with a view to liquidation of the undertaking's assets as a rule and with no exceptions, it puts at a disadvantage the workers and their essential rights provided earlier by Transfers of Undertakings Directive 2001. Hence, the dismissal of employees during the pre-pack are eligible, even if the purchaser of the business is the party closely related to the debtor[232].

We understand that the concerns are mainly raised in the situations when the shareholder wants to become an owner of a so-called new company created due to the pre-pack procedure. The adopted version of Directive harmonising certain aspects of insolvency law explicitly states that the main objective of the pre-pack is to maximize the creditors' claims satisfaction[233]. In this regard, it is relevantly to note that the transfer of employees and the preservation of their rights may potentially reduce the purchase price of the business[234]. Hence, the main aim of the pre-pack mechanism may not be achieved to its greatest extent.

We observe that the EU legislator does not provide the differentiated rules regarding the employment' safeguards during the pre-pack for the cases when the acquirer is a connected party and when it is an external purchaser. Therefore, the same approach will be introduced throughout the EU.

The adopted Directive harmonising certain aspects of insolvency law does not fully disregard the employment issues in the context of the pre-pack: it is stated that the employees' guarantees should be preserved as much as possible[235]. Additionally, it is established that the obligations arising from the employment relationships do not fall under the scope of those debts and liabilities from which the company is relieved: they are transferred to the purchaser[236].

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[231] "European harmonisation of Pre-packs: Initiating a European race to the bottom at the expense of employees," Corporate Finance Lab, accessed 25 April 2026, https://corporatefinancelab.org/2025/09/02/european-harmonisation-of-pre-packs-initiating-a-european-race-to-the-bottom-at-the-expense-of-employees/

[232] *Ibid*.

[233] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 33.

[234] European harmonisation of Pre-packs: Initiating a European race to the bottom at the expense of employees, *op. cit*.

[235] Directive harmonising certain aspects of insolvency law, *op.cit.*, Rec. 33.

[236] *Ibid.*, Art. 31.

Furthermore, while establishing the criteria to select the best bidder during the pre-pack sale, MS are encouraged to include the employment preservation[237]. Another safeguard for the employees within the pre-pack which may be internally decided is that MS are able to oblige the connected party-buyer to preserve the employment contracts after the purchase of the business[238]. Therefore, the EU legislator addresses the employment safeguards and provides some provisions regarding them.

We understand that the employees are not the group whose interests are primarily taken into the consideration during the pre-pack. As it was mentioned earlier, the creditors' body have to take the main benefits from it. However, we believe, that the workers may also be considered as the stakeholders as their interests are also affected by the pre-pack. We presume that the unfair connected parties, especially shareholders of the debtor, may potentially use the pre-pack in order to get its viable part free of liabilities and with no obligations in relation to the employees. Hence, it may create the insufficient protection to their rights earlier provided by Transfers of Undertakings Directive 2001.

The provision of Directive harmonising certain aspects of insolvency law indicating that the preservation of the employment should be maintained as much as possible[239] illustrates that the employment is an important matter during the pre-pack. However, no minimum requirements or considerations are established. We understand that Directive harmonising certain aspects of insolvency law follows a minimum harmonization approach[240], but at the same time it is also indicated that the essential standards are provided for MS which shall be followed[241]. At this point, we regard that the employment protective tools, being the issue which is considered as a very important one according to the EU policies[242], especially in situations when the acquirer is the connected party to the debtor, should be addressed more appropriately.

We believe that although the pre-pack is aimed primarily at creditor's claims satisfaction, the workers' rights should be although appropriately taken into account. Hence, the minimum requirements for the employment preservation should be established. In such case, the balance between the interests of those 2 groups would be provided.

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[237] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 33.
[238] *Ibid.*, Rec. 53.
[239] *Ibid.*, Rec. 33.
[240] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Chapter 2. Legal basis, Subsidiarity and Proportionality.
[241] Directive harmonising certain aspects of insolvency law, *op.cit.*, Rec. 30.
[242] "Treaty on the Functioning of the European Union," EUR-Lex, accessed 25 April 2026, Art. 9, 151, 153, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

3.3. Protection of creditors in the pre-pack proceeding: mechanisms established by Directive harmonising certain aspects of insolvency law

The creditors' protective tools and maximization of the satisfaction of their claims is the central point of the pre-pack proceeding under Directive harmonising certain aspects of insolvency law as its idea is to get the higher purchase price of the business via selling it as a going concern[243]. It was explicitly pointed out in the *travaux preparatoires* that it is the creditors' body which has to benefit from the pre-pack procedure due to the expected high value recovery and the proceeds distribution[244]. In the context of this Thesis research, it is very important to investigate whether the provided by Directive harmonising certain aspects of insolvency law measures are sufficient to address this issue.

