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Client Alert

January 2026

Germany: EU Directive on Insolvency Harmonization

What does this mean for Germany?

In brief

On 5 December 2025, the competent bodies of the European Union agreed on a compromise text concerning the Directive on the harmonization of certain aspects of insolvency law (“**Directive**”) (the text is currently only available in English). The aim of the Directive is to remove obstacles to the single (European) market and the capital markets that arise from differing national insolvency rules. This represents a further step towards the substantive harmonization of insolvency proceedings in the EU Member States. We reported on this in detail in January 2023 and March 2024.

Contents

How did the Directive come about?

The path to the new Directive was marked by intensive coordination and consultation. The European Commission presented a first draft on 7 December 2022, which for the first time sought to harmonize key areas of insolvency law in the EU. This was followed by the ordinary legislative procedure based on the so-called "trilogue" model. In the course of the legislative process, numerous opinions were obtained from Member States and associations. The Directive has yet to be adopted. It will then enter into force 20 days after its publication in the Official Journal of the European Union, and Member States will have two years and nine months to transpose it into national law.

Overview

In addition to comprehensive recitals, the Directive contains seven sections: General provisions (Articles 1-3b), avoidance actions (Articles 4-12), tracing assets belonging to the insolvency estate (Articles 13-18a), pre-packs (Articles 19-35), directors' duty to request the opening of insolvency proceedings and civil liability (Articles 36-37a), creditor participation and committees (Articles 58-67), measures enhancing transparency of national insolvency laws (Article 68) and final provisions (Articles 68a-73). The Directive does not affect when insolvency proceedings can be opened, in particular what constitutes grounds for insolvency. These continue to be determined solely by national law. The provisions concerning the winding up of insolvent microenterprises (Articles 38-57) have been completely deleted from the compromise text.
The most important mandatory changes (in some cases, the Directive allows Member States some leeway) are as follows:

Harmonization of insolvency avoidance actions

The Directive now sets minimum standards for insolvency claw back concerning legal acts that disadvantage creditors.

It distinguishes between three grounds for claw back (Articles 6-8).

1. **Preferences**, Article 6
    - Collateralization or satisfaction that are detrimental to the estate, which were made within three months prior to the insolvency application and benefit a creditor, are void if the debtor (within the meaning of the respective national law) was illiquid.
    - The same applies in the period between the filing of the application and the opening of insolvency proceedings without the requirement of illiquidity.

- If a due claim of a creditor was satisfied or secured, the creditor must also be aware of the illiquidity or the application for insolvency (which is presumed in the case of closely related parties).
- Among other things, avoidance is excluded altogether if appropriate consideration is paid directly to the insolvency estate.

The Directive thus essentially reflects sections 130, 131 and 142 of the Insolvency Code ("**InsO**"). No major changes are to be expected here with regard to German law.

2. Legal acts against no consideration or against manifestly inadequate consideration, Article 7

   Acts against no consideration or against manifestly inadequate consideration that were carried out within one year prior to the insolvency application or, in the absence of such an application, prior to the opening of insolvency proceedings, are void without further requirements, unless they are gifts and donations of symbolic value.

   These requirements are already covered by section 134 InsO, although the time frame of section 134 InsO is significantly longer at four years.

   However, what still needs to be clarified is the distinction between Article 6 and Article 7. Here, there remains an intermediate area of consideration that is not within the meaning of Article 6 but also not "manifestly inadequate" within the meaning of Article 7. Services affected by this type of consideration remain contestable under Article 6.

3. Legal acts intentionally detrimental to creditors, Article 8

   Legal acts by which the debtor has intentionally caused a detriment to the general body of creditors are void if they were carried out within two years prior to the insolvency application or, in the absence of such an application, prior to the opening of insolvency proceedings, and if the other party was aware of the intent to cause detriment (which is presumed in the case of closely related parties). It is not sufficient if the party only should have had knowledge of the intent.

   This refers to section 133 InsO. No major changes are to be expected.

The Directive also provides for the regulation of restitution obligations and enforcement against third parties (Articles 9-11) and leaves room for Member States to adopt stricter national rules in this regard. The limitation period may not exceed three years from the opening of insolvency proceedings (whereby the knowledge of the insolvency administrator may also be taken into account, a circumstance that German law rejected several years ago).

Tracing assets belonging to the insolvency estate

Among other things, the regulations provide for access to accounts by designated courts or authorities for the purpose of obtaining information, insofar as this is intended to trace asset transfers that are detrimental to the insolvency estate. The information obtained may be shared by the courts or authorities with insolvency administrators, whereby the confidential treatment of the information must be guaranteed. German law does not yet provide for any comparable regulations.

Introducing of pre-packs proceedings

A key element of the Directive is the introduction of so-called pre-pack proceedings (Articles 19-35). The Directive (see Article 2(p)) defines these as proceedings as involving a preparation phase and a liquidation phase for the partial or complete sale of the debtor's business as a going concern to the highest bidder. The preparation phase involves finding an appropriate buyer, while the liquidation phase involves approving and executing the sale after the opening of insolvency proceedings. Such proceedings must be available at least in cases of a debtor which is likely to become insolvent and must be conducted at least in part under self-administration; Member States may exclude illiquid debtors (within the meaning of their respective national law) from this. The pre-pack proceedings may be separate proceedings or part of existing insolvency proceedings (Article 19).

