Fast-Track Acquisitions

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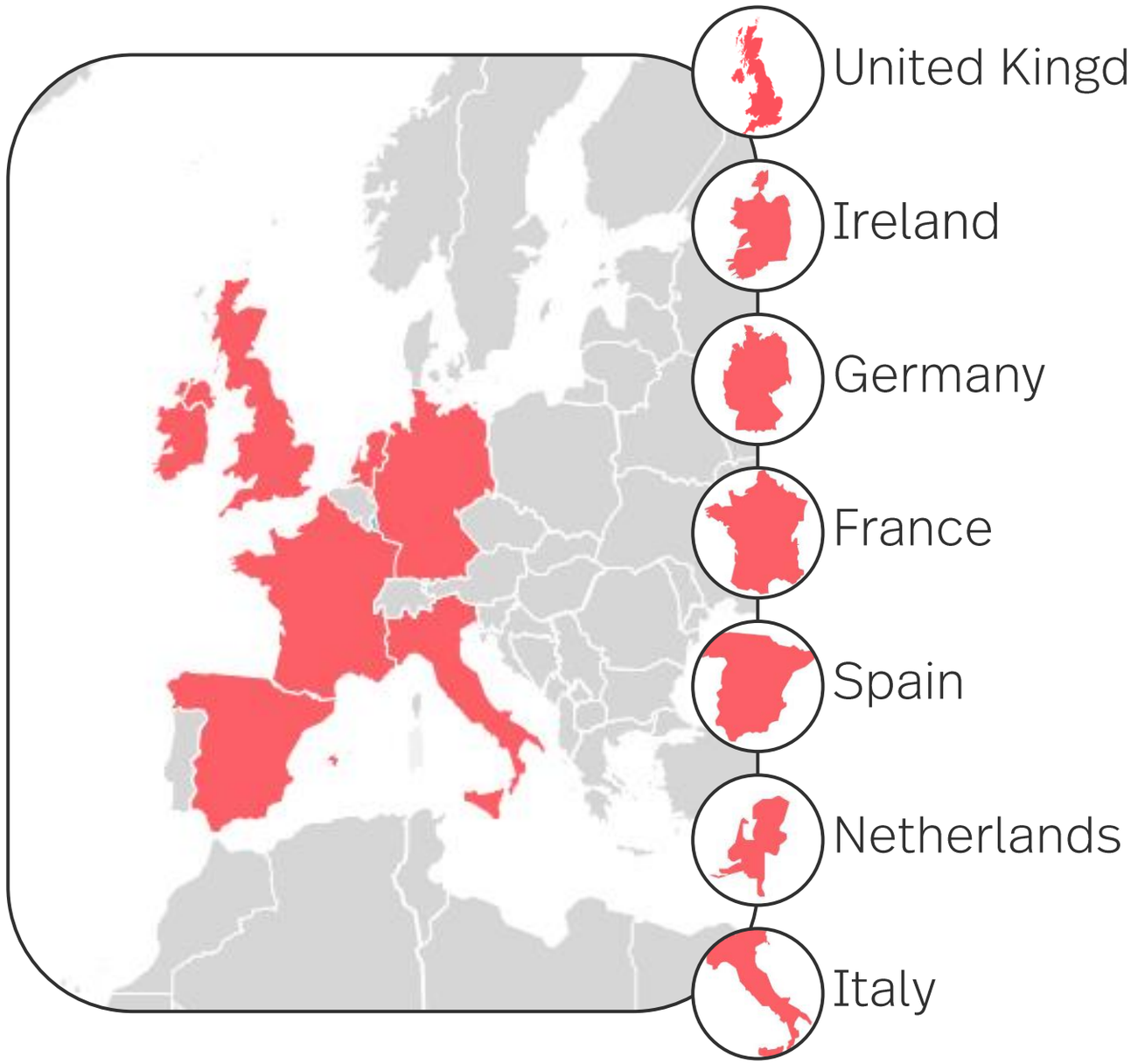
Overview of prepack sales under different European jurisdictions: an opportunity for fast-tracked takeover of distressed companies?

What we will cover...

- **What is a prepack sale?**
- **Detailed procedure of a pre-pack sale**
- **Prepack sale timeline**
- **Advantages of the prepack asset sale plan**
- **Challenges of a prepack asset sale plan**



Fast-Track Acquisitions: United Kingdom

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What is a prepack sale?

In England and Wales, the term “pre-pack” is used as shorthand to describe a transaction (most often a sale of a company’s business and / or assets), the terms of which are negotiated and finalised prior to the formal commencement of an insolvency proceeding in respect of that company, but which is entered into and takes effect immediately thereafter. Contrast this with a “normal” administration sale where administrators take possession then market and transact after their appointment.

Detailed procedure of a pre-pack sale

The use of pre-packs is not restricted to any particular insolvency proceeding; however, they are most commonly used in conjunction with an English law administration. This is because the provisions of Schedule B1 to the Insolvency Act 1986 (“IA 1986”) permit administrators to be appointed by a company, its directors, or its qualifying floating charge holders without the involvement or sanction of the Court or the company’s general body of creditors (therefore placing the timing of the administrators’ appointment in the hands of the appointor). Once a debtor has identified a risk of insolvency, it is able to work with its key stakeholders, legal advisers and prospective administrators at an early stage to plan for, negotiate and agree the terms of a sale which is then “pre-packaged” ahead of the formal commencement of administration. Sale documentation is then entered into, and the transaction is effected by, the administrators immediately on or after their appointment.

