EU Insolvency Law: Harmonisation approaches the finish line

April 2026

Introduction

On 1 April 2026, the long-awaited Directive harmonising certain aspects of insolvency law (the ***Directive***) entered into force. Member States now have until 22 January 2029 to transpose the majority of its provisions it into national law.

The Directive covers **five** pillars:

1. Avoidance actions
2. Pre-pack proceedings
3. Duty to file for insolvency
4. Creditors' Committees
5. Asset tracing

The aim of the Directive is to harmonise these pillars of substantive insolvency law across Member States, not only in cross-border cases but also in domestic cases.

In previous blog posts, we have tracked the various drafts of the Directive from the Commission proposal in 2022 (as we covered here) throughout Council and Parliament negotiations (here, here and here). In this briefing, we explain the Directive's major pillars and highlight key implications in Germany, the Netherlands, France and Spain.

The Directive aims to provide for new *minimum* rules to improve predictability of insolvency proceedings in each Member State for creditors and investors; it does not set out a standard set of harmonised insolvency rules that each Member State must implement uniformly. Instead, the Directive allows Member States to implement (or keep) rules that go above the standard the Directive sets, as long as it provides for greater protection for the general body of creditors.

Pillar 1: Avoidance actions

Member States must ensure that certain transactions concluded by the debtor prior to insolvency which are detrimental to the general body of creditors can be challenged. The Directive specifies, subject to certain conditions, three sets of voidable transactions completed either prior to, or at any point after, the request for the opening of insolvency proceedings or, in the absence of such a formal request, the resolution to commence insolvency proceedings:

- 'Preferences' perfected within **3 months**, provided the counterparty knew (1) that the debtor was unable to pay its debts as they fell due, or (2) of the request for the opening of insolvency proceedings, or (3) of the resolution to commence insolvency proceedings.
- 'Transactions for no or manifestly inadequate consideration', perfected within **12 months**.
- 'Transactions intentionally detrimental to creditors' perfected within **2 years**, provided the counterparty knew of the debtor's intent to harm creditors.

Since the Directive is an instrument of minimum harmonisation, Member States are not precluded from maintaining or adopting longer look-back periods that benefit the general body of creditors. However, Member States must ensure that the *limitation period* for avoidance actions does not exceed **3 years**.

Certain transactions are excluded from the avoidance regime, including those aimed at supporting the ordinary activity of the debtor's business, performed for fair consideration and close-out netting arrangements.

Connected party transactions inevitably attract more attention. For preferences and transactions intentionally detrimental to creditors, which both require knowledge of certain circumstances, there is a rebuttable presumption that "closely related" parties have the requisite actual knowledge.

Whether the annulled transaction is deemed void, voidable or unenforceable will be a matter for national law. However, the Directive seeks to ensure that the party which benefitted from the transaction must fully compensate the insolvency estate, for instance by precluding set-off claims. To avoid an enrichment of the insolvency estate, any counter-performance of the benefitting party shall be refunded from the insolvency estate to the extent funds are still available.

Pillar 2: Pre-pack proceedings

A standout feature of the Directive is the EU-wide introduction of a pre-pack mechanism, now regarded as an invaluable tool for rescuing viable parts of distressed companies and achieving higher recovery rates. Pre-pack proceedings may be used at least when the debtor is likely to become insolvent, as defined by national law.

The Directive splits the process into 2 phases:

The 'preparation phase':

- The debtor shall at least partially remain in control of and continue to operate the day-to-day business. It can benefit from a stay on enforcement actions.
- An independent 'monitor' is appointed to identify a buyer and oversee and document the sales process, which must be competitive, transparent, fair and meet market standards for M&A.
- The monitor applies a 'best-interest-of-creditors' test to ensure that creditors are not left worse off following a pre-pack sale than they would be if the company were either liquidated or sold as a going concern (whichever is the correct comparator); and then recommends the best offer.
- Alternatively, Member States may require that a public auction be conducted to assess the fair market price and in particular in situations where there is reasonable doubt as to whether the best bid recommended by the monitor reflects the fair market price. They may also allow that creditors approve the sale of the business even if the sale process does not meet the standards and certain pre-conditions set out above.

The 'liquidation phase':

- The court opens formal insolvency proceedings (other than preventive restructuring proceedings) and appoints the monitor as the insolvency officeholder.
- Generally, if the court (or other competent authority) is satisfied that the sales process has been competitive, transparent, fair and in accordance with market standards and that the monitor has performed their obligations (or a public auction has been conducted, or the sale is approved by the creditors), it authorises the sale. 'Credit bidding' shall be permissible for secured creditors up to the market value of the business.

