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Proposal for European rules on pre-pack proceedings should be supported

TvI 2023/14

1. Introduction

On 7 December 2022, the European Commission published the Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (hereinafter "the Proposal").[2] The Proposal is intended to harmonise the insolvency laws of the Member States in order to make insolvency proceedings more predictable and efficient. The Proposal also includes a number of principles the pre-pack proceedings in each Member State must meet.

The Proposal defines pre-pack proceedings as follows:

> "expedited liquidation proceedings that allow for the sale of the business of the debtor, in whole or in part, as a going-concern to the best bidder, with a view to the liquidation of the assets of the debtor as a result of the established insolvency of the debtor."[3]

The explanatory memorandum to the Proposal states the following about pre-pack proceedings:

> "In a pre-pack proceeding, the sale of the debtor's business (or part of it) is prepared and negotiated before the formal opening of the insolvency proceedings. This makes it possible to execute the sale and obtain the proceeds shortly after opening the formal insolvency proceedings intended to liquidate a company."[4]

This part of the Proposal is of great importance for insolvency practice, because it provides for the introduction of pre-pack proceedings in all Member States. For a careful settlement of bankruptcies in the Member States, it is important that debtors in every Member State have access to these proceedings. This prevents forum shopping and contributes to legal equality. In addition, it is important that the Proposal sets a number of minimum requirements for pre-pack proceedings at the European level, which increases the quality of the national statutory regulations.

CJEU case law has created uncertainty regarding the feasibility of pre-pack proceedings because there is a risk of a transfer of business or undertaking within the meaning of Directive 2001/23/EC. If that is the case, the party purchasing the business will take on all employees of the transferring party by operation of law.[5] This may affect the conclusion of the transfer or the purchase price.

With the Proposal, the European Commission is taking an important step forward in the development of the pre-pack proceedings as a method to limit the harm or loss of parties involved in bankruptcies, such as debtors, employees and customers. The Netherlands was one of the front-runners in the development of legislation on pre-pack proceedings. On 21 June 2016, the Dutch House of Representatives passed the Continuity of Enterprises Act I (*Wet continuïteit ondernemingen I*).[6] The Continuity of Enterprises Act I provides a legal basis for the pre-pack practice developed in the Dutch legal practice. However, the CJEU's judgment in *Smallsteps*[7] has brought the pre-pack practice in the Netherlands, including the debate on the Continuity of Enterprises Act I in the Dutch Senate, to a standstill. In its judgment in *Smallsteps*, the CJEU held that the exception to the employment protection of Articles 3 and 4 of Directive 2001/23 included in Article 5(1) of Directive 2001/23 may apply only when the main objective of the insolvency or similar proceedings is the liquidation of the assets of the transferor and not the preservation of the business. According to the CJEU, if the transfer of the business is prepared in pre-pack proceedings down to its every last detail in order to enable a swift relaunch of the business's viable units after the declaration of insolvency, the requirement that the proceedings are initiated with a view to liquidation is not met. The CJEU also held that in the Dutch context, the requirement that these proceedings are under the supervision of a public authority is not met either.

In its judgment in *Heiploeg*,[8] the CJEU once again had to answer the question of to what extent the pre-pack proceedings, as described in the judgment of the Supreme Court of

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2 Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law dated 7 December 2022, COM(2022) 702 final ("*Proposal*").

3 Article 2(p) of the Proposal.

4 Explanatory Memorandum to the Proposal, p. 15.

5 See Article 3 of the Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses ("Directive 2001/23").

6 EK 34.218, A.

7 CJEU 22 June 2017, ECLI:EU:C:2017:489 (*FNV et al. v Smallsteps BV*). For the sake of brevity, for the many publications that appeared further to this judgment I refer to footnote 3 of N.W.A. Tollenaar, *'De implicaties van Estro voor de pre-pack en WCO I'*, *TvI* 2018/6 and furthermore to, among others: J. van der Pijl, *Arbeidsrecht en insolventie* (*Monografieën Sociaal Recht* no. 75), Deventer: Kluwer 2019, pp. 181-188 and M.R. van Zanten, *'It takes Smallsteps to pre-pack, een analyse*', in: E.J.R. Verwey, P.W. Schreurs, M.A. Broeders (ed.), *De Curator en het Personeel (INSOLAD Jaarboek 2018)*, Deventer: Wolters Kluwer 2018, pp. 40-47.

8 CJEU 28 April 2022, ECLI:EU:C:2022:321 (*FNV v Heiploeg*). For a discussion of the judgment see, among others: J. van der Pijl, '*Het Heiploeg-arrest*', *TAC*, 2022/4, pp. 165-170 and R.J. van Galen, '*Overgang van een onderneming in faillissement: de stand van zaken na Heiploeg*', *Ondernemingsrecht* 2022/55, *pp. 339-346.*

the Netherlands referring that case to the CJEU for a preliminary ruling,[9] meet the exception requirements of Article 5(1) of Directive 2001/23.[10] In this judgment, the CJEU repeated that the application of the exception provision of Article 5(1) of Directive 2001/23 depends on whether the situation involves bankruptcy proceedings that were initiated with a view to the liquidation of the assets of the transferor or with a view to the continuation of the activities. The CJEU held that it is an established fact that in this case, the transfer of the business concerned took place in the context of bankruptcy proceedings intended to liquidate all the assets, i.e. of the business of the transferor.[11] The wording of Article 5(1) of Directive 2001/23 shows that the exceptional situation does not apply only to businesses whose activities definitively ended before or after the transfer. This exception is intended to rule out the serious risk of a general decrease in the value of the transferred business or general deterioration of the living and working conditions of the employees. For this reason, it should be possible to transfer a business subject to the deviation laid down in the aforementioned provision.[12] Because Article 5(1) of Directive 2001/23 does not pertain to the period prior to bankruptcy or insolvency proceedings, it is irrelevant to the application of this criterion whether the transfer was prepared before the initiation of the bankruptcy proceedings.[13] According to the CJEU, when the primary objective of pre-pack proceedings, followed by bankruptcy proceedings, is to obtain the highest possible payment for its joint creditors after the declaration of insolvency and after liquidation, these proceedings jointly in principle meet the second condition set out in Article 5(1) of Directive 2001/23.[14] It must be established not only that the primary objective of these proceedings is to achieve the highest possible payment to the joint creditors, but also that the implementation of the liquidation through a transfer of the business or a part thereof as a going concern, as prepared in the pre-pack proceedings and implemented following the bankruptcy proceedings, makes it possible to achieve this primary objective. Finally, the CJEU ruled that the conditions of Article 5(1) of Directive 2001/23 can certainly be satisfied when bankruptcy proceedings are prepared in pre-pack proceedings, provided that the pre-pack proceedings are governed by statutory or regulatory provisions.[15]

The judgment in *Heiploeg* demonstrated that pre-pack proceedings, once they are provided for by law, most certainly can fall under the scope of the exception of Article 5(1) of Directive 2001/23. From the perspective of the parties involved in the bankruptcy, who benefit from having the harm or loss limited as much as possible and seeing the highest possible proceeds, it is good to see that EU law is looking to reinstate the pre-pack practice through the Proposal, after the same EU law saw it unseated earlier.