To start with, it is relevantly to note that Directive harmonising certain aspects of insolvency law does not establish the rules regarding the creditors' ranking, the process of the claims' distribution, the creditors' participation issues: the national legislation regulates these matters[245], hence, the creditors should rely on the MS' norms to get acquainted with their rights and obligations during the pre-pack. We understand that the EU countries have distinct legal norms and legal cultures in the field of the insolvency law[246]. Therefore, in our opinion, the establishment of similar regulation concerning the claims' ranking, the way of creditors' participation in the pre-pack would not properly contribute into their rights' protection.

The creditors' safeguards are reflected during the pre-pack procedure as will be further discussed below. First and foremost, it is worth noting that the appointed monitor from the beginning of the proceeding is required to conduct the assessment whether the sale of business as a going concern would produce higher revenue for creditors rather than its piecemeal liquidation[247]. From this provision we can assume that the monitor who has been already empowered to arrange the sale of the company, has the obligation to properly evaluate whether the pre-pack proceeding is the best strategy in the case-by-case situation. Hence, the level of creditors' claims satisfaction has to be considered from the very beginning of the pre-pack. We support such approach. The monitor who shall be a real professional in insolvency matters[248], due to its skills and qualification may potentially consider whether the particular company would generate more revenue in case of its piece-by-piece sale, or its sale as a productive economical unit would bring

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[243] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 30.
[244] Impact Assessment Report accompanying Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 34: Annex 5, Para. 2.4.
[245] Directive harmonising certain aspects of insolvency law, *op.cit.*, Rec. 35.
[246] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Chapter 2. Legal basis, Subsidiarity and Proportionality.
[247] Directive harmonising certain aspects of insolvency law, *op.cit.*, Rec. 30.
[248] *Ibid.*, Art. 23.

more proceeds for the creditors. Such assessment, in our opinion, may save the time and costs spent during the pre-pack which, in the end, may not give the expected results for creditors.

Another monitor's duty which is related with the creditors' protection is that when the best bid is selected, the best-interests-of-creditors test shall be performed and laid down in the special statement[249] in order to establish that the creditor's position would not be worse in the pre-pack liquidation in comparison to the ordinary insolvency proceeding or any other scenario[250]. We observe that another important obligation is imposed on the monitor. Such duty requires from the monitor to carry out the scrupulous analysis in order to assess whether the other possible way exist which would contribute to satisfy creditors' claims to a higher degree rather than the pre-pack procedure.

We would like also to draw the attention to the fact that the formulation by Directive harmonising certain aspects of insolvency law regarding the best-interests-of-creditors test definition indicates that the assessment does not include the general interests of creditors but every single creditor[251]. Therefore, not the general welfare of the creditors' body should be taken into account, but individual interests of each creditor, secured as well as unsecured ones, have to be considered. We suggest that such proper evaluation and its reflection in the special report may enhance the protection of creditors.

As the maximizing of sale price is at the core of the pre-pack proceeding, it is important that this mechanism helps to achieve it not theoretically, but it has to be demonstrated in practice. However, the empirical studies, conducted in 2020, revealed that when the connected parties to the debtor are the acquirers of the company, the purchase price is often lower in comparison to its market value[252]. We see that Directive harmonising certain aspects of insolvency law encourages MS to impose more scrutiny and more requirements to consider when the party closely related to the debtor is selected as the best bidder[253]. Hence, it is under the discretion of the EU countries to address this issue internally. In our point of view, enhanced control during the preparatory stage would only strengthen the creditors' position.

The possibility to introduce public auction, provided by Directive harmonising certain aspects of insolvency law [254], could be regarded as one more safeguard for creditors. It is indicated that MS are allowed to provide the public auction to ensure the transparency, fairness, competitiveness and fair market price during the bidding process[255] in case one or more creditors

[249] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 24.
[250] *Ibid*., Art. 2.
[251] *Ibid.*
[252] Adebola, *supra note*, 2: 6.
[253] Directive harmonising certain aspects of insolvency law, *op.cit.*, Rec. 38.
[254] *Ibid.*, Art. 24.
[255] *Ibid.*, Rec.40.

present the reasonable doubts whether the selected by the monitor bidder meet the above-mentioned criteria[256]. The transposition of public auction is not mandatory for MS. Hence, they have the possibility to choose whether such mechanism should exist in their national legislation.

