

19 Jan 2026



□ □ Restructuring & Insolvency □

European Union: Commission's proposal for a Directive on the harmonisation of certain aspects of Insolvency Law - Update

## European Union: Commission's proposal for a Directive on the harmonisation of certain aspects of Insolvency Law - Update

---

26 Mar 2024 □ 6 minute read

---

Topics [Banking & Finance](#)

[Restructuring & Insolvency](#) |

---

### In brief

On 7 December 2022, the EU Commission presented a Draft Directive on the harmonization of certain aspects of insolvency law (the official English version is available for download: [COM\(2022\) 702 final](#)). We reported on this [in detail](#) in January 2023. With the Draft Directive, the EU is taking its first steps towards a substantive harmonization of core insolvency law.

---

### Contents

1. Status of the legislative process
  2. Introduction of so-called "pre-pack" procedure (Art. 19 – 29 Draft Directive)
  3. Obligations to file for insolvency and avoidance
  4. Perspective / Outlook
- 

### Status of the legislative process

The presentation of the Draft Directive just over a year ago set the legislative process in motion at European Union level. As usual, the legislative bodies and advisory bodies are working on the bill in parallel. Various EU institutions and, in some cases, parliaments of the Member States have already issued opinions (available [here](#)). However, the first reading in Parliament has not yet taken place.

## **Introduction of so-called "pre-pack" procedure (Art. 19 – 29 Draft Directive)**

The introduction of so-called "pre-pack" procedure is of particular importance. This does not refer to a separate type of procedure. Rather, it means that the preparation for insolvency and the planned sale process out of insolvency take place in parallel and in a coordinated manner. The sale is carried out on the basis of a contract that is negotiated confidentially prior to the opening of insolvency proceedings and is concluded and implemented in a very short insolvency procedure virtually upon opening (for details and the content of the Draft Directive in this regard, see our [last newsletter](#)).

The German Bundesrat (recommendation of the Legal and Economic Committee, dated 20 March 2023, available [here](#) in German language only) is initially rather skeptical about the Draft Directive and would prefer individual member states to further develop their national insolvency law, if necessary, without extensive harmonization. However, it does provide an assessment of the content of the proposed innovations. It is interesting to note that the Federal Council states that, in its view, German insolvency law already has an efficient and internationally recognized framework for dealing with corporate insolvencies (para. 5). This rather suggests that only individual aspects of German law will be amended, and only to the extent necessary, if the Directive is adopted. Specifically with regard to the "pre-pack" procedure, the Federal Council refers to the current practice of preparing the sale in preliminary insolvency proceedings (para. 10).

This confirms our assessment that only minor changes are to be expected in this area. The "pre-pack" procedure could be implemented by introducing a new section 270h InsO (if a regulation is deemed necessary at all). This new procedure would then be a special type of preliminary insolvency proceedings in self-administration (such as the protective shield procedure). In this type of proceedings the application is not published online ([insolvenzbekanntmachungen.de](https://insolvenzbekanntmachungen.de), Section 9 InsO), the procedural objective of the transferred restructuring to an investor is postulated at the beginning and the preliminary administrator is appointed as the insolvency administrator by the court when the proceedings are opened.

The decisive factor here will be whether the preparation of the sale in preliminary insolvency proceedings is considered to be compatible with the directive or whether, on the contrary, proceedings prior to the preliminary proceedings or the insolvency application are considered necessary. To date, the Draft Directive does not contain any specific regulations on the entry requirements for being able to use the "pre-pack" procedure. However, Art. 23 of the Draft Directive indicates that the so-called preparatory phase of the "pre-pack" proceedings and the German preliminary insolvency proceedings could be the same. Art. 23 of the Draft Directive says that a stay of individual enforcement measures can be claimed in this phase if the debtor "is in a situation where insolvency is likely or is insolvent under national law".

When implementing EU law, the German legislature traditionally takes into account the opinions of professional lobby associations. It is therefore interesting at this early stage of the legislative process to see how the draft is assessed by these associations. The possibility of assigning contracts of the debtor to the

buyer without the consent of his contractual partners or terminating them in court (Art. 27 of the Draft Directive) is often viewed critically. In addition to the constitutionality of the regulations against the background of the freedom of contract protected by Article 2 of the German Constitutional Law (*Grundgesetz*), concerns are also expressed that not every contractual partner can be tolerated due to internal compliance regulations and that the forced transfer of contracts may well present contractual partners with difficulties<sup>1</sup>. The assignment of authority to terminate contracts to the insolvency courts is viewed critically. We share this assessment from a practical point of view, as courts will not be able to assess the details of the contracts as the basis for the decision from a time perspective alone, at least unless there is a concentration of proceedings at a few courts and the restructuring competence of the courts can thus be ensured.

