

PRE-PACK POOL: IS IT WORTH IT?

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Abstract

Legislators often set ambitious objectives when they reform the rules/regulations of insolvency practice. In order to achieve their objectives, they choose between two main strategies. They either (i) impose new rules and practices; or (ii) nudge parties towards adopting non-binding behaviour which is in line with the reformed objectives, but to a certain extent inconsistent with the established legal culture and practice.

This article considers the recent attempt carried out in England and Wales to reform pre-pack practices by means of industry-led mechanisms. In particular, it analyses the changes introduced by one of the key recommendations of the Graham Report: the Pre-Pack Pool ('the Pool').

This paper describes the mechanics of this assessment panel, investigates its functioning and tries to explain the reasons behind the low uptake rate of this voluntary measure. It concludes by arguing that, to be worth the time and effort already put into establishing the Pool, relevant changes and perhaps mandatory measures may be needed to promote the significant shifts in insolvency practice encouraged by the legislator.

Keywords: Insolvency Culture; Insolvency Reform; Pre-pack procedure; Pre-pack Pool; England; Corporate insolvency.

1. Foundations

Whenever legislators seek to modify established practices in the insolvency industry, they face a choice between imposing new mandatory rules or nudging parties to embrace a new approach by means of best practices and recommendations on a voluntary basis. “Nudging” refers to the law-reform choice to promote innovative practices while preserving the stakeholders’ rights to go their own way and continue to adopt conventional procedures.¹ A recent work suggested that hard laws may not be the optimal instrument to promote compliance with policy objectives in the cross-border insolvency context. This conclusion applied even where legislators sought to depart from established practices in the industry.² Do the same conclusions apply in purely domestic situations?

This paper looks at recent reforms that have adopted nudging approaches in domestic contexts to promote a significant breakthrough in insolvency practice. It analyses the English de-regulatory measures designed to address the potential abusive use of pre-pack procedures by connected parties. The English reforms sought to modify the behaviour of players in the distressed market, i.e. those parties connected to the insolvent debtor that were willing to buy the distressed company or business by means of a quick formal insolvency procedure.

The Pool represented one of these measures and one of the most recent attempts to significantly amend the existing insolvency practice by means of voluntary and industry-led actions. Its success or failure might determine more in general the future desirability to rely on nudging approaches to reform domestic corporate insolvency practices.

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¹ R Thaler and CR Sustein, *Nudge* (Yale University Press: New Haven, CT, 2008); CR Sustein, *Why Nudge?* (Yale University Press: New Haven, CT, 2014); A Alemanno and A Sibony, *Nudge and the Law: A European Perspective* (Hart Publishing: Oxford, 2017).

² I Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (OUP: Oxford, 2018), arguing that to promote the establishment of a system of modified universalism a series of model laws represents the optimal tool to close gaps and overcome biases, despite its soft law nature.

This article considers and assesses the degree of success of the introduction of the Pool in English corporate insolvency practice. After a brief introduction on “nudging practices”, in section 2 the paper introduces the problem of pre-pack sales to connected parties. Section 3 describes the English de-regulatory approach to this problem by analysing the mechanics and rationale of the Pool and by testing how it has worked in the first years of practice. Section 4 considers different suggestions on how to address the shortcomings of the current implementation of the Pool and the final section concludes with the author’s view on the nudging approach adopted by the English legislature on pre-pack sales to connected parties.

2. Nudging and Pre-Packing in England

The partition between mandatory and nudging approaches is not always neat. With reference to regulatory reforms, the legislator may introduce a system of incentives and penalties that promotes (and not simply imposes) the use of the newly introduced rules. Vice versa, whenever the legislator opts for preserving the parties’ autonomy to continue to do business as usual, it may either restrict the options originally available to them or their discretion. A system of incentives and penalties is usually put into place whenever the legislature opts to reform corporate practice by means of de-regulatory, industry-led measures. The Pool is no exception and it deals with pre-pack sales to connected parties.

Pre-pack administrations³ are by nature controversial mainly because they seem to promote the interests of purchasers, sophisticated creditors and (sometimes) existing shareholders at the expense of less sophisticated and unsecured claimants. Nonetheless, they have proven hugely popular among debtors to preserve the going concern value of a company, especially when the purchaser is a party connected or associated with the distressed entity or its

³ See generally: V Finch and D Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn CUP, Cambridge 2017) Ch. 10; I Fletcher, *The Law of Insolvency* (5th edn Sweet & Maxwell, London 2017) [16-029] – [16-031].

management. At the same time, recent reviews⁴ and studies⁵ of the pre-pack administration process have concluded that these sales are beneficial to the economy and society at large.

To address some of the transparency and accountability concerns raised by pre-packs, the English government introduced a series of industry-led reforms in 2015. One of the innovations was the Pool. It was the intention of the legislator to design the Pool to encourage parties to adopt practices that would have increased transparency and accountability of pre-packs to connected parties and the survival rate of purchased businesses. In other words, it was designed to promote a change in established corporate insolvency practices.

Commentators and recent figures on the use of this voluntary mechanism⁶ raise doubts that these policy objectives have been achieved. It is pertinent, therefore, to investigate if the rationale behind the recognition of pre-pack sales to connected parties is still actual. In case of an affirmative answer, it is also proper to reflect on whether alternative, mandatory approaches are better suited to achieve the policy objectives.

2(a). Pre-packs in England

According to SIP 16, para.1 a pre-pack sale is:

‘an arrangement under which the sale of all or part of the company’s business or assets is negotiated with a purchaser prior to the appointment of an administrator

⁴ T Graham, ‘Graham Review into Pre-pack Administration: Report to the Rt Hon Vince Cable MP’ *The Insolvency Service* (London, 16 June 2014) <<https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration>> accessed 4 June 2018.

⁵ P Walton and C Umfreville, ‘Pre-Pack Empirical Research: Characteristics and Outcome Analysis of Pre-Pack Administration – Final Report to the Graham Review’ (University of Wolverhampton, April 2014) <<https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration>> accessed 4 June 2018.

⁶ See below 3(a).

and the administrator effects the sale immediately on, or shortly after, appointment.⁷

Despite accounting for only a fraction of all insolvency procedures,⁸ pre-pack sales ('pre-packs') have received considerable attention from the public⁹ and commentators.¹⁰ This is partially due to the statistics which show that pre-packs represent a significant portion of all administrations¹¹ and to the perception that they are used primarily in the interests of the debtor, the secured creditors and the purchasing party to the detriment of all other stakeholders.