We understand that a public auction may contribute to the transparent, fair and competitive sale process as more potential buyers could be involved and, moreover, this process would be more open to others. Furthermore, the creditors' participation and opinion in such case plays more significant role. However, we would like to recall another side of the consequences of public auction. As it was already addressed in the Chapter 2 of this Thesis, the introduction of possibility to conduct the public auction may potentially reduce the confidentiality of the whole process and, as a result, the business value would be lowered as well. It is upon MS' choice to implement the public auction or not, hence, we suggest it depends on the approach of each state and assessment of potential risks which may arise.

In the context of the creditors' body protection, it is appropriate to mention the situations when the general interests of creditors may be taken into account during the pre-pack proceeding. First of all, MS are not precluded to provide the suspension of the opening of the liquidation phase in case any creditor has filed for the insolvency[257]. It is indicated that all circumstances in the case-by-case situation should be considered, so that it would be objectively reasonable to take such measures. It becomes apparent that in such case the single creditor's right to file for the insolvency would contrast with the general interests of the whole creditors' body. We regard that the implementation of such provision may prevent the possible abuse from the single creditor's side, and, therefore, preserves the possibility to achieve the goal of the pre-pack – to get higher business value. On the other hand, the right of the creditor to file a claim was earlier ensured in EIR[258], hence, such suspension may create the conflict between the EU legal acts and encroach upon the creditor's fundamental right in the context of insolvency. Therefore, in case of the implementation of the suspension of the insolvency proceeding opening, MS should account for these issues and preserve the necessary balance between the single creditor's right and general welfare of the creditors.

Directive harmonising certain aspects of insolvency law also provides the possibility for MS to set aside the "debtor in possession" principle, established for the pre-pack[259], and limit the debtor's right to manage the business[260]. The following conditions should precede such limitation:

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[256] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 24.
[257] *Ibid.*, Art. 26.
[258] EIR, *supra note*, 168: Art. 53.
[259] Directive harmonising certain aspects of insolvency law, *op.cit.*, Art. 21.
[260] *Ibid.*, Rec. 39.

1. The debtor does not cooperate properly with the monitor or does not act with due diligence;

2. It is in the general interests of creditors to carry on the preparation phase within the pre-pack procedure[261].

The imposition of this provision is not obligatory for MS. However, we consider that such limitation may contribute to the protection of the creditors' interests and provide the mechanism so that the unfair debtor's behavior would not hinder the pre-pack proceeding.

The sale approval during the liquidation phase may be considered as a culmination for the creditors: the proceeds obtained during the sale are distributed among them[262]. Hence, the possibility for creditors to be involved into this part of the pre-pack proceeding is very important. Directive harmonising certain aspects of insolvency law addresses this matter and establishes that the creditors' rights to take part in the opened insolvency proceeding shall be duly provided[263]. It is specified that creditors' claims shall be documented in the appropriate way and considered under the national insolvency law[264].

It has been already investigated that the pre-pack procedure is often criticized due to the fact that during the pre-arranged sales the creditors, especially unsecured ones, are usually deprived from the fundamental safeguards regarding their participation provided within the ordinary insolvency proceeding[265]. We observe that the adopted Directive harmonising certain aspects of insolvency law does not disregard the creditors' participation during the liquidation phase and constitutes that creditors shall have the possibility to file their claims according to the procedure, established by national legislation. Hence, we understand that the liquidation phase should not be conducted outside the creditors' awareness. It was argued in the academic literature that the so-called pre-view rights of creditors are very important as the creditors would have the real opportunity to express the objections to the sale[266]. The possibility of the creditors' enhanced pre-view rights which imply not only to file the claims against the sale, but also to reject the unacceptable business value and the proposed purchase price[267], was also proposed in the context of the pre-pack mechanism.

We support the approach which provides the opportunities for the creditors to file the claims against the deal. In our point of view, the creditors should be duly involved into the liquidation phase and be able to present the objections to the proposed business value of the offered

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[261] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 39.
[262] *Ibid.*, Rec. 31.
[263] *Ibid.*, Rec. 42.
[264] *Ibid.*
[265] Xie, *supra note*, 11: 409.
[266] *Ibid.*
[267]Adebola, *supra note*, 2: 16.

price. Such mechanism would enable the creditors to express their opinions in front of the court or other competent authority which is empowered to authorize the sale[268]. Directive harmonising certain aspects of insolvency law explicitly indicates that MS are obliged to provide the appropriate participation of creditors during the insolvency proceeding. Furthermore, the creditors' claims should be not only examined but also satisfied if the national legislation provides so[269]. Hence, we believe, that this provision may positively contribute to the creditors' protection.

