

The New ‘Alert Procedures’ in Italy: *Regarder au-delà du modèle français?*

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«The only man who sticks closer to you in adversity than a friend
is a creditor» (Proverb, Unknown Author)

Abstract

Italy is about to enforce the first, comprehensive reform of its corporate insolvency framework since the Second World War. The new *Codice della Crisi d’Impresa e dell’Insolvenza* builds on international recommendations, European laws and foreign best practices.

One area that has been subject to substantial influence from foreign models is preventive insolvency mechanisms, where the Italian Legislator drew from the French and English experience, as these countries have a widely recognised reputation of excellence in this field. Nevertheless, the similarities between the Italian and the English system – particularly with reference to the Italian panel of experts in alert procedures and the English ‘pre-pack pool’ in pre-packaged administrations – have so far been overlooked in the academic literature.

This paper sheds some light on the degree of cross-fertilisation between the Italian panel of experts in *procedure d’allerta* and the English pre-pack pool in pre-packaged administration. The primary purpose of this study is to investigate if regulatory reforms are needed to support the activity of the Italian panel in promoting restructuring deals for debtors in distress.

Key Words: Regulatory Reforms, Insolvency, Italy, England, Pre-packaged Administration, Alert Procedure.

1 Introduction¹

The Italian *procedure d'allerta* ('alert procedures') draw the majority of their key elements from the French *procédures d'alerte*. There is vast literature that discusses the importance of the French model on the Italian equivalent, and the degree of "cross-fertilisation"² between the two.³ However, unlike the French instance, the Italian

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² The word "cross-fertilisation" describes the process of exchanging, discussing and comparing legal solutions and their practical implementation for the purpose of improving the existing statutory framework.

There is always a degree of cross-fertilisation between laws, especially for jurisdictions belonging to the same legal family (as in the case of France and Italy – see PR Wood, 'Principles of International Insolvency' in PR Wood, *The Law and Practice of International Finance Series* (3rd ed, vol. 1, Sweet & Maxwell 2019), 73) or with strong economic, historical and cultural links (as the case of the UK and Italy, which were both part of the European Union until 31 January 2020). One of the purposes of this paper is to determine the degree of cross-fertilisation between the Italian alert procedures and the English pre-packs with a critical focus on the work of their panel of experts.

³ Among others, see: G Carmellino, 'Le droit français des entreprises en difficulté e i rapporti con la nuova normativa europea' (2015) *Fallimento* 1062; M Cataldo, 'La soggezione dell'impresa in crisi al regime di allerta e composizione assistita' (2016) *Fallimento* 1022; G D'Atorre, 'Prime Riflessioni sulla Delega al Governo per la Riforma delle Discipline delle Crisi d'Impresa e dell'Insolvenza' (2017) *Rivista delle Società* 517, 521; A Pellegatta, 'La Riforma della Normativa sulle Crisi d'Impresa e dell'Insolvenza: Le Procedure di Allerta e Composizione Assistita' (8 March 2017) *Crisi d'Impresa e Fallimento* 1, 2-8; A Mastrangelo, 'La prevenzione in Italia alla luce del decreto legislativo 12 gennaio 2019 n.14 (Codice della crisi d'impresa e della insolvenza)' *Diritto.it* (29 November 2019) <<https://www.diritto.it/la-prevenzione-in-italia-alla-luce-del-decreto-legislativo-12->

procedure d'allerta are subject to the supervision of a panel of experts. Such characteristic bears a lot of similarities with the English pre-pack pool ('the pool'), which is required to give an opinion on pre-packaged administrations ('pre-packs') to connected parties.⁴

This paper investigates the degree of cross-fertilisation between the Italian panel in the *procedure d'allerta* and the English pool in pre-packs. Its main purpose is to provide evidence-based recommendations to the Italian Legislator, before the *Codice della Crisi d'Impresa e dell'Insolvenza* (hereinafter, Italian Insolvency Code or IIC) comes into force. This topic has not previously been explored in the Anglo-Italian academic literature.

Identifying the aspects of the English pool that share significant similarities with the Italian panel is instrumental in identifying the strengths and weaknesses of the latter, in order to make suggestions for reform. The main contribution of this paper is to identify the most significant risks associated with the implementation of the *procedure d'allerta* as currently drafted in the IIC, and to offer solutions in light of the English experience. This approach is implemented to investigate if regulatory reforms are needed to support the activity of the Italian panel in promoting restructuring deals for debtors in distress.

To address these questions, the paper primarily adopts a comparative and doctrinal but reform-oriented, socio-legal methodology. Reference to statistical data and practical cases will be made when deemed relevant for the purposes of this paper.

[gennaio-2019-n-14-codice-della-crisi-dimpresa-e-della-insolvenza/>](#) accessed 1 July 2020.

⁴ SIP 16 defines "connected party" with reference to sections 249 and 435 of the IA 1986 & article 7 and article 4 of the Insolvency (NI) Order 1986. Directors, shadow directors, associate persons of the debtor, close family members, companies in the same group and anybody with significant prior connection to the debtor fall within the definition of connected party. However, SIP 16 contains a carve-out for secured lenders over one third or more of the shares in the insolvent company.

The socio-legal approach is a well-established albeit under-used methodology in comparative, reform-oriented papers, especially in the area of corporate insolvency law.⁵ In socio-legal studies, analysis of law is directly linked to the analysis of the social situation to which the law applies. This analysis is carried out by investigating the part the law plays in the creation, maintenance and/or change of the situation.⁶ In this paper, the socio-legal approach is used to investigate the impact of the English pool on the practice of connected pre-packages sales by means of an administration procedure. It is also used to establish the potential strengths and weaknesses of the Italian panel as envisaged by the IIC.

The paper proceeds as follows. Part 2 of this paper discusses the evolution of the Italian corporate insolvency law in light of recent developments at the EU level and in England. The focus of this part is on rescue-oriented procedures, namely the *procedure d'allerta* in Italy and the pre-packaged administration in England. Despite their differences, both English and Italian procedures require the involvement of a (panel of) independent expert(s). Sections 2.1 and 2.1 highlight the features and roles of each of these panels.

These findings are used in part 3 of this paper to determine the degree of cross-fertilization between the two jurisdictions as well as the need for regulatory reforms in the area. Part 4 concludes by: (i) suggesting that the similarities between the two mechanisms represent an example of legal cross-fertilisation; and (ii) by making recommendations for regulatory reforms for the Italian alert procedure (and its panel).

⁵ R Tomasic, 'Insolvency Law Reform in Asia and Emerging Global Insolvency Norms' (2009) 15 *Insolv. L.J.* 229; MD Sousa, 'Bankruptcy Stigma: A Socio-Legal Study' (2013) 87 *Am. Bankr. L.J.* 435. This methodology is more popular with reference to studies on personal or consumer bankruptcies: see, among others, I Ramsay, 'Towards an International Paradigm of Personal Insolvency Law? A Critical View' (2017) 17(1) *QUT L. Rev.* 15.

⁶ DN Schiff, 'Socio-Legal Theory: Social Structure and Law' (1976) 39 *MLR* 287, 287.

2 Preventive Restructuring Mechanisms under English and Italian Law

The European Union has been working tirelessly on a series of legislative measures aimed at increasing convergence of insolvency and restructuring procedures among Member States and at promoting their timely use.

The latest directive on preventive restructuring frameworks⁷ encourages the adoption of key principles on effective preventive restructuring and second chance frameworks. It also suggests the introduction of measures to make all types of insolvency procedures more efficient, i.e. faster, less expensive and capable of ensuring higher returns to creditors.

More recently, the High Level Forum on the Capital Markets Union suggested the need for further integration and harmonisation.⁸ In their final report, the High Level Forum made several key recommendations. One of the key recommendations to the Commission is the adoption of a legislative proposal for minimum harmonisation of certain targeted elements of core non-bank corporate insolvency laws.⁹ These include a definition of triggers for insolvency proceedings, harmonised rules for the ranking of claims (which comprises legal convergence on the position of secured creditors in insolvency), and further core elements such as avoidance actions.