In the past, critics have often raised doubts on their legality *per se*¹² and complained that pre-pack businesses are not marketed in a competitive manner,¹³ which may lead to undervalue sales.¹⁴ Creditors' rights are significantly restricted compared to the procedural and

⁷ R3, 'Statement of Insolvency Practice 16 – Version 3' (effective from 1 November 2015) <<https://www.r3.org.uk/what-we-do/publications/professional/statements-of-insolvency-practice/e-and-w/sip-16-list>> accessed 4 June 2018.

⁸ According to the latest available data, out of 17,290 companies entered into formal insolvency procedures in the period 1 January – 31 December 2017, but only 1,316 (7.6 per cent) filed for administration: The Insolvency Service, 'Insolvency Statistics – January to March 2018 (Q1 2018)' (27 April 2018) <<https://www.gov.uk/government/statistics/insolvency-statistics-january-to-march-2018>> accessed 5 June 2018.

⁹ V Finch, 'Pre-Packaged Administrations and the Construction of Property' (2011) J.C.L.S. 1, ftn 2; P Walton, 'When is Pre-packaged Administration Appropriate? – A Theoretical Consideration' (2011) 20 Nott. L.J. 1, ftn. 10.

¹⁰ Among others, see: L Conway, *Pre-pack Administrations* (House of Commons Library, 20 January 2016) (No. CBP5035).

¹¹ From 2010 to 2017, pre-packs have consistently represented roughly one out of four administrations: Pre-Pack Pool, 'Annual Review 2017' (May 2018) 6 <<https://www.prepackpool.co.uk/uploads/files/documents/Pre-pack-Pool-Annual-Review-2017.pdf>> accessed 4 June 2018.

¹² P Walton, 'Pre-packaged Administration: Trick or Treat?' (2006) 19(8) *Insolv. Int.* 113 (advocating against the legality of pre-packs because they are administrations in which it is not possible to pursue one of the main objectives of the procedure, i.e. rescuing the company as a going concern); P Walton, 'Pre-packin' in the UK' (2009) 18 *Int. Insolv. Rev.* 85. However, English courts have long accepted the legitimacy of this procedure: *Re T&D Industries Plc* [2000] 1 WLR 646, 652 [A] – [H] (where Neuberger J – as he then was – argued that the question whether an administrator can conclude a pre-pack sale is normally an administrative or commercial decision, on which the court has nothing useful to say); *Re Transbus Int'l Ltd (in liq.)* [2004] EWHC 932 (Ch), [2004] BCC 401; *DKLL Solicitors v HM Revenue & Customs* [2007] EWHC 2067 (Ch), [2008] 1 BCLC 112; *Re Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC 3199 (Ch), [2010] BCC 295; *Re Kayley Vending Ltd* [2009] EWHC 904 (Ch), [2009] BCC 578 as commented by R Tett and others, 'Pre-pack administration: court considers its discretion and pre-appointment costs' (2009) 22(8) *Insolv. Int.* 123.

¹³ D Flynn, 'Pre-pack Administrations – A Regulatory Perspective' (Summer 2006) *Recovery* 3; S Frisby, 'A Preliminary Analysis of Pre-Packaged Administrations' *R3* (London, August 2007) 49 (stating that in only 7.9 per cent of pre-packs the company was marketed, compared to a figure of 55.6 per cent for corporate sales without pre-packs).

¹⁴ J Moulton, 'The Uncomfortable Edge of Propriety – Pre-packs or Just Stitch-ups?' (Autumn 2005) *Recovery* 2; S Davies, 'Pre-pack – He Who Pays The Piper Calls The Tune' (Summer 2006) *Recovery* 16, 17 (arguing that a small

substantive protections granted by the Insolvency Act 1986 ('IA 1986')¹⁵ as secured claimants can exercise a disproportionately high level of control over the procedure.¹⁶

Additionally, there are concerns that returns to unsecured creditors are lower than in other formal insolvency procedures.¹⁷ The process of pre-packs lacks transparency and accountability, as non-negotiating creditors are presented with a *fait accompli*.¹⁸ In other words, it is biased towards the interests of the secured creditors and the owners of the oldco, thus giving rise to concerns of "phoenixism"¹⁹ and collusion.²⁰ Finally, it has been evidenced that pre-packs are short-term fixes to write-off liabilities that do not ensure the long-term viability of the company.²¹

number of professional bad apples tend to operate via pre-packs to facilitate phoenix trading); Walton, 'Trick or Treat?' (n 12).

¹⁵ Nevertheless, creditors can challenge the decision to pre-pack by submitting a misfeasance application under para.75 Sch. B1 IA 1986, by claiming that the administrator has acted unfairly to harm the interest of the applicant under para 74(1) Sch. B1 IA 1986 or by requesting the removal of the administrator pursuant to para.88 Sch. B1 IA 1986: M Haywood, 'Pre-pack Administrations' (2010) 23 *Insolv. Int.* 17, 21.

¹⁶ S Harris, 'The Decision to Pre-pack' (Winter 2004) *Recovery* 26, 27.

¹⁷ This conclusion is mainly anecdotal, as empirical studies do not show significant differences in the return rate to creditors: S Frisby, 'The pre-pack progression: latest empirical findings' (2008) 21(10) *Insolv. Int.* 154, 157.

¹⁸ V Finch, 'Pre-packaged administrations: bargains in the shadow of the law or shadowy bargains?' (2006) *J.B.L.* 568, 583; Finch, 'Construction of Property' (n 8) 19. It has been observed that with pre-packs, '[t]he first that stakeholders learn is not of insolvency, but of rescue': T Astle, 'Pack up your troubles: addressing the negative image of pre-packs' (2015) 28(5) *Insolv. Int.* 72, 72.

¹⁹ "Phoenixism" 'involves the continued use of a failed company's name, or a similar one, by a director who is also a director in a successor company' (A Kastrinou, 'An analysis of the pre-pack technique and recent developments in the area' (2008) 29(9) *Comp. Law.* 259, 262). It has been argued that there is nothing unlawful or objectionable in such practice, if consideration is appropriate and creditors and clients are not deceived: Frisby, 'The pre-pack progression' (n 17) 156. See also: M Ellis, 'The Thin Line in the Sand – Pre-packs and Phoenixes' (Spring 2006) *Recovery* 3; Y Rotem, 'Small Business Financial Distress and the "Phoenix Syndrome" – A Re-evaluation' (2013) 22 *Int. Insolv. Rev.* 1.

