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**The Pre-Pack in the Context of the *Heiploeg* Case before the CJEU: A Polish Perspective**

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*Introduction*

In Poland, the pre-packaged sale, also called the pre-pack administration, has been possible since 2016, as a result of important amendments to Bankruptcy Law and Restructuring Law – introduced via the Act of 15 May 2015. The pre-pack has grown in popularity, though some pitfalls occurred when two important cases were brought to the Court of Justice of the European Union (CJEU), namely *Smallsteps* (also known as *Estro*) (C-126/16) and *Plessers* (C-509/17) cases.

As a consequence of the first case especially, *Estro* or *Smallsteps*, the opinion of Polish government was that this required amendments to the Bankruptcy Law provisions regulating pre-packs. Within the legislative process, numerous experts contested this need and presented opinions proving that amendments are not required and they may make the Polish pre-pack less popular for the business. Indeed, after the amendments – introducing direct application of the Article 23[1] of the Polish Labour Code to a bankruptcy sale – the popularity of pre-packs went significantly down, with an estimated decrease of perhaps half of projects.

The amendment provided for applying the Labour Code rule that the transferor and the transferee of business can be held liable on a joint and several liability basis for the wages of employees. This rule was quite extraordinary within the Polish insolvency law system, because the main rule therein provided that the acquirer within bankruptcy proceedings does not share liability for old debts connected to the bankrupt–debtor who sells their business (the trustee is normally a party to the sale–purchase agreement). This rule, stated clearly in Article 317 of the Polish Bankruptcy Law is known as the execution sale effect. Its meaning is crucial for acquirers of the distressed businesses because, usually in insolvency related cases, there is not much time to conduct thorough, complex and complete due diligence. On the other hand, there is no need to provide extra protection for creditors, because they will be satisfied from the sales price obtained by the trustee.

To mention one obvious fact, satisfaction at a lower level is always better than no satisfaction at all, which could be an issue where the acquirer is not interested in a sale–purchase of a bankrupt/debtor’s enterprise.

The *Smallsteps* case concerned the Dutch pre-pack, which was not regulated by provisions of statutory law, but was rather a soft-law concept. Also, there were appointed a provisional court supervisor and provisional judge overlooking the transaction. These factors led the ECJ to the conclusion that the pre-pack in the Netherlands does not enjoy the privilege set forth in Article 5(1) of 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 (TUPE Directive), because it does not fulfil the criteria set out in the text.

In Poland, the situation was slightly different, as the pre-pack sale is regulated within bankruptcy law and an interim court supervisor is appointed by the bankruptcy court, like the judge-commissioner at the next level. It is also important to note that the Polish pre-pack is meant to liquidate the business, though allowing the quick sale of the debtor/bankrupt’s enterprise (or important assets) as a going concern, but within the ruling (court decision) declaring bankruptcy.

All these factors and arguments did not lead the Polish government to change its decision over the proposed amendment touching joint and several liability of the transferor and the transferee.

*The Heiploeg Effect*

Fortunately (at least for pre-packs), in a more recent judgement – *Heiploeg* (C-237/20), the CJEU lifted conditions for the Dutch pre-pack a little bit. The judgement provided that the criteria from the TUPE Directive are satisfied where the transfer of all or part of an undertaking is prepared, prior to the institution of insolvency proceedings with a view to the liquidation of the assets of the transferor and in the course of which that transfer is carried out, in the context of a pre-pack procedure which has as its primary aim to enable, in the insolvency proceedings, a liquidation of the undertaking as a going concern satisfying, to the greatest extent possible, the claims of all the creditors and preserving employment as far as possible.

This is provided that the pre-pack procedure is governed by statutory or regulatory provisions and – also with regard to the transfer of all or part of an undertaking – is prepared in the context of a pre-pack procedure prior to the declaration of insolvency by a ‘prospective insolvency administrator’ under the supervision of a ‘prospective supervisory judge’. Moreover, the agreement concerning that transfer should be concluded and performed after the declaration of insolvency with a view to the liquidation of the transferor’s assets.

The *Heiploeg* judgement proves that careful consideration and thorough analysis of the facts of each case is crucial to reaching guidance for other like cases. Therefore, the Polish pre-pack still can be a method of liquidation with the aim thereto, but also enables the saving of workplaces, thus combining the aim of liquidate and restructuring. In the author’s view, this does not infringe the direction of the EU case-law because the liquidation purpose of the process prevails.

Although Polish law has changed a little bit, the conclusions presented above allow the author to claim that, if the case were of Polish origin, the CJEU would most probably allow the application of Article 5(1) of the TUPE Directive. This is mainly because the abovementioned domestic amendments to the pre-pack process do not affect its most important feature, namely that the pre-pack in Poland aims to liquidate a business and not continue operations.

*The One-Judgment Rule*

The importance of the one-judgement rule should also be stressed. As already mentioned, in Poland, pre-pack sale conditions are approved in the same judgement as the declaration of bankruptcy. There is no provisional trustee or provisional judge. In fact, these bodies start operating immediately after their appointment in the judgement declaring bankruptcy. Even well before, an interim court supervisor is appointed, who supervises the transaction and give an opinion to the court on the merits and also about the proposed sale-purchase conditions.

As mentioned in the *Heiploeg* case, the accent should be placed on the presence of regulatory or statutory law provisions, a criterion met within Polish law. It is even more important that the pre-pack process law provisions are set forth in the Bankruptcy Law, not the Restructuring law – covering mainly the restructuring proceedings. Conversely, if the main aim and purpose of the pre-pack will be restructuring, not liquidation, these rules should be placed within the Restructuring Law – especially bearing in mind that the Act of 15 May 2015 precisely regulated 4 restructuring proceedings and additionally significantly amended the law – not only the Bankruptcy Law, but also other legal acts, including judiciary system short reform in this regards.

*Conclusion*

The pre-pack process in Poland continues to evolve. Other recent changes to the pre-pack process require the notification of the filing of a bankruptcy petition together with the pre-pack application (which should be assessed as an advantage), as well as the necessity to pay security deposit in the amount of 10% of the proposed price for the pre-pack subject. Moreover, a formal auction process has been introduced, applicable when multiple petitioners are interested in the pre-pack transaction. This all combines to ensure the relevance of the pre-pack to Polish insolvency law.