⁷ Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) OJ L 172/18. For a commentary on the proposal, see NWA Tollenaar, 'The European Commission's Proposal for a Directive on Preventive Restructuring Proceedings' (2017) 30(5) *Insol. Int.* 65.

⁸ High Level Forum on the Capital Markets Union, *A New Vision for Europe's Capital Markets – Final Report* (Brussels, 10 June 2020) <https://ec.europa.eu/info/files/200610-cmu-high-level-forum-final-report_en> accessed 1 July 2020.

⁹ *Ibid* 114.

Many Member States have enthusiastically supported this harmonisation process of restructuring procedures,¹⁰ particularly with reference to preventive restructuring frameworks. Successful examples include France (*procédures d'alerte*), England (CVAs and pre-pack procedures) and – to a lesser extent – Italy (*concordato preventivo*). Not all of these frameworks, however, are equally effective, as evidenced by the World Bank's *Doing Business* Report.¹¹ Italy, in particular, ranks 20th in the “Resolving Insolvency” indicator, below some of its key competitors, such as the USA (#2), Germany (#4), the UK (#13) and Spain (#17) but – surprisingly – ahead of France (#23).¹²

In an attempt to improve its ranking in the “Resolving Insolvency” indicator and to comply with the recommendations emerging at European and international levels, the Italian Government embarked on a process of comprehensive reform of its ageing insolvency framework. The work was carried out by a commission of experts known as the ‘Rordorf Commission’.

The Rordorf Commission recommended several measures, including the introduction of new preventive restructuring mechanisms known

¹⁰ In many insolvency treaties, the words “rescue” and “restructuring” are improperly and frequently used as synonyms. Both rescue and restructuring can be defined as “a major intervention necessary to avert eventual failure of the company” (A Belcher, *Corporate Rescue* (Sweet & Maxwell 1997) 22-24). It would be preferable to use the word “rescue” *only* with reference to formal or hybrid insolvency proceedings, i.e. those proceedings that are mandated and regulated by insolvency law (D Burdette and P Omar, ‘Why Rescue?’ in J Adriaanse and JP van der Rest, *Turnaround Management and Bankruptcy* (Routledge 2017) 230). However, the European Legislator uses the word “restructuring” instead of “rescue” to refer to these proceedings. As a result, this paper follows the choice of language adopted by the European Legislator to avoid confusion in the reader.

¹¹ World Bank, *Doing Business 2020* (Washington DC, 24 October 2019): <<https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf>> accessed 1 July 2020.

¹² The 2020 rankings are available here: <<https://www.doingbusiness.org/en/rankings?region=ocd-high-income>> accessed 1 July 2020.

as *procedure d'allerta* ('alert procedures').¹³ Its proposals were translated into law with amendments by Parliament,¹⁴ and later resulted in the IIC.¹⁵

The IIC should have entered into force on 15 August 2020. However, the need to prioritise emergency fiscal and economic measures to deal with the Covid-19 pandemic pushed the Government to postpone the entrance into force of the majority of its provisions to 1st September 2021.¹⁶

The decision to postpone the entrance into force of the IIC is a sensible one. The IIC introduces new procedures – including the afore-mentioned *procedure d'allerta* – and it is premised on the correct functioning of some *indicatori di crisi* ('crisis or warning indicators').¹⁷ If a company fails to either meet these indicators or show economic viability for a period of up to six months, the auditors of the company and some public bodies are under the legal obligation to commence an alert procedure.¹⁸

The implementation of these new procedures and rules requires a stable economic environment. The challenges raised by the sharp deterioration in the global economic environment due to the Covid-19 pandemic jeopardise the smooth implementation of the provisions included in the IIC.

If the IIC entered into force this summer as originally envisaged by the Legislator, the auditors and public bodies would have had to commence a large number of *procedure d'allerta*. This is because many companies suffered significant reductions in their cash flow

¹³ Commissione per Elaborare Proposte di Interventi di Riforma, Ricognizione e Riordino della Disciplina delle Procedure Concorsuali, 'Relazione allo Schema di Legge Delega per la Riforma delle Procedure Concorsuali' (29 December 2015).

¹⁴ Article 4, Law 19 October 2017 no. 155.

¹⁵ Legislative Decree 12 January 2019, no. 14. The measures on the *procedure d'allerta* are included in articles 12-25 of the IIC.

¹⁶ Article 5, Law Decree 8 April 2020, no. 8.

¹⁷ Article 13 IIC.

¹⁸ Articles 14-15 IIC.

and revenues in the first half of 2020 due to the trade restrictions imposed by the Covid-19 pandemic. Many companies would have been forced to undertake an assessment of their long-term viability by the panel of experts, even if their lack of solvency was only temporary and determined by external factors (i.e. lock-down and a sharp fall in consumer demand).

The postponement of the entrance into force of the IIC also offers an unexpected opportunity to further analyse the relevance and functioning of one of its key innovations, the afore-mentioned *procedure d'allerta*.

Whilst recognising the influence of the French *procédures d'alerte* on the Italian *procedure d'allerta*, and the similarities with the English pre-packaged administration, this paper aims to extend the scholarly debate in the area. This is done by investigating the degree of cross-fertilisation (if any) between the English pre-packs and Italian *procedure d'allerta*, in order to provide a preliminary assessment of their strengths and weaknesses as well as suggesting aspects of the Italian *procedura d'allerta* that could be subject to regulatory reforms.

English pre-packs are a variation of the court-supervised administration procedure, while Italian alert procedures are a stand-alone, out-of-court mechanism. English pre-packs¹⁹ and Italian alert procedures²⁰ share a common purpose: to promote timely restructuring of distressed yet viable companies (and their businesses) before they become insolvent. However, the procedural content of these procedures sets them apart.

As a result, the next sections of this part of the paper highlight the key features and roles of the experts who have supervisory roles over

¹⁹ See generally: I Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell: London, 2017) [16-029] – [16-031].

²⁰ For a description of the procedure and its implications, see: MS Spolidoro, 'Procedura d'Allerta, Poteri Individuali degli Amministratori non Delegati e Altre Considerazioni sulla Composizione Anticipata delle Crisi' (2018) *Rivista delle Società* 171.

the English pre-pack sales to connected parties and the Italian *procedure d'allerta*. The comparison between the English and Italian procedure is justified on the basis that they share significant similarities with reference to one key aspect: the pool on the one hand, the panel of experts on the other.

*2.1 The 'Pre-Pack Pool': Its Mechanics and The Policy Rationale*²¹

The English pre-packs are a hybrid form of corporate rescue, a procedure which combines the benefits of informal workouts with the properties of formal procedures.²² Pre-package administration is a process in which a troubled company, a prospective buyer and key creditors conclude an agreement on the sale or restructuring of the company in advance of statutory administration procedures. The agreement is then executed by the administrator before his proposals are presented for approval at a general meeting of creditors.

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.²³

The findings of the *Graham Review into Pre-Pack Administration* ('Graham Review', 2014) were based upon anecdotal evidence, interviews with stakeholders and quantitative data presented in the

²¹ Parts of this section first appeared in E Vaccari, 'Pre-Pack Pool: Is It Worth It?' (2018) 29(12) I.C.C.L.R. 697, 703-704.

²² B Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Edward Elgar Publishing 2016) 28. See also SIP16 at [1].

²³ The terms of the review are available in the Graham Report: T Graham, 'Graham Review into Pre-pack Administration: Report to the Rt Hon Vince Cable MP' *The Insolvency Service* (London, 16 June 2014) paragraph 5.3 <<https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration>> accessed 1 July 2020.