In the Autumn Budget 2017 and Spring Statement 2018, the government announced that it would explore ways to tackle those who deliberately abuse the insolvency regime in trying to avoid or evade their tax liabilities, including through the use of phoenixism. On 11 April 2018, HMRC published a discussion document seeking views on how to tackle taxpayers who abuse the insolvency regime to try and avoid or evade tax, including through phoenixism: <<https://www.gov.uk/government/consultations/tax-abuse-and-insolvency>> accessed 6 June 2018.

²⁰ Frisby, 'A Preliminary Analysis' (n 13) 8-9.

²¹ Empirical data seems to support this claim, as it has been observed that where just over 5 per cent of all pre-packs failed within 12 months from the completion of the sale, the figure rose to around a quarter if the horizon was extended to 36 months. In the same period, just fewer than 20 per cent of businesses sold out of trading administration failed, noticeably less than from pre-packs: Graham (n 4) 33-35.

These criticisms manifest themselves even further when the sale is to a connected party.²²

The *Graham Review* and the *Wolverhampton Report* observed that connected sales in pre-packs result in lower returns to unsecured creditors, lower survival rates and three times higher odds of failure than sales to non-connected parties.²³

However, pre-packs can also be very successful. In fact, not all commentators depict a gloomy picture of the pre-pack phenomenon. Some argue that they should be safeguarded because, when done properly and in the right circumstances, they represent an essential rescue tool.²⁴

The reason for this is that they are a low cost and speedy route to recovery (sometimes the *only* available option),²⁵ create better records of job preservation and – especially in large cases – counter holdout problems associated with vulture funds and debt traders.²⁶

The rise of pre-packs dates back to May 2003, before the Enterprise Act 2002 ('EA 2002') came into force.²⁷ Initially, the only regulation on pre-pack administrations came from case law, thus raising strong criticisms in the academic community²⁸ and public opinion²⁹ due to

²² Under s.249 IA 1986, a person is connected with the company if that person is a director or shadow director of the company, an associate of such a director or shadow director or an associate of the company. Under s.435 IA 1986, a person is associated with an individual or company if he or she is a close family member of the above-mentioned persons. Companies can also be 'associate' of another company if they form part of the same group, for instance.

Rather confusingly, to shield lenders with voting rights associated with their debt, the *Graham Review* adopted a different definition and list of connected and associate parties: Graham (n 4) [9.5] – [9.6].

The risk that the difference in terminology might provide a "safe heaven" for secured creditors has been highlighted elsewhere: Astle (n 18) 74.

²³ Graham (n 4) [7.53] – [7.56] and [7.88] – [7.90].

²⁴ A Bloom and S Harris, 'Pre-packaged administrations – What should be done given the current disquiet?' (2006) 19(8) *Insolv. Int.* 122 (arguing that neither courts nor creditors should have a right to review the deal, because if IPs are fully accountable for their actions, they will ensure to strike the best possible deal for the distressed debtor); L Qi, 'The Rise of Pre-packaged Corporate Rescue on Both Sides of the Atlantic' (2007) 20 *Insolv. Int.* 129, 134 (arguing however that effective control in the form of professional regulation or legislative reforms is needed); S Frisby, 'The second-chance culture and beyond: some observations on the pre-pack contribution' (2009) *LFMR* 242; R Insall, 'Pre-packaged administrations: misguided or misunderstood?' (2010) *C.R. & I.* 99 (arguing that minor changes to the pre-pack process and education of potential creditors should help to improve transparency and confidence); Haywood (n 15).

²⁵ S Frisby, 'A preponderance of pre-packs?' (2008) 1 *JIBFL* 23.

²⁶ *DKLL* (n 12), as commented by Kastrinou (n 19). See generally: Frisby, 'The pre-pack progression' (n 17) 158 (arguing that pre-packs appear to be developing in a constructive manner); Finch, 'Construction of Property' (n 6) 2-8.

²⁷ Frisby, 'A Preliminary Analysis' (n 13) 15-16. However, pre-packs are not a new phenomenon, as before the changes introduced by EA 2002, most of pre-packs was carried out by receivers: Astle (n 18) 72.

²⁸ Walton, 'Trick or Treat?' (n 12); Frisby, 'A Preliminary Analysis' (n 13); Walton, 'Pre-packin' in the UK' (n 12); Haywood (n 15).

the lack of comprehensive and predictable guidance in this area and the risk that interested stakeholders (debtor, secured creditors and buyer) would further their interests at the expense of less sophisticated claimants.

The calls for reform that originated from this debate prompted the profession to adopt some soft-law guidelines in the form of the Statement of Insolvency Practice 16,³⁰ effective since January 2009. Departure from the practices described in SIPs may lead to disciplinary or regulatory actions against the party in breach by his or her licensing body.

Nowadays, pre-packs are still not specifically provided for in insolvency legislation. However, as pre-packs are under the ultimate control of the court (like any other formal insolvency procedure), the administrator must act in the best interest of all the creditors³¹ and failure to do so may make him or her liable for misfeasance.³²

Furthermore, not all problems have been addressed by SIP 16.³³ As part of the Coalition Government's "Transparency and Trust" agenda in July 2013, Teresa Graham CBE was commissioned by the Secretary of State for Business, Innovation and Skills ('BIS'), Sir Vincent Cable, to undertake an independent review of the pre-pack process and its economic impact.³⁴

²⁹ A recent investigation published on the Financial Times suggests that pre-packs to connected parties have been used by the industry to offload almost £4 billion of pension liabilities: L Haddou and J Cumbo, 'Companies use 'pre-packs' to dump £3.8bn of pension liabilities' *Financial Times* (London 9 April 2017) <<https://www.ft.com/content/f3f574fa-0f2c-11e7-a88c-50ba212dce4d>> accessed 5 June 2018.

³⁰ Statements of Insolvency Practice (SIPs) are issued to insolvency practitioners by the regulatory bodies to promote and maintain high standards by setting out required practice and harmonising practitioners' approaches to aspects of insolvency work.

³¹ S.172 Companies Act 2006.

³² S.212 IA 1986.

³³ The most recent report on SIP 16 covers the period 1 January – 31 December 2011. This data was not promising, as the report found that 32 per cent of cases were not fully compliant with SIP 16 disclosure and 7 per cent of them were referred to the relevant authorities for being substantially deficient: The Insolvency Service, 'Annual Report on the Operation of Statement of Insolvency Practice 16: 1 January to 31 December 2011' (7 April 2014) <<https://www.gov.uk/government/publications/statements-of-insolvency-practice-16-sip-16>> accessed 6 June 2018.

