



# THE ART OF THE PRE-PACK GUIDE

SECOND EDITION

Editors

Jacqueline Ingram and Ryan Cattle

# **The Art of the Pre-Pack**

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**Second Edition**

**Editors**

**Jacqueline Ingram and Ryan Cattle**

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# Publisher's Note

Global Restructuring Review is delighted to publish this new edition of *The Art of the Pre-Pack*, one of our most popular technical guides.

'Pre-packs' – private negotiations followed by (the briefest) formal insolvency to cement the deal – remain a hot topic in restructuring across the world. While the term is universal, the details vary greatly according to location.

This volume aims to cut through the noise to the underlying common traits. As with so much in this field of professional practice, pre-packs often represent the market finding a solution faced with shortcomings in other mechanisms. In that sense, pre-packs have a certain evolutionary beauty but are also ephemeral – remove the flaws that make them necessary and they may cease to occur. While they are a feature of life, this book will help you master them.

We are grateful to the wisdom of the eminent practitioners who have distilled the art of the pre-pack for us, and we welcome your comments and feedback.

If you enjoy this book, you may be interested in its sister *The Art of the Ad Hoc*, also available on the GRR site and in print. Please write to us at [insight@globalrestructuringreview.com](mailto:insight@globalrestructuringreview.com) for more information.

Last, my personal thanks to the team at Milbank, as editors of this guide, for their vision, and to my colleagues, particularly on the production side, for the elan with which they have brought it to life.

**David Samuels**

**February 2022**

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# **Part 1**

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## **Pre-packs in the United Kingdom**

## **CHAPTER 2**

# **Legislative Developments: The New Pre-Pack Regulations**

**Adam Plainer, Kay Morley and Ola Majiyagbe<sup>1</sup>**

On 30 April 2021, the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 (the Regulations) came into force. The purpose of the Regulations is to increase the transparency of pre-pack administrations to connected parties by requiring an administrator to obtain an independent ‘qualifying report’ from an evaluator where the pre-pack is implemented within eight weeks of the appointment of the administrator.

The Regulations were proposed by the UK government in October 2020, following a report<sup>2</sup> by the Insolvency Service (the Report) to appraise the effectiveness of certain voluntary measures<sup>3</sup> introduced in November 2015 to regulate pre-pack sales to connected parties. The changes introduced in 2015 followed an independent review undertaken at the request of the UK government by Dame Teresa Graham, the results of which were published in 2014 (the Graham Review).

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1 Adam Plainer and Kay Morley are partners and Ola Majiyagbe is an associate at Dechert LLP.

2 The Insolvency Service, 'Pre-pack sales in administration' Report (published 8 October 2020).

3 The measures implemented in 2015 included the introduction of the 'pre-pack pool', an independent committee of experienced business individuals that would review a proposed pre-pack sale to a connected party and issue an opinion on the reasonableness of the sale, and a new Statement of Insolvency Practice 16 to improve the transparency and fairness of a pre-pack sale.

Pre-packs are a common feature of the restructuring landscape, representing around 29 per cent of UK administrations. However, despite the frequency with which they are used, surprisingly perhaps, there is no statutory basis for pre-packs. Instead, given the broad scope of the role of the administrator, pre-packs have evolved as a matter of market practice and received judicial endorsement pursuant to long-established case law.

Conceptually, a pre-pack is commonly understood to be an arrangement whereby a putative administrator identifies and agrees terms with a purchaser to acquire the whole or a substantial part of the business and assets of a distressed company. Immediately on, or shortly following, the appointment of the administrator, the pre-negotiated transaction is executed.

Pre-packs are popular because they typically minimise business interruption, often achieve a better realisation for creditors as a whole and help preserve jobs. Compared with trading administrations, pre-packs are typically quicker and cheaper to transact with minimal execution risk. However, despite the demonstrable benefits of pre-packs, the inherent secrecy with which they are contrived and the speed with which they are executed creates suspicion and concern that a fair and robust process has not been followed.