Wolverhampton Report.²⁴ The Graham Review found that pre-pack sales – despite being relatively small in number – represent a useful corporate rescue tool that preserves employment and viable businesses. Additionally, the Graham Review also found that pre-packs are cheaper than upstream procedures and, therefore by and large, successful.²⁵

At the same time, it was observed that there were transparency issues and evidence of less successful outcomes in pre-pack sales to a connected party.²⁶ 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;
4. lack of evidence of the future viability of the new.co.²⁷

To address these and other issues, Teresa Graham argued for a de-regulatory approach²⁸ and the implementation of industry-led changes. The Government endorsed this approach and favoured the introduction of a series of voluntary industry measures with the Small Business, Enterprise and Employment Act ('SBEEA') 2015, which received Royal Assent on 26 March 2015. The Government reserved the power to introduce subsequent legislation should the proposed industry-led self-regulation not have the desired effect.²⁹ This power expired on 25 May 2020, i.e. on the fifth anniversary of

²⁴ 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 1 July 2020.

²⁵ Graham (n 23) [3.4] – [3.7].

²⁶ Graham (n 23) [3.8] – [3.13].

²⁷ *Ibid.*

²⁸ Graham (n 23) 12 at paragraph 5.5.

²⁹ Insolvency Act ('IA') 1986 paragraph 60A as introduced by section 129 SBEEA 2015.

the coming into force of the SBEEA 2015 and as a result it is also referred to as the “sunset clause”.³⁰

Parliament recently introduced far-reaching reforms to the English corporate insolvency framework by means of the *Corporate Insolvency and Governance Act 2020* (‘CIGA 2020’). The proposed reforms do not affect the discipline of pre-packs, even if some of the innovations introduced by the SBEEA 2015 are struggling for survival.³¹ Nevertheless, section 8 of CIGA 2020 revives the Government’s power to review connected pre-packs and related instruments, included the pool. This power has now been extended to the end of June 2021.

One of the innovations currently under review is the creation of a pool of experts that the purchasers could voluntarily approach in case of a sale to a connected party.³² This section of the paper carries out an analysis of the salient characteristics of the pool, in order to make a comparison with the Italian panel of experts.

The establishment of the pool 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. As will become apparent later in this paper, the Italian panel pursues additional purposes, including facilitating negotiations between the parties and ensuring that procedures are not abused. However, such goals could not be achieved if transparency and trust are not established between the parties.

³⁰ C Umfrville, ‘Review of the Pre-pack Industry Measures: Reconsidering the Connected Party Sale Before the Sun Sets’ (2018) *Inso. Int.* 58, 58.

³¹ A Ralph, ‘Pre-packs watchdog says it faces collapse’ *The Times* (London, 26 May 2020).

³² Graham (n 23) paragraph 4.

The pool was launched on 2 November 2015 but it was not met with universal enthusiasm by the ‘trade press’.³³ It is an independent body and a limited company constituting of experienced business people who are selected following a public recruitment exercise.³⁴ 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.³⁵

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 (£950 + VAT) have been received. Access to the Italian panel is also subject to a fee, which is made of a fixed and a variable part.³⁶ Unlike the pool, all the costs associated with the Italian panel (with the exception of the debtor and other parties’ counselling costs) are tax-deductible.

When a pre-pack sale to a connected party is proposed, the insolvency practitioner (‘IP’) should inform the purchaser of the opportunity to approach the pool. The voluntary rather than mandatory nature of the procedure is one of the most striking differences between the English and Italian mechanisms.

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 new.co. 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. The applicants should highlight the steps taken to avoid administration and explain why a pre-pack sale is necessary. Finally, they should describe who is expected to take advantage of, and who suffers a disadvantage from the sale, and on which basis they expect the business to thrive in the

³³ S Hopewell and D Kerr, ‘Unpacking the Pre-Pack’ (Nov. 2016) Credit Management 13 (arguing, however, that progress was made since the first impact).

³⁴ A list of these people is available here: <<https://www.prepackpool.co.uk/about-the-pool>> accessed 1 July 2020.

³⁵ See: <<https://www.prepackpool.co.uk/>>, accessed 1 July 2020.

³⁶ Article 351 IIC.

future (at least for the following twelve months).³⁷ With the exception of the documents about the sale, the applicant should submit similar documents to the Italian panel. Under the Italian *procedura d'allerta*, the negotiation is facilitated by the panel. There is no need to submit a restructuring plan upon commencement of the procedure, even if this may help facilitate the negotiations between the parties.

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

Another significant difference between the Italian panel and English pool is the outcome of the procedure. The Italian procedure is outlined in the next section. As for the English procedure, 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 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. The light-touch approach and limited powers of the experts involved in the procedure are another common characteristic with the Italian 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

³⁷ See: <<https://www.prepackpool.co.uk/guidance-documents>>, accessed 1 July 2020.

‘old.co.’ 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 ‘new.co.’. This facilitating role is another commonality with the Italian panel, who revolves around this goal.

The pool has proven effective in dealing with connected pre-packs, as evidenced by the most recent sale of *Go Outdoors*.³⁸ In this case, the debtor was sold back to its previous owner *JD Sports* by means of a deal cleared by the Pool in less than 24 hours. Unfortunately, the pool has experienced a very low uptake rate from eligible applicants, especially in the last few months. Recent data³⁹ and interviews⁴⁰ suggest that only about 10 per cent of eligible cases are being referred to the body. This is despite English courts taking into account the expert judgment of the members of the pool to determine if a pre-pack sale to a connected party is in the best interest of the creditors as a whole. For instance, in the recent case of *Moss Groundworks*, the court declined to make an administration order in relation to a civil engineering company because the proposed pre-pack sale to a new.co. which was connected with the directors of the existing company had not been marketed properly and there was no suggestion that the pool was involved in assessing the sale.⁴¹

2.2 The Panel of Experts in the Italian Alert Procedure

On 14 November 2017, the first comprehensive reform of Italian insolvency law since Mussolini’s time came into force. Law 19

³⁸ P Sweet, ‘Deloitte handles £56m Go Outdoors pre-pack administration’ *Accountancy Daily* (London, 24 June 2020) <<https://www.accountancydaily.co/deloitte-handles-ps56m-go-outdoors-pre-pack-administration>> accessed 1 July 2020.

³⁹ Pre-Pack Pool, *Annual Report 2018* (London, 2019) <<https://www.prepackpool.co.uk/uploads/files/documents/Pre-Pack-Pool-2018-Annual-report-v4.pdf>> accessed 1 July 2020.

⁴⁰ Ralph (n 31). – am I correct to think that this is a newspaper article? is this something that can be built upon in terms of general conclusion for this paper? Who were interviewed? For which purposes? By whom?

⁴¹ *Re Moss Groundworks Ltd* [2019] EWHC 2825 (Ch), [2019] 9 WLUK 471.

October 2017, no. 155⁴² authorised the Government to reform the statutory discipline of business crisis and insolvency procedures. The 2017 Act is designed to promote the timely rescue of distressed yet viable businesses, in line with European laws⁴³ and recommendations,⁴⁴ as well as international suggestions⁴⁵ and best practices.⁴⁶ As mentioned in the introduction, the new Code was finally enacted by Legislative Decree 12 January 2019, no. 14.

The 2017 Act and the 2019 IIC are based on a draft bill prepared by a commission of experts made of judges, professors and practitioners and supported by a scientific committee. This commission was chaired by Renato Rordorf, the then president of the I Civil Section of the Supreme Court, and is known as the ‘Rordorf Commission’.

One of the hallmarks of the 2017 Act is article 4, which instructs the Ministry of Justice, after having considered the opinions of the

⁴² *Gazzetta Ufficiale*, Year 158, No. 254 (30 October 2017).

⁴³ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (recast) [2015] OJ L141/19.

⁴⁴ Commission (EC), ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions’ COM(2012) 795 final, 9 January 2013; EU Directive on preventive restructuring frameworks (n 7).

⁴⁵ The Government specifically mentioned – with reference to the alert procedure – the principles conceived by the UNCITRAL and the World Bank: Camera dei Deputati, ‘Disegno di Legge Presentato dal Ministro della Giustizia (Orlando) di Concerto con il Ministro dello Sviluppo Economico (Guidi)’ (No. 3671) (11 March 2016) 3. The Government was also concerned with the negative impact that an outdated legislation could have on the country’s ranking in the World Business *Doing Business* Report (n 11).