During the **preparation phase**, there should be an independent and knowledgeable monitor (Article 22). The sale process and the selection of the buyer must be competitive, transparent and meets market standards. It has to be subject to comprehensive documentation requirements (Article 22a), it may take the form of a public auction. During this phase, individual enforcement measures may be suspended (Article 23). The preparation phase must be limited in time, although the Directive does not specify any concrete requirements in this regard (Article 23b); the public auction should last no longer than three months (Article 26).

The **liquidation phase** begins with the opening of insolvency proceedings (within the meaning of the respective national law). During this phase, the court orders the (partial) legally effective sale of the business if (i) the acquirer is proposed by the monitor provided that the monitor has issued an opinion to that end, (ii) the acquirer is selected in a public auction, or (iii) the sale is approved by the creditors (Article 26). Member States may provide that creditors may decide on the sale even without court approval.

The acquirer generally takes over the company free of debts and liabilities (Article 28), with exceptions applying in particular to liabilities arising from employment relationships (e.g., occupational benefit entitlementws) (see Recital 28c). Executory contracts necessary for the continuation of business operations may be transferred to the purchaser, who is not a competitor, even without the consent of the contracting party, although Member States may provide for exceptions. If the transfer would unfairly prejudice the counterparty, Member States may provide for termination rights (see Art. 27 for the above). The specific distribution of the proceeds of the sale continues to be governed by national law.

Finally, the directive contains further regulatory requirements for pre-packs, e.g., concerning binding selection criteria for the best offer, liability provisions for the monitor, preemptive rights and credit bidding, as well as protective provisions in favor of (secured) creditors.

As this is only a directive that still needs to be transposed into German law, some points are inevitably unclear or not regulated in detail — partly in order to give Member States the opportunity and freedom to adapt the proposal to existing national law. The legislative process will therefore show exactly how the pre-pack will be integrated into German insolvency law. Since the liquidation phase requires the opening of insolvency proceedings, it is clear in any case that it must be regulated separately from the German Act on the Stabilization and Restructuring Framework for Enterprises (StaRUG) procedure.

However, in the authors' view, no major changes to German law are necessary due to the special nature of preliminary insolvency proceedings in Germany. Even today, a typical sale process essentially proceeds as specified in the directive: immediately after filing for insolvency, the provisional insolvency administrator regularly begins searching for investors in an orderly and fair process, often with the support of external and independent M&A advisors (alternatively, self-administration under the supervision of the trustee). The creditors' committee decides which investor(s) will be negotiated with in the final stage. The purchase agreement is often finalized with the preferred investor shortly before the opening of insolvency proceedings and signed immediately after the opening (usually notarized).

The authors would expect individual additions to German law in the area of creditor approval of the sale. Here, it should be clearly stipulated that the approval of the (provisional) creditors' committee alone is sufficient, possibly with the recommendation of the administrator. However, what will be new is that contracts can be transferred without the consent of the counterparty, at least initially. This is currently not possible which may preclude a transferable restructuring if no insolvency plan is possible. However, the Directive also allows for far-reaching exceptions here, so that at least a material change to the current law does not appear necessary. However, insofar as the Directive provides for certain labor law liabilities to be transferred to the acquirer, this could represent a significant step backwards from a German perspective.

Management duties

Managing directors must file for insolvency no later than three months after they become aware of the company's insolvency or could reasonably have become aware of it (Article 36). If they fail to comply with this obligation, the managing directors are liable for the resulting damage to creditors. This obligation may be waived if other measures are taken to protect creditors (e.g., public announcement of the insolvency).

As Member States may also provide for a shorter period (Article 3a No. 1), it is not to be expected that any changes will be made to Section 15a InsO.

Creditors' committees

Under the Directive Meber States shall ensure that a creditors' committee is established, unless the proceedings are of insignificant economic importance (Articles 58-67). The committee must be independent of other procedural bodies and has the task of supervising the insolvency administrator, participating in important decisions and representing the interests of creditors; to this end, the committee has extensive rights to information (Article 64). The members must fairly represent the various creditor groups (Article 58). Finally, the Directive contains further provisions on the appointment and dismissal of creditors' committee members, their working methods, rights and obligations, etc.

Since German law already provides for the possibility of creditors' committees and these are even mandatory if the thresholds specified in section 22a (1) InsO are exceeded, no substantial changes are to be expected here.

Conclusion and outlook

The Directive is not expected to bring about any radical changes to German insolvency law. Rather, it is likely that only specific areas will be adjusted in order to comply with the European minimum harmonization requirements. Implementation will show to what extent the existing German regulations serve as a model and where selective adjustments are necessary. To the knowledgeable reader, however, it appears that German insolvency law already served as a model in the European legislative process. Nevertheless, the Directive marks an important step towards greater legal certainty and efficiency in cross-border insolvencies in Europe.

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