The provisions of Title IV of the Proposal are discussed and commented on below, where I also give a number of suggestions for additional provisions.

2. Title IV Proposal (pre-pack proceedings)

2.1 *Definition*

Based on Article 2, opening words and (p) of the Proposal, the pre-pack proceedings are expedited liquidation proceedings that allow for the sale of the business of the debtor, in whole or in part, as a going-concern to the best bidder, with a view to the liquidation of the assets of the debtor as a result of the established insolvency of the debtor. This definition, in line with the CJEU case law, shows that the objective of the pre-pack proceedings is to liquidate the assets and that these proceedings pertain to an insolvent debtor. This means that a declaration of insolvency is no longer a choice to be made by the debtor but has become a certainty. It is for this situation, which is bad for many of the parties involved, that the pre-pack proceedings offer a procedure that minimises the harm or loss incurred by the creditors as a result of the bankruptcy.

2.2 *Pre-pack proceedings*

Article 19(1) of the Proposal stipulates that the Member States have to lay down legislation with regard to such pre-pack proceedings. The Member States must ensure that pre-pack proceedings are composed of the following two consecutive phases:

a) the preparation phase, which aims at finding an appropriate buyer for the debtor's business or part thereof;
b) the liquidation phase, which aims at approving and executing the sale of the debtor's business or part thereof and at distributing the proceeds to the creditors.

The elaboration of the pre-pack proceedings into two consecutive phases is the correct approach. The article-by-article explanation regarding Title IV indicates that the preparation phase is usually confidential.[16] In my opinion, pre-pack proceedings have added value over ordinary insolvency proceedings primarily because of the former's confidential nature. If the preparation phase were not, by its nature, in principle confidential, then one might be left to wonder as to the justification and added value of this part of the pre-pack proceedings compared to ordinary insolvency proceedings, prepared or otherwise. I believe it is

9 Supreme Court 7 April 2002, ECLI:NL:HR:2020:753 and Supreme Court 29 May 2020, ECLI:NL:2020:954 (*FNV v Heiploeg*).
10 Article 3 and 4 of Directive 2001/23 include a number of rights the employees have in case of a transfer of business. Article 5(1) of Directive 2001/23 provides that, unless Member States provide otherwise, Articles 3 and 4 of Directive 2001/23 shall not apply to any transfer of a business, where the transferor is the subject of bankruptcy proceedings or any similar proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be a insolvency practitioner authorised by a competent public authority).
11 Paras. 47.
12 Paras. 49-50.
13 Paras. 51.
14 Paras. 52.
15 Paras. 55 and 66.
16 See Explanatory Memorandum, p. 17.

appropriate to also state the fact that the preparation phase is in principle confidential in Article 19(1)(a) of the Proposal.

2.3 ***Relation to other juridical acts of the EU***

Article 20(1) of the Proposal provides that the liquidation phase must be considered to be an insolvency proceeding as defined in Article 2, point (4), of Regulation (EU) 2015/848.[17] Pursuant to the provisions in Article 20(2) of the Proposal, the liquidation phase must be considered to be insolvency proceedings instituted with a view to the liquidation of the assets of the transferor under the supervision of a competent public authority within the meaning of Article 5(1) of Directive 2001/23.

In this provision, the European Commission explains the relationship between the Proposal and Directive 2001/23.[18] This codifies the judgment in *Heiploeg* and is a clear attempt to remove any doubt as to whether the bankruptcy exception applies in the event of pre-pack proceedings that meet the definition of Article 2, opening words and (p) of the Proposal.[19]

The EU legislature thereby determines in a general sense that in the case of pre-pack proceedings as defined in the Proposal, comprising, among other things, a liquidation phase which based on Article 19(1)(b) is aimed at the sale of the business and the distribution of the proceeds among the creditors, these proceedings meet the exception provision of Article 5(1) of Directive 2001/23. However, the *Heiploeg* judgment shows that it is not sufficient for the proceedings, in a general sense, to have the primary objective of achieving the highest possible payment to the joint creditors. Specifically, it is the transfer of a going concern that must make it possible to achieve this objective and must be an appropriate means to that end in the case in question.[20] However, as Verstijlen notes:

> "it would be very strange for a court to rule that the transfer of a business going concern is not suitable to realise the highest possible proceeds from the estate; should this nevertheless occur, the insolvency practitioner and supervisory judge would not cooperate with the transfer."[21]

In practice, this provision would therefore most likely not result in much uncertainty. As a result of the clarity provided by the judgment in *Heiploeg* and the provision of Article 20(1) of the Proposal, such disputes about the objective of pre-pack proceedings designed in this way will probably be limited in practice. Furthermore, the monitor/insolvency practitioner and the court are involved in the initiation and follow-up of the process, which ensures that the application of pre-pack proceedings can be monitored in practice.

2.4 ***Jurisdiction in pre-pack proceedings***

Article 21 of the Proposal provides that the court having jurisdiction in pre-pack proceedings will have exclusive jurisdiction in matters relating to the scope and effects of the sale of the debtor's business.

This provision is addressed below at 2.12 in the discussion of Article 29 of the Proposal that provides for, among other things, the possibility of an appeal against the proposed sale.

2.5 ***The monitor***

Article 22 of the Proposal includes rules for the "monitor", the European equivalent of the Dutch *beoogd curator (*"prospective insolvency practitioner"). The Member States must ensure that the court will appoint a monitor at the request of the debtor, which is the start of the preparation phase. Article 22(2) of the Proposal contains a number of duties of the monitor, including:

a) documents and reports each step of the sale process;
b) justifies why it considers that the sale process is competitive, transparent, fair and meets market standards;
c) recommends the best bidder as the pre-pack acquirer;
d) states whether it considers that the best bid does not constitute a manifest breach of the best-interest-of-creditors test.