Prepack sale timeline

There is no fixed timeline for pre-pack transactions. Because there is no court involvement the timetable will usually be dictated by the cash available in the debtor’s business to continue to fund operations for a sufficient time for the debtor, working with the proposed administrator to undertake a marketing process, identify a preferred party (or parties) and negotiate definitive legal documentation.
Note however that new regulations prohibit an administrator of a company from completing a sale of all or substantially all of its business and assets to one or more connected persons within 8 weeks from the date of the company’s entry into administration unless the administrator has obtained either the approval of the company’s creditors, or a written report from an independent evaluator opining on whether the consideration to be provided and the grounds for the disposal are reasonable in all of the circumstances.

Advantages of the prepack asset sale plan

This procedure affords a struggling debtor an opportunity to effect a sale quickly, discreetly, cheaply (relative to a sale conducted during a trading administration) and with minimal disruption to its operations, goodwill and employees. Those assets not “cherry-picked” by the buyer as part of the sale are left with the insolvent company and become subject to the administration procedure in the ordinary course.

Challenges of a prepack asset sale plan

Due to their rapid and rather opaque nature, there is a common perception amongst critics that pre-packs inherently (and disproportionately) favour existing management and secured creditors and are conducted without sufficient consideration to the interests of creditors as a whole. This has led to numerous calls for greater transparency and oversight of such transactions.

Fast-Track Acquisitions: Ireland

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What is a prepack sale?

The term “pre-pack” is used as shorthand to describe a transaction (most often involving a sale of a company’s business and/or assets), the terms of which are agreed prior to the formal commencement of an insolvency process in respect of that company, but which is entered into and takes effect immediately thereafter. Contrast this with a “normal” receivership or liquidation sale where the receiver or liquidator takes possession then markets and transacts after their appointment.

Prepack sales in Ireland are not restricted to any particular insolvency process, however they are most commonly used in conjunction with a receivership appointment. This is because a Receiver and Manager can be appointed to a company without the involvement or sanction of the Court or the company’s general body of creditors (therefore placing the timing of the receiver’s appointment in the hands of the appointor). Once a debtor has identified a risk of insolvency, it is able to work with its key stakeholders, legal advisers and prospective receivers at an early stage to plan for, negotiate and agree the terms of a sale which is then ‘pre-packaged’ ahead of the formal commencement of the receivership. Often, it is the debtor’s secured creditor which instigates or prompts the debtor to explore the possibility of a pre-pack sale. Sale documentation is then entered into and the transaction is effected by the receivers immediately on or after their appointment.
This procedure affords a struggling debtor an opportunity to effect a sale quickly, discreetly, cheaply (relative to a sale conducted during a trading receivership) and with minimal disruption to its operations, goodwill and employees. Those assets not ‘cherry-picked’ by the buyer as part of the sale are left with the insolvent company and either are dealt with as part of the receivership (if remaining appointed) or any liquidation of the company.

Detailed procedure of a pre-pack sale

- In Ireland, there are no rules or guidelines for the conduct of pre-packs, although some insolvency professionals follow the UK’s SIP-16 guidelines. In the absence of detailed rules, the critical standard for the appointed insolvency office holder is to ensure that he/she obtains the best price reasonably obtainable for the assets at the time of sale (Section 439 of the Companies Act, 2014). Provided the insolvency office holder complies with this test and adheres to the highest professional standards, there is no barrier to effecting a pre-pack sale in a manner which will stand up to scrutiny and which will allay the concerns of creditors.
- As a result, receivers generally have the flexibility to conduct pre-packs on such terms as they (and the secured lender and/or debtor) see fit, so long as they can demonstrate that the price achieved is the best price reasonably possible.
- In order to ensure a receiver is satisfied that he/she is obtaining the best price possible, the proposed receiver is usually involved in the process prior to his/her appointment. The receiver in order to quickly effect the sale will need to have obtained sufficient information to ensure that he/she is happy that the sale is for the best price possible before he or she accepts the appointment.

Prepack sale timeline

0-6 months: Target company and secured lender agree consensual process for the sale of all or part of the assets and business of the company by way of pre-pack sale. Proposed receiver identified and approached. Agreed sales process commences, potential bidders approached etc and selected purchaser carries out due diligence and agrees form of documents to be signed on completion.
Day 1: Receiver appointed and transaction documents signed and completion occurs that day or shortly thereafter.