⁴⁶ U.N. Comm’n on Int’l Trade Law, ‘UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation’, U.N. Sales No. E.14.V.2 (2014), <<http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>> [<https://perma.cc/T9Y3-NR8B>]> accessed 1 July 2020. In the document that introduced the bill to the Justice Committee of the Chamber of Deputies, the then Ministry of Justice, Andrea Orlando, recommended the implementation of its rules even if assistance to foreign representatives and co-operation to procedures initiated in countries that have not adopted the Model Law should have been restricted: Camera dei Deputati, ‘DDL Orlando’ (n 45) 2. This decision is in stark contrast with the recommendations of the UNCITRAL Working Group V and the approach adopted by other countries such as England.

Ministry of Economy and the Ministry of Welfare and Economic Development, to introduce an alert procedure into the Italian insolvency framework.⁴⁷ The linchpin of the procedure is the establishment in each local Chamber of Commerce, Industry and Artisanry of a panel of independent business experts ('the panel'). The panel and procedure are now regulated by articles 16-23 of the IIC.⁴⁸

The alert procedure is a non-judicial and confidential⁴⁹ composition and rescue mechanism⁵⁰ carried out under the supervision of the Chamber of Commerce.⁵¹ Such a procedure should help the early

⁴⁷ Article 1(3) 2017 Act. On the topic, see A Jorio, 'Su Allerta e Dintorni' (2016) I Giur. Comm. 261; Spolidoro (n 20).

⁴⁸ For a comprehensive analysis of the procedure, see: R Ranalli, *Le misure di allerta. Dagli adeguati assetti sino al procedimento avanti all'OCRI* (Giuffrè 2019), 115 ff.; P Montalenti, 'Gestione dell'impresa, assetti organizzativi e procedure di allerta nella riforma Rordorf' (2017) Nuovo dir. soc. 951. For a shorter outline, see: Redazione, 'Le procedure di allerta nella procedura fallimentare' *Diritto.it* (18 June 2019) <<https://www.diritto.it/le-procedure-di-allerta-nella-procedura-fallimentare/>> accessed 1 July 2020.

⁴⁹ In their observations to the proposed bill, the representatives of accountants argued that the confidential nature should be dropped with reference to those alert procedures initiated by qualified public entities: Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili, 'Osservazioni e proposte del Consiglio Nazionale dei Commercialisti e degli Esperti Contabili alla II Commissione Permanente Camera dei Deputati' (Rome 8 June 2016) 10.

⁵⁰ Article 4(1) 2017 Act and article 12 IIC.

⁵¹ For a general overview of the procedure, see: F Barachini, 'Le Procedure di Allerta e di Composizione della Crisi nel Progetto di Legge Delega per la Riforma della Legge Fallimentare' in L Calvosa (ed.), *Crisi di Impresa e Insolvenza: Prospettive di Riforma* (Pacini Ed., Pisa 2017); M Panelli, 'La Prevenzione della Crisi d'Impresa. I Lavori della Commissione Rordorf e gli Scenari Futuri' (April 2015) 6 *Economia Aziendale Online* 225, 229; R Ranalli, 'Le Procedure di Allerta e di Composizione Assistita della Crisi: Insidie ed Opportunità' (2017) *Il Fallimentarista*; A Rossi and V Pigarelli, 'Nuovo Codice della crisi e dell'insolvenza: le procedure d'allerta' (5 February 2018) *Crisi d'Impresa*. Similar mechanisms had been proposed in the past, for instance by the so called 'Trevisanato Commission' established in 2001 to design a comprehensive proposal of reform of the Italian insolvency framework. The Trevisanato Commission concluded its work in 2003, but the proposal to introduce an alert procedure was rejected by the Legislator due to the strong opposition of the industry (*Confindustria* and *Assonimine*): E Busato, 'Arrivano le Nuove Procedure di

emergence of a condition of crisis or distress, as the debtor is assisted by a professional body with the objective to turn around his business and reach an agreement with creditors. The debtor may also apply to the court to obtain some protections, including a stay on executory actions.⁵²

The Italian alert procedures aim to facilitate the early emersion of a situation of financial or economic distress and a composition between the affected parties with the view of rescuing the company or its business. They are an out-of-court workout with the companies' creditors designed to preserve the continuation of the business.⁵³ To encourage their use, whenever the request to commence an alert procedure is timely,⁵⁴ the debtor enjoys both fiscal and personal incentives. These include the possibility of not being charged with the crime of bankruptcy and the other crimes embedded in insolvency law whenever the actions of the debtor have only caused small damage to the collectivity.⁵⁵ For all other crimes, the debtor can benefit from a significant reduction in the punishment sentencing phase.⁵⁶

The procedure applies to any corporate entity except for state-owned entities, public corporations and large companies defined in accordance with the European framework,⁵⁷ as well as banks, insurance companies and pension funds.⁵⁸ Whenever the company

Allerta e la Composizione Assistita della Crisi' (16 March 2015) <<https://www.organizing.it/arrivano-le-nuove-procedure-di-allerta-e-la-composizione-assistita-della-crisi/>> accessed 1 July 2020.

⁵² Article 4(1)(g) 2017 Act and article 20 IIC.

⁵³ Article 4(1) 2017 Act and article 12(1) IIC.

⁵⁴ The Ministry of Justice clarified that a request is timely whenever it occurs within six months from the appearance of financial disequilibria whose existence is assessed by reference to criteria such as the company's debt and its levels of stock and liquidity. Specific criteria are outlined by article 24 IIC.

⁵⁵ Article 25(1) IIC.

⁵⁶ Article 4(1)(h) 2017 Act and article 25(2) IIC.

⁵⁷ This means that the procedure could not apply to companies that have either 250 or more employees or with a turnover of more than €50 million and a balance sheet exceeding €43 million.

⁵⁸ Article 12 IIC.

finds itself in a situation of crisis,⁵⁹ its managers,⁶⁰ auditors⁶¹ and qualified public entities⁶² have the *duty* to inform the local Chamber of Commerce of the existence of such situation if effective corrective measures are not put into place within a short period of time (30 to 90 days).⁶³ This is a significant difference with the English procedure, where the pool is approached on a voluntary basis.

Once the information is received, the local Chamber of Commerce then has the obligation to establish the panel and commence the *procedura d'allerta*. This is a significant difference from the French “model”⁶⁴ of the *procédure d'alerte*, where that information has to be transmitted to the president of the *Tribunal de Commerce*.⁶⁵

The decision to involve independent experts instead of a court has been motivated by various reasons, including the lobbying activity of the associations representing the Italian IPs. Other explanations include the absence of specialised judges to deal with insolvency

⁵⁹ Even if many commentators criticised the indicators of a situation of crisis for being too generous and close to a situation of “insolvency”: P Vella, ‘L’allerta nel Codice della Crisi e dell’Insolvenza alla Luce della Direttiva (UE) 2019/1023’ (24 July 2019) *Il Caso.it* 1, 27 <<https://blog.ilcaso.it/libreriaFile/1124.pdf>> accessed 1 July 2020; A Rossi, ‘Della crisi tipica *ex* CCII alla resilienza della twilight zone’ (2019) 3 *Fallimento* 296.

⁶⁰ Article 16 IIC.

⁶¹ Article 4(1)(c) 2017 Act and article 14 IIC.

⁶² Article 4(1)(d) 2017 Act and article 15 IIC. These include in particular the Italian equivalent of the HMRC and the National Social Insurance and Pension Agency. This choice was criticised by ‘*Assonimine*’, the Italian association of public companies, in an oral hearing in front of the Rordorf Commission: Camera dei Deputati, ‘DDL Orlando’ (n 45) 54.

⁶³ For an analysis of these duties, see: B Inzitari, ‘Crisi, insolvenza, insolvenza prospettica, allerta: nuovi confini della diligenza del debitore, obblighi di segnalazione e sistema sanzionatorio nel quadro delle misure di prevenzione e risoluzione’ (2020) *Apr/Giu Rivista di Diritto Bancario* 355, 369-374.

