ALERT MEMORANDUM

EU Insolvency Directive II: Another Step Forward in the Harmonization of European Insolvency Law

April 23, 2026

The harmonization of European insolvency law is a work in progress, already consisting of Regulation (EU) 2015/848 – addressing the procedural and conflict-of-laws issues of cross-border insolvency – and Directive (EU) 2019/1023 (the "Insolvency Directive I") – which introduced common substantive rules for preventive restructuring proceedings.

On March 30, 2026, a new piece has been added, with the adoption of Directive (EU) No. 2026/799 (the "Insolvency Directive II").[1]

The Insolvency Directive II operates across four principal areas: (*i*) it introduces pre-pack proceedings, consisting in the swift sale of the debtor's business to a bidder identified ahead of the insolvency proceedings, and includes the ability of creditors to "credit bid"; (*ii*) it seeks to level up the rules on insolvency claw-back actions, identifying the relevant transactions, applicable "suspect period" and related exemptions; (*iii*) it aligns the framework on directors' filing duties, introducing a specific obligation to file for insolvency; and (*iv*) it establishes the creditors' committee as a regular player in most insolvencies.

The rationale for this new European intervention is again the need to ensure a proper functioning of the internal market and the realization of an effective Capital Markets Union. Wide disparities among the substantive insolvency laws of Member States have been deemed to contribute to legal uncertainty and unpredictability as to the outcome of insolvency proceedings, ultimately hampering the free movement of capital and the freedom of establishment within the internal market.

The Insolvency Directive II originates from a proposal tabled by the European Commission in 2022[2] (the "Proposal") and is the result of a lengthy negotiation with Council and Parliament (so-called trilogue). Member States shall implement it by January 22, 2029.

As an instrument of minimum harmonization, in multiple instances the Insolvency Directive II expressly allows Member States to introduce or maintain rules offering a higher level of protection to the general body of creditors and providing for greater creditor participation in insolvency proceedings.

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1 Directive (EU) 2026/799 of the European Parliament and of the Council harmonizing certain aspects of insolvency law.

2 See our alert memorandum dated February 6, 2023, available here.

I. Pre-Pack Proceedings

Perhaps the most innovative feature of the Insolvency Directive II is its introduction of a harmonized framework for pre-pack proceedings – a two-phase procedure available "*at least*" to a debtor that is likely to become insolvent.[3] These are designed to enable the quick divestiture of the debtor's business or business unit as a going concern shortly after the formal opening of insolvency proceedings, thereby preserving the value that a lengthier process or piecemeal liquidation would otherwise destroy.

These pre-pack proceedings will consist of a preparatory phase and a subsequent liquidation phase, and will result in the sale of the debtor's business to the best bidder once the insolvency proceedings have been opened:

- the preparatory phase shall be debtor-in-possession, so that the debtor remains "*totally, or at least partially*" in control of its assets and the day-to-day operation of its business. It is during this phase that the best bid for the business is to be identified;[4] [5] and
- the liquidation phase must take place in the context of the insolvency proceedings (as opposed to "*preventive restructuring proceedings*").[6] It is in this phase that the sale is executed, and the proceeds are thereafter distributed to creditors.

The Preparatory Phase and the Monitor

The preparatory phase, and thus the pre-pack proceedings, start at the initiative of the debtor, when it seeks the appointment of a "monitor" (not necessarily by a court).[7]

The monitor is a newly introduced player, not corresponding to any customary "*insolvency practitioner*" (such as insolvency trustees, *mandataires*, or commissioners), who must be independent from the debtor and whose primary mandate is to ensure that the sale process – which in principle is run by the debtor – is competitive, transparent, fair and compliant with market standards.

At the end of the sale process, the monitor shall recommend the best bidder as the "*pre-pack acquirer*", and confirm that, in its assessment, the bid satisfies the "*best-interest-of-creditors test*".[8]

The preparatory phase is limited in time, although the exact duration is deferred to Member States, which may also provide that it could be terminated when: (*i*) the debtor fails to provide the necessary assistance or to act with due diligence; or (*ii*) the preparatory phase has no reasonable prospects of success.

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[3] This specification was not included in the Proposal. On the other hand, Member States may also provide that the preparatory phase cannot be initiated where the debtor is unable to pay its debts as they fall due (which in most jurisdictions corresponds to insolvency).