As for the enhanced pre-view rights, we can observe that MS whose insolvency legislation approach is guided by the creditors' autonomy principle, are allowed to provide that it is the creditors who are authorized to approve the business sale during the pre-pack proceeding[270]. There are two options which EU counties may implement into their legislations:

1. The creditors' approval of the recommended by the monitor purchaser before its authorization of court or other public authority[271];
2. The creditors' approval of sale without judicial or other authorities' involvement in case national law demands the creditors' consent[272].

We observe that MS may enhance the creditors' safeguards in the way that their consent is definitive for the sale approval. Hence, they would be able to have a direct impact on the pre-pack proceeding. It was explored that the junior creditors whose claims are not supported by any security consider that the possibility for them to stop the unfavourable deal should be provided[273]. We understand that the enforcement of such norm would only strengthen their position during the pre-pack. However, as Directive harmonising certain aspects of insolvency law follows the minimum harmonization approach[274], the issue regarding the necessity of creditor's consent and its detailed regulation should be addressed internally by MS. We consider that the implementation of the creditor's consent or approval without the public authority's participation would contribute to their safeguards. Also, it may potentially raise the creditors' trust towards the pre-pack mechanism.

During the liquidation phase MS are obliged to impose the special power for the public authority that approve the sale regarding the possibility to establish that the selected bidder does not meet the best-interests-of-creditors test[275]. Furthermore, Directive harmonising certain aspects of insolvency law allows MS to start piecemeal liquidation of assets within the opened pre-pack

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[268] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 29.
[269] *Ibid.*, Rec. 42.
[270] *Ibid.*, Rec. 43.
[271] *Ibid.*, Art. 24, 29.
[272] *Ibid.*, Art. 29.
[273] Adebola, *supra note*, 2: 16.
[274] Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 6: Chapter 2. Legal basis, Subsidiarity and Proportionality.
[275] Directive harmonising certain aspects of insolvency law, *op.cit.*, Art. 29.

proceeding in case it is investigated that criteria of transparency, competitiveness, fairness and market standards are failed[276]. It is apparent that competent authority should not rely only on the monitor's recommendations, but also it is important for the state authority to review the proposed bidder and investigate if the creditors are not put in the worse position in comparison with another alternative scenario within the insolvency legal framework[277].

With regard to this, we would like to provide some considerations. As it has been earlier explored, the interests of creditors are put on the first place during the pre-pack. The greater satisfaction of their claims directly depends on the proper establishing of business value and selecting the best bidder. Therefore, we believe that in order to address this issue, it is not sufficient to be guided only by legal knowledge, but other skills and qualifications are very important.

It has been argued that although the competent authority is provided with the necessary documents to decide whether the business value and the proposed price meet the interests of creditors, it is evident that the effectiveness of the review concerning the economics aspects of the sale may be questioned. The state organs which are empowered to approve the sale are not usually experts which can properly establish the business value on the market and consider such criteria as business activity, its location, its place in the relevant industry which may contribute to its proper assessment[278]. We regard such opinion as a relevant one in the context of the pre-pack.

The court or other competent authority are usually guided by the legal norms, some general principles or by general knowledge while rendering the judgement. The objectivity of their decisions is based on the above-mentioned factors. However, we understand that company's assets assessment should not be grounded only on general knowledge in the business activity: it is important to take into account all the peculiarities of the industry in order to establish its possible highest value.

The proposal to involve into the process the independent expert valuers was put forward. It was suggested that such assessment may become a good basis for the sale approval decision. Furthermore, the creditors' confidence in the proper business value may arise as more objectivity for such decision would be provided[279]. We agree with such argumentation and consider that it would provide better outcome.

Having investigated the pre-pack, we consider that the problematics arisen around this mechanism lies in the fact that creditors have concerns that the higher business value in comparison to ordinary insolvency proceeding may not be achieved. It is quite difficult to establish the real

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[276] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 41.
[277] *Ibid.*, Art. 2.
[278] Xie, *supra note*, 11: 414-415.
[279] *Ibid.*, 416-417.

value on the economic market, especially if it is assessed by the parties which do not have deep knowledge in such matters.

The introduction of the independent experts may properly serve for achievement of the objective business assessment. It should be recalled that in the UK such practice exists when the business acquirer is the party closely related to the debtor. The Pre-Pack Pool is regarded as an organization of the experienced businesspeople whose function is to evaluate whether the sale of business to connected party is reasonable[280]. We observe that the practice to implement such evaluators is already applied.