Advantages of the prepack asset sale plan

- It can be implemented quickly (subject to all parties in agreement);
- It is cost effective (relative to a sale conducted during a trading receivership);
- It creates minimal disruption to a trading business including its operations, goodwill and employees;
- It preserves jobs;
- The terms of the transaction is confidential except the appointment of the receiver will be made public due to the requirement to file the relevant form with the Irish Companies Registration Office;
- Due to the debtor’s involvement and co-operation, a higher level of information on the target’s business and figures are usually provided than would normally be during insolvency proceedings;
- The involvement of the debtor and its co-operation tends to help achieve a higher price than would be achieved if sold during receivership lacking debtor support and co-operation;
- It is not subject to approval by the Court or the company’s creditors; and
- It is a relatively flexible restructuring tool.

Challenges of a prepack asset sale plan

- Limited or no representations and warranties are provided to the buyer;
- There tends to some price chip based on certain risks, e.g. that landlords will not consent to an assignment of a lease to the buyer; and
- the lack of an open and transparent marketing of the business and its assets questions whether the best price is achieved

Fast-Track Acquisitions: Germany

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What is a prepack sale?

In German restructuring and insolvency, the term “pre-pack” is not commonly used. Nonetheless, Germany has similar tools and practices which may resemble a pre-pack with a view to some of their outcomes; however there are also important differences. It is therefore fair to say that Germany does not have a “pre-pack” as that term is used in the UK.
There exists a German restructuring practice which resembles a UK “pre-pack”. This practice is called “*übertragende Sanierung*” which literally translates as “transferring restructuring” and is often referred to in the German market as a “sale of the business as a going concern”. Like a UK pre-pack, the practice aims at safeguarding the going-concern value of the debtor’s business with as few disruptions by the insolvency proceeding as possible. The practice is very common in insolvencies in Germany. It is by far the most frequently used rescue practice in Germany.

Detailed procedure of a pre-pack sale

- The debtor files for insolvency proceedings.
- The insolvency court appoints a preliminary insolvency administrator and a preliminary creditors’ committee.
- The preliminary insolvency administrator sets up a marketing process for the debtor’s business as a whole, while main proceedings have not been opened.
- When main proceedings are opened (usually three months after the insolvency filing), the insolvency court appoints the preliminary insolvency administrator as (permanent) insolvency administrator and the preliminary creditors’ committee as (permanent) creditors’ committee.
- After main proceedings have been opened, the insolvency administrator finalises the marketing process and requests the approval of the creditors’ committee for the sale of the business as a whole to the highest bidding investor.
- Where the business will be sold to connected persons, the approval of the creditors’ assembly must be requested instead of the creditors’ committee.
- The sales agreement is executed, and closing will occur once all closing conditions have been satisfied (usually within three months after execution, depending, inter alia, on cartel clearance issues).
- Until closing the business may be pre-financed to some extent by the investor.
- After closing, all assets belonging to the debtor’s business will transfer to the investor on an asset by asset basis and, as far as possible, without liabilities.
- The purchase price will be paid to the debtor’s estate and will be used for quota-payments to the insolvency creditors whose claims have not transferred together with the assets.
- The debtor is subsequently liquidated, and proceedings will terminate thereafter.

Prepack sale timeline

From approx. Day -120 to Day 0: Consensual restructuring negotiations (may involve investors)
Day 0: Application for opening of insolvency proceedings
Approx. Day 0 to Day 90: Negotiations for prepack sale between the relevant stakeholders
Approx. Day 90: Opening of insolvency proceedings
Approx. Day 95: Approval of the creditors’ committee
Approx. Day 100: Signing of the sales agreement
Approx. 120: Closing of the transaction

Advantages of the prepack asset sale plan

The main advantage of a transferring restructuring as the main form of “business rescue” in Germany is reducing complexity when compared with the alternative of “company rescue” by way of an insolvency or restructuring plan. The transferring restructuring is an exit mechanism which gives the parties involved (debtor and its directors, insolvency practitioner acting as administrator or custodian, investor, creditors and court) an easy to use, market-compliant valuation tool for determining the value of the debtor’s business. Alternative measures are, for example, setting up an insolvency plan, or a restructuring plan in the StaRUG proceeding by which the debtor itself will be rescued. In these circumstances, the insolvency or restructuring plan must describe a relevant comparator (“*Vergleichsrechnung*”) to determine the value of each involved stakeholder’s rights in the most likely alternative scenario, e.g. liquidation. Usually, this would be described in a lengthy and complex valuation report which may be heavily scrutinised by out-of-the-money creditors and the insolvency court. Therefore, today it is common practice to combine a valuation report with a “dual track” M&A process, in order to test what the market would be prepared to pay for the business. Obviously, a “dual track” is more complex and produces higher costs than a simple marketing and sale of the business to the highest bidder.

Challenges of a prepack asset sale plan

Market failure is one of the main disadvantages. For some businesses, there simply is no adequate market, in particular where the assets are highly specialised. In addition, the marketing process may come under a lot of time pressure and may end up in a “fire-sale” scenario which can easily deplete the enterprise value. That is in particular the case where the sale of the business cannot be achieved within the three-month period before the opening of insolvency proceedings. Usually within that timeframe, the preliminary insolvency administrator can pre-finance insolvency money for the workforce which is then used to finance the M&A process. However, if the M&A process takes longer than expected, the administrator may run out of money and is then dependent on either a creditor or the investor to pre-finance the M&A process until the end. This can further deplete the value of the business.
An additional effect which often reduces the value paid for the business is the fact that the insolvency administrator never gives any representations or warranties in the sales agreement in relation to what is being sold. This is because the insolvency administrator will have no prior knowledge of the debtor and there is not enough time for them to undertake their own due diligence. This will generally reduce the value offered. Finally, asset transfers may not work where the business is largely dependent on licenses or contracts which cannot be transferred to an investor without the consent of the licensor or contractual counterparty. Examples are airlines in relation to their aircraft operating certificates, or automotive suppliers in relation to their supply contracts with the OEMs. Obtaining these consents is time consuming and very often not acceptable for an investor.