A recent report on the activity of insolvency practitioners found that only 62 per cent of SIP 16 statements reviewed were fully compliant with the rules, but the vast majority of the others had breaches that were not considered serious and merely of technical nature: The Insolvency Service, '2016 Annual Review of Insolvency Practitioner Regulation' (March 2017) 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/605331/Annual_Review_Of_IP_Regulation_2016_final.pdf> accessed 6 June 2018.

³⁴ The terms of the review are available in the Graham Report: Graham (n 4) para.5.3.

The *Graham Review into Pre-Pack Administration* ('*Graham Review*', 2014) adopted a similar, less windy definition of a pre-pack sale.³⁵ Its findings were based upon anecdotal evidence, interviews with stakeholders and quantitative data presented in the *Wolverhampton Report*.³⁶

The *Graham Review* found that pre-pack sales – despite being relatively small in number – presented a useful corporate rescue tool that preserved employment and viable businesses and was cheaper than upstream procedures and, therefore by and large, successful.³⁷ At the same time, it observed that there were transparency issues and evidence of less successful outcomes where the pre-pack sale was to a connected party.³⁸ In particular, the *Graham Review* suggested that four key aspects, linked to the lack of transparency in the process were in urgent need of improvement:

1. Lack of transparency in the process pre-sale;
2. Marketing of pre-pack sales;
3. Information available on the valuation methodology; and
4. Lack of evidence of the future viability of the newco.³⁹

To address these issues, Teresa Graham argued for a de-regulatory approach⁴⁰ and the implementation of industry-led changes. In other words, she argued that the government should have nudged (but not forced) parties to abandon established practices and follow behaviours consistent with the finding of the review.

The government endorsed this approach and favoured the introduction of a series of voluntary industry-led measures with the Small Business, Enterprise and Employment Act ('SBEEA') 2015 which received Royal Assent on 26 March 2015. The government reserved for

³⁵ Graham (n 4) para.5.15: '[a]rranging the sale of all or part of a company's undertaking before formal insolvency is entered, with the sale to be executed at or soon after the appointment of an administrator.'

³⁶ Walton and Umfreville (n 5).

³⁷ Graham (n 4) [3.4] – [3.7].

³⁸ Graham (n 4) [3.8] – [3.13].

³⁹ Ibid.

⁴⁰ Graham (n 4) 12 at para.5.5.

themselves the power to introduce subsequent legislation, should the proposed industry-led self-regulation not have the desired effect.⁴¹ This power expires on 25 May 2020, i.e. on the fifth anniversary of the coming into force of the SBEEA 2015 and as a result it is also referred to as the “sunset clause”.⁴²

In December 2017, the Insolvency Service (a governmental executive agency of the Department for Business, Energy and Industrial Strategy – ‘BEIS’) announced that it would be contacting a variety of interested parties to assess the impact of voluntary measures, seek their views and determine whether further regulation is needed prior to the expiration of the regulation making power.⁴³ The review should have been concluded in the first half of 2018, so as to give Parliament enough time to discuss and adopt statutory legislative measures (if such a need arises).

3. The ‘Pre-Pack Pool’: Its Mechanics and The Policy Rationale

The first of the six recommendations⁴⁴ in the *Graham Review* was the creation of a Pool that the purchasers could voluntarily approach in case of a sale to a connected party. Its establishment has primarily been furthered by the BIS Secretary, Vince Cable, and an “Oversight Group” comprising a variety of stakeholders from the corporate and insolvency industry. The aims of the Pool are to increase the transparency of connected pre-pack sales and to provide assurance for creditors that the price agreed for the transaction is a fair one.

⁴¹ Insolvency Act (‘IA’) 1986 para.60A as introduced by s.129 SBEEA 2015.

⁴² C Umfreville, ‘Review of the Pre-pack Industry Measures: Reconsidering the Connected Party Sale Before the Sun Sets’ (2018) *Insolv. Int.* 58, 58.

⁴³ <https://www.gov.uk/government/news/review-of-the-pre-pack-industry-measures>. At the end of this review, the government must decide whether to ban any sales from any administration to a connected party, not just pre-packs.

⁴⁴ Graham (n 4) para.4.

The Pool was launched on 2 November 2015 but it was not met with universal enthusiasm by the 'trade press'.⁴⁵ It is an independent body and a limited liability company constituting of experienced business people who are selected following a public recruitment exercise.⁴⁶ Its members offer an opinion on the purchase of a business and/or its assets by connected parties to a company where a pre-packaged sale is proposed.⁴⁷

Applications are made electronically and sent to Pool members on a rota basis. The Pool aims to provide a response within two business days from the time the application papers and fee (£800 + VAT) have been received.

When a pre-pack sale to a connected party is proposed, the insolvency practitioner should inform the purchaser of the opportunity to approach the Pool. In addressing the Pool, applicants (the prospective purchasers, i.e. the connected parties in the transaction) should provide the details of the old company and the newco that will run the business once the sale has been completed. They should also provide a summary of the events that led to the situation of corporate distress and the details of the offer to be made to the administrator. They should highlight the steps taken to avoid administration and a pre-pack sale and explain why a pre-pack is necessary, describe who is expected to be advantaged and disadvantaged from the sale and on which basis they expect the business to thrive in the future (at least for the following 12 months).⁴⁸

The Pool encourages applicants to rely on supporting evidence such as viability studies and business plans, as well as forecasts. It is also good practice to include in the bundle a summary of the financial accounts (i.e. balance sheet) and the statement of affairs of the old company.

⁴⁵ S Hopewell and D Kerr, 'Unpacking the Pre-Pack' (Nov. 2016) Credit Management 13 (arguing, however, that progress was made since the first impact).

⁴⁶ A list of these people is available here: <<https://www.prepackpool.co.uk/about-the-pool>> accessed 4 June 2018.

⁴⁷ <<https://www.prepackpool.co.uk/>>.

⁴⁸ <<https://www.prepackpool.co.uk/guidance-documents>>.

The submission is reviewed by one member of the Pool who can issue any of three opinions: (1) the case for a pre-pack sale is not unreasonable; (2) the case is not made; or (3) the case is not unreasonable but there are minor limitations in the evidence provided. The applicants can decide not only whether to approach the Pool, but also to disclose the opinion to the insolvency practitioner ('IP') in charge of the administration. In any case, the Pool has no power to block a pre-pack sale from going forward, not even when the case for the pre-pack appears unreasonable to the panel.