⁶⁴ The word “model” describes a legislative framework that is used as a standard for comparison to draw inspiration for regulatory reforms. As far as the author is aware, there was never any suggestion in the Rordorf Commission to choose a foreign law and imitate/apply it in the Italian framework.

⁶⁵ L. 234-1, al. 4 *Code de Commerce*.

matters⁶⁶ and the problematic situation of Italian courts, which are frequently too understaffed and overworked to operate efficiently.⁶⁷

The decision not to involve the judiciary at this stage has been praised by some commentators⁶⁸ as well as the industry. Some scholars, however, rightly observe that the success of the choice to rely on independent experts rather than courts depends on the ability of these experts to act independently, quickly and in the interests of all those parties who have residual interests in the distressed enterprise.⁶⁹ As for the representatives of the industry, *Assonimine* – the association of Italian public companies – openly supported this decision in a hearing in front of the Parliamentary committee on 6 July 2016.⁷⁰

One of the key differences with the English approach to pre-packs is the highly technical and detailed nature of the Italian procedure. The Italian alert procedure is compulsory and highly bureaucratic,⁷¹ resulting in rules that make the participants' life more complicated than it should.⁷² For instance, debtors have to be heard in front of the panel, but such hearing could easily be replaced by the submission of a written report upon the submission of the petition or at the request of the panel if the procedure is not commenced by the debtor.

⁶⁶ In Italy Tribunals of Commerce have been abolished by means of law no. 5147/1888 which unified the commercial and civil jurisdiction of the courts. The recently established Tribunals of Enterprises (law decree no. 1/2012) do not have jurisdictions over insolvency matters.

⁶⁷ A Pellegatta, 'Prevenzione delle Crisi d'Impresa e Procedure d'Allerta' (2013) *Judicium*.

⁶⁸ M Fabiani, 'L'Ipertrofica Legislazione Concorsuale fra Nostalgie e Incerte Contaminazioni Ideologiche' (6 August 2015) *Crisi d'Impresa e Fallimento* 1.

⁶⁹ *Ibid* 8.

⁷⁰ As reported in R Guidotti, 'Emersione della Crisi e Opportunità di Risanamento' (24 November 2016) *Il Caso.it* 1, 7.

⁷¹ M Ferro, 'Allerta e composizione assistita della crisi nel D. Lgs n. 14/2019: le istituzioni della concorsualità preventiva' (2019) *Fallimento* 421; M Fabiani, 'La fase dell'allerta non volontaria e il ruolo dell'OCRI' (9 October 2019) *Il Caso.it* 1, 1-2 <<https://blog.ilcaso.it/libreriaFile/11323.pdf>> accessed 1 July 2020.

⁷² Fabiani (n 71) 2.

While sharing similarities with the English pool, the Italian panel is not a copy-and-paste exercise of the latter. This is an important element in the analysis of whether the Italian panel is an example of cross-fertilisation from the English pool.

Like the English pool, the procedure in front of the Italian panel is not judicial and it is aimed at promoting the early emergence of crisis. As a result, in both procedures the courts only have a secondary role.⁷³ After the initial assessment on the existence of a situation of crisis, the Italian panel is tasked to find a solution to the said situation of crisis. Should a debtor wish to start negotiations with the creditors, the panel will promote a dialogue between the debtors and creditors, in order for them to agree on an out-of-court rescue plan. The panel acts as a facilitator, not as an assessor of a pre-negotiated plan.⁷⁴

This facilitating nature is possible only if the debtor expresses their willingness to carry out some negotiations with the creditors, with the view of overcoming the situation of distress. The facilitating role of the panel in these circumstances brought some commentators⁷⁵ to argue that the Italian panel is modelled after the French *mandataire ad hoc*. However, unlike the French counterpart, the Italian panel has an *obligation* to report failure in the negotiations between the parties to the district attorney, with the view of commencing a liquidation procedure.⁷⁶ As a result, the public nature of the panel differentiates it from the French *mandataire ad hoc*. This obligation to report is quite unique, as it is not shared with the English pool either.

According to the version of the bill proposed by the Rordorf Commission, this facilitator should have been appointed on a rota basis from experienced business people selected following a public

⁷³ This role is more marked and interventionist for the English pre-packs, as these are judicial proceedings as opposed to the Italian alert procedures, which are entirely out-of-court procedures.

⁷⁴ Articles 18-19 of the IIC.

⁷⁵ Ranalli (n 48); A Jorio, 'La riforma della legge fallimentare tra utopia e realtà' (2019) 94(2) *Il diritto fallimentare* 283.

⁷⁶ Article 22 IIC.

recruitment exercise. This selection procedure would have shared several similarities with the way the members of the pool are selected. The appointee, an experienced IP, should have concluded his work in the shortest possible time.⁷⁷

The Government, probably in an attempt to reduce the costs associated with the establishment of a new body of experienced practitioners and a selection procedure, suggested that the work of the panel could have been carried out by existing entities with specific expertise in facilitating turnaround plans agreed by both debtors and creditors (known as ‘OCRIs’).⁷⁸ The representatives of IPs praised the Government’s decision to involve the OCRIs in the assessment exercise, but they also suggested to further restrict the eligibility criterion to those OCRI members that were in possession of managerial or legal expertise (basically, their representatives).⁷⁹

The Parliamentary debate significantly amended this aspect of the proposal. First, it “institutionalised” the panel at the level of each Chamber of Commerce, with the result that new or existing personnel should be hired and trained to handle these requests. This may negatively affect the overall cost of the procedure.

Second, the 2017 Act opted for a three-member panel which should not be made up of people specifically trained for that purpose but by any member of a regulated profession. One of them should be

⁷⁷ Article 4(1)(e) of the proposed bill: <https://www.giustizia.it/giustizia/it/mg_1_2_1.page?facetNode_1=0_10&contentId=SAN1217600&previousPage=mg_1_2> accessed 1 July 2020.

⁷⁸ Camera dei Deputati, ‘DDL Orlando’ (n 45) 4. These bodies are known as ‘Organismi di Composizione della Crisi d’Impresa’ (‘OCRI’). They work alongside the ‘Organismi di Composizione della Crisi da Sovrindebitamento’ (known as ‘OCCs’), first introduced by law 27 January 2012 no. 3 - *Gazzetta Ufficiale* Year 153, No. 18 (30 January 2012) - and established pursuant to the Ministerial Decree 24 September 2014 no. 212 published in the *Gazzetta Ufficiale* Year 156, No. 21 (27 January 2015). OCCs have jurisdiction for agricultural enterprises and small companies.

⁷⁹ Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili, ‘Osservazioni e proposte’ (n 49) 8.

appointed by the president of the local insolvency court,⁸⁰ one from the Chamber of Commerce and one from the regulatory bodies of eligible professionals. The last appointee was later replaced in the final version of the law by a representative of the corporative body of the sector in which the debtor operates.⁸¹

Third, the law established a rather long period (up to six months) to complete the procedure. In reality, the procedure should only last for three months, which could be extended to six months in case of positive progression in the negotiations with the creditors.⁸²

Finally, the petition has to be submitted to the OCRI where the company has its registered seat. No reference is made to the debtor's centre of main interest ('COMI'). While this decision may promote certainty, it is significantly different from the English approach, where there is a centralised and electronic petition. Also, the OCRI's jurisdictions do not match the local courts' jurisdiction, with the result that there might be filing issues and delays in the commencement of the procedure.

The Italian panel⁸³ demonstrates both significant similarities and also differences over the English pool. The main elements of variance are with reference to the composition, role, powers and duties of these mechanisms. The next part discusses the degree of cross-fertilisation between the Italian panel and the English pool, as well as the need for regulatory reforms in light of the English experience.

⁸⁰ In Italy there are no separate insolvency courts similar to the U.S. bankruptcy courts, but specialised sections within the Civil branch of selected courts, similar to the Chancery Divisions of English High Courts.

⁸¹ Article 17(1)(c) IIC.

⁸² Article 19(1) IIC.