Fast-Track Acquisitions: France

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What is a prepack sale?

A “prepack sale” is a total or partial asset sale project discussed during a preliminary confidential amicable proceeding and implemented in a subsequent insolvency proceeding of the target company. The anticipation of follow-up insolvency proceedings brings the advantage of preparing it in advance so to keep it to a minimum duration, which can be as short as 3 weeks (to a couple of months), yet getting the benefit to the buyer not to acquire any liabilities and the scope of the assets and employment contracts it sees fit for its own operation
As an hybrid transactional amicable yet insolvency proceedings related sale, it combines the advantages from both systems and allows for fast-tracked secured acquisitions of distressed companies.

Detailed procedure of a pre-pack sale

- The debtor (target company) requests the president of the Commercial Court to open a confidential amicable proceeding to address his distressed situation (so called “conciliation” under article L611-7 of the French Commercial Code). A third-party, usually an insolvency professional known as a “conciliator”, is appointed to assist the debtor and may look for prospective buyers of the business. The conciliator’s mission lasts up to 5 months (non-renewable).
- During the course of the amicable proceeding, potential bidders (competitors, specialized distressed investors…) are approached to seek their willingness for such an asset-based acquisition.
- Should potential bidders manifest their interest, negotiations begin under the aegis of the conciliator, to define the scope and main terms of the contemplated takeover (which can lead to a letter of intent, or a term sheet).
- Once the main conditions are finalized, ideally through the signature of a term sheet, the executive officer of the debtor company will request the Court to open an insolvency proceeding and to implement the agreed upon prepack asset sale plan during its course. The amicable proceeding ends as soon as a bankruptcy proceeding starts.
- The conciliator addresses a report to the Court detailing the outcome of the amicable proceedings and the bidder’s offer’s main terms. After hearing the Public Prosecutor’s opinion, the Court may decide to implement the prepack sale and therefore not to initiate an invitation for tenders.
- In such alternative, the bidder avoids competition of other bidders but sometimes allow new parties to bid. The Court will set a hearing to discuss the merits of the offers received, under much shorter notice than under a regular insolvency proceedings (15 days would still be a minimum).
- External bidders may only submit takeover offers 8 days maximum until the scheduled hearing, which leaves little time for such competitors to position themselves.
- Once submitted, offers cannot be withdrawn and can only be upgraded, no later than 2 business days before the hearing.
- The Court hears the merits of each bids and may interview employees, contractors and executives of the debtor company, as well as bidders and court-appointed administrator.
- Approximately a week later, the Court approves or reject the proposed sale through a ruling. Usually, the bidder gets the possession of the company as of the date of the ruling.

Prepack sale timeline

Appr. Day -130: Request by the executive officer of the target company to open an amicable proceeding including the mediator’s mission to undertake the negotiation of a prepack asset sale plan
From Day -130 to Day 0: Ordinary course of the amicable proceeding – the Conciliator reaches out to potential bidders and initiates negotiations for the sale of the company
Day 0: An agreement, term sheet, or letter of intent is issued by the bidder
Approx. Day 1 to Day 7: Debtor company files for insolvency proceeding
Day 22: Opening of the insolvency proceeding and approval of prepack process;
Day 30: Deadline for new offers to be submitted to the court-appointed administrator;
Day 38 (at best): Hearing before the Court of the merits of the sale plan
Approx. Day 45: The court approves the offer and orders the prepack sale

Advantages of the prepack asset sale plan

- Fast-tracked acquisition compared to an ordinary takeover (whether *in bonis* or during insolvency proceedings)
- Confidential – amicable proceedings are strictly confidential, which preserve the target’s market value. The shortened insolvency proceeding limits the damage to the target’s value. The Bidder may withdraw from the deal confidentially should the negotiations meet a dead end.
- Less competitive process: potential bidders have already been filtered – in case of a single bidder, approved by the debtor, the Court is more likely to order the sale.
- Smoother relations with executives of the company as they are less likely to perceive the bidder as hostile and will be more involved in the takeover and subsequent operations, if needed
- Discounted price for the bidders as opposed to acquiring a non-distressed company
- May be used in the context of carve-out operations;
- Higher level of information on the target’s business and figures than under insolvency proceedings;
- *Cherry*-picking : the bidder may limit precisely the scope of its takeover;
- The fact that the sale results from a Court ruling and that such rulings are published renders the transfer of assets and contracts enforceable against all third parties.