We believe that the requirement to introduce such independent assessment may have a positive effect not only in cases when the connected party is the best bidder. The objective evaluation, conducted by the people with necessary skills, knowledge and qualifications will only strengthen the creditors' trust towards the selected bidder and ensure that their legitimate interests are protected. Apart from this, as one of the aims of Directive harmonising certain aspects of insolvency law is to provide the free movement of capital and foster investors' trust[281], we believe that the independent business evaluation may enhance their confidence as more objectivity would be provided.

In the context of creditors' safeguards, it is worth to recall that Directive harmonising certain aspects of insolvency law demands from MS to establish that the monitor as well as the insolvency practitioner are responsible before the creditors in case their intentional or negligent failure to perform the obligations under Directive harmonising certain aspects of insolvency law[282]. We consider that this norm ensures the right for creditors to seek compensation in case the monitor or insolvency practitioner did not comply with their direct duties. Moreover, such provision may potentially create the so-called motivation for monitors and insolvency practitioners to act in good faith and with enhanced due diligence. On the other side, we presume that the introduction of the liability may produce a chilling effect on the monitor and insolvency practitioner and, as a result, would discourage them from taking the necessary procedural steps. Therefore, MS should find the balance while transposing the norm regarding their liability into national legislation.

The safeguards for the secured creditors are explicitly provided in Directive harmonising certain aspects of insolvency law[283]. It is stated that release from the encumbrances shall be

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[280] "Introducing the Pre-Pack Pool," PrePackPool, accessed 27 April 2026, https://www.prepackpool.co.uk
[281] Impact Assessment Report accompanying Proposal for a Directive harmonising certain aspects of insolvency law, *supra note*, 34: 4.1. General objectives.
[282] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Art. 34.
[283] *Ibid.*, Rec. 51, Art. 38.

conducted in accordance with the national legislation[284]. We understand that this provision is very important as the pre-pack sale initially establishes that the business is acquired free of debts and liabilities[285]. Therefore, Directive harmonising certain aspects of insolvency law addresses this issue and does not prejudice the creditors who have the security interests: the pre-pack does not deprive them of their legitimate rights. It is also indicated that the security interests shall be released in the same way as it is performed during the insolvency proceeding[286]. Hence, we see that it is important that the secured creditors are not put in worse situation during the pre-pack proceeding comparably to their position in the ordinary procedure. We consider that it would enhance the trust of the creditors towards the pre-pack mechanism.

With the regard to the secured creditors, MS are granted the option to derogate from the necessity to obtain the consent of the secured claims holders for release of the encumbrances in case their insolvency legal framework requires it[287]. However, it is also provided that if the holder objects to such release, the derogation cannot be applied[288]. We consider that the derogation from such requirement may potentially interfere in the legitimate right of the creditor to ownership. Therefore, the implementation of such norm by MS should be legally framed in the way so that the secured creditor would have the sufficient amount of time and the relevant means to express such objection.

According to Directive harmonising certain aspects of insolvency law the secured creditors have the possibility to take part in the sale process by the means of credit bidding[289]. This mechanism provides that their secured claims may be submitted as a consideration to acquire the business or part of its assets. It is regarded that the credit bidding instrument helps to increase the quantity of potential bidders, and, as a result, more favourable propositions for the sale price may be submitted[290]. However, it has also been suggested that such credit bidding may discourage another potential bidders as it permits the security holders to bid by using the claim that may be worth little in reality[291].

Directive harmonising certain aspects of insolvency law addresses the credit bidding issue in the following way. Although the secured creditors are allowed to participate in the sale process, they are not permitted to use the whole amount of their claims in case such amount is higher than

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284 Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 51, Art. 38.
285 *Ibid.*, Art. 31.
286 *Ibid.*, Art. 38.
287 *Ibid.*
288 *Ibid.*, Rec. 51.
289 *Ibid.*, Rec. 55.
290 Donald S. Bernstein, Brian Resnick and Hilary Dengel, "The Logic and Limits of Credit Bidding by Secured Creditors Under the Bankruptcy Code," *Thirty-Seventh Annual Lawrence P. King and Charles Seligson Workshop on Bankruptcy and Business Reorganization* (2011): 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975932
291 *Ibid.*

the business value on the market[292]. If such situation happens, MS shall provide that the creditor's bid is limited to the market value of the debtor's business. But the implementation of such restriction does not entail the loss of the security interest over the unbid portion[293].