The statement of the monitor need not be accompanied by a valuation in every case. The monitor must reasonably conclude that the sale price is not significantly lower than the proceeds that could be obtained through gradual liquidation. If the business is sold to a party closely related to the debtor, the monitor or insolvency practitioner will have to reject the offer if it fails the best-interest-of-creditors test.[22] This formulation appears to imply that the monitor or insolvency practitioner need not reject an offer if the offer fails the best-interest-of-creditors test in case of a sale to a third party, but it seems to me that this cannot be the intention.

In my view, the duty assigned to the monitor of recommending the highest bidder is too limited. It leaves insufficient room for choosing the best offer. Other interests such as, for example, job retention, could also be considered when assessing which offer is the best. Article 30 of the Proposal stipulates that the criteria to select the best offer in the pre-pack proceedings are the same as the criteria used to select between competing offers in winding-up proceedings. According to Dutch law, the insolvency practitioner must also take into account public interests,[23] but it is recommended to expressly include the provision that the monitor must

17 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).
18 Explanatory Memorandum to the Proposal, p. 15.
19 See also: B.A. Schuijling, '*Het commissievoorstel voor een nieuwe insolventierichtlijn*', *FIP* 2023/2, p. 15.
20 Paras. 53.
21 F.M.J. Verstijlen, *NJ* 2022/272, par. 6 and the further opinion of AG Drijber dated 31 March 2023 in Heiploeg, ECLI:NL:PHR:2023:368, at 3.16.
22 Proposal, p. 26, at (24).
23 See: Supreme Court 24 February 1995, ECLI:NL:HR:1995:ZC1643 (*Sigmacom II*); Supreme Court 19 April 1996, ECLI:NL:HR:1996:ZC2047 (*Maclou*); Supreme Court 19 December 2003, ECLI:NL:HR:2003:AN7817 (*Mobell v Interplan*).

choose the best offer, which pursuant to Article 30 of the Proposal must be chosen on the basis of the selection criteria developed in national law.

In order for a person to qualify for appointment as monitor, they must meet the criteria applicable to insolvency practitioners and they must actually be appointable as insolvency practitioner in the following liquation phase.[24]

The debtor will continue to have the power of disposition during the preparation phase.[25] The costs of the monitor are paid by the debtor in case there is no subsequent liquidation phase, or by the estate as "preferential administrative expenses" in case there is a liquidation phase.[26] I assume that this order of priority corresponds with that of the insolvency practitioner's salary in Dutch bankruptcy law, namely the highest rank within the estate debts.

In my opinion, EU legislation should only contain general provisions on the monitor. I believe the current provisions are in line with this criterion. In addition, it could be stipulated that the monitor should not be regarded as an advisor of the debtor or its director. The monitor will ensure that the interests of the joint creditors are not harmed during the preparation phase. The strength, and added value, of the monitor's involvement lies in the fact that they will be appointed as insolvency practitioners in the liquidation phase and will have to request the court's approval for the sale they prepared together with the board in the preparation phase. The debtor is therefore dependent on the monitor and their opinion regarding the proposed sale. This means that the monitor has a crucial role in the preparation phase, in which they can monitor a careful sale that serves the interests of the joint creditors.

EU legislation must indeed stipulate that the monitor is paid by the debtor. If a claim of the monitor remains after the declaration of insolvency, this claim must be regarded as falling under general bankruptcy costs. This claim should be paid first from the estate assets and has the same order of priority as the claim relating to the insolvency practitioner's salary.

2.6 *Stay of individual enforcement actions*

Based on Article 23 of the Proposal, the Member States must ensure that during the preparation phase, where the debtor is in a situation of imminent insolvency or is insolvent in accordance with national law, the debtor can benefit from a stay of enforcement actions in accordance with Articles 6 and 7 of Directive (EU) 2019/1023, where it facilitates the seamless and effective roll-out of the pre-pack proceedings. The monitor will be heard prior to the decision on the stay of enforcement actions.

Careful preparation can limit the harm or loss for the parties involved in a bankruptcy and help preserve as many jobs as possible by allowing a restart to take place. The pre-pack proceedings, consisting of a preparation phase and a liquidation phase, is when the sale is prepared and implemented. The preparation and implementation of such a sale, which has the important positive effects mentioned above, are disrupted if enforcement measures are taken that jeopardise the continuity of business operations during the preparation and liquidation phase. This could result in a sale no longer being possible after bankruptcy because the business was or will not remain going concern after the date of the declaration of insolvency.

Additional measures are required in order for the objective of the proposed rules to be realised. These may involve changes in the current system of the Member States. One of those changes is the stay of individual enforcement actions as early as in the preparation phase proposed in Article 23 of the Proposal. This measure has the effect of a cooling-off period, as the rights of creditors cannot be enforced during such period either. Except the measures provided for in the Proposal are taken in an earlier phase than the stay of enforcement measures or cooling-off period as a result of bankruptcy (the liquidation phase) provided for by Dutch law.[27] The stay of enforcement measures set out in Directive 2019/1023 for the negotiation of a restructuring plan in the context of a preventive restructuring is thus also introduced in the preparation phase of pre-pack proceedings, on the condition that there is a probability of insolvency or declaration of insolvency. The debtor must therefore be heading for bankruptcy.

This choice is in the interest of part of the parties involved and serves the objective of the proposed scheme, but is of course not in the interest of the creditor who wanted to initiate or had already initiated enforcement measures. This creditor might have been able to recover their claim just before bankruptcy through enforcement measures. By providing for a stay of enforcement measures or a cooling-off period in this way, a conscious choice is made to support the preparation of the sale as much as possible during a period when bankruptcy is already inevitable and imminent. After all, the preparation phase will soon be followed by the liquidation phase.

The result is that the enforcing creditor will become aware of the confidential preparation phase of the pre-pack proceedings. This could be overcome by imposing a court order on the creditor to refrain from public communications about the pre-pack proceedings. In that event, the court should be able to stipulate, in its judgment ordering a stay of individual enforcement measures at the request of the debtor or monitor, that the creditor will incur an immediately payable penalty at the moment it can be demonstrated that they violated the confidentiality of the preparation phase.

24 Article 22(3) of the Proposal.
25 Article 22(4) of the Proposal.
26 Article 22(5) of the Proposal.
27 Articles 33, 34 and 63a of the Bankruptcy Act (*Faillissementswet*).