If the Pool's endorsement (or lack of it) is transmitted to the IP, then it forms part of the IP report, which is rendered available to the 'oldco' creditors and suppliers. This objective and independent valuation should facilitate creditors and suppliers to assess if the transaction is reasonable and if it is in their best interest to continue to deal with or supply the 'newco'.

3(a). Testing the Pre-Pack Pool

According to the latest available data,⁴⁹ it seems that the uptake rate among purchasers in connected party sales is quite low. Out of 356 pre-pack sales in 2017, 203 (57 per cent) involved a purchase by a connected party. However, only 23 (11 per cent) of the proposed connected party pre-pack purchases was submitted to the Pool for review and only 11 of them (48 per cent) received a 'not unreasonable' opinion.⁵⁰

These figures compare poorly with previously available statistics for the first 14 months of operation of the Pool (1 November 2015 – 31 December 2016). The industry's expectations of statistically significant use were disattended.⁵¹ The members of the Pool themselves recognise

⁴⁹ Pre-Pack Pool, 'Annual Review 2017' (n 11).

⁵⁰ As for the remaining cases, 8 (35 per cent) received a 'not unreasonable but limitations in evidence' opinion and 4 (17 per cent) received a 'case not made' opinion.

⁵¹ Hopewell and Kerr (n 45). In commenting the first year's results, Oliver Parry, head of the corporate governance at the Institute of Directors, said that the pool simply needed 'a bit more bedding-in time' and anticipated that the figures would have been significantly higher for the following 12 months: M Goldbart, 'The pool is struggling to sell the idea of 'good' pre-packs' *PrintWeek* (London, 24 April 2017)

that the 'referral rate is much lower than expected'.⁵² According to the 2016 Review,⁵³ opinions were given in 53 sales to connected parties, which presents more than a quarter (28 per cent) of eligible transactions, while 34 cases (64 per cent) received a 'not unreasonable' opinion.⁵⁴

It seems that the concerns expressed by some commentators⁵⁵ on the ability of the Pool to address transparency issues in connected parties' sales are justified. This may be due to a variety of factors. While it is unlikely that insolvency practitioners fail to inform prospective purchasers,⁵⁶ the latter may want to avoid the cost, time and complexities associated with this exercise. Additionally, parties (mainly creditors) who should benefit from this assessment, have no or little knowledge of the Pool or place little faith in the valuation of its members. The latter is because the Pool's opinion is based on documents provided by the purchaser and there is no possibility of debate. The Pool's members effectively have no real power to pre-emptively block potential abusive sales. As a result, creditors might have little interest in the Pool.

Additionally, a 'not unreasonable' opinion does not ensure that the company which undertakes the pre-pack administration will in fact thrive in the future. This is what happened in the case of *Polestar UK Print Limited* ('*Polestar*').⁵⁷ The company was incorporated on February 2016 as a special purpose vehicle to acquire certain business and assets of Old Polestar Group, which was at that time undergoing the administration process. The Group

<<https://www.printweek.com/print-week/briefing/1160948/the-pool-is-struggling-to-sell-the-idea-of-good-pre-packs>> accessed 5 June 2018.

⁵² Pre-Pack Pool, 'Annual Review 2017' (n 11) 2.

⁵³ Pre-Pack Pool, 'Annual Review 2016' (March 2017)

<<https://www.prepackpool.co.uk/uploads/files/documents/Pre-pack%20Pool%20Annual%20Review%202016-17.pdf>> accessed 4 June 2018.

⁵⁴ As for the remaining ones, 13 (24.5 per cent) received a 'not unreasonable but limitations in evidence' opinion and 6 (11.5 per cent) received a 'case not made' opinion.

⁵⁵ Umfreville (n 42) 59-60 (commenting on the 2016 Review).

⁵⁶ It would, however, be interesting to investigate when exactly this information is conveyed and how the practitioners describe the opportunity to make use of the pool.

⁵⁷ More information and documents are available on the webpage of the joint administrators at PwC:

<<https://www.pwc.co.uk/services/business-recovery/administrations/polestar-2.html>> accessed 5 June 2018.

was the UK's largest independent printing company and leading content delivery specialist and produced more than 50 million products a week for newspaper supplements, magazines, retail and journals, as well as reference publications.

The parties entered a pre-packaged sale with the aim of protecting value and achieving stability for the company, its workers, creditors and clients. As the sale was to a connected party (the Swedish private equity fund *Proventus Capital Partners*), *Polestar* commissioned an opinion from the Pool. On 21 March 2016, the Pool issued a 'not unreasonable' opinion backed by a viability statement that evidenced that the new company could survive for at least 12 months from the date of the acquisition. The acquisition was completed three days after the release of the Pool's opinion.

Upon completion of the acquisition, *Polestar* began a process of novating customer agreements to secure all future trading relationships as quickly as possible. However, on 22 April 2016, the newspaper publisher *DMG Media*, *Polestar's* biggest customer, notified the decision not to novate its contract to the new business.⁵⁸ This and other adverse factors⁵⁹ were blamed by the joint administrators of *PricewaterCoopers* ('PwC') as the leading reasons that plunged the company again into administration on 25 April 2016, just one month after the closure of the pre-pack sale.

The administration procedure allowed preferential creditors (mainly employees) to be paid in full, while secured creditors received 92 per cent of their claims and unsecured ones received

⁵⁸ J Francis, 'Polestar sites go into administration' *PrintWeek* (London 25 April 2016) <<https://www.printweek.com/print-week/news/1156978/polestar-sites-go-into-administration>> accessed 5 June 2018.

⁵⁹ These include higher than anticipated ransom payments to suppliers, higher than anticipated pro-forma payments, slower debtor payments and the loss of two more major contracts: PwC, 'Joint administrators' final progress report from 11 March 2018 to 23 April 2018 – Polestar UK Print Limited (in administration)' EWHC Case no. 380/2016 (Ch), Leeds District Registry (23 April 2018) <https://www.pwc.co.uk/business-recovery/administrations/assets/pulp_final.pdf> accessed 5 June 2018.

only 0.62 per cent of their entitlements (mainly from the prescribed part). The administration came to a close on 23 April 2018 and the company was dissolved on 9 May 2018.⁶⁰

Cases such as the *Polestar* are rather alarming and represent ‘a kick in the teeth for a voluntary regulator’.⁶¹ They also suggest that changes are needed to address the shortcomings of the current framework.