Several points in relation to the liquidation phase are worth noting:

- **Release of security**: security interests or other encumbrances shall be released in the course of pre-pack proceedings. Where Member States currently require the consent of security holders for the release in insolvency proceedings, they may provide that such consent is not required in pre-pack proceedings.
- **Interim financing**: the providers of interim financing are to be protected from claw-back and 'lender liability', and Member States may provide for priority repayment. 'Interim financing' is defined as "any new financial assistance" during pre-pack proceedings that is (i) "reasonable" and (ii) "immediately necessary" (a) for the continued operation of the debtor's business or (b) to preserve or enhance its value.
- **Assignment of contracts**: contracts which are necessary for the continuation of the debtor's business will be automatically assigned to the buyer without counterparty consent (and overriding any contractual consent requirements), except where the acquirer of the business is a competitor of the debtor's counterparty. Member States retain flexibility to require consent in expansively defined circumstances (depending on "the type of contract, the nature of the parties, or the interests of the business") and may grant counterparties termination rights where assignment would be unfairly prejudicial.
- **Transfer of employees**: after much EU case law ink has been spilt on the issue (e.g. *Smallsteps* and *Heiploeg*), the Directive provides for certain rules regarding the transfer of employees. The Recitals point out that while the *primary* objective of the pre-pack proceedings is to enable the debtor's assets to be liquidated by means of the sale of (part of) the business as a going concern in the context of insolvency proceedings in order to satisfy the claims of all the creditors to the greatest extent possible, it can *also* serve to preserve employment. Accordingly, the Directive clarifies that generally it is without prejudice to the Acquired Rights Directive (2001/23/EC) and national rules implementing it. However, an exception shall apply, and the liquidation phase shall be considered to be bankruptcy proceedings or any analogous insolvency proceedings for the purposes of the Acquired Rights Directive (article 5(1)) if the liquidation phase of pre-pack proceedings takes place in proceedings which could end in the liquidation of the debtor. In the Recitals, the Directive specifies that this exception shall apply where the pre-pack proceedings have the primary objective to satisfy the claims of creditors to the greatest extent possible whilst preserving employment as much as possible. It remains to be seen how Member States will deal with the issue; much will also depend on how courts will interpret the provisions.
- **Buyers 'closely related' to the debtor**: additional safeguards apply, including enhanced disclosure

obligations and the valuation of the business as a going concern. Where the 'closely related' buyer's offer is deemed the best offer, Member States may introduce further protections, such as requiring the buyer to ensure business continuity for a minimum period or to keep in place pending employment contracts.

Pillar 3: Duty to file for insolvency

Member States have different rules about the duty of directors to file for the company's insolvency, and the potential liability for failing to meet this obligation, or for late filing.

The Directive introduces a new *minimum* standard, requiring Member States to ensure that, if a legal entity becomes insolvent, directors submit a request for the opening of insolvency proceedings within **three months** of when they became aware (or reasonably ought to have been aware) of the insolvency. 'Insolvency' is to be defined by the Member States. Member States shall ensure that directors not complying with this duty are personally liable in accordance with national laws.

Member States that already provide for a higher threshold and require directors to file earlier than within three months can retain such higher threshold. The introduction is therefore only relevant to those jurisdictions that did not have a mandatory duty threshold to file or had a lower threshold. There are, however, also provisions for significant opportunities for derogation from the filing duty:

- **Suspension of the duty**: the duty may be "suspended" if the directors take measures designed to avoid damage to creditors and ensure a level of creditor protection that is "equivalent" to the protection provided by the duty to file for insolvency.
    - This seeks to allow directors to explore restructuring avenues without fear of *automatic* personal liability.
    - Directors will nonetheless be liable for any losses that would not have been caused had they filed for insolvency, subject to a defence that the restructuring measures were reasonably likely to secure an equivalent or better outcome for creditors.
    - Query if a trend will emerge where more restructuring opinions like the German S6 restructuring opinion which banks require in restructurings, issued to evidence the sustainability of the envisaged restructuring, thereby protecting lenders from 'lender liability' will emerge which as a side effect may also then protect directors from personal liability.
- **Notification**: Member States may provide that the duty is satisfied by informing the public of the company's insolvency through a notification in the public register.