The pre-pack proceedings may also be in the interest of the creditor itself, because it may be possible to generate higher estate proceeds in the event of a sale going concern. In my view, there remains a risk that the imminent insolvency and the preparation phase will become known, which may jeopardise the objective of pre-pack proceedings. The question is therefore whether this provision can be properly performed in practice and whether it will be put to use often.

One could also wonder whether the cooling-off period should apply to secured creditors as well. The Proposal includes no exception for secured creditors in terms of the applicability of this provision. The cooling-off period thus applies to this party as well. The question is whether the existing rights of secured creditors are in fact affected in an unacceptable manner. Assuming that the secured creditor acquired security interests in goods that are part of the sale, and part of the purchase price is paid to the secured creditors in accordance with the national statutory provisions, the interests of the secured creditors are not unreasonably prejudiced by this provision in my opinion. In the Netherlands, this arrangement is already being applied in bankruptcies when the supervisory judge orders a cooling-off period pursuant to Article 63a of the Bankruptcy Act. The extension compared to current Dutch law lies in the possibility of a stay in the preparation phase, in the period in which there is an imminent insolvency or insolvency. Since 1 January 2021, Article 376(1) of the Dutch Bankruptcy Act has provided the option for the court to impose a cooling-off period based on the act on the confirmation of out-of-court restructuring plans (*Wet homologatie onderhands akkoord, WHOA*), i.e. outside of bankruptcy proceedings or suspension of payments proceedings. In my opinion, it is precisely this preparation phase in which it is important for the monitor and the debtor to be able to prepare the sale with ample time. If enforcement measures are taken, this preparation phase may be put at risk, as a result of which it may not be possible to realise the most value for the joint creditors because the sale going concern cannot proceed.

I believe the stay should not take place by operation of law. The debtor must be able to make a deliberate choice between requesting a stay (with the risk that the preparation phase will no longer be confidential) or finding funds to ensure a stay of execution (in which case the preparation phase will remain confidential). In that case, it is up to the debtor whether or not it will use this option.

2.7 *Principles applicable to the sale process*

Based on Article 24(1) of the Proposal, the Member States must ensure that the sale process carried out during the preparation phase is competitive, transparent, fair and meets market standards. Where the sale process only produces one binding offer, that offer will be deemed to reflect the business market price.[28] Member States may depart from the provisions of Article 24(1) of the Proposal only where the court runs a public auction in accordance with Article 26 of the Proposal.[29]

This provision would sufficiently protect the interests of the joint creditors in the pre-pack proceedings. The requirements that are set in respect of the sale process are important precisely because the sale is prepared in the confidential preparation phase. Sale by public auction, which the court provides as an alternative in case the requirements are not met, is a workable solution in practice. In this way, a market price will still be realised through a fair procedure.

2.8 *Appointment of the insolvency practitioner*

Article 25 of the Proposal stipulates that the Member States must ensure that, when the liquidation phase is opened, the court appoints the monitor referred to in Article 22 as insolvency practitioner.

This is a sound provision. The knowledge and experience of the monitor and their role in the preparation of the sale justify their appointment, in principle, as insolvency practitioners in the liquidation phase. If the monitor is not appointed as insolvency practitioner, the advantage achieved through the involvement of the monitor in the preparation phase would be lost because their activities will end once the liquidation phase starts. In that case, a quick sale after the start of the liquidation phase may be jeopardised because the new insolvency practitioner must first study the case and form an opinion on the sale proposed by the former monitor.

2.9 *Authorisation of the sale of the debtor's business or a part thereof*

Based on Article 26(1) of the Proposal, the Member States must ensure that, when the liquidation phase is opened, the court authorises the sale proposed by the monitor, provided that the latter has issued an opinion confirming that the sale process run during the preparation phase complied with the requirements laid down in Article 22(2) and (3) (see 2.5, above), and Article 24(1) and (2) of the Proposal (see 2.7, above). The court may not authorise the sale if these requirements are not met and the Member States must ensure that, in the latter case, the court continues with the insolvency proceedings.

In order for these requirements to be met, the sale process must be consistent with the standard rules and standard practice regarding mergers and acquisitions in the Member State concerned. This means, among other things, that potentially interested parties will be invited to participate in the sale process, that the same information will be disclosed to potential acquirers, that interested acquirers will be given the opportunity to conduct a due diligence investigation and that the offers of the interested parties can be obtained through a structured process.[30] The aforementio-

28 Article 24(2) of the Proposal.

29 Article 24(3) of the Proposal.

30 Proposal, pp. 30-31, at (26).

ned parts of the sale process correspond with the parts of a customary sale process after a declaration of insolvency and are workable in practice.

When the court orders a public auction, that public auction may not last longer than four weeks and must be initiated within two weeks of the opening of the liquidation phase. The offer received in the preparation phase will serve as the 'stalking horse bid' (the initial bid) in the auction. The debtor must have an opportunity during the preparation phase to offer an incentive to the 'stalking horse bidder', perhaps by agreeing to reimbursement of expenses or break-up fees if a better bid is chosen through the public auction.[31]

This provision would contribute to a careful sale process. However, with regard to the latter provision, it is important to take into account the risk that the bidder will not make the highest bid in the preparation phase, because the bidder must expect that there will be a public auction in which their bid will serve as the minimum price.

2.10 ***Assignment or termination of executory contracts***

Article 27(1) of the Proposal provides that the acquirer of the debtor's business or part thereof is assigned the executory contracts which are necessary for the continuation of the debtor's business if the suspension of those contracts would lead to a business standstill. The assignment does not require the consent of the counterparty to those contracts. Moreover, Article 27(2) of the Proposal provides that Member States must ensure that the court may decide to terminate the executory contracts if the termination is in the interest of the debtor's business and/or the executory contract contains public service obligations for which the counterparty is a public authority and the acquirer of the debtor's business or part thereof does not meet the technical and legal obligations to carry out the services provided for in such contract. This provision in Article 27(2)(a) of the Proposal does not apply to executory contracts relating to licences of intellectual and industrial property rights.