[4] The best bid shall be selected on the basis of criteria consistent with those established by Member States for selecting the best bid among competing bids in insolvency proceedings. Moreover, the preparatory phase should be "*confidential, at least with regard to finding an appropriate buyer*".

[5] As already envisaged in the Proposal, in recommending the bid, the monitor overseeing the sale process shall consider whether, for competition (merger control) reasons, there is an appreciable risk that the transaction does not go through or is materially delayed. In such case, the monitor must take "appropriate steps" to find alternative bids and may disregard the original one (provided that the original bid is not the only one and the delay caused by such original bid would cause a damage to the debtor's business).

[6] Annex A of Regulation (EU) 2015/848 lists the insolvency proceedings available in each Member State. However, such annex is not limited to proceedings that are pure bankruptcy liquidation proceedings, but extends to "*preventive restructuring proceedings*", as envisaged under the Insolvency Directive I (and thus proceedings intended to preserve in whole or in part the debtor's business as a going concern). Since the Insolvency Directive II clarifies that the pre-pack's liquidation phase cannot take place in the context of preventive restructuring proceedings, only the pure bankruptcy liquidation proceedings listed in Annex A are relevant for the purposes of the pre-pack's liquidation phase.

[7] The monitor is appointed in accordance with the rules that national laws will set out; therefore, unlike the Proposal, the Insolvency Directive II does not require that the court be the exclusive appointing body. Moreover, given the role assigned to the monitor during the preparatory phase, the monitor must be independent from the debtor and any party closely related thereto. National laws could also provide additional independence requirements – for example, with respect to equity holders or creditors.

[8] This test is satisfied where the proceeds of the pre-pack sale would ensure a creditor recovery that is no worse than in the event of a piecemeal liquidation and subject to the absolute priority rule. Member States may also provide that the test is satisfied in the event of the "*next-best-alternative scenario*" (an unspecified concept intended to address situations where creditors may have better options than a piecemeal liquidation, such as an alternative restructuring plan, which would be used as a benchmark having particular regard to the restructuring value available to creditors thereunder).

Pending the preparatory phase, and with a view to enabling that it unfolds successfully, the debtor may seek a court stay against individual enforcement actions.

The Liquidation Phase

The liquidation phase follows the preparatory one and starts with the court[9] issuing a decision to open insolvency proceedings, upon the initiative of the debtor.

This phase seeks to ensure the quick sale of the business, which must be authorized by the court in the following circumstances:

(i) the sale is made to the acquirer selected in the preparatory phase, provided that: (*a*) the acquirer is proposed by the monitor, who shall confirm (and the court shall be satisfied) that the requirements of competitiveness, transparency and compliance with market standards have been met; or, alternatively (*b*), the sale is approved by the creditors (if national law so provides, the court authorization is not required);

(ii) the acquirer has been selected through a public auction, if so provided by national law. In this case, the auction cannot last more than 3 months, and the bidder selected in the preceding preparatory phase acts as a "*stalking horse*": in the event that the auction is adjudicated to another party, the pre-pack bidder shall be entitled to "*commensurate and proportional*" protections, *e.g.*, in the form of break-up fees or cost reimbursements. Member States may also require that a public auction be conducted where one or more creditors show that there are reasonable grounds to doubt that the monitor's recommended bid reflects the fair market price of the business.[10]

Where the best bid does not satisfy the best-interest-of-creditors test, Member States may provide that the court orders a going-concern valuation of the debtor's business. Such valuation is mandatory where the bid recommended by the monitor as a result of the preparatory phase is submitted by a party "*closely related*"[11] to the debtor.

Finally, with a view to ensuring greater certainty and stability of pre-pack sales, Member States may provide that if a third party appeals the court authorization of the sale, the appeal does not suspend the sale unless suitable protections are granted by the appellant to address the risk of damages caused by an unjustified deferral of closing.

Liabilities and Executory Contracts

Pursuant to the Insolvency Directive II, the pre-pack buyer acquires the business free and clear of debts and liabilities, unless otherwise agreed.[12]

Executory contracts necessary to continue the business may be assigned to the pre-pack acquirer without requiring the counterparty's consent,[13] though Member States may provide otherwise depending on the type of contract, the nature of the parties, or the interests of the business. Where an assignment would unfairly prejudice the counterparty, Member States may also provide that the assigned counterparty is entitled to terminate the assigned contract by serving a notice period of no less than three months from the assignment.