4. Ways Forward?

It is clearly not possible to ensure the right decision is taken with reference to each application for several reasons, including that Pool members must rely on documents submitted by the parties and are required to give an opinion in a very short time-frame. Additionally, some pre-packs – and *Polestar* seems to represent the clearest example of this risk – simply fail for reasons that fall outside the control of the parties. Nevertheless, to minimise the risk of erroneous decisions, the application could be complemented by documents (such as independent valuations) and reports (such as on the expected outcome for creditors in case of liquidation or ‘traditional’ administration) from the IP in charge of the procedure. If disclosure and co-operation obligations are imposed on IPs, Pool members will be able to better assess whether the case for a pre-pack sale should be made or not.

The members of the Pool first suggested in the 2017 review that reforms might ‘deter [...] some connected party pre-packs being proposed in the first place’,⁶² but this seems to be a poor justification to leave things as they currently stand, especially considering the lack of applications for the first years of operation of the Pool. Unsurprisingly, in the 2018 exercise, the Pool members admitted that ‘connected party purchasers do not currently worry about

⁶⁰ <https://0-fame-bvdinfo-com.wam.city.ac.uk/version-2018327/Report.serv?_CID=721&context=3GRD3ATA8TPFFCX&SeqNr=4992> accessed 5 June 2018.

⁶¹ Goldbart (n 51).

⁶² Pre-Pack Pool, ‘Annual Review 2016’ (n 53) 3.

the consequences of making a referral',⁶³ thus impliedly confirming the concerns raised in the previous paragraphs and most of the academic literature quoted in this paper.

However, the Pool falls short of suggesting a regulatory reconsideration of the system, a possibility voiced by some commentators and the then BIS Secretary, Vincent Cable.⁶⁴ The latter suggested that regulation would increase the transparency and confidence of the parties in the system and promote the competitiveness, reliability and attractiveness of the English system.⁶⁵ Despite these arguments, the Pool endorsed a different course of action, in line with the de-regulatory nature of the Pool and the industry-led approach suggested by Teresa Graham.

The recommended course of action for pre-packs to connected purchasers included asking influential newco stakeholders, such as financial institutions and the HMRC, to render the Pool referral a condition of doing business with the post-insolvency entity.⁶⁶ Pool members also argued that the Pool should continue to exist (either as a voluntary or mandatory mechanism) in light of the positive feedback received by the parties (when used) and because it represented a proper instrument to tackle the lack of transparency and confidence in the pre-pack procedure. Other commentators suggested that post-sale finance should be conditioned to pre-packs that have been referred to the Pool.⁶⁷

These recommendations, however, fail to address the biggest issues raised by the current system: (i) its costs; (ii) the lack of perceived benefits for the applicants and other stakeholders involved in the procedure; and (iii) its length and complexity.

⁶³ Pre-Pack Pool, 'Annual Review 2017' (n 11) 1.

⁶⁴ S Jones, 'The Pre Pack Pool: is it working?' (2017) 10(4) CRI 138, 139.

⁶⁵ Umfreville (n 42) 62.

⁶⁶ Pre-Pack Pool, 'Annual Review 2017' (n 11) 2.

⁶⁷ Hopewell and Kerr (n 42).

The existence of the first problem is evidenced by a variety of considerations. The *Graham Review*⁶⁸ and the *Wolverhampton Report*⁶⁹ observed that the average transaction value of pre-pack sales to connected parties was £100,000 and involved mainly ‘micro’ and ‘small’ enterprises. Nevertheless, in the first year of operation, the Pool dealt primarily with applications from medium to large firms, with an average transaction value of £500,000.⁷⁰ This seems to suggest that small pre-packs fall outside the Pool’s net. This issue could be easily addressed by reducing the cost of the procedure and introducing tax benefits for the purchaser equal to the amount paid for the referral to the Pool.

Keeping the cost low should, however, be a paramount priority of the legal and insolvency system in general, as it has been observed that most companies decided to pre-pack because they had no money to fund a trading administration⁷¹ or a scheme of arrangement. Changes are needed to meet the demands for quick, inexpensive, yet binding procedures coming from the market.

Tax incentives would meet this call for change for at least two reasons. The first one is that the introduction of an additional, expensive and burdensome requirement in the pre-pack procedure (the £800 fee) may have a deterring effect on the use of formal insolvency procedures such as administration. Administrations (and pre-packs among them) offer more protection to creditors and third parties compared to informal workouts,⁷² particularly if creditors are empowered to challenge the sale in a ‘case not made’ opinion. The use of formal procedures should be promoted rather than hindered if the overall policy objective is to enhance the accountability and transparency of the insolvency system.

⁶⁸ Graham (n 4) para.7.3 and 7.4.

⁶⁹ Walton and Umfreville (n 5) 11-13.

⁷⁰ Hopewell and Kerr (n 42).

⁷¹ Graham (n 4) para.7.13.

⁷² For the protection granted in administration procedures to creditors and members, see: Fletcher (n 3) [16-078] – [16-086].

The second reason is social justice. As a rule, it is appropriate to impose a cost on a party only if that party reaps benefits from the goods or services provided. This is not the case for the Pool's valuation: the cost is on the purchaser, but the (main) beneficiaries are debtors' creditors and society at large.

As for the second aspect, the involvement of the Pool does not result in remarkable benefits for the purchaser. It was expected that applicants would agree to provide a copy of the opinion to the IP who is running the procedure and that a 'not unreasonable' opinion would provide assurance to creditors and positively impact on future dealings with suppliers.⁷³ There is no evidence of these spillover effects. The case of *Polestar* demonstrates that a more accurate prediction might be that creditors are ignoring at best, or looking with suspicion at worse, at the opinion of the Pool.

On the contrary, any application to the Pool requires the fulfilment of additional administrative duties which may lengthen the duration or even jeopardise the success of the pre-pack procedure (especially whenever the Pool does not conclude that the sale is 'not unreasonable').

The expected benefits stemming from the use of this instrument should fall primarily on the creditors (and society at large), who have voiced their dissatisfaction for the current *status quo* and called for greater engagement in the assessment exercise.⁷⁴ The involvement of the Pool, however, does not dramatically improve their condition. As in all other pre-pack sales, creditors do not have the right to consider and vote on the pre-pack proposal.⁷⁵ The SIP 16

⁷³ D Kerr, 'Pre-Pack Pool' (June 2015) Credit Management 12.

⁷⁴ Goldbart (n 51) reporting the views of Charles Jarrold, Chief Executive of the British Printing Industries Federation commenting on the consequences of the *Polestar* case.