Challenges of a prepack asset sale plan

- Fast-paced due diligences and negotiations given the short deadlines;
- Strong guarantees on bidder’s side are often expected for the financing of the operations as well as potential commitments regarding future investments, level of business activity and employment;
- The assistance of seasoned advisors is highly recommended to navigate through these very specific operations and their challenges, both in legal and financial terms;
- No warranties whatsoever from the seller of the assets and business transfer.

Fast-Track Acquisitions: Spain

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What is a prepack sale?

In Spain, a pre-pack is understood to be a sale transaction of an operating business unit, including all or part of the business (technically referred to as a "production unit", which is defined to mean "a set of organised means necessary for the exercise of an essential or ancillary business activity"), where the competitive process is undertaken in the pre-insolvency phase, but the transaction is executed within the insolvency process.
The Spanish Insolvency Act has been amendment on August 25th. New regulation of the sale of production units foresees that can be carried out (i) with the filing of the application for the opening of a special liquidation procedure; (ii) with its inclusion in the liquidation plan; or, (iii) without prior inclusion in the liquidation plan, in the event that an interested party appears during the insolvency proceedings.
This new regulation seeks a way to carry out such sales not only in the insolvency proceedings, but also enables the debtor to negotiate the conditions of the sale prior to the declaration of the insolvency proceedings, with the aim of avoiding the loss of value and business deterioration that an insolvency proceeding entails.

Detailed procedure of a pre-pack sale

- The debtor may request the court with jurisdiction for the declaration of insolvency to appoint an expert to obtain offers from third parties for the acquisition of one or more production units owned by the debtor. Once the expert has the offers, the debtor shall ask for insolvency and the expert will become appointed as insolvency administrator
- In the order declaring insolvency, the judge shall grant a period of fifteen days in which to the creditors who appear may make such observations on the proposal as they deem appropriate and for any interested party to submit a binding alternative proposal. In the same order, the judge shall require the insolvency administration to within that period, to issue an evaluation report on the proposal submitted.
- If one or more alternative takeover proposals are submitted, the judge shall require the insolvency administrator to issue, within five days, a report on its evaluation report
- The pre-pack sale is authorised by the judge who has declared the insolvency proceedings, once the other parties interested in the acquisition of the assets have been heard and the mandatory reports have been issued by the insolvency administration.
- In the proposal the creditor or the third party must assume the obligation to continue or restart the activity with the production unit(s) to which it relates for at least a minimum of three years.
- Once the report or reports have been issued by the insolvency administration, the judge, if several proposals have been submitted, shall grant a simultaneous period of three days to the bidders so that, if they so wish, they may improve the proposals submitted by each of them. Within three days following the expiry of this period, the judge will proceed to approve the one that is most advantageous to the interests of the competition.

Prepack sale timeline

Appr. Day -60: appointment of an expert to obtain offers though a out of court sale process
Day -60 to Day 0: Offers gathering through an Out of court Sale process
Day 0: Debtor company files for insolvency proceeding
Approx. Day 2: Opening of the insolvency proceeding and appointment of the expert as insolvency administrator
Day 15: creditors who appear may make such observations on the proposal
Day 20: Insolvency administrator evaluation
Day 23 (at best): the bidders they may improve the proposals submitted by each of them
Approx. Day 30: the judge will proceed to approve the one that is most advantageous to the interests of the competition

Advantages of the prepack asset sale plan

Historically, the sale of production units in Spain (both in pre-packs and in bankruptcy proceedings) has been hampered by the risk assumed by the buyer that labour or social security debts of the debtor would transfer to the buyer with the debtor's undertaking, even though such liabilities were not necessarily linked to the workers being transferred.

This risk has been mitigated through the Consolidated Text of the Insolvency Act (which is the current legislation in force), which provides clarity on the risks assumed by the buyer and the competence of the insolvency judge to delimit the assets acquired and the obligations assumed. The sale of production units has two fundamental advantages:

- Avoid the impact on the business of a procedure as lengthy as an insolvency proceeding (loss of customers, suppliers and employees), with the consequent deterioration in the value of assets. This will enable a higher price to be obtained and allow higher recovery rates for creditors.
- Through the sale of production units, obligations and positions in contracts can be transferred without the need for the counterparty's agreement.

The amendment to the Consolidated Text of the Insolvency Act continues to facilitate the sale of production units by defining the purchaser's liability and recognising the insolvency judge's competence to resolve any question related to the sale of a production unit.

Challenges of a prepack asset sale plan

- First of all, fast-paced due diligences and negotiations are adopted given the short deadlines.
- The warranty of maintaining the continuity of the business for at least two or three years.
- The presence of an expert for the purpose of the negotiations of the sale of assets.

Fast-Track Acquisitions: Netherlands

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What is a prepack sale?

The pre-pack in the Netherlands is a restructuring tool which was introduced in the aftermath of the global financial crisis (which currently has no formal legal basis (yet).

