Restructuring using a pre-pack? Best not to ask!

While the mainstream press covers the parts of the wide ranging Small Business, Enterprise and Employment Bill that impact the type of ale that can be sold by pubs up and down the country, restructuring advisors have been more focussed on the sections that deal with insolvency reform, say ***Andrew Wilkinson and Linton Bloomberg*** *of law firm Weil, Gotshal & Manges*

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Following the **Graham Report on pre-pack administration sales**, the Bill includes a reserve power for the government to enact regulations restricting sales by administrators to connected persons. This is despite the report recommending that legislation should be introduced as a last resort, and that, instead, it is preferable for the insolvency industry to embrace the suggested measures on a voluntary basis.

It is good to see that the report recognises some of a pre-pack sale's key benefits, including enabling a company to keep trading without the damage to goodwill which could be caused by a protracted insolvency process.

The report also highlights the criticism levelled against pre-pack sales in recent years as a result of a perceived lack of transparency and deals being negotiated behind closed doors with limited marketing and valuations being carried out. Whilst any attempt to increase confidence in the procedure is welcomed, the criticism unfortunately seems to be at the process as a whole, rather than targeted at specific deals.

The report identifies potential reforms to make pre-packs more transparent. One recommendation is that any connected party that proposes to buy a business through a pre-pack could, on a voluntary basis, obtain 'consent' from a pool of around 30 experienced business people (who do not necessarily have any insolvency experience) who would then issue a statement (interestingly, given the aims of the reforms, on an anonymous basis) on the proposed sale. Although it remains to be seen how this will work in practice, any advisor in a complex restructuring, which involves a connected pre-pack, will face an interesting dilemma:

• Approach the pool – this runs the risk that the pool issues a negative statement, possibly because they have not had sufficient time in the half-day allocated to carry out a comprehensive analysis, something understandable perhaps in a complex cross-border restructuring. Following a negative statement, it would be a brave administrator who proceeds with a sale however much they thought it was in creditors' best interests. Being naturally cautious individuals and with very little to be gained by having their conduct investigated, a negative statement could kill off any proposed pre-pack sale – possibly leading to a failed restructuring; or

• Not approach the pool – this runs the risk that the administrator could be criticised for not ensuring that the option of having voluntary independent scrutiny of the deal is taken up but at least avoids getting an answer that may not be wanted.

It may be unfair to criticise the pool before we see how it works in practice, however a recent poll suggests that over half of those asked thought that the pool may be unworkable in practice.

The pre-pack sale process is used successfully in connection with the implementation of corporate restructurings and there are questions regarding the viability of the pool approach and whether it is really necessary. The High Court has become much more adept at approving restructuring pre-packs as a number of Court decisions, including the recent decision in the ATU restructuring, illustrate.

In effect, restructuring advisors already have the ability to seek sanction for a sale. Rather than taking a risk in seeking the view of the pool (which will not have the consistency of decision, fair process or option to appeal) and contrary to the desire of the Graham Report, restructuring advisors may prefer to continue to seek the safety of the Court.

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