⁷⁵ In traditional administration procedures, the administrator must prepare within 8 weeks from the opening of the procedure a proposal that explains how to achieve the purpose of the administration (para.49 Sch. B1 IA 1986). The proposal should then be sent to the registrar of the company and to all known creditors, who must approve it within 10 weeks from the beginning of the administration procedure (para.51 Sch.B1 IA 1986). The requirement to seek a decision from the creditors can be obviated if the proposal states that creditors shall be paid in full or conversely that the company has not enough assets to pay a dividend to unsecured creditors other than from the prescribed part (para.51 Sch.B1 IA 1986). On this topic, see: Fletcher (n 3) [16-067] – [16-077].

statement, which the administrators are required to provide to creditors and which includes details on the sale, is issued *after* the sale is concluded. Therefore, even an opinion which did not recommend the sale to a connected party could not be used by the creditors to challenge the outcome of the procedure.

4(a). Policy Recommendations

It seems that the most appropriate course of action to promote transparency and accountability might be to mandate the referral to the Pool, at least for sales to connected parties involving medium and large debtors.⁷⁶ It does not seem appropriate to extend the obligation to micro and small enterprises. These are frequently mom-and-pop businesses that represent the only source of income for the members of a family. While it may not be true that the beauty is in the eye of the beholder, for these companies it is frequently the case that the only potential investors are the owners of the old company. It is submitted that in these cases the administrator can check that parties do not abuse the insolvency procedure without the need to involve the Pool in this assessment.

For the same purpose of promoting transparency and confidence, creditors should be given the right to challenge the sale *before* it takes place, at least whenever the Pool finds that the case was not made.⁷⁷

⁷⁶ Mandating the Pool is apparently supported by Vanessa Finch and David Milman, who observed that under the current de-regulated system it is extremely impossible for vulnerable parties to mount challenges against the administrator and the parties involved in the transaction: Finch and Milman, (n 3) 407. On the opposite end of the spectrum, use of regulation was strongly opposed by Teresa Graham, who warned that the mandatory nature of the referral would 'destroy a mechanism that has a legitimate place within the insolvency landscape': Jones (n 64) 139. Insofar, however, the discussion has been on whether to make the referral mandatory for *all* debtors; maybe a proposal restricted to medium and large enterprises would allay Graham's scepticism. Another commentator who favoured professional-led to statutory regulation is Bo Xie: B Xie, 'Protecting the interests of general unsecured creditors in pre-packs: the implication and implementation of SIP 16' (2010) 31(6) Comp. Law. 189.

⁷⁷ Current figures suggest that this outcome occurs in the minority of cases, i.e. 11.5 per cent of all applications in 2016 and 17 per cent in 2017 (respectively, 6 and 4 applications each year). With time it is expected that experience and guidance from the pool should ensure that this outcome arises in a statistically insubstantial number of cases.

The declining number of purchasers who are making use of the Pool seems to suggest that reforms that simply promote the use of the procedure with tax incentives may fail to dramatically reverse current trends. Limiting the mandatory requirement to medium and large enterprises would also be in line with the evidence provided by the *Graham Review* that companies which file for pre-packs have usually been operating for a few years and have a significant takeover rate.⁷⁸

Other commentators have evidenced that application numbers are low because the procedure is time consuming.⁷⁹ Reference is clearly not to the time required to issue the opinion, but to the process of collecting the documents and preparing the bundle for the application. Additionally, the IP needs to include the opinion in their report and it is not clear how soon after the opinion was given the sale can be concluded.

If the application is made mandatorily, the applicant may wish make investigations before the application is submitted to determine whether the material is adequate or the proposal is likely to be rejected as it currently stands. This would minimise the chances to receive a negative opinion from the Pool or to face the risk of a second submission or the need to comply with a request for additional documents.⁸⁰

The current framework largely ignores these issues. However, guidance could be easily introduced to deal with each of the above-mentioned matters and the process of re-applying.

Timing may be an issue even for the independent expert - a possibility largely ignored in the current debate. He or she is forced to give an opinion based on the material submitted by the purchaser which rarely includes a valuation of the debtor's business (independent valuations are usually in the hands of administrators). This is a crucial omission under the current framework. Steps should be taken to allow the administrator to add those elements to the

⁷⁸ Walton and Umfreville (n 5) 12.

⁷⁹ Jones (n 64).

⁸⁰ Neither of these courses of action is currently possible under the existing law.

application that are not in the possession of the purchaser, such as an independent valuation from a third party or their best estimate of the consequences for the business, its employees and the returns to creditors, should the sale not go ahead.⁸¹

Problems	Recommendations
<ul style="list-style-type: none"> ▪ <i>Polestar</i> 	<ul style="list-style-type: none"> ▪ Disclosure and co-operation obligations on IPs
<ul style="list-style-type: none"> ▪ Costs 	<ul style="list-style-type: none"> ▪ Reduction of fees ▪ Tax incentives
<ul style="list-style-type: none"> ▪ No direct benefit for applicants (i.e. purchasers) 	<ul style="list-style-type: none"> ▪ Mandatory requirement (only medium and large entities) ▪ Creditors have a right to challenge a sale <i>before</i> it is concluded if the case is not made
<ul style="list-style-type: none"> ▪ Duration and complexity 	<ul style="list-style-type: none"> ▪ Streamline procedure and filing requirements ▪ Co-operation from IPs ▪ Address legal hurdles (e.g. notion of ‘connected party’)

4(b). Preliminary Findings

The falling number of administrations in general and pre-pack sales in particular,⁸² as well as the even smaller figures on sales to connected parties and on the use of the Pool, have pushed some commentators to call for the outright abolition of the Pool.⁸³ This conclusion is, however, unwarranted.

The *Graham Report* demonstrated that pre-pack sales (including those to connected parties) by means of administration procedures play a beneficial role in securing the continuation of

⁸¹ Duncan Swift, deputy vice president at R3 (a trade body for IPs) observed that IPs ‘should be allowed to provide information to the pool to make sure reviewers have the complete picture when assessing a pre-pack deal’: Anonymous, ‘Government pre-pack review opportunity for improvement – R3’ (13 December 2017 <<https://www.r3.org.uk/index.cfm?page=1114&element=31163>> accessed 5 June 2018.