These concerns are particularly acute in the case of connected party transactions and in the SME market where typically pre-packs will involve little or no engagement with the company's unsecured creditors. In these circumstances, unsecured creditors naturally feel aggrieved when the first they learn of any pre-pack transaction is when they are advised that the business has been acquired by the company's existing management, directors or shareholders, who are continuing to trade the same business but without the burden of, and liability to pay, the company's unsecured creditors. For companies with larger capital structures, a successful restructuring often requires a company to engage with a wider range of stakeholders to preserve value and the goodwill of the business. However, irrespective of the size of any given company, concerns remain as to whether pre-packs really maximise returns for the benefit of a company's creditors as a whole.

To address the concerns outlined above, the Graham Review recommended a number of changes to improve, in particular, the transparency of pre-pack sales in administration. The measures recommended by the Graham Review included the establishment of a 'pre-pack pool' (the Pool). The Pool comprised a group of independent experts who could be requested by a purchaser to provide an opinion on any proposed pre-pack involving a connected party. Referrals to the Pool were entirely voluntary and any opinion provided by the Pool was not binding, even where a negative opinion was provided.

Following the introduction of the Pool, its utilisation has been underwhelming. In 2016, 22 per cent of eligible connected party pre-packs were referred to the Pool. However, by 2019, this figure dwindled to just 9 per cent of all eligible transactions. A survey of insolvency practitioners undertaken by the UK government for the purposes of the Report found that the biggest reason (comprising 25 per cent of respondents) for the failure of the Pool was that the parties 'saw no benefit' to the Pool. This suggests that, while the Pool has failed on one level by reason of its low take up rates, arguably its (intended) light touch rendered it of limited practical benefit to stakeholders.

In addition to the Pool, the Graham Review resulted in certain amendments being made to Statement of Insolvency Practice 16 (SIP 16), pursuant to which administrators were required to follow six principles of good marketing, compliance with which had to be set out in the administrator's statement of proposals. These principles broadly required an administrator to undertake a more robust and transparent marketing process for any pre-pack and to either fully comply with the requirements of SIP 16 or to explain to creditors why it was necessary for the administrator to depart from such principles.

At the time of implementing the changes proposed by the Graham Review, while the UK government acknowledged the value of pre-packs, it was recognised that if the voluntary measures introduced at this time were not sufficient to improve the perception and transparency of pre-packs, the UK government would legislate to drive change.

In recent years, notwithstanding the changes introduced following the Graham Review, public scepticism of pre-packs has not abated and, as a result of a number of high-profile corporate failures, media attention on pre-packs has continued to keep them firmly in the public and political spotlight.

The Report noted that, although certain improvements to the pre-pack regime had been made as a result of the 2015 reforms, notable shortcomings<sup>4</sup> still existed. Accordingly, the UK government concluded that it was necessary to introduce mandatory reforms in order to provide stakeholders with greater assurance that any proposed pre-pack was appropriate in the circumstances.

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<sup>4</sup> In particular, the voluntary nature of the pre-pack pool often resulting in the process being seldom used.

## The Regulations

Under the Regulations, an administrator must not dispose of, hire out or sell, to one or more connected persons, all or a substantial part<sup>5</sup> of the company's business and assets within the first eight weeks of that company being placed into administration (known as a 'substantial disposal') unless the company's creditors have approved such disposal, or a qualifying report, given by an evaluator, has been obtained by a connected person and given to the administrator.

In reality, the likelihood of creditor consent being obtained for a pre-pack pursuant to the Regulations is small. Secured lenders are not permitted to vote in respect of their secured debt, and to preserve value and avoid business disruption, pre-packs are typically implemented without the knowledge of a company's unsecured creditors. Accordingly, in most circumstances, an administrator seeking to implement a connected party pre-pack within eight weeks of his or her appointment will need to adhere to the Regulations.

## Connected persons

The Regulations apply the definition of 'connected person' contained in the Insolvency Act 1986,<sup>6</sup> being a 'relevant person' in relation to the company in administration, or a company connected with the company in administration. A 'relevant person' in turn, is (1) a director or other officer, or shadow director, of the company, or (2) a non-employee associate of such person or the company.