⁸³ On the "central" role of the panel to promote early restructuring and agreements between debtors and creditors, see: Crisi & Insolvenza, 'Il ruolo centrale del nuovo OCRI nella composizione della crisi' (3 December 2019) <<https://www.crisieinsolvenza.it/dottrina/il-ruolo-centrale-del-nuovo-ocri-nella-composizione-della-crisi/>> accessed 1 July 2020.

3 The Models Behind the Italian Reform

The Rordorf Commission examined foreign best practices, in particular from countries such as the United States, England, Germany and France.⁸⁴

In particular, the Commission took inspiration from the U.S. Chapter 11 procedure to modify the Italian judicial reorganization formal insolvency procedures for both small and large corporations.

The English “model” was mentioned as an example of a system capable of facilitating early out-of-court workouts and semi-judicial procedures. The Rordorf Commission praised in particular the role that certain financial institutions co-ordinated by the Bank of England played in promoting the rescue of viable businesses (the ‘London Approach’).⁸⁵ The Rordorf Commission consequently embraced the English approach to promote out-of-court workouts as opposed to judicially-supervised procedures, a choice adopted for instance in other jurisdictions such as France.⁸⁶

Germany was taken as an example for its judicial procedure and, in particular, for the existence of a single common “point of entry” to all debtors irrespective of the purpose (liquidation, restructuring, sale or a combination of both) of the procedure.

The French model is particularly notable for alert procedures. The commission looked in particular at the workings of the *réglement*

⁸⁴ Commissione Ministeriale per la Riforma delle Procedure Concorsuali, ‘Schema di Disegno di Legge recante “Delega al Governo per la Riforma Organica della Disciplina della Crisi di Impresa e dell’Insolvenza”. Relazione Generale’ (2015) <<http://www.ordineavvocatitrani.it/pubblica/articolo.php?articolo=109>> accessed 1 July 2020.

⁸⁵ *Ibid.* For a closer analysis of the London Approach, see: J Armour and S Deakin, ‘Norms in Private Insolvency: The ‘London Approach’ to the Resolution of Financial Distress’ (2001) 1 J. Corp. Law Stud. 21; V Finch and D Milman, *Corporate Insolvency Law. Perspectives and Principles* (3rd edn, CUP 2017), 254-264.

⁸⁶ Camera dei Deputati, ‘DDL Orlando’ (n 45) 55 (noting that the Rordorf Commission dismissed calls for carrying out the alert procedure under the control or supervision of the local court).

amiable and the *procédure d'alerte*. A first attempt to introduce the French *procédures d'alerte* under Italian law was carried out in 2001 by a commission of experts known as 'Trevisanato Commission', but its work did not result in a Parliamentary bill.⁸⁷ The alert procedures discussed in this paper share manifold elements with the French *procédures d'alerte*.⁸⁸ Furthermore, France as a civil law country shares more cultural and legislative similarities with Italy (whose Civil Code is still remarkably akin to the French model from which it derives) than most other jurisdictions.

It is therefore possible to conclude that, in order to implement the suggestions included in the EU Directive on preventive restructuring mechanisms⁸⁹ into Italian law,⁹⁰ the Rordorf Commission looked primarily at two foreign jurisdictions for inspiration: the United Kingdom and France. It is now therefore appropriate to infer to what extent – absent any express reference to the pool – the Italian Legislator and the Rordorf Commission had this mechanism in mind when they designed the new alert procedure described in the IIC.

3.1 The Panel: What Model (if any)?

This analysis of the main characteristics of both the English pool and the Italian panel shows the remarkable parallels between the two instruments, despite the clear influence of the French model of the *procédures d'alerte* on several remaining aspects.

Both the English pool and Italian panel are required to carry out out-of-court assessment exercises by independent business experts. The companies that submit a request to either the pool or the panel should be in a situation of crisis but not necessarily or not yet in a condition of insolvency.

⁸⁷ Pellegatta (n 3), 2-8 and (n 67).

⁸⁸ Among others, see: D'Attorre (n 3) 521.

⁸⁹ EU Directive on preventive restructuring frameworks (n 7).

⁹⁰ On the degree of compliance of the alert procedures with the EU directive on preventive restructuring frameworks, see: Mastrangelo (n 3).

More generally, both procedures are confidential (albeit the English procedure only for the assessment in front of the pool) and have been designed by the respective Legislators to promote transparency and accountability in out-of-court turnaround practices. Both mechanisms aim to promote the rescue of distressed yet viable businesses, saving jobs and achieving higher dividends for creditors (particularly unsecured ones).

Finally, the pool and particularly the panel, are required to give independent, informed and prompt support to companies in serious financial difficulties. They rely on the professionalism and expertise of selected players from the industry and the profession, to promote the rescue or restructuring of companies and businesses.

At the same time, differences in the duration (two days versus up to six months) and the objective (to assess the desirability of a rescue solution or agree on one) between these mechanisms should not be overlooked.

This leads to the conclusion that it is not possible to establish with absolute certainty if the English pool acted as a model for the Italian panel. As a consequence, it is possible to dismiss the claim that the case described in this paper represents a “legal transplant”,⁹¹ a copy-and-paste exercise from one borrowing jurisdiction to another one.

This is because, as outlined by the Scottish legal historian and comparatist Alan Watson, “legal transplants” require the establishment of a strong, historical connection between legal systems.⁹² Such connection could be easily established for France, but it is certainly not established for the UK. Had the English framework influenced the European law on this matter, the case for an indirect legal transplant could have been made. However, this is not the case for the pool.

⁹¹ A Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press: Athens GA, 1993).

⁹² *Ibid.*

Nevertheless, it is clear that the two mechanisms share the policy rationale. They both incentivise the achievement of out-of-court restructuring by means of independent, business experts, thus dismissing the long-established perception that fairness and accountability can only be achieved in a courtroom.⁹³ It is, therefore, appropriate to investigate which lessons could be learnt from the English experience of the pool, which is done in the next section of this paper.

3.2 Lessons from the English Model

There is a significant volume of literature on the reforms introduced in the wake of the Graham Review and, particularly, on the pool.⁹⁴ The author has previously written two pieces and a blog post on this topic,⁹⁵ arguing that ‘the pool’s low uptake rate should be attributed to the failure from the Government to properly and actively support this industry-led body’.⁹⁶

In light of the striking similarities evidenced in the previous section and the pivotal role of the Italian panel for the success of alert

⁹³ English commentators and the judiciary have long since dismissed the idea that judges are the most appropriate figures to assess the commercial soundness of a rescue or restructuring plan. The same cannot always be said for Italian judges.

⁹⁴ Among others, see: T Astle, "Pack up your troubles: addressing the negative image of pre-packs" (2015) 28(5) *Insolv. Int.* 72; JM Wood, ‘The Sun is Setting: Is It time to Legislate Pre-Packs?’ (2016) 67(2) *N.I.L.Q.* 173; S Jones, ‘The pre-pack pool: is it working?’ (2017) 10(4) *C.R. & I.* 138; C Umfreville, ‘Taking a DIP into the Pool: Should the Pool be Extended to CVAs?’ (2018) 11(5) *C.R. & I.* 158; Umfreville (n 30); B Adebola, ‘The Case for Mandatory Referrals to the Pre-pack Pool’ (2019) 32(2) *Insolv. Int.* 71; S Ellina, ‘Administration and CVA in corporate insolvency law: pursuing the optimum outcome’ (2019) 30(3) *I.C.C.L.R.* 180, 188.

⁹⁵ Vaccari ‘Worth it?’ (n 21); E Vaccari, ‘English pre-packaged corporate rescue procedures: is there a case for propping industry self-regulation and industry-led measures such as the pre-pack pool?’ (2020) 31(3) *I.C.C.L.R.* 170. See also: E Vaccari, ‘Pre-Pack Pool: Quo Vadis?’ (Essex Law Research, 7 July 2020) <<https://essexlawresearch.blog/2020/07/07/pre-pack-pool-quo-vadis/>> accessed 9 July 2020.

⁹⁶ Vaccari, ‘English pre-packaged rescue’ (n 95) 197.

procedures,⁹⁷ this part of the paper focuses on the shortcomings of the pool. The purpose of this section is to assess which lessons can be learnt from the English experience.