Pillar 4: Creditors' committees

With a view to enhancing the involvement of creditors in the insolvency process, the Directive mandates the establishment of creditors' committees after the opening of insolvency proceedings if creditors request this. Member States may also provide for the establishment of committees *before* insolvency proceedings commence. The members of the creditors' committee shall fairly reflect the different creditor groups. The role of creditors' committees is monitoring the fairness and integrity of insolvency proceedings. Creditors' committees shall examine the activities of the insolvency officeholder, or, in debtor-in-possession proceedings, of the debtor. For this purpose, they may request and receive information and have the right to be heard in insolvency proceedings. Member States may also vest them with the power to approve certain decisions or transactions, including those of special importance.

However, Member States may restrict the circumstances in which committees shall be established where the disadvantages, such as the negative effect of possible delays on the financial situation of the debtor, would outweigh the benefits.

The Directive also harmonises certain grounds for removal of members (such as gross negligence and conflict of interests) and limits the personal liability of members (either through wide exclusions or by guaranteeing liability insurance financed by the insolvency estate).

Pillar 5: Asset tracing

The ability to identify and trace assets belonging to the insolvency estate is central to effective cross-border recoveries. If the insolvency officeholder requests this, subject to certain conditions, designated courts or administrative authorities will obtain direct access to the following data and information across the EU:

i. bank account information, using BARIS to access foreign registers;

ii. beneficial ownership data, including the beneficial owner's name, date of birth, country of residence and nationality and extent of beneficial interest held; and

iii. national asset registers, such as for real estate or share records.

Member States must ensure non-discriminatory access and afford foreign officeholders no less favourable treatment than that afforded to officeholders appointed in the host Member State. Access is to be granted on a case-by-case basis, subject to confidentiality and data protection constraints.

Key implications - Germany

The Directive's most significant impact on German insolvency law will be the introduction of a statutory **pre-pack** mechanism. The German Insolvency Code currently makes no provision for pre-packs. However, in Germany, 'pre-pack-like' asset sales are commonly implemented on a de facto basis. Such sales of the business are 'prepared' during the (usually 3 months) preliminary phase of insolvency proceedings (*vorläufiges Insolvenzverfahren*) and implemented ideally on the day of, or relatively shortly after, the opening of formal insolvency proceedings.

It will be interesting to see how the German legislator translates the current practice of asset sales into a new statutory regime while complying with the minimum requirements of the Directive. Certainly, there is a benefit of formalising asset sales integrating the preparatory phase of this M&A process into the current framework of preliminary insolvency proceedings. Regarding the liquidation phase, including the authorisation and the sale itself, the German legislator would have to make certain amendments to the Insolvency Code. These would concern e.g. the valuation requirements of the Directive and certain procedural rules regarding the court approval.

However, the devil is in the detail.

First, German law includes detailed rules on the insolvency administrator's right to dispose of encumbered assets; whether or not the insolvency administrator is entitled to dispose depends on the quality of the encumbrance. It remains to be seen how the German legislator will deal with the release of security without the consent of the secured creditor in situations where the insolvency administrator is not entitled to dispose. The scope of the existing rules is already the subject of discussion in legal literature and case law. Recently, the Federal Court of Justice (*Bundesgerichtshof*) ruled that the secured creditor, not the insolvency administrator, is entitled to the realisation of pledged trademark rights. This has been applied to pledged shares in the literature, too. It is questionable whether the legislator will make adjustments here.

Second, the protection of interim financing during the preparation phase would also require certain amendments to the Insolvency Code. The current practice of granting individual court authorisations for interim financing or other transactions entered into by the debtor with the approval of a provisional insolvency administrator to elevate the claims to the status of priority liabilities may not satisfy the requirements of the Directive on protection against lender liability and claw-back without further specific statutory protection. It will also be interesting to see whether US-style 'priming' regulations will be introduced in Germany. This would constitute an exciting development for financial investors and create opportunities to invest in distressed businesses.

Third, the automatic assignment of contracts without counterparty consent provided for in the Directive is also a novelty in German law. A fundamental principle of German civil law is 'private autonomy' and the 'negative freedom of contract'. Therefore, the German legislator might make use of the considerable room given by the Directive to depart from the base position. Where the retention of certain contracts is important for the business or the acquirer, the use of an insolvency plan to restructure the debtor's business and the transfer of the shares in the debtor to the acquirer may remain an option, as before.

Rules governing **avoidance actions**, **directors' duties** and **creditors' committees** generally already meet or exceed the Directive's standards and will see little change – given that, in particular, a higher threshold requiring directors to file for insolvency earlier than the minimum standard set by the Directive can remain.