Interim Finance

Recognizing the crucial role that interim finance plays in preserving a distressed business, pending its sale, the Insolvency Directive II confirms the protections already set forth in the Proposal, notably (*i*) the super-priority status of interim finance claims in case of subsequent insolvency proceedings of the debtor, and (*ii*) allowing the debtor to grant security over the sale

[9] The Insolvency Directive II contemplates the possibility that, where so provided by national law, the authority in charge of this decision is not a court. For simplicity, hereinafter we will refer to the court only.

[10] This creditor-driven check is a notable addition that was absent in the original Proposal.

[11] The Insolvency Directive II contains a broad definition of "closely related" person, which includes, among others, board members, controlling shareholders, or any spouse, relative, or concubine of the foregoing.

[12] This is without prejudice to national provisions under which the debtor's conduct may be taken into account in assessing the acquirer's liability for damages (*e.g.*, for environmental damages), where such conduct is imputable to the acquirer.

[13] With the exception, already envisaged in the Proposal, of the buyer who is a competitor of such contract counterparty, in which case the consent of the counterparty remains required.

proceeds. In addition, the directive introduces two further incentives for providers of interim financing: (*a*) such financing cannot thereafter be declared "*void, voidable or unenforceable*"; and (*b*) providers are exempt from civil, administrative and criminal liability on the ground that the financing is detrimental to the general body of creditors.[14]

Credit Bidding

In many jurisdictions, the ability of existing creditors to offer their claim as purchase price for an asset of their debtor (so-called "credit bidding") is either controversial or not envisaged.

The Insolvency Directive II marks a significant development in this respect, to the extent that it expressly permits such credit bidding, in two different situations:

- where the business is encumbered by security interests, the relevant secured creditors may offset their claims against the purchase price, but only up to an amount not exceeding the market value of the business;[15]
- similarly, Member States are allowed to provide that the interim finance lenders themselves may credit bid, by offsetting their claims for the interim financing they have provided against the purchase price for the debtor's business. In this case, the Insolvency Directive II does not seem to limit such ability based on the value of the business or the amount of the lender's claims.

II. Insolvency Claw-Back Actions

The harmonization of insolvency law pursued by the Insolvency Directive II extends to insolvency claw-back actions,[16] a matter that typically belonged to Member States only (and thus caused material discrepancies across jurisdictions).

These actions enable the insolvency estate to challenge transactions, detrimental to the general body of creditors, entered into by the debtor prior to the opening of the insolvency proceeding, as a result of which: (*i*) the relevant transaction[17] is deemed void, voidable or unenforceable,[18] and (*ii*) the debtor's counterparty shall compensate the insolvency estate in full (by returning the benefit it received from the transaction or its monetary equivalent). However, any claim of the counterparty that were satisfied by means of the relevant transaction revive (although in principle such counterparty would be treated as an unsecured creditor and would need to submit a proof of claim just like any other pre-petition creditor).

Suspect Period

The Insolvency Directive II seeks to level up the types of transactions that may be affected by claw-back actions and the applicable timeframe (which is determined as a certain period prior to the submission of the request for the opening of insolvency proceedings, and thereafter, until the opening thereof; so-called "suspect period"). Specifically, the following legal acts should be void, voidable or unenforceable if entered into during that suspect period:

- Three months:
  - detrimental "preferential" transactions;[19]
  - satisfaction of a claim when due, provided that the counterparty was aware that, at the time of the transaction, the debtor was unable to pay its debts as they fell due or that an insolvency application was pending (which is presumed in case it is a party closely related to the debtor).

[14] However, Member States may condition such protections on "*ex ante* control" (which presumably refers to the control carried out by a court upon authorizing such financing).

[15] This formulation departs from the Proposal, which had provided that credit bidding could operate only where the value of the security interests was "significantly lower" than the market value of the business.

[16] "*Avoidance actions*" in the language of Insolvency Directive II.

[17] In fact, the Insolvency Directive II takes a broader approach and refers to "*any deliberate human behaviour producing legal effects*", although it is unclear whether this would include "omissions", as instead the Proposal expressly envisaged.

[18] The consequences of a successful claw-back action are no longer confined to voidness alone, as the Proposal originally envisaged, but expressly extend to unenforceability (as currently provided in many EU jurisdictions).

[19] Defined as transactions "*benefitting a creditor or group of creditors by satisfaction or collateralisation*".