## Obligations to file for insolvency and avoidance

The opinion of the Federal Council and various lobby associations confirms the previous assessment that few changes are to be expected in the areas of insolvency filing obligations and insolvency avoidance from a German perspective. The deadline of three months for filing for insolvency after insolvency has occurred is considerably too long for the Federal Council (para. 11).

Particularly in the case of insolvency avoidance law, it is clear that harmonization of sub-areas of insolvency law in all member states is complicated. The right of avoidance depends heavily on the objectives of the proceedings, which in turn vary greatly between the Member States. Whereas in Germany, the interests of creditors are paramount (Section 1 InsO), French law, for example, places a high value on the interests of employees and job preservation. If employees are at the top of the ranking with their claims, it makes little sense to skim off pre-insolvency benefits through insolvency avoidance, which they will receive back in the end through the insolvency dividend (albeit possibly redistributed). Individual interventions in an often highly differentiated system of regulations in the member states must be carefully considered. This is, however, ultimately up to the national legislature, that can make use of the leeway provided by a directive. However, minimum standards are to be welcomed.

## Perspective / Outlook

As the directive will be adopted in the ordinary legislative procedure, an agreement must ultimately be reached with the Council, which means that experience shows that there will still be some adjustments to the current draft status<sup>2</sup>. It is not yet possible to predict when the directive will be adopted. These adjustments will determine whether, from a German perspective, far-reaching changes can be expected at all or whether there will merely be individual selective modifications to the German legal situation. There are also rumors from German government circles that the current legislative proposal is only the prelude to further harmonization. In view of the fact that the EU's authority to regulate the matter is already being called into question for this project, some resistance is to be expected should this come to pass.

Click [here](#) to read the German version.

---

<sup>1</sup> See VID statement dated March 9, 2023, page 62; TMA statement, date unknown, page 4; German Banking Association statement dated August 29, 2023, page 9.

<sup>2</sup> TMA, date unknown, page 10; VID statement dated March 9, 2023, pages 8, 13.

## Contact Information

### Joachim Ponseck, MBA

Partner

Frankfurt

[Read my Bio](#)

[joachim.ponseck@bakermckenzie.com](mailto:joachim.ponseck@bakermckenzie.com)

### Prof. Dr. Artur M. Swierczok LL.M. (UCL), Mst. (Oxford)

Counsel

Frankfurt

[Read my Bio](#)

[artur.swierczok@bakermckenzie.com](mailto:artur.swierczok@bakermckenzie.com)

### Dr. Andrea Soprano

Counsel

Frankfurt

[Read my Bio](#)

[andrea.soprano@bakermckenzie.com](mailto:andrea.soprano@bakermckenzie.com)

### Tim Kerim Hosgör, LL.B.

Associate

Frankfurt

[Read my Bio](#)

[tim.hosgoer@bakermckenzie.com](mailto:tim.hosgoer@bakermckenzie.com)

---

Copyright © 2025 Baker & McKenzie. All rights reserved. **Ownership:** This documentation and content (Content) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms). The Content is protected under international copyright conventions. Use of this Content does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion:** All Content is for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulations and practice are subject to change. The Content is not offered as legal or professional advice for any specific matter. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any Content. Baker McKenzie and the editors and the contributing authors do not guarantee the accuracy of the Content and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the Content. The Content may contain links to external websites and external websites may link to the Content. Baker McKenzie is not responsible for the content or operation of any such external sites and disclaims all liability, howsoever occurring, in respect of the content or operation of any such external websites. **Attorney Advertising:** This Content may qualify as "Attorney Advertising" requiring notice in some jurisdictions. To the extent that this Content may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. **Reproduction:** Reproduction of reasonable portions of the Content is permitted provided that (i) such reproductions are made available free of charge and for non-commercial purposes, (ii) such reproductions are properly attributed to Baker McKenzie, (iii) the portion of the Content being reproduced is not altered or made available in a manner that modifies the Content or presents the Content being reproduced in a false light and (iv) notice is made to the disclaimers included on the Content. The permission to re-copy does not allow for incorporation of any substantial portion of the Content in any work or publication, whether in hard copy, electronic or any other form or for commercial purposes.