We observe that Directive harmonising certain aspects of insolvency law proposes the option for creditors to participate in the sale process and use their security interests as the bid. In this case the creditor's body is granted more possibilities to protect their claims. The Directive, governed by the minimum harmonisation approach, does not establish the detailed mechanism how the creditors should be involved into the sale process. Considering that it is indicated that meeting market standards requirement implies the invitation of the potential interested buyers into the sale process[294], we presume that the secured creditors in such case should also be approached in order to give them the possibility to submit their security interests as a bid. However, the restrictions in the credit bidding are also provided to not to discourage other potential acquirers to participate in the bid[295]. Therefore, it appears that secured creditors are provided with one more protective tool which may contribute to the satisfaction of their claims.

Having explored the creditors' safeguards under Directive harmonising certain aspects of insolvency law, it becomes clear that this legal instrument establishes the tools which have to serve for the maximization of their claims' satisfaction. Directive harmonising certain aspects of insolvency law grants different options for MS how to address the creditors' protection issue. It was also investigated that creditors' participation in the liquidation phase is not denied, hence, they have the possibility to file their claims. The security interests of the creditors are ensured as Directive harmonising certain aspects of insolvency law explicitly states that their treatment should be the same as during the ordinary insolvency proceeding. Nevertheless, our concerns which may be arisen around the creditors' safeguards are mostly connected with the junior creditors whose claims are not backed. We consider that the satisfaction of their claims mostly depends on the appropriate sale arrangement and its approval. This group remains the vulnerable one. Therefore, MS while transposing the provisions of Directive harmonising certain aspects of insolvency law into their legislation, should find the balance to enhance the position of such junior creditors.

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[292] Directive harmonising certain aspects of insolvency law, *supra note*, 7: Rec. 55.
[293] *Ibid.*
[294] *Ibid.*, Rec. 44.
[295] *Ibid.*, Rec. 55.

CONCLUSIONS

1. The pre-pack is a restructuring tool for financially distressed companies. It combines the features of the informal workout and an ordinary insolvency proceeding. The first part of the pre-pack mostly consists of the business sale arrangement when the potential company acquirer and the purchase price of the business are identified. The final phase lies in the sale authorization by the competent authority and allocation of the obtained proceeds between the creditors' body.

2. One of the key features of the pre-pack mechanism is the reduction of the time spent on it in comparison with the ordinary insolvency proceeding. The saving of the costs is also considered as the advantage of this tool which makes it attractive for the debtor. The confidentiality and the business value preservation are usually followed during the pre-pack proceeding which make this tool more beneficial for the stakeholders. Apart from this, the pre-pack helps to minimize the reduction of workplaces within the company. As for the concerns around the pre-pack, they are mostly connected with the protection of creditors' safeguards, especially unsecured ones, the connected party sale issue and the "phoenix company" phenomenon.

3. The UK, the USA and some MS have already introduced the pre-pack into their legislation. Although these countries demonstrate different approaches concerning its regulation, the essence of this tool consists of prior negotiations of the sale with its further approval by the competent public authority.

4. New Directive harmonising certain aspects of insolvency law has introduced the pre-pack mechanism and imposed an obligation on MS to implement it into their national legislation. The pre-pack comprises a pre-arranged sale of the business as a going concern with its further approval by the state authority. The minimum harmonization approach has been chosen in order to preserve different legal traditions of MS whilst establishing the most important standards of this procedure.

5. The preparatory stage is the significant part of the pre-pack proceeding during which the business sale arrangement takes place. The monitor plays a pivotal role during this phase so MS should apply the high standards to their status into their legislation. The principles of the preparatory stage indicated in Directive harmonising certain aspects of insolvency law reflect the main benchmarks for MS concerning the pre-pak proceeding. In order to make the pre-pack proceeding more effective and useful for the interested parties, MS should address the tension between the confidentiality of the procedure and maintaining the transparency, competitiveness and fairness during the sale process. The viability consideration of the business during the preparatory stage should be also addressed in the pre-pack procedure in order to contribute into well-designed insolvency regime. Although the legal framework of the preparatory stage

established by Directive harmonising certain aspects of insolvency law provides a solid foundation and some options for MS to choose, the proper regulation should be created by MS in order to achieve the highest purchase value of business.

6. According to Directive harmonising certain aspects of insolvency law the liquidation stage of the pre-pack is targeted at sale authorization and the allocation of the considerations among the creditors. The options for MS to introduce the public auction or to grant the power to creditors to approve the sale are reflected in Directive harmonising certain aspects of insolvency law. They may ehnance the standards of transparency, fairness and competitiveness and provide more protection for the creditors' body. The contracts' assignment and the relief from previous debts and liabilities of the company should be regarded as the safeguards for the business purchaser which may conribute to the further viability of the company. MS while regulating the liquidation phase should choose the approach regarding the sale approval and determine the degree of the creditors' involvement during it.