The meaning of associate in this context is taken from Section 435 of the Insolvency Act 1986. A company will be an associate of another company if (1) the same person controls both companies (e.g., 'sister companies'), or such person controls one company and an associate of that person controls the other,<sup>7</sup> or (2) a group of two or more persons controls each company, and the groups consist of the same persons.<sup>8</sup>

'Control' is also defined under Section 435,<sup>9</sup> with a person having control of a company if (1) the directors of that company (or the directors of another company which has control of the company in question) are accustomed to act in

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5 As to what constitutes 'all or a substantial' part is to be determined by the administrator (Regulation 3(3)(a)).

6 Paragraph 60(A)(3) of Schedule B1.

7 Either alone or together with such person.

8 This includes situations where a person forms part of one group and an associate of that person forms part of the other.

9 Paragraph 10(a) and (b).

accordance with the person's directions or instructions, or (2) that person is entitled to exercise a third or more of the voting power of the company, or another company that has control of the company in question.

### Qualifying report

The qualifying report will state whether the evaluator is satisfied that the consideration to be provided for the relevant property (i.e., the assets subject to the pre-pack sale) and the grounds for the substantial disposal are 'reasonable' as well as the evaluator's principal reasons in this regard.<sup>10</sup> A report stating that the proposed pre-pack sale has fallen foul of one of the two limbs is known as a 'case not made opinion'. Once the report is delivered, the administrator is required to send the report to Companies House and the company's creditors together with the administrator's statement of proposals.

If an evaluator issues a 'case not made opinion' then the connected person obtaining the report can approach another evaluator for a separate report<sup>11</sup> and may continue to do so until a favourable report has been obtained. However, any subsequent report must include a copy, or detail the contents, of the previous report.<sup>12</sup> Furthermore, if a favourable report is subsequently obtained, the administrator, when submitting such report to Companies House and the company's creditors must still include a statement explaining why they are proceeding with the transaction, as a result of the 'case not made opinion' having previously been given.<sup>13</sup>

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- 10 Regulation 7(h)(i) and (ii). This Regulation also sets out certain procedural contents that must be included in the qualifying report such as the evaluator's relevant knowledge and experience and their professional indemnity insurance details.
  - 11 If the previous report has not been provided to the new evaluator, the subsequent report must include a statement that this is the case, the reasons why the previous report had not been provided, details of any steps taken to obtain the report and (if applicable) the reasons why such evaluator believes a previous report exists, in the event the connected person declares that no such previous report exists.
  - 12 Regulation 8. However, the Regulations, as drafted, are unclear as to whether the most recent report or all previous reports must be given to the evaluator in respect of a subsequent report.
  - 13 Regulation 9(3)(b) and 4.

Separately, an administrator may still proceed with a substantial disposal notwithstanding a ‘case not made opinion’ being given by an evaluator, so long as the administrator provides Companies House and the company’s creditors its reasons for doing so.<sup>14</sup>

### The evaluator

An evaluator must be an individual who is satisfied that their relevant knowledge and experience is sufficient for the purposes of making a qualifying report, provided that such person has professional indemnity insurance.<sup>15</sup> Although the Regulations do not specify that the evaluator must be a licensed or regulated professional (whether an insolvency practitioner or otherwise) the requirement for professional indemnity insurance will likely limit who may be an evaluator to somebody who falls within this remit. This is reinforced by the requirement that the administrator must also be satisfied that the evaluator had sufficient knowledge and experience to make the report.<sup>16</sup>

In addition to the self-certification of the evaluator’s knowledge and experience, an evaluator must also be independent. An evaluator will be considered to be independent unless they (1) are connected with the company, (2) are an associate of the connected person or connected with the connected person, (3) know or have reason to believe that they have a conflict of interest in respect of the substantial disposal, or (4) in the 12 months prior to the date a report is made, have provided advice to the company in respect of an insolvency procedure<sup>17</sup> or a corporate rescue or restructuring.