For a sale of a going concern immediately after a declaration of insolvency to succeed so that the loss can be limited and as many jobs as possible can be retained, it is important to include a provision regarding the acquirer's assumption of necessary reciprocal agreements. This provision infringes on the parties' freedom to contract in the sense that after the declaration of insolvency, the debtor's counterparty remains bound by an agreement concluded with the debtor prior to the declaration of insolvency and thus, after the bankruptcy, the debtor's counterparty is tied, through that agreement, to a contract partner that the debtor's counterparty did not choose for itself. However, if an agreement is concluded with the debtor and the purchaser of the business wishes to continue that business unchanged, the option of forcing the debtor's counterparty to do this may be a factor in the success of the restart. That may be the case, for example, in connection with leases for retail space or leases relating to necessary means of production. Naturally, the usually agreed provisions will remain in effect between the contracting parties after the continuation, which means that the agreement could be dissolved, for example, in the event of an attributable failure to perform. A poor financial position on the part of the acquirer and an ensuing attributable failure to perform the agreement continued with the acquirer can also quickly lead to the counterparty having the option to dissolve the agreement.

In my view, there is sufficient justification for the infringement on party autonomy. This measure serves the objective of pre-pack proceedings. After all, there would be little point to a sale if the agreements relevant to the continuation did not remain in effect. The justification for this infringement on party autonomy lies in the fact that the forced assumption of contract has no negative impact on the contracting party. That party had an agreement with the debtor, who is struggling financially and will be declared insolvent. Normally, that would spell the end of the agreement. The sale will allow the activities to be continued and in turn allow the contracting party to continue doing business, now with the acquirer. This forced assumption of contract actually has no effect on the contracting party other than allowing it to continue the agreement for a period of time subject to the previously agreed terms and conditions; in essence, that party is presented with an opportunity to limit the loss it may incur as a consequence of the bankruptcy. The infringement of the contracting party's freedom to contract inherent in this provision is less egregious than it seems. Although it introduces a new contracting party, the contract will effectively be performed by the same business.[32] An exception will be possible if, on the basis of a special circumstance, the counterparty cannot be required to continue an agreement with the restarting party.

The provision that permits the court to terminate executory reciprocal agreements is a practical one for the finalisation of the sale. This provision prevents uncertainty from arising regarding whether or not a given executory reciprocal agreement will be continued.

2.11 ***Debts and liabilities of the business acquired via the pre-pack proceedings***

Article 28 of the Proposal provides that Member States must ensure that the purchaser acquires the debtor's business or part thereof free of debts and liabilities unless the purchaser expressly consents to assuming such debts and liabilities. That consent to the assumption is necessary for the continuation of the necessary reciprocal agreements provided for in Article 27 of the Proposal. Those agreements aside, the acquisition – as is usual in bankruptcy cases – will be made free of debts and liabilities.

31 Proposal, p. 31, at (27) and Article 26(2) of the Proposal.

32 See: T.T. van Zanten, *De overeenkomst in het insolventierecht* (doctoral thesis), Deventer: Kluwer 2012, p. 362.

This provision also implies that the exception provision in Article 5 of Directive 2001/23 *must* apply to pre-pack proceedings. After all, the labour-law protection afforded to employees upon the transfer of a business within the meaning of Directive 2001/23 conflicts with Article 28 of the Proposal. National legislation, to which the exception provision of Article 5 of Directive 2001/23 does not apply, will also conflict with this provision upon an acquisition after bankruptcy.

2.12 ***Specific rules on the suspensive effect of appeals***

Article 29(1) of the Proposal provides that the Member States must ensure that their legislation offers the possibility to appeal court decisions relating to the authorisation or execution of the sale of the debtor's business. The court with jurisdiction to hear those appeals is the court that has jurisdiction over the pre-pack proceedings. These decisions may only have a suspensive effect if the appellant furnishes security that is sufficient to cover any loss or harm that may be caused by suspending the execution of the sale. The court has full discretion to exempt an appellant from the obligation to furnish security if the appellant is a natural person, if an exemption were considered to be suitable given the circumstances.[33]

From my perspective, the Proposal falls short of the mark in this respect. In my view, in accordance with current Dutch bankruptcy law, there should be no option to appeal a court decision authorising a sale. First, because the monitor's – and the court's – supervision of the sale process already ensures an external review of the sale desired by the debtor. Second, the authorisation given by the court ensures a second judicial review immediately after the preparation phase transitions into the liquidation phase. The initiation of an appeal would create uncertainty that would not be compensated for by the furnishing of security proposed in the Proposal. Specifically, this uncertainty might mean that a given sale will never come about at all. The option of appeal or of hearing certain parties obviates the entire advantage achieved by the preparation phase, which after all makes it possible to proceed to effectuating the sale immediately after the insolvency is declared.

2.13 ***Criteria to select the best offer***

Article 30 of the Proposal provides that Member States must ensure that the criteria to select the best bid in the pre-pack proceedings are the same as the criteria used to select between competing offers in winding-up proceedings.

It would be desirable to have the selection criteria for bids in the pre-pack proceedings harmonised with the selection criteria in the standard insolvency proceedings. In the Netherlands, the insolvency practitioner finalising a bankruptcy must also take societal interests, such as job retention, into account.[34] In the Netherlands, the number of employees who will be offered an employment contract also plays a role in choosing a purchaser. It would be undesirable for the Proposal to require that choice to be made based solely on who submitted the highest bid. Sometimes, the best bid also depends on the purchaser's plans, for example, for the most effective measures to mitigate losses or the continuation of certain social amenities. It would therefore be desirable for the monitor to have to make that choice based on national law.

2.14 ***Civil liability of the monitor and of the insolvency practitioner***

Pursuant to Article 31 of the Proposal, Member States must ensure that the monitor and the insolvency practitioner are liable for the harm or loss incurred by creditors and third parties as a result of their failure to comply with their obligations under Title IV.

This provision is undesirable and may beg the question of whether such a liability standard would actually fall within the scope of the insolvency practitioners' customary professional liability insurance. This stringent standard also begs the question of whether there would be any animus for seeking appointment as a monitor or insolvency practitioner in pre-pack proceedings. In my view, a separate liability scheme should apply to the monitor and insolvency practitioner. This could be done by following up on the *Maclou* standard[35] developed by the Supreme Court of the Netherlands and the standard for the *beoogd curator* which the Supreme Court formulated based on that standard.[36] The monitor and the insolvency practitioner must be guided by the interests of the joint creditors and, in this respect, they must also take into account societal interests, such as the importance of job retention.[37] The monitor must act as may reasonably be expected from a monitor who possesses sufficient insight and experience and who performs their duties accurately and diligently.[38] According to the Supreme Court, the insolvency practitioner's personal liability must always be assessed based on the *Maclou* standard, even if that person acted as the debtor's *beoogd curator* prior to the declaration of insolvency. When applied correctly, the *Maclou* standard takes into account the insolvency practitioner's actions and omissions as a *beoogd curator* prior to the bankruptcy as well as the knowledge they acquired while acting in that capacity.[39]

33 Article 29(2) of the Proposal.

34 See: Supreme Court 24 February 1995, ECLI:NL:HR:1995:ZC1643 (*Sigmacom II*); Supreme Court 19 April 1996, ECLI:NL:HR:1996:ZC2047 (*Maclou*); Supreme Court 19 December 2003, ECLI:NL:HR:2003:AN7817 (*Mobell v Interplan*).