A legislative proposal (the 'WCO I') has been introduced in 2015 to provide a legal basis for the pre-pack in the Netherlands. However, the WCO I has been on hold since 2019 due to case law which effectively defeated the purpose of using the pre-pack in the Netherlands. Therefore, another legislative proposal (the 'Novelle WCO I') was introduced in 2021 to accelerate the introduction of a legal basis for the pre-pack in the Netherlands by limiting the type of business that can use the pre-pack (whereby only a legal basis will be created for the use of the pre-pack method in the case of distressed companies which serve a public interest). A third legislative proposal concerning the transfer of a company in insolvency proceedings (Wet overgang van onderneming in faillissement, 'WOVOF') was also on hold as it was awaiting the outcome of the European Court of Justice ('ECJ') in the Heiploeg-case. The ECJ rendered its decision in the Heiploeg-case on 28 April 2022. In the Heiploeg judgment the ECJ ruled that the pre-pack procedure as we know it in the Netherlands does fall under the bankruptcy exception of transfer of undertaking, provided that this procedure is regulated by law or administrative law, so that it meets the requirement of legal certainty.
Now that the Heiploeg judgment has been rendered, the WCO I and the WOVOF can be discussed further: it is the legislator's turn again.

Detailed procedure of a pre-pack sale

The Dutch pre-pack practice allows a company in financial distress to request a Dutch court to appoint in silence ('*aanwijzen in stilte*') a "silent trustee" ('*beoogd curator')* and a "silent delegated judge" ('*beoogd rechter-commissaris*') and negotiate and prepare an asset deal as an alternative to filing for bankruptcy. The silent trustee will work with and supervise the company in the negotiations and preparations and the silent delegated judge will closely monitor the process. Once the negotiations with a potential purchaser are close to being finalised, the company will file for bankruptcy, the court will appoint the silent trustee and silent delegated judge as the actual bankruptcy trustee and delegated judge, respectively. The bankruptcy trustee will then sign and close the transaction that was prepared prior to the bankruptcy. The objective of a pre-pack is to continue (partially or in full) the business of a financially distressed company and to avoid the negative impact on the value of the business, its employees and creditors when pursuing a sale of a financially distressed business through a bankruptcy process. By using a pre-pack, enterprise value is preserved as much as possible, and the business (or parts of it) may be sold as a going concern for the maximum value.

Prepack sale timeline

As the pre-pack currently has no formal legal foundation in the Netherlands, it is entirely based on market practice and rules derived from case law. As such, the pre-pack has not been uniformly applied and therefore there are no hard-and-fast (timing) rules (yet) for the procedure that must be followed by a silent trustee in conducting a sale.

Advantages of the prepack asset sale plan

- **Timing:** The main advantage of pre-pack compared to a suspension of payments or bankruptcy is that a potential sale of the business can be prepared before filing for bankruptcy. That extra bit of time allows for the debtor and the silent trustee to prepare a potential deal without having to deal with the 'chaos' following and during a bankruptcy.
- **Information:** It also allows for more time for the silent trustee, during which it will receive more information in comparison to a bankruptcy proceeding where a trustee has limited time to act.
- **Proceeds:** Research has shown that the proceeds of a pre-pack sale are also often higher than the proceeds that are collected by a trustee during bankruptcy, also given that the value of a company remains the same during a pre-pack whereas the value can drop during bankruptcy.

Challenges of a prepack asset sale plan

- **Enforcement measures:** A disadvantage of the pre-pack compared to bankruptcy and suspension of payment is that creditors cannot take immediate enforcement measures during a pre-pack.
- **Parties:** a restart is often negotiated with only one party.
- **Employee rights:** Another disadvantage of the pre-pack and the main reason why it has not been used as much in the Netherlands in recent years, is the uncertainty regarding employee rights during a transfer of the undertaking. If a company is transferred to a new owner by way of a pre-pack, it is uncertain whether the contracts of the employees were transferred to the new owner by operation of law or whether the new owner is not required to hire those employees. Due to this uncertainty, preliminary questions have been asked to the ECJ on the applicability of the Transfers of Undertaking Directive 2001/23/EC in the pre-pack procedure. Under this directive, the transfer of an undertaking means that all employees are automatically transferred to the transferee, but this does not apply in bankruptcy procedures. The Dutch Supreme Court has asked questions to the ECJ in the Heiploeg-case. The ECJ ruled that the Dutch pre-pack procedure may fall under the liquidation exception of the Transfer of Undertaking Directive 2001/23/EC provided that this procedure is regulated in statutory or administrative provisions. The ECJ ruled that if the pre-pack is executed under the supervision of a (prospective) delegated judge and the primary objective of a pre-pack procedure followed by bankruptcy proceedings is to obtain the highest possible payment to his joint creditors, the procedure does fall under the liquidation exception. According to the ECJ, it should be examined in each individual situation whether the pre-pack and bankruptcy proceedings concerned are aimed at the liquidation of the company.

Fast-Track Acquisitions: Italy

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What is a prepack sale?

Until 2015, a pre-pack scheme, substantially similar to that found in English law, was available in the context of a Concordato Preventivo proceedings effecting a composition with creditors.