Key implications - Netherlands

The Directive brings several principal changes to Dutch insolvency law, as a result of which the Dutch Bankruptcy Act will need to be amended.

First, the implementation of the Directive's requirement for a **duty for directors to file for insolvency** (and its associated liability) will introduce substantial changes to Dutch law, as the current Dutch legal framework does not contain such specific statutory obligations for directors to file for insolvency. It is, however, unclear how significant this change will be, considering that the Directive does not define 'insolvency'. This potentially allows for a flexible implementation by the Dutch legislator. However, the current case law regarding directors liability around wrongful trading will (most likely) not suffice.

Second, the Directive appears set to resurrect the Dutch **pre-pack**. Having emerged without an express statutory footing, as in Germany, the mechanism fell into disuse after the Court of Justice of the European Union (***CJEU***) in *Smallsteps* (Case C-126/16) held that the pre-pack cannot rely on the bankruptcy exception to the automatic transfer of employment contracts due to its restructuring focus. The CJEU partially revised its view in *Heiploeg* (Case C-237/20) on the nature of the pre-pack, but decided that the existing pre-pack could not rely on this absence of a statutory basis. The Directive therefore gives the Dutch legislator the opportunity to provide legal certainty whilst reviving the pre-pack mechanism, potentially on the basis of existing legislative proposals (that have been pending before the Dutch House of Representatives since 2016 and 2019).

Third, the framework in the Directive regarding the **avoidance regime** substantially differs from the current set-up of avoidance rules in the Netherlands, which will require several updates to the Dutch Bankruptcy Act. As set out above, the distinction in the Directive is between the various avoidance grounds, i.e. preferences, transactions at an undervalue and intentionally detrimental legal acts, whereas Dutch law currently distinguishes between voluntary and mandatory legal acts. The new regime will introduce more hard-and-fast rules, compared to the existing nuanced system. For instance, new to Dutch law is the requirement in the Directive that limits the avoidance of preferences to legal acts within three months prior to the submission of the petition to open insolvency proceedings. The Dutch legislator may, upon implementation, opt to offer creditors more protection by including a longer period, since the Directive provides for minimum harmonisation. The Directive does not require knowledge of the detriment to creditors in the same manner as currently required under Dutch law, thereby reducing the subjective requirements for avoidance of preferences. The current regime regarding transaction avoidance during rescue attempts will change as a result of the Directive, making it harder to challenge security rights granted during a rescue attempt.

Fourth, contrary to the other items, only minor adjustments will be needed to the rules regarding **creditors' committees**, such as provisions dealing with expenses.

Key implications – France

The Directive's impact on French insolvency law is expected to be evolutionary rather than revolutionary. Nevertheless, four main categories of anticipated changes deserve attention.

First and foremost, the introduction of mandatory creditors' committees could represent an important development within the traditionally court-centred French system. At present, creditor representation primarily relies on court-appointed officers (mandataires judiciaires or liquidateurs judiciaires, depending on the type of proceedings), with the additional possibility for a limited number of individual creditors to be appointed as "controlling" creditors (contrôleurs) (subject to court designation following an application for such status). The procedural rights and powers of these controlling creditors are, to a certain extent, comparable to those contemplated for creditors' committees under the Directive, albeit currently more limited in scope. It is therefore generally expected among practitioners and scholars that, where applicable, the introduction of creditors' committees would lead to the replacement of the existing controlling-creditor mechanism. The establishment of creditors' committees would be expected to further strengthen creditor involvement, building on the creditor-friendly reforms introduced in 2021, although their application may ultimately be confined to larger cases.

As regards the Directive's requirement to introduce pre-pack proceedings, it is worth noting that the French pre-pack mechanism has proved relatively successful since its formal introduction in 2014. To a large extent, it appears to have inspired the model contemplated by the Directive, in particular the procedural articulation between a preparation phase and a liquidation phase. The French liquidation phase already addresses issues relating to the release of security, the assignment of contracts and the transfer of employees, with the result that any legislative adjustments required in this respect are expected to be limited. By contrast, the preparation phase may require more substantive amendments. While the Directive's requirements relating to transparency, fair competition and compliance with M&A standards already underpin the French system in spirit, the statutory framework remains relatively light and affords wide discretion to the courts and insolvency practitioners. Going forward, a more objective regime with clearer and more detailed rules may have to be introduced, in particular as regards the adherence to a "best-interest-of-creditors test". In this context, the Directive's reference to potential incentives for a "stalking horse bidder" — namely, the bidder selected during the preparation phase whose offer serves as the opening bid in the auction phase — may prompt debate, and it remains to be seen how the French legislator will consider such mechanisms to enhance the attractiveness of the existing framework.