However, several transactions are exempt from claw back actions, such as: (*i*) arm's length transactions (for "*fair consideration*"); (*ii*) acts aimed at satisfying or collateralizing claims by social security authorities; and (*iii*) certain netting arrangements;[20]

- One year: non-arm's length transactions (for no or manifestly inadequate consideration);
- Two years[21]: transactions intentionally detrimental to the general body of creditors (provided that the other party knew of the debtor's intent).[22]

In any event, the Insolvency Directive provides that a claw-back action may affect any such transaction only up to three years from the opening of the insolvency proceeding (or, if so provided by Member States, from the date the insolvency practitioner becomes aware of the relevant ground to bring such action).

Finally, the Insolvency Directive II introduces an incentive designed to encourage parties to continue dealing with the debtor during preventive restructuring proceedings, as envisaged in the Insolvency Directive I; in particular, where, in the course of such proceedings, a debtor becomes unable to pay its debts as they fall due and a stay of individual enforcement actions is in place, Member States may provide that transactions carried out during the stay period are not subject to claw-back actions on the ground of a party's knowledge of that debtor's inability.

III. Directors' Filing Duties

Member States' legislations on whether and when directors are subject to a specific obligation to start insolvency proceedings vary significantly, although in many jurisdictions there is no express obligation, but rather personal liabilities, including of criminal nature, for failure to seek access (*e.g.*, so-called "deepening insolvency"). The Insolvency Directive II seeks to address this fragmentation, pursuing a balance between encouraging proactive distress management and preserving director accountability for the consequences of delay.

In particular, it formally introduces the obligation for directors to submit a request for the opening of insolvency proceedings within three months of becoming aware – or being reasonably expected to have become aware – of the company's state of insolvency (as defined by national law).

However, this duty does not apply in the following circumstances:

- where the company is already subject to preventive restructuring proceedings under the Insolvency Directive I;
- if so provided by Member States, (i) where directors are natural persons and are personally liable for all of the company's debt; or (ii) where directors adopt measures designed to prevent damage to creditors and to ensure a level of protection for the general body of creditors equivalent to that provided by the submission of a request for the opening of insolvency proceedings.[23]

[20] These were not contemplated in the Proposal and include: "*close-out netting arrangements, in financial markets, energy markets and other commodity markets, as well as legal acts supporting the operation of such arrangements*".

[21] This is a significant reduction compared to the Proposal, which had set the suspect period at four years.

[22] Unlike the Proposal, which considered it sufficient that the counterparty ought to have known of the debtor's intent, the Insolvency Directive II requires actual knowledge.

[23] In this event, directors remain civilly liable for any damage suffered by creditors that would not otherwise have occurred had the opening of insolvency proceedings been requested. Such liability is excluded where and to the extent that directors demonstrate, on the basis of objective circumstances, that the measures taken were reasonably likely to secure an equivalent or better outcome for creditors than that resulting from the opening of insolvency proceedings.

IV. Creditors' Committee

The Insolvency Directive II provides for the establishment of a creditors' committee,[24] where the general meeting of creditors so decides or requests.[25]

With a view to achieving minimum harmonization among Member States also as regards the creditors' committee, the Insolvency Directive II sets out a number of noteworthy provisions:

- Workers' representation: where workers are among the creditors, they or their representatives are expressly eligible for appointment to the creditors' committee, unless an equivalent mechanism for representing workers' interests already exists in the insolvency proceedings.
- Oversight function: the creditors' committee is responsible for examining the activities of insolvency practitioners and must be afforded the right to be heard on matters of interest to the general body of creditors, including significant decisions such as the sale of assets outside the ordinary course of business.
- Governance standards: committee members must represent the interests of the general body of creditors, act in good faith and independently of insolvency practitioners, and maintain the confidentiality of information obtained in connection with the committee's activities.
- Liability insurance: the committee members' personal liability for actions taken in that capacity shall be covered by insurance whose costs are borne by the insolvency estate.

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[24] A creditors' committee shall not be established where, due to circumstances related to the nature and scope of the debtor's business, the burdens of establishment would outweigh the benefits. Such circumstances include not only the low economic relevance of the insolvency estate and the low number of creditors (as in the Proposal), but also the negative effect on the debtor's financial situation caused by potential delays in constituting the committee.

[25] Where national law does not provide for a general meeting of creditors, the establishment of a creditors' committee may be requested by the creditors themselves.