7. Connected parties sales are considered as one of main concerns in the context of the pre-pack proceeding. The "phoenixism" effect, the issue regarding the further business viability and the concern about the company's devaluation may arise when the connected party acquires the business. In order to address this issue, Directive harmonising certain aspects of insolvency law establishes additional scrutiny when the potential bidder is a party closely related to the debtor and requires MS to introduce more safeguards in such cases.

8. Although the employment preservation during the pre-pack proceeding is considered as important aspect, the workers' rights to automatic transfer established by Transfers of Undertakings Directive 2001 are not provided during the pre-pack and no exceptions are made. This may put the employees into the vulnerable and unfair position, especially, when the acquirer of the business is the shareholder of the old company. The employees as the stakeholders during the pre-pack proceeding are not provided with relevant safeguards. Therefore, minimum requirements for employment preservation should become binding for MS.

9. Directive harmonising certain aspects of insolvency law provides the protective tools for creditors. The possibility to participate in liquidation phase is established for creditors. MS are granted the options to introduce within the pre-pack proceeding the public auction institution and the sale approval with the creditors' consent. The security interests are preserved on the same level as during the ordinary insolvency proceeding. The credit bidding is provided for security claims' holders. However, junior creditors as the vulnerable group are not protected enoough. Directive harmonising certain aspects of insolvency law does not provide special safeguards for them. In order to set more objectivity for the sale approval and the business purchase price, the independent evaluators should be involved into the sale authorization process.

RECOMMENDATIONS

The investigation conducted in Thesis has demonstrated that Directive harmonising certain aspects of insolvency law does not fully address the problematic issues which usually arise around the pre-pack procedure. The study has revealed that during the pre-pack proceeding the employees are deprived of right to transfer earlier established by Transfers of Undertakings Directive 2001 and minimum guarantees are not provided for them. Along with that, it was researched that unsecured creditors remain the vulnerable group during the pre-pack procedure, and the proper satisfaction of their claims may still be called into question. Furthermore, the additional requirements to the pre-pack mechanism, especially, the conduct of the preparatory stage should be introduced in order to make it more effective. The following proposals are put forward in order to provide the possible solutions to the aforementioned concerns:

1. Although the minimum harmonization approach is viewed throughout Directive harmonising certain aspects of insolvency law, EU policy makers should alter the standards of the preparatory phase during the pre-pack proceeding and make the viability assessment of the company obligatory to consider by monitor. The EU legislator should establish the viability as one of those criteria which determines whether the pre-pack proceeding is more appropriate mechanism for the debtor and the creditors rather than piecemeal liquidation. For this purpose, the following formulation is proposed for Art. 24 Para. 2 of Directive harmonising certain aspects of insolvency law: "Member States shall ensure that the monitor, if necessary with the assistance of the debtor: … (d) conducts the viability evaluation of the debtor's business."

2. EU officials should take into consideration the employees' interests during the pre-pack procedure. The minimum transfer requirements for the employees and guarantees of preservation of their rights, provided by Transfers of Undertakings Directive 2001, should be granted. EU policy makers should provide the safeguards for employees, specifically in the cases when the company's acquirer is a party closely related to the debtor. For this purpose, the following formulation is proposed for Art. 22 Para. 2 of Directive harmonising certain aspects of insolvency law: "…Unless otherwise provided, for the purpose of Article 5(1) of Directive 2001/23/EC, when it takes place in proceedings which could end in the liquidation of the debtor, 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."; Art. 35 Para. 3: When a party closely related to the debtor is the acquirer of the debtor's business, Member States shall ensure that the employees are provided with the guarantees, established by Directive 2001/23/EC."

3. The regulation of the pre-pack proceeding on the EU level should provide more mechanisms which would enhance the junior creditors' position. One of the prospective options

which may strengthen the status of unsecured creditors is the involvement of the independent evaluator during the sale authorization process whose function would be to establish the real business value and provide the impartial assessment. The recommendation is based on the assumption that more objectivity of the purchase price may be achieved in case such experts have participated in the process. To not prejudice the junior creditors during the pre-pack proceeding, the similar and precise safeguards for them should be applied on the EU level. For this purpose, the following formulation is proposed for Art. 29 Para. 5 of Directive harmonising certain aspects of insolvency law: ”Member States shall provide that the independent evaluator is involved into the process of the sale authorization. Member States shall ensure that the independent evaluator impartially assesses the reasonableness of sale authorization and the conformity of the purchase price with market value.”