Thirdly, the avoidance regime would require some amendments, which are expected to be largely technical in nature. The manner in which the Directive's requirements on transactions with closely related parties will be implemented may prove noteworthy.

Finally, directors' filing duties are unlikely to be materially affected, as the existing 45-day filing deadline under French law is stricter than the three-month period provided for by the Directive. That said, it remains debatable whether the current liability framework fully complies with the Directive's requirements. In this respect, the implementation of the Directive will take place against the backdrop of an ongoing academic debate in France concerning directors' liability in insolvency.

Key implications - Spain

While pioneering in the Spanish context, the two **pre-pack procedures** currently contained in the provisions of the Spanish Insolvency Act present several practical problems. The transposition exercise will require the Spanish pre-pack framework to be redesigned as it was not built to accommodate the Directive's comprehensive two-phase architecture with its elaborate procedural safeguards.

Other key implications include the implementation of the 'best-interest-of-creditors' test and the protection of interim financing for pre-packs, as these mechanisms are now only regulated for restructuring plans.

Separately, to comply with the Directive, the national legislator must ensure the application of enhanced safeguards whenever buyers closely related to the debtor participate in a pre-pack process. These measures, which include proper disclosure and mandatory business valuation, are necessary for assessing their participation on equitable terms with other competitors. Furthermore, the Directive recognises that Member States should allow the use of credit bidding for secured creditors, allowing them to acquire the specific assets securing their claims within a pre-pack process, albeit subject to certain defined restrictions. As the current Spanish regulation does not explicitly permit credit bidding, this provision should also be transposed by the national legislator. Finally, even though the automatic contractual assignment *ex lege* is already covered in Article 222 TRLC, an exception saying that this automatic assignment does not apply when the acquirer is a competitor of the counterparty to the contract must be introduced in the Spanish legislation.

In Spain, the Directive will also mean the **introduction of creditors' committees**, which are currently unknown to Spanish insolvency law. Spain's **avoidance regime** (*acciones rescisorias*) is in several aspects more protective of creditors than the Directive's minimum standards (notably the 2-year general suspect period, irrebuttable presumption for gratuitous acts and for payments extinguishing obligations whose maturity date is after the declaration of insolvency, unless they are secured by collateral, and broad detriment-based approach). These features can be maintained under the minimum harmonisation principle. However, the Spanish Insolvency Act will require some tweaks such as (i) introduction of the tripartite avoidance structure (preferences / undervalue / intentionally detrimental), with the specific conditions and knowledge requirements prescribed by the Directive; (ii) mandatory 3-year limitation period for all claims; and (iii) alignment of consequence provisions (assignability to a creditor or to a third party of claims to obtain full compensation for the return of benefits, lapse of enrichment defence, successor liability) that are not currently regulated in the Spanish Insolvency Act.

Finally, no significant changes are expected regarding **directors' filing duties**, since the two-month deadline is stricter than that in the Directive.

Conclusion

As EU insolvency law approaches an era of substantive harmonisation in minimum standards, practitioners will need to remain abreast of legislative developments as the Directive will not provide a set of uniform rules across EU countries. The Directive is, however, a decisive step towards pan-European recovery predictability and potential future harmonisation to come.

Silvia Angós

Senior Knowledge Lawyer

T +34 91 700 3767

Charlotte Ausema

Senior Knowledge Lawer

T +31 20 485 7667

Marjolein Bakker

Associate

T +31 20 485 7067

E marjolein.bakker@freshfields.com

Huub Boekhorst

Senior Associate

T +44 20 7785 2011

E huub.boekhorst@freshfields.com

Michael Broeders

Partner

T +31 20 485 7661

Katharina Crinson

Counsel

T +44 20 7716 4510

Susanne Hoerrmann

Senior Knowledge Lawyer

T +49 89 20 70 23 99

E susanne.hoerrmann@freshfields.com

Marvin Knapp

Partner

T +90 40 36 90 63 16
E marvin.knapp@freshfields.com

Ana Lopez

Partner

T +34 91 700 3754

E ana.lopez@freshfields.com

Antoine Rueda

Counsel

T +33 1 44 56 29 26

E antoine.rueda@freshfields.com

Freshfields.com

DSR0037000v3