⁸² The total number of administrations has fallen significantly in recent years, down from 2,835 in 2010 to 1,289 in 2017. Nevertheless, the portion of pre-pack sale has remained steady: they were 769 (27 per cent) in 2010, 356 (28 per cent) in 2017. Similarly, the portion of pre-pack sales to connected parties has not dropped significantly, down from 72 per cent (554) in 2010 to 57 per cent (203) in 2017. Pre-Pack Pool, ‘Annual Review 2017’ (n 11) 6.

⁸³ S Feast, ‘Plunging into the Pre-Pack Pool’ (May 2017) Credit Management 4.

viable businesses as well as protecting employment and the interests of third parties, suppliers and society at large.⁸⁴ It concluded that there was a place for pre-packs in the English insolvency landscape and that the benefits can be worthwhile.

It is unlikely that these conclusions are no longer valid less than a lustrum after the publication of the report. Nevertheless, the Insolvency Service's consultation on the voluntary measures introduced in the wake of the review⁸⁵ may provide some guidance on the current view of the industry on this matter.

If, however – as it is assumed by this paper – the reasons that justified the conclusion of and supervision over pre-pack sales to connected parties were still valid, the government should focus their effort on addressing the shortcomings of the existing framework. With reference to the Pool, which is the focus of this paper, the government should devise strategies to remove the barriers to its use and promote the relevance of the assessing exercise.

As evidenced in table 1, this paper has argued to:

- Impose disclosure and co-operation obligations on IPs;
- Reduce costs and introduce tax incentives;
- Render the referral to the Pool mandatory for the companies most likely to use pre-packs and to give creditors the right to challenge a sale when a case is not made;
- Streamline the procedure and address legal uncertainties (such as on the definition of 'connected party') which may represent adequate measures to boost the use and efficiency of the Pool.

⁸⁴ Graham (n 4) para.6.1.

⁸⁵ See above para.2.

To appease creditors, however, it is necessary that the Pool is perceived to work in their interest; hence more should be done by insolvency practitioners and bodies to highlight the positive contribution that the Pool can make in pre-pack sales to connected parties.⁸⁶

The proposed recommendations represent, in the author's view, a sensible balance between contractarian views⁸⁷ (primarily supported by the Insolvency Service and the IPs' regulatory bodies) and communitarian ideals⁸⁸ (promoted by the law and the Secretary of State).⁸⁹ They would strengthen the case for the practical implementation of pre-packs, avoid red tape restrictions that could limit the effectiveness of the procedure and stitch-up the divide between established principles and commercial practice observed by some commentators.⁹⁰ This would abandon the nudging approach favoured by Teresa Graham without embracing the full regulatory position supported by Sir Vincent Cable, among others.

To conclude, statistical evidence and the critical analysis of some of the shortcomings of the system and the recommendations arising from the scholarly debate suggest that the Pool does not lack sound foundations. Reforms, however, are needed to boost the use of the Pool and fully align this instrument with the policy objectives.

⁸⁶ S Hopewell, 'Pool Party?' (May 2017) *Credit Management* 30.

⁸⁷ Contractarians argued that the basic tenet of insolvency law is to maximise the collective return to creditors: MG Shanker, 'The Abuse and Use of Federal Bankruptcy Power' (Fall 1975) 26(3) *Case W. Res. L. Rev.* 3 (believing that rules valid only in front of bankruptcy courts are a tension-creating situation); TH Jackson, 'Bankruptcy, Non Bankruptcy Entitlement, and the Creditor's Bargain' (1982) 91 *Yale L.J.* 857 (arguing that insolvency law should deal only with inter-creditor questions on the basis of the creditors' bargain model); DG Baird, 'Bankruptcy's Uncontested Axioms' (1998) 108 *Yale L.J.* 573.

⁸⁸ Communitarians sought to balance the interest and expectations of a wide range of stakeholders. Prominent contributors to this line of thinking include DR Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1992) 71 *Tex. L. Rev.* 541; K Gross, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 *Wash. U. L.Q.* 1031.

⁸⁹ Walton, 'A Theoretical Consideration' (n 9) 12.

⁹⁰ S Frisby, 'Insolvency Law and Insolvency Practice: Principles and Pragmatism Diverge?' (2011) 64 *CLR* 349.

5. Concluding Remarks

The policy rationale behind the establishment of the Pool is still actual and sound. Therefore, the decision to completely ban connected party pre-pack sales (which is within the remit of the SBEEA 2015) or abolish the Pool would seem precipitate and unjustified.

Changes however are needed to make the Pool more attractive and in line with the expectations of the industry, the debtor's creditors and suppliers and of society at large. It appears that the assessment of the business by the Pool is more attractive for medium and large debtors that kept their financial records updated even in times of crisis.

Tax and related incentives should be introduced to make the procedure more attractive (particularly in case the voluntary nature of the system is preserved) and not to place the burden of the procedure on the party that receives only a minimal benefit from it. Additionally, the members of the Pool might benefit from the co-operation of the administrator. The latter should be obliged, for instance, to include in the applicant's bundle elements already in his or her possession, such as an independent valuation of the business, that could help the Pool to make a more informed decision on the application.

Unlike other commentators,⁹¹ the author has no strong views on the mandatory nature of the procedure. However, the Pool's innate complexity suggests that it would work better for medium and large enterprises, therefore mandatory referrals should at least be restricted to pre-pack sales to connected parties involving these businesses only. Should regulation be

⁹¹ Jones (n 64) 139 (agreeing with Teresa Graham and Stuart Hopewell, co-director of the pool, that making referrals compulsory might dissuade owners from proposing pre-pack deals). Against: JM Wood, 'The Sun Is Setting: Is It Time to Legislate Pre-Packs?' (2016) 67 N. Ir. Legal Q. 173 (arguing that the endorsement of the six recommendations is enough to prevent eventual legislation is wishful thinking); R3 (Anonymous, 'Government pre-pack review opportunity for improvement – R3' (13 December 2017 <<https://www.r3.org.uk/index.cfm?page=1114&element=31163>> accessed 5 June 2018); Umfreville (n 42) 62 (arguing – quoting Duncan Swift – that the pool needs to be used for it to be useful).

restricted to those cases, it would adhere to the “principles of better regulation” promoted by Teresa Graham in her review.⁹²

The failure to nudge parties to voluntarily adopt a course of action that promotes transparency and accountability of pre-pack sales to connected parties suggests that hard laws still represent the mechanism that the legislator should favour to promote relevant changes in corporate insolvency practice, at least at domestic level.

⁹² These are proportionality, accountability, consistency, transparency and targeted approach: Graham (n 4) para.5.7.