Pursuant to the applicable law, in the context of Concordato Preventivo (Articles 84 and ff of the Italian Bankruptcy Law (Legislative Decree n. 14/2019, "IBL")), when a pre-pack offer is included in the plan, the Court shall run a competitive procedure to seek other potential offerors which are invited to offer and to compete, through an auction process, for the purchase of the business/assets of the distressed company. Such an auction procedure prevails on any condition/clause of the pre-pack offer and the original offeror may participate in the process only by adapting its offer to the conditions set forth by the Court. Same mandatory auction procedure occurs under the proceedings named Restructuring Plan subject to Homologation, pursuant to Articles 64-bis and ff. of the IBL, in case of inclusion of a pre-pack offer in the plan. In the context of the Restructuring Plan subject to Homologation the debtor remains in possession with respect to the ordinary and extraordinary business, under the supervision of the judicial commissioner appointed by the Court. The relevant plan shall be sanctioned by the Court by way of homologation.

It is worth noting that upon the recent introduction of a new procedure named Composizione negoziata per la soluzione della crisi d'impresa pursuant to Articles 12 and ff. of the IBL, the current system might become more flexible. If in the context of such proceedings, an agreement for the composition of the crisis is not entered into by and between the debtor and his creditors, the debtor is allowed to submit to the Court a Simplified Concordato proposal with a liquidation plan for all assets of the company. Such plan may include a pre-pack offer, that the liquidator is allowed to accept, provided that "no better solution are available on the market".

Please note that as of today, we cannot rely upon any praxis of the Courts. Therefore, we are not able to provide a final answer about the effective flexibility of this new proceedings.

Detailed procedure of a pre-pack sale

As of today, we cannot provide a detailed procedure of a pre-pack sale in the context of insolvency proceedings.

It should be noticed that Simplified Concordato is a tool that can be accessed only following the failure of negotiations under a previous Negotiated Composition scheme and, in addition, the flexibility introduced thereby is still untested in its practical application by Courts.

Advantages of the prepack asset sale plan

One of the main advantages of a pre-pack solution typically lies in the mitigation of the risk of depreciation of the assets, as the sale is negotiated immediately prior to the formal application for commencement of restructuring proceedings. Similar (but more limited) advantages can be achieved under Italian regulation by entering in a pre-pack proposal prior to applying for a consensual restructuring scheme, such as a recovery plans (*piano attestato di risanamento*) pursuant to Article 56 ("**56 Plan**") of the Italian Bankruptcy Law or a Restructuring Agreement pursuant to Articles 57 ff. of IBL ("**Restructuring Agreement**").

A Restructuring Agreement scheme consists of a private agreement that is entered into between the debtor (that remains in possession) and (at least) 60% of its creditors (30 % in case of facilitated restructuring agreements pursuant to Article 60 of IBL). It is aimed at restructuring the indebtedness of the company along with a plan with business continuity or with liquidation purposes. Under such a scheme, any affected creditor is entitled to participate in the agreement, while those that do not wish to participate in it must be paid in full. Payments to such non-adhering creditors, however, are subject to a legal moratorium of 120 days from the homologation date or from the original maturity date, if it falls after the homologation date.

Furthermore, under the Restructuring Agreement scheme, a debtor is allowed to subdivide the creditors into classes (which must include creditors homogeneous in terms of economic position and legal status) and, provided that a majority of 75% of the members of the relevant class agree to the Restructuring Agreement, the dissenting 25% are subject to a cram-down mechanism whereby they may be forced to accept the conditions of the Restructuring Agreement. The Restructuring Agreement must also be sanctioned by the Court by way of an homologation decree. Dissenting creditors, subject to the cram-down mechanism described above, may successfully oppose to homologation only if they prove that the recovery offered to them, under the Restructuring Plan, offers a recovery to their claims lower than the bankruptcy liquidation scenario ("**Neutrality Test**"). Through such a scheme, therefore, it is possible to impose a Restructuring Agreement based on a pre-pack offer to dissenting creditors, provided that they do not exceed 25% of the relevant class.

Challenges of a prepack asset sale plan

- Specific duties of protection are imposed on directors, in terms of: acting expeditiously to access the more appropriate restructuring tool, in order to maximise the value of the recovery for the creditors as a whole and in particular, to dispose of the assets at the best conditions available on the market and avoiding any conflict of interest.
- Court's involvement is not required for 56 Plan while is limited in case of Restructuring Agreements, where a deeper Court's involvement is required only in case of opposition by dissenting creditors and related necessity to run the Neutrality Test. A significant Court's involvement is required in the Concordato Preventivo and Restructuring Plan subject to Homologation, in which in case of pre-pack proposal the Court shall also run the mandatory auction process. On the other hand, Negotiated Composition requires Court's involvement in the event that the debtor ask for specific protections, such as a partial or general stay of claims or the access to super priority financing. Court's involvement is limited in case of Simplified Concordato, unless the presence of opposition by dissenting creditors and the necessity for the Court to run the Neutrality Test.
- Pre-pack are generally allowed only with the consent of the affected creditors, with the limited exceptions highlighted in the paragraphs above.