35 Supreme Court 19 April 1996, ECLI:NL:HR:1996:ZC2047 (*Maclou*).

36 Supreme Court 4 October 2019, ECLI:NL:HR:2019:1492 (*Ruwaard van Puttenziekenhuis*).

37 Cf. Supreme Court 4 October 2019, ECLI:NL:HR:2019:1492 (*Ruwaard van Puttenziekenhuis*), para. 3.2.1.

38 Cf. Supreme Court 4 October 2019, ECLI:NL:HR:2019:1492 (*Ruwaard van Puttenziekenhuis*), para. 3.2.3.

39 Cf. Supreme Court 4 October 2019, ECLI:NL:HR:2019:1492 (*Ruwaard van Puttenziekenhuis*), para. 3.2.4.

Based on the foregoing, it would be desirable for the Proposal to include a provision requiring a monitor and insolvency practitioner to act properly, as may reasonably be expected from an insolvency practitioner who possesses sufficient insight and experience and who performs their duties accurately and diligently. Personal liability may arise if the monitor or insolvency practitioner acts contrary to this standard.

2.15 ***Parties closely related to the debtor in the sale process***

Pursuant to Article 32 of the Proposal, Member States must ensure that parties closely related to the debtor are also eligible to acquire the debtor's business or part thereof, provided that all of the following conditions are met:

a) they disclose their relationship to the debtor in a timely manner to the monitor and to the court;
b) other parties to the sale process receive adequate information on the existence of parties closely related to the debtor and their relationship to the debtor;
c) parties not closely related to the debtor are granted sufficient time to make an offer.

If the offer made by a party closely related to the debtor is the only existing offer, Member States must introduce additional safeguards for the authorisation and execution of the sale. These safeguards must at least include the duty for the monitor and the insolvency practitioner to reject the offer from the party closely related to the debtor if the offer does not satisfy the best-interest-of-creditors test.[40]

It is important to the due care to be exercised during the sale process that a provision be included for a purchaser that is closely related to the debtor. This provision would allow for the prevention of abuse. In my view, it would be wise not to prohibit a sale to a party that is closely related to the debtor. Sometimes a sale to such a party is the only and the best option. The safeguards included in this provision are adequate and counterbalance the fact that the preparation phase was confidential, and parties who are closely related to the debtor can usually submit bids much more quickly than third parties. The advantage of parties closely related to the debtor entails risks regarding the amount of the purchase price, because third parties are often unable to submit adequate bids as quickly. This provision would mitigate those risks.

2.16 ***Measures to maximize the value of the debtor's business or part thereof***

Article 33 of the Proposal contains various provisions that are intended to maximise the value of the debtor's business. If interim financing is needed, the monitor must ensure that this is obtained at the lowest possible cost. Providers of interim financing are entitled to receive payment with priority in insolvency proceedings and they may be granted security interests in the sale proceeds. Member States should allow secured creditors to participate in the bidding process in the pre-pack proceedings by offering the amount of their secured claims as consideration for the purchase of the assets in respect of which they have been furnished security ("credit-bidding"), but only when the amount of their secured claim against the debtor's assets is significantly lower than the market value of the business so that they are not unfairly advantaged in the bidding process.[41]

This provision ensures the possibility of providing financing and the furnishing of security. This provision merits further attention. Given that this provision also regards the monitor, and thus the preparation phase, one might wonder how this provision stands in relation to the fact that the debtor retains the power of disposition. Can monitors themselves procure credit and establish security? How can the legislature now ensure that this is done at the lowest possible costs? Must Article 33(1)(c) be understood as prescribing that creditors of secured claims must be subordinated when the proceeds are allocated? That strikes me as undesirable and would meet fierce resistance from banks and other financiers. The furnishing of security during liquidation proceedings must not result in the erosion of security interests that have already been established. If security is furnished in the liquidation phase, such security may only comprise security interests that existing financiers were unable to acquire because national law prohibited them from acquiring additional security interests in that property after the declaration of insolvency.

2.17 ***Protection of the interests of the creditors***

Article 34(1) of the Proposal provides that creditors and shareholders have the right to be heard by the court before the authorisation and execution of the sale. This provision excludes creditors or shareholders who are "out of the money".

The provision in Article 34(1) of the Proposal would only be desirable if the hearing could be held in the short term. This means that the provision must be worked out in more detail, in the sense that the hearing must be held in the shortest term possible.

The exclusion of creditors or shareholders who are out of the money strikes me as undesirable. It is precisely when these parties are out of the money that they wish to be heard because they might have another feasible transaction in mind that could put them "in the money".

Article 34(3) of the Proposal also provides that Member States must ensure that security interests are released in pre-pack proceedings under the same requirements that would apply in winding-up proceedings.

Article 34(4) of the Proposal provides that Member States in which consent from holders of secured claims is required in

40 Article 32(2) of the Proposal.

41 Article 33(3) of the Proposal, and Proposal, p. 32, at (30).

winding-up proceedings for the release of security interests may depart from requiring such consent, provided that the security interests relate to assets that are necessary for the continuation of the day-to-day operations of the debtor's business or part thereof and one of the following two conditions is fulfilled:

a) the creditors of secured claims fail to prove that the pre-pack offer does not satisfy the best-interest-of-creditors test;
b) the creditors of secured claims have not filed (directly or through a third party) an alternative binding acquisition offer that allows the insolvency estate to obtain a better recovery than with the proposed pre-pack offer.

This provision restricts the rights of secured creditors. Article 57(1) of the Bankruptcy Act provides that pledgees and mortgagees may exercise their rights as though no bankruptcy has occurred. This provision would negate this right and at first blush would seem to entail a comprehensive change, at least in terms of Dutch practice. This provision would entail a farther-reaching erosion of secured creditors' rights than would a cooling-off period requiring the secured creditor to wait before proceeding with enforcement. The provision currently being proposed gives no indication of whether the secured creditors also lose their rights to the proceeds of the sale of the goods to which their security interests pertain. My view, in any case, is that this should not be so because of the enormous impact this would have on financiers' provision of credit and would effectively make the security interests illusory. I also assume that this provision exclusively regards the authorisation of the sale and release of security interests, in which respect a right to all or part of the sales proceeds is simultaneously acquired (or retained). This could still be clarified in this provision. If that is not the purport of this provision, then it must be scrapped.