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ABSTRACT

The research of this Thesis has been dedicated to the pre-pack proceeding regulation which has been recently introduced by Directive harmonising certain aspects of insolvency law. The esssence of the pre-pack procedure, its advantages and problemaric issues have been investigated. The Thesis demonstrated the practice of the pre-pack in different countries which have already imposed into their insolvency legislation this tool. The investigation has been mostly focused on the analysis of the stages of the pre-pack proceeding and its main standards established by Directive harmonising certain aspects of insolvency law.

Having conducted the thorough research of the pre-pack regulation on the EU level and having explored the theoretical background of this tool, the preparatory stage, the liquidation phase and common provisions of the pre-pack proceeding have been analyzed. The research has revealed that although Directive harmonising certain aspects of insolvency law address main issues of the pre-pack, some concerns still may arise during its real application in MS. It was explored that the some adjustements to the EU legal instrument should be made in order to strengthen the position of the unsecured creditors. Additionally, the Thesis demonstrated that employees are not provided with sufficient and fair safeguards during the pre-pack. In order to create the well-designed insolvency regime, it has been proposed to establish the company viability assessment as an obligatory one during the pre-pack proceeding.

Keywords: *pre-pack, creditors' protection, employees' safeguards, minimum harmonization approach, viability assessment.*

SUMMARY

The freedom of capital is considered as one of the most significant values for the EU and its policy makers. Hence, providing the companies with more options during the insolvency estate is regarded as an important contribution for the business within the EU. Having introduced new Directive harmonising certain aspects of insolvency law, the EU officials established the pre-pack proceeding as an obligatory mechanism which shall be implemented in MS. This Thesis, entitled "The pre-pack proceeding in Insolvency", focused on the investigation of the pre-pack regulation under Directive harmonising certain aspects of insolvency and on the examining whether the legal instrument provides the sufficient measures which would make the pre-pack proceeding a useful one for the financially distressed companies. The main objectives of the study were to examine the nature of the pre-pack mechanism and its core features, and explore whether this mechanism is beneficial for the business in financial difficulty. Additionally, the research paper targeted at investigating the already existing regulation of the pre-pack in other countries, especially in MS. The main part was dedicated to the analysis of the preparation and liquidation phases of the pre-pack according to Directive harmonising certain aspects of insolvency and the common provisons which are applicable throughout the whole proceeding.

The contents of the Thesis is divided into three Chapters. The first Chapter contains the theoretical background of the pre-pack procedure and reveals its legislation in other countries. Additionally, the short introduction of Directive harmonising certain aspects of insolvency law and its minimum harmonization approach is provided. Chapter 2 and Chapter 3 address the pre-pack regulation of the pre-pack established by Directive harmonising certain aspects of insolvency.

The Thesis presented that the EU legislator provided that preparatory and liquidation phases shall constitute the pre-pack mechanism is MS. The mandatory requirements regarding the monitor appointment, the standards of the preparatory and liquidation phases, the time limitation for the sale arrangement, the stay of individual enforcement actions, the relief of debts and liabilities of the company and the automatic assignment of the necessary for the business contracts are established for MS. However, following the minimum harmonization approach, the EU policy makers provided for MS the options to implement the public auction, to grant to the creditors the authority to approve the sale. Having analyzed the stages, it was proposed that the business viability assessment should be introduced in MS in order to create a well-designed insolvency regime. Besides, the research raised the importance of the adequate preservation of the confidentiality during the process of sale arrangement.

Having explored the common provisions of the pre-pack under the EU legal act, the connected parties sale, the employees' safeguards and measures for creditors' protection were addressed. It was demonstrated that during the pre-pack proceeding the employees remain the

vulnerable group as no minimum protective mechanisms are laid down for them. Hence, the protective tools for this group of stakeholders should be established. The creditors, which are considered as those who should benefit from the pre-pack proceeding to the greatest extent, are provided with mechanisms which protect their rights. Directive harmonising certain aspects of insolvency ensures their right to participate in the proceeding, provides the possibility to play a decisive role in sale approval if MS follows such approach. Besides, the legal act protects the security interests of their holders. Additionally, the secured creditors are given the possibility to use the instrument of credit bidding in order to participate in the sale process. However, the junior creditors are not provided with sufficient measures which would protect their legitimate claims. This group is not granted the special safeguards which would ensure the proper and fair satisfaction of their claims. Therefore, more tools should be implemented in order to preserve the balance between all types of creditors. It was proposed to introdure the independent evaluators in order to provide more objectivity to the sale process.

The pre-pack proceeding is regarded as a useful and beneficial mechanism in insolvency law, and Directive harmonising certain aspects of insolvency established it on the EU level. However, the improvements for this procedure are still necessary in order to constitute its proper legal framework on the EU level.