Contact details



Andrea Brennan, Ireland
Managing Associate
Dispute Resolution
T: +353 1266 2956
E: andrea.brennan@simmons-simmons.com



Dr Christopher Kranz, LL.M., Germany
Partner
Financial Markets
T: +49 69 907454 27
E: christopher.kranz@simmons-simmons.com



Simon Kirschner, Germany
Associate
Financial Markets
T: +49 69 907454 28
E: simon.kirschner@simmons-simmons.com



Sandra Esquiva-Hesse, France
Partner
Dispute Resolution
T: +331 5329 1291
E: sandra.esquiva-hesse@simmons-simmons.com



Santiago Hurtado, Spain
Partner
Dispute Resolution
T: +3491 426 2719
E: santiago.hurtado@simmons-simmons.com



Javier Royo, Spain
Managing Associate
Dispute Resolution
T: +3491 426 2731
E: Javier.Royo@simmons-simmons.com



Ivo van Dijk, Netherlands
Partner
Financial Markets
T: +3120 722 2308
E: ivo.vandijk@simmons-simmons.com



Jeroen Bos, Netherlands
Partner
Financial Markets
T: +3120 722 2343
E: jeroen.bos@simmons-simmons.com

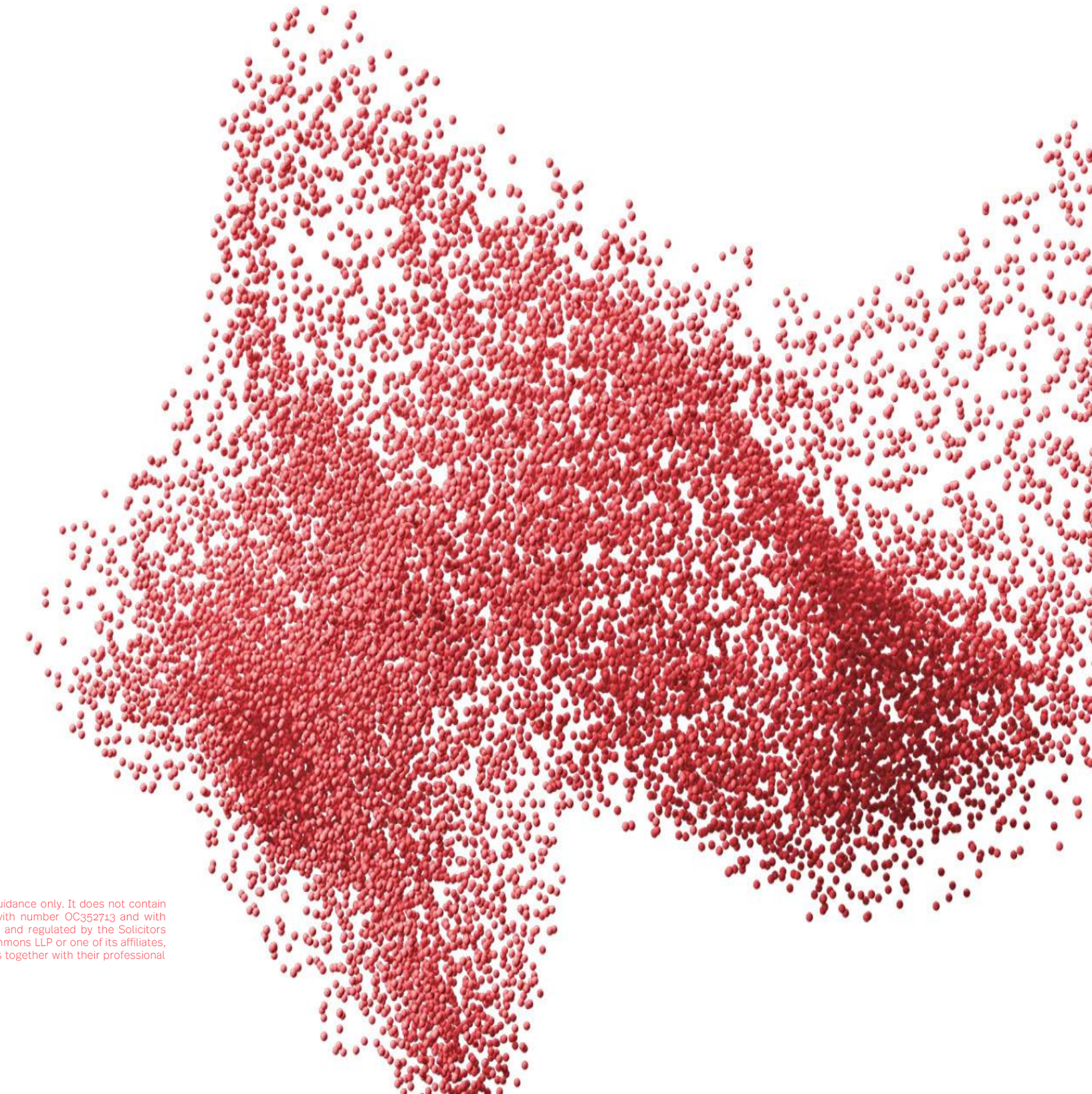


Nicholas Lasagna, Italy
Partner
Financial Markets
T: +3902 7250 5571
E: nicholas.lasagna@simmons-simmons.com



Mario Orsenigo, Italy
Of Counsel
Financial Markets
T: +3902 7250 5441
E: mario.orsenigo@simmons-simmons.com

simmons
+simmons



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