To the extent that the provision "only" entails that secured creditors must cooperate with releasing their security in the event of a sale in the context of pre-pack proceedings, but must do so based on their national-law rights to the proceeds of the sale, the secured creditors' rights do not actually seem to be subject to erosion. The relevant sale must serve the creditors' interests, based on which, as a result of the sale effectuated by the monitor and insolvency practitioner, secured creditors are to receive payment of their part of the claim through the best procedure.

2.18 *Impact of competition law procedures on the timing or the successful outcome of the bid*

Article 35 of the Proposal contains desired provisions that are intended to mitigate competition-law implications as much as possible.

What follows are several suggestions for supplementing Title IV of the Proposal. These provisions would ensure even more due care in pre-pack proceedings.

3. Suggestions for supplementing the proposal

3.1 *Position of the Works Council*

Articles 3 and 4 of Directive 2001/23 do not apply during the liquidation phase of pre-pack proceedings,[42] but it is important that the legislation in the Member States do contain rules about the involvement, during both the preparation and liquidation phases, of any Works Council which the debtor may have established. This ensures the Works Council is kept apprised of developments that may affect the business and – in particular – jobs. It also allows the Works Council to better utilise the arrangements included in national legislation, such as opposition to a declaration of insolvency, if, in the Works Council's view, the latter involves an abuse of law. Citing the Supreme Court's findings in the *DA* judgment,[43] one option could be to include a provision to the effect, which would entail that if the debtor has established a Works Council, the insolvency practitioner must, immediately after the declaration of insolvency, afford that Works Council the opportunity to issue a written, substantiated formal opinion regarding the insolvency practitioner's proposed resolution to sell the business. In connection with the special nature of bankruptcy proceedings and the need for rapid but careful decision-making, the Member States' legislation could include exceptions to the usual procedure for obtaining a formal opinion from the Works Council.[44]

For the preparation phase, during which no resolutions can be passed, it would be sufficient to inform the Works Council – thoroughly, in a timely fashion and subject to a duty of confidentiality – of the most important developments occurring in the preparation phase.

Incidentally, it is my view that, in the Netherlands, account must also be taken of all the provisions of labour law that continue to apply during bankruptcy even after the declaration of insolvency, such as the provisions in Article 3 of the Collective Redundancy Notification Act (*Wet melding collectief ontslag*) that applies if a case involves the dismissal of 20 or more employees. In that context, the insolvency practitioner is required to notify the trade unions of the termination.[45] The same goes for the provisions in Article 7 of Directive 2001/23, which includes a duty to notify the trade unions upon the transfer of a business.

42 Article 20(2) of the Proposal.
43 Supreme Court 2 June 2017, *JAR* 2017/172 (*OR v DA Retailgroep*).
44 In the Netherlands, for example, the four-week deferment period pursuant to Article 25(6) of the Works Councils Act (*Wet op de ondernemingsraden*; "WOR") that applies if a negative opinion is issued and the possibility that Article 26 of the Works Councils Act offers to appeal a business owner's decision to the Enterprise Court, would not mesh well with pre-pack proceedings.
45 For more on this topic, see, among others: J. van der Pijl, *Arbeidsrecht en insolventie* (*Monografieën Sociaal Recht* no. 75), Deventer: Kluwer 2019, pp. 307-311.

3.2 *Impossibility of terminating certain reciprocal agreements*

It is necessary, as a continuation of Article 27(1) of the Proposal, to include a provision to the effect that an application to initiate pre-pack proceedings will not constitute a ground for changing the rights and obligations held by or in respect of the debtor under the law of obligations, for suspending performance of an obligation in respect of the debtor, or for dissolving an agreement concluded with the debtor. The initiation of pre-pack proceedings cannot constitute a reason for dissolving a reciprocal agreement. Such a provision is important to prevent a situation in which the contact between the debtor and the banks/suppliers which is necessary for the success of pre-pack proceedings results in continuity problems because these parties go on to seek dissolutions or suspensions.

Naturally, a reciprocal agreement can be terminated even during pre-pack proceedings if there is a ground for dissolution, such as an attributable failure to perform, This ground for dissolution must have arisen after the acquisition, because otherwise, this arrangement would not achieve the desired objective. The mere fact that it concerns pre-pack proceedings cannot constitute a reason for dissolution during the pre-pack proceedings.

Since 1 January 2021, when the act on the confirmation of out-of-court restructuring plans (WHOA) entered into effect, Dutch bankruptcy law has provided that *ipso facto* clauses[46] cannot be used against the debtor.[47] Since this act entered into effect, the preparation or offer of a private composition could no longer serve either to alter or suspend the obligations and commitments under an agreement or to dissolve the agreement. It would also be desirable to include such a provision in the European rules on pre-pack proceedings.

3.3 *Post-proceedings disclosure via reporting*

The preparation process is accomplished in a confidential preparation phase. The liquidation phase is open to the public. In order to compensate for the lack of transparency in the preparation phase, the insolvency practitioner must release public reports soon after the liquidation phase is opened. This will allow interested parties to rapidly familiarise themselves with the monitor's supervision and still allow them the opportunity to oppose the liquidation phase if, for example, they believe that bankruptcy laws have been abused. It would be desirable for the Proposal to call on Member States to include a provision on this point in their legislation.

3.4 *Directors and officers liability*

The success of pre-pack proceedings largely depends on the cooperation of the debtor's board of directors. It is extremely important for all necessary information to be provided to ensure the proper and careful course of the pre-pack proceedings. It would be desirable for the Proposal to direct the Member States to ensure that their legislation contains a provision enabling the debtor's directors and officers to be held personally liable in the liquidation phase if they failed to properly perform their duty to inform the monitor. This also prevents abuse.

3.5 *Appointing a supervisory insolvency judge*

When a monitor is appointed, the court must also appoint a member of that court to supervise the manner in which the monitor performs their work. This will promote a careful preparation of the sale and the bankruptcy proceedings. This member will then be appointed to serve as the supervisory bankruptcy judge in the liquidation phase, depending on the arrangements the Member State has made in this respect.