Three main recommendations were put forward to strengthen the role of the pool in preventing abusive filings:

- (1) strengthening the powers and duties of the pool;
- (2) making referrals compulsory in any pre-pack sale; and
- (3) ensuring adequate supervision on the pool's decisions.⁹⁸

With reference to the first point, it is challenging to assess if the Italian panel has enough powers to effectively promote successful negotiations between the debtor and its creditors.

The Italian panel operates within a procedure that gives to the debtor less negotiating power than the corresponding English pre-pack procedure. This occurs even if Italian debtors can rely on some supporting measures, such as a ban on the enforceability of *ipso facto* clauses⁹⁹ and – where not confidential – the possibility to obtain an automatic stay on executory actions.¹⁰⁰

At least the first point seems to represent a significant advantage of the Italian over the English procedure. In fact, under English law *ipso facto* clauses have always been enforceable. As a result, a creditor could walk away from the obligation to supply goods or services to a company, which enters into an administration procedure.

However, English law does restrict the contractual power of the parties with reference to certain contracts. Section 233 of the Insolvency Act 1986 ('IA 1986') forces the essential suppliers – i.e. the suppliers of electricity, gas, water and telecommunication

⁹⁷ R Ranalli, 'Il successo della riforma dipende dall'OCRI: un accorto suggerimento al legislatore' (4 December 2018) Il Caso.it <<https://blog.ilcaso.it/libreriaFile/10621.pdf>> accessed 1 July 2020.

⁹⁸ Ibid.

⁹⁹ Article 12(3) IIC.

¹⁰⁰ Article 20 IIC.

services – to continue the provision of these supplies during a formal insolvency procedure (including administration), if requested by the office holder. The *Insolvency (Protection of Essential Supplies) Order 2015 (SI 2015/989)* extended the list of essential suppliers to IT services and landlord to tenant contracts. More recently, the *CIGA 2020* introduced a general ban¹⁰¹ on the enforceability of *ipso facto* clauses triggered by the commencement of a formal insolvency procedure.¹⁰² As a result, Italian and English laws now grant similar protection to the debtors who want to continue trading during the insolvency procedure.

As for the stay on executory actions, under English law this is triggered automatically as soon as an application to the court for an administration order is made,¹⁰³ and any breach of moratorium provisions entitles the administrator to seek damages.¹⁰⁴ Additionally, the English moratorium is very broad in scope, as it covers the commencement or continuation of quasi-legal proceedings such as arbitration¹⁰⁵ and it includes property that was acquired by a company and then sub-let to end users.¹⁰⁶ Under Italian law, protective measures are only granted by the court following a petition from the debtor who commenced the alert procedure and only after the debtor's first hearing with the panel. As a result, the English

¹⁰¹ This general ban does not apply to small suppliers. For a temporary period (ending on 30 June 2020 or one month after the legislation comes into force, whichever is later) small suppliers will be exempt from the proposed changes and can (if they chose) terminate the supply contract. This is a temporary exemption designed to address the current difficulties faced by UK companies as a consequence of the Covid-19 pandemic. It will capture suppliers who meet at least two of the following three criteria: (1) Employ less than 50 people; (2) Have a balance sheet with assets totalling £5.1 million or below; or (3) Have a turnover of £10.2 million or below. The criteria differ slightly when the supplier has been trading for less than one year. When the temporary period expires (unless extended) small suppliers will be caught by the new *ipso facto* regime and will not be able to terminate their supply contract for insolvency-related reasons.

¹⁰² Section 233B, Schedule B1 IA 1986.

¹⁰³ Paragraphs 42-44, Schedule B1 IA 1986.

¹⁰⁴ *Euro Commercial Leasing Ltd v Cartwright & Lewis* [1995] B.C.C. 830.

¹⁰⁵ *Bristol Airport v Powdrill (aka Re Paramount Airways Ltd (No. 1))* [1990] Ch. 744.

¹⁰⁶ *Re Atlantic Computer Systems Plc* [1992] Ch 505.

administrator is in a much better position to strike a deal with the company's creditors than the Italian debtor under the supervision of the panel.

Moreover, the panel is only granted limited powers. At the beginning of the procedure, the panel assesses whether the debtor is in a situation of crisis and identifies with the debtor the emergency measures needed to deal with it. Failure to comply with these measures within an agreed timeframe may result in the early termination of the procedure.¹⁰⁷

At a later stage in the procedure, the panel's main role is facilitating, i.e. to promote a restructuring agreement between the parties. If such agreement is reached, this is not binding on non-signatories¹⁰⁸ and the panel has no cram-down power on dissenting creditors. Like the pool, the panel has no power to block an agreement from going forward, even if it appears that such agreement was reached for abusive purposes, such as avoiding tax or personal liabilities on the signatories or connected parties.

Finally, the law is silent on whether any reduction to the creditors' claims agreed in the restructuring plan would be binding in the ensuing insolvency procedure, should the debtor fail to turn around their business or implement the restructuring plan. The contractual nature of the agreement and the need to register it in the Italian equivalent of the Companies House (*Registro delle Imprese*) suggest that such reduction would be binding, but guidance from the Government or the judiciary is needed on this point.

As a result, it is argued that the limited spectrum of powers granted to the Italian panel may represent an issue for the successful outcome of the *procedure d'allerta*. As the pool's limited involvement and negotiating power in the English pre-packs have been identified as one of the key reasons for the lack of effectiveness of this instrument,

¹⁰⁷ Article 18(4) IIC.

¹⁰⁸ Article 19(4) IIC.

this suggests the need to re-think the role and powers of the Italian panel.

With reference to the second point, the non-mandatory nature of the referral to the pool is not an issue under Italian law. What is more, the Italian Legislator introduced penalties for failure to timely apply to the *procedura d'allerta*. These penalties are effective and wide ranging, and affect all of the parties that have an obligation to submit a petition for an alter procedure. These include personal liability for auditors,¹⁰⁹ loss of preferential ranking or inability to file certain claims against the debtor for the public entities,¹¹⁰ as well as inability to benefit from both fiscal and personal incentives and waivers of criminal liability for the debtor.¹¹¹ As a result, this recommendation does not apply to the Italian panel.

The risk associated with the Italian procedure is that OCRI are inundated with requests. Recent studies from the Bank of Italy and CERVED¹¹² estimated that in “normal” periods (i.e. when the economic activity is not affected by pandemics), OCRI are expected to deal with 8,000 to 47,000 cases each year. As a result, some commentators suggested that – at least in the initial period – small companies should be exonerated from the obligation to file for an alert procedure.¹¹³

The author of this paper is not willing to concur to such recommendation. Micro, small and medium enterprises are those less equipped to deal with economic and financial downturns. Unlike large enterprises, they rarely have access to expert professional advice on a regular basis. Nevertheless, mechanisms have to be put in place to ensure the smooth running of the alert procedures and timely engagement from the experts.

¹⁰⁹ Article 14(3) IIC.

¹¹⁰ Article 15(1) IIC.

¹¹¹ Article 25 IIC.

¹¹² CERVED, ‘Riforma legge fallimentare: quali soglie per il regime di allerta?’ (October 2018) <<https://know.cerved.com/impresе-mercati/legge-fallimentare-allerta-per-crisi/>> accessed 1 July 2020.

¹¹³ Ranalli (n 97).

The third point is not really applicable to the Italian panel either. The Italian alert procedures are an out-of-court restructuring procedure.¹¹⁴ They are supervised by courts, who appoint one of the members of the panel and decide on the petitions for protective measures¹¹⁵ and on other ancillary petitions from the debtor.¹¹⁶ This light-touch approach is appropriate considering the limited powers of the panel and the non-binding nature of the procedure. Should these elements – as advocated earlier in this section – change in favour of a more interventionist role of the panel, then the Legislator should ensure a more extensive supervision by the courts.

Overall, it seems that on paper the Italian panel has the potential of being much more effective than the English pool in propping up corporate restructuring procedures. Nevertheless, there are additional and peculiar issues that need to be addressed to further promote the negotiation and validation of restructuring plans by the Italian panel.