3.6 *Pre-pack proceedings as the statutorily prescribed introduction to insolvency proceedings*

Consideration may be given to including a provision that pre-pack proceedings are the prescribed manner of opening insolvency proceedings for several specific businesses that serve the public interest, such as hospitals, educational institutions, and energy suppliers. Societal interests play a major role in those cases and a quiet preparation phase could limit societal unrest and harm or loss for large groups of people. Upon receiving a substantiated application from the debtor, the court may hold that pre-pack proceedings represent no added value in a given case and proceed immediately to issuing a declaration of insolvency.

4. Conclusion

In the wake of *Smallsteps*, some authors asserted that this judgment did not necessarily spell the end for pre-pack practice and that the judgment did not apply to ordinary post-bankruptcy restart practice.[48] Other authors asserted that the judgment would not only spell the end for pre-pack practice, but also for post-bankruptcy restarts that had been

46 An *ipso facto* clause allows a party to an agreement to unilaterally terminate the agreement, or terminates the agreement by operation of law, in the event of bankruptcy, any other insolvency-related situation, or due to the counterparty's poor financial situation.

47 Article 373(3) of the Bankruptcy Act.

48 See, *inter alia*: N.W.A. Tollenaar, '*De implicaties van Estro voor de pre-pack en WCO I*', *TvI* 2018/6 and *TRA* 2018/15; I. Spinath, '*De beperkte reikwijdte van het Smallsteps-arrest*', *MvO* 2017, nos. 10 & 11, pp. 253-256; S.C.J.J. Kortmann/L.P. Kortmann, '*Doorstarten post-Estro; smallsteps vooruit of een giant leap achteruit?*', in C.J.H. Jansen, M.M.C. van Moosdijk, R.W.E. van Leuken (eds.), *Nijmeegs Europees Privaatrecht (Liber amicorum prof Sieburgh)*, Deventer: Wolters Kluwer 2018, pp. 31-46; L.G. Verburg, '*Smallsteps: over de vraag of de gewone doorstart uit faillissement nog toekomst heeft*', *FIP* 2017/334; M.R. van Zanten, 'It takes Smallsteps to pre-pack, een analyse', in: E.J.R. Verwey, P.W. Schreurs, M.A. Broeders (eds.), *De Curator en het Personeel (INSOLAD Jaarboek 2018)*, Deventer: Wolters Kluwer 2018, pp. 54-60.

prepared before bankruptcy.[49] Since *Heiploeg*, pre-pack proceedings have been taking centre stage in both the Netherlands and in Brussels, and this time in a positive sense. The Dutch legislature must now decide on several legislative proposals that have not yet been passed into law.[50]

The Proposal discussed in this contribution represents significant support for the continuation (rebirth) of pre-pack practice in the European Union. In his more recent supplementary opinion in *Heiploeg*, Dutch Supreme Court Advocate General Drijber asserted that the pre-pack, which seemed dead in the water after the judgment in *Smallsteps*, seems to have just been slumbering, but only proper statutory rules can truly unlock its full potential.[51]

The substantive judicial objections asserted against the pre-pack proceedings in *Heiploeg* were insufficient to secure a ruling that the exception provided for in Article 5(1) of Directive 2001/23 applies in every situation. Although an assessment must be made on a case-by-case basis as to whether the purpose of an individual case is liquidation, it seems that, in the wake of the judgment in *Heiploeg*, that is not a genuine obstacle to applying the exception provision. What remains is a procedural matter that currently stands in the way of the pre-pack practice: specifically, the absence of statutory or regulatory rules. If the Proposal is passed, the Member States will be charged with implementing such statutory rules. Although this process will take several years, it is important for practice. Pre-pack practice cannot be awakened without such provisions.

For the pre-pack practice to be resumed in anticipation of European legislation, it would be desirable for the Dutch Senate to pass the Continuity of Enterprises Act I as soon as possible. The introduction of the Proposal, in combination with the judgment in *Heiploeg*, is a solid impetus for this. In this respect, the Legislative Proposal on the Transfer of Bankrupt Businesses Act and the Amended Continuity of Enterprises Act I need not be introduced, given the clarity that has since been provided by the CJEU. Furthermore, it seems as though the Legislative Proposal on the Transfer of Bankrupt Businesses Act conflicts with the provisions in Article 28 of the Proposal and with the rationale underlying the proposed European rules on pre-pack proceedings. Specifically, these rules are premised on the exception provision regarding employee protection upon the transfer of a business, while it is precisely the exception provision from which the Legislative Proposal on the Transfer of Bankrupt Businesses Act will deviate. The benefit of enacting the Continuity of Enterprises Act I in anticipation of the passage of the Proposal is that pre-pack proceedings can again be used in practice.

The Proposal contains provisions for the Member States' legislation on pre-pack proceedings which are desirable and necessary for practice. One provision, as mentioned in this contribution, can be scrapped. The Proposal offers sufficient safeguards for a careful sale process with the objective of realising the highest possible proceeds for the joint creditors. This would limit the loss as much as possible for everyone involved when the debtor is insolvent and a declaration of insolvency is imminent. This contribution contains suggestions for several additional provisions. European insolvency practice would benefit from the rapid passage of the Proposal that would allow for the rapid yet careful preparation and execution of the sale of a business immediately after a declaration of insolvency.

49 See, *inter alia*: J. van der Pijl, '*Het Smallsteps-arrest van het Hof van Justitie van de Europese Unie ECLI:EU:C:2017:489*', *Tijdschrift voor Arbeid & Onderneming* 2017, no. 3, p. 125; J.R. Hurenkamp, '*Ondergang van onderneming door de pre-pack?*', *TvI* 2017/21; F.M.J. Verstijlen, '*De dubbele natuur van de doorstart'*, *TvI* 2017/20; J.F. Fliek/F.M.J. Verstijlen, '*De eerste stappen voorbij Estro*', *TvI* 2018/7; P.R.W. Schaink, '*Het arrest van het Hof van Justitie inzake FNV c.s./Smallsteps*', *TvI* 2017/22.

50 The Continuity of Enterprises Act I, the Legislative Proposal on the Transfer of Bankrupt Businesses Act (*Wetsvoorstel overgang van onderneming in faillissement*), which was issued for consultation on 29 May 2019 and the Amended Continuity of Enterprises Act I (*Novelle WCO I*) which was issued for consultation on 25 May 2021.

51 Supplementary opinion of AG Drijber dated 31 March 2023 in *Heiploeg*, ECLI:NL:PHR:2023:368, at 3.1.