Beside the non-interventionist nature of the Italian alert procedure, two other reasons of concern are represented by the composition of the panel as well as the need for co-ordination between its members. As observed in section 2.2 of this paper, the panel's composition seems to have been more influenced by the lobbying activity of the associations representing the Italian practitioners rather than by the need to provide efficient remedies to debtors in distress.

The case for a multi-player supervisory body is not made, as the majority of Italian companies are micro, small and medium enterprises and as the pool proved that one member is more than capable of dealing with large restructuring procedures.¹¹⁷

¹¹⁴ Even if the failure in the negotiations and the insolvency of the debtor may force the OCRI to submit a report to the public attorney, who will in turn have to commence a formal liquidation proceeding against the debtor – see article 22 IIC.

¹¹⁵ Article 20(1) IIC.

¹¹⁶ Article 20(5) IIC.

¹¹⁷ See, for instance, the recent, fast-track approval of the pre-pack sale of *Go Outdoors* by its old owner: Sweet (n 38).

Finally and more worryingly, while the debtor may benefit from an automatic stay on executory actions for the duration of the *procedura d'allerta*,¹¹⁸ the final agreement is not binding on dissenting or non-participating creditors.¹¹⁹ As a result, it is possible that the *procedura d'allerta* will only be used as a preliminary, conciliatory phase before the opening of a formal insolvency procedure, such as a *concordato preventivo*.

This would be an unfortunate outcome, especially considering the duration of the Italian alert procedure. It is only fair to acknowledge that the English pool – despite the low uptake rate mentioned earlier on and some “juvenile” mistakes, such as the decision in *Polestar UK Print Ltd* (2016)¹²⁰ – produced remarkable results in the procedures in which it was actively involved. For instance, Deloitte administrators completed a pre-pack sale of the UK camping and hiking retailer *Go Outdoors*,¹²¹ just 24 hours after they filed a notice of intent to appoint them. As the debtor was sold to a new entity set up by its former owner, the pool was instructed the case by the connected party purchaser and concluded that the case for the pre-pack sale was not unreasonable in a very short time-frame.

The timely decisions of the pool consistently ensure the smooth and prompt nature of pre-pack sales to connected parties, as well as the possibility for the debtors to continue trading and retain jobs. While it is too early to determine if the *Go Outdoors* case is an example of successful restructuring, other cases¹²² prove the benefits of

¹¹⁸ Article 20 IIC.

¹¹⁹ Article 19(4) IIC.

¹²⁰ It is questionable whether *Polestar* was a pool rather than a market failure: see on this point Vaccari, ‘Worth It?’ (n 21) 705-706.

¹²¹ Sweet (n 38).

¹²² Among others, see the recent cases of *Everest*, *Cath Kidston* and *Clintons*.

Everest, a double glazing firm, was sold to its private equity owner *Capital* which received a qualified positive opinion from the pool: Z Wood, ‘Everest double glazing rescue deal saves 1,000 UK jobs’ *The Guardian* (London, 9 June 2020) <<https://www.theguardian.com/business/2020/jun/09/everest-double-glazing-rescue-deal-saves-1000-uk-jobs>> accessed 1 July 2020; A Ralph, ‘Contentious deals show watchdog’s lack of teeth’ *The Times* (London, 11 June 2020). *Cath Kidston*, a retail company known for its polka dots and floral patterns, was sold to

involving professionals and the pool in the early stages of corporate restructuring.

The Italian *procedura d'allerta* has the potential of proving an effective mechanism to deal with viable yet distressed corporate entities. It is praiseworthy that many of the shortcomings evidenced for the pool are not replicated in the Italian panel. However, it is submitted that the peculiar issues raised with reference to the panel (and, particularly, its powers and composition) and the duration of the procedure need to be addressed in order not to undermine the goals of the regulatory reforms, as well as the work of the professionals involved in them.

4 Concluding Remarks

While the English and French statutory frameworks were used as inspiration for the revised Italian preventive restructuring mechanisms, it is not possible to conclude with certainty whether the members of the Rordorf Commission had the Anglo-Saxon pool in mind when they designed a panel of experts for the Italian alert procedures. The author is not aware of any specific reason not to mention the English model in official documents if that was the starting point of the discussion on the alert procedure (or part of it). Nevertheless, the striking similarities both in the structure and in the rationale underpinning these two instruments, and the expertise of the members of the Rordorf Commission should not be overlooked. It is safe to assume that the drafters of the IIC were fully informed about recent developments under English law.

its private equity owner *Baring Private Equity Asia*: A Armstrong, 'Cath Kidston quits high street and puts 900 staff out of work' *The Times* (London, 22 April 2020). Finally, *Clintons*, a high street greeting card chain, was sold out of administration to the Weiss family, its current owners, in a deal that saved 2,500 jobs and 334 stores: A Hall and J Eley, 'Clintons sold out of administration' *The Financial Times* (London, 4 December 2019) <<https://www.ft.com/content/4e171d82-16bc-11ea-8d73-6303645ac406>> accessed 1 July 2020.

These observations are relevant to determine if the pool had a cross-fertilising effect on the alert procedure and its reliance on a panel of experts. This paper suggests that the similarities between the two mechanisms represent an example of legal cross-fertilisation due to significant resemblances in their policy rationale and in several elements of their structure.

Promoting the early restructuring and the facilitation of out-of-court procedures are key elements for the success of any corporate distress framework. It is encouraging to observe that policy-makers are “keeping their minds wide open” to new ideas and best practices without passively introducing foreign institutes into a domestic context.

If harmonization is to be understood as the process of promoting shared goals and practices across jurisdictions, this modest yet potentially significant example of cross-fertilization of insolvency laws should be cheered. Nevertheless, the panel as envisaged by the IIC is not without criticism.

This paper observed that some elements contribute to make the Italian panel potentially more effective at promoting restructuring deals than the English pool. These include the confidential nature of the Italian alert procedures and the advisory and facilitating role of the panel (as opposed to the pool’s assertive role). It is commendable that these characteristics are coupled with the possibility to obtain a judicial stay on enforcement actions, and the general ban on the enforceability of *ipso facto* clauses. The mandatory referral to the panel is another praiseworthy element of the Italian procedure, as it avoids the risk that the procedure is underused.¹²³

¹²³ Recently, the pool's oversight committee has written to Lord Callanan, Minister for corporate responsibility, notifying the Government that the body is "unsustainable" unless referrals of pre-pack sales to it are made mandatory. This prompted Sir Vince Cable to comment that “if the power lapses and the pool dries up, we shall get a resurgence of dodgy deals under cover of insolvency ripping off bona fide investors and creditors”. Such opinion was shared by Theresa Graham, who commented that the demise of the pool would be “utter folly”. For more on this, see: Ralph (n 31).

At the same time, the paper shed light on some of the shortcomings of the panel by comparing its powers, duties and role with the equivalent responsibilities of the English pool. It concluded that the duration of the Italian procedure is disproportionate and should not exceed three months. It evidenced that the case for a panel of experts is not made (as negotiations can be better co-ordinated and facilitated by a single expert). On this point, there is merit in reverting to the original proposal submitted by the Rordorf Commission, according to which a single expert should have been appointed on a rota basis from experienced business people selected following a public recruitment exercise.

Additionally, the panel needs to be granted more powers to facilitate the deal. In particular, the Italian Legislator should consider making the deal binding on dissenting and non-participating parties, as well as granting cram-down powers to courts (on application of the panel/single expert), provided that adequate protection against hardship is granted to dissenting creditors. Finally, the panel/single expert should be given the power to block restructuring deals entered for abusive purposes and courts should be given more extensive supervisory powers to ensure adequate protection to the creditors.

The panel and – more generally – the Italian *procedure d'allerta* represent a remarkable development in the Italian corporate insolvency framework. It is hoped that the judiciary and Legislator can work together in light of the experience gained from other jurisdictions (in this case, England and the pool) to tweak the system and ensure its successful implementation from the fall of 2021.