The Regulations also include a number of exclusions in respect of individuals who may not act as an evaluator, even if the aforementioned criteria has been satisfied. Such exclusions include the administrator of the company or an associate of the administrator.<sup>18</sup>

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14 Regulation 9(3) and (4).

15 Regulation 11.

16 Regulation 6(2).

17 Under Parts A1 to 5 of the Insolvency Act 1986.

18 Regulation 13. Other exclusions include individuals convicted of unspent dishonesty or deception offences as well as disqualified directors.

## Likely impact of the Regulations on connected party pre-pack administrations

The UK government continues to support and recognise the value of pre-packs as an import tool to help rescue viable businesses, preserve jobs and maximise recoveries for stakeholders. The Regulations do not seek to restrict or otherwise undermine the utility of pre-packs but rather aim to enhance the credibility and perception of connected party pre-packs by means of further improving transparency and accountability. Whether the UK government will achieve its stated ambitions has yet to be seen but a number of concerns have been raised with regard to various aspects of the Regulations.

### The evaluator and opinion shopping

As outlined above, the Regulations do not prescribe any formal qualifications for the evaluator. This has led to some concerns that in certain circumstances, persons insufficiently qualified will be engaged to provide reports thereby undermining the credibility of the process. In order to provide a level of comfort to stakeholders, the administrator must be satisfied that the evaluator is suitably qualified. However, where the administrator and a connected party have agreed the identity of the evaluator in advance, this could, on occasion, create the impression of collusion between the parties as opposed to a robust and independent process.

It is notable that a report is not binding on the administrator and that connected parties may be inclined to ‘opinion shop’ in order to obtain a favourable report. In reality, it is unlikely that many administrators will proceed with a connected party pre-pack where a ‘case not made opinion’ has been provided. Where this situation does arise, we would expect the administrator to have a robust explanation to defend any such decision; for instance, in circumstances where the trading of the company has unexpectedly deteriorated, there are no alternative buyers and the pre-pack is the only viable alternative option to an insolvent liquidation. In this situation, an administrator discharging his or her duties with the objective of maximising recoveries for the company’s creditors as a whole, would take precedence over the need to obtain a favourable qualifying report.

If multiple reports have previously been obtained, the connected party is required to advise the evaluator of this fact and a copy of any previous reports must be provided. However, there are currently no sanctions in place if a connected party fails to disclose the existence of a negative report.

With regard to the report more generally, similar to the opinion previously provided by the Pool, the report is not an independent valuation. The intended purpose of the report is more limited and essentially provides an independent view that, in the circumstances, the proposed transaction is reasonable. The report will

of course take into consideration any valuation evidence provided to the evaluator by the connected party. However, given that the remit of the evaluator does not extend to provide an independent valuation, certain stakeholders may feel that the reforms do not go far enough. This tension between stakeholders reflects the challenge for the UK government to strike a delicate balance between recognising the value of pre-packs while at the same time providing sufficient comfort and visibility to stakeholders as to whether they are suitable in any given circumstance.

### **Additional cost and delay**

Concerns have been expressed that, in addition to the cost of obtaining a report, additional costs could be incurred trading a business for a longer period of time than is possible or desirable in the circumstances. In some situations, such additional costs could ultimately result in reduced returns to stakeholders (either because the amounts due to secured and preferential creditors increase or because the company precipitously falls into an insolvent liquidation). However, in the majority of situations, connected parties will anticipate, some time in advance, the need to restructure and implement a pre-pack. As a practical matter, while the Regulations require that a qualifying report is provided to an administrator,<sup>19</sup> the administrator does not need to be in office when a connected party requests the preparation of a report. Instead, the report can be obtained from an evaluator in advance during the planning and negotiation phase of a pre-pack and delivered to the administrator following appointment. Accordingly, in the majority of situations, it is unlikely that the Regulations should cause any material delays to any proposed pre-pack.

### **No carve-out for secured creditors**

The Regulations do not include any specific carve-outs for secured lenders who could fall under the definition of a ‘connected person’ by virtue of voting rights connected with debt, security and other financial instruments. During the consultation period in respect of the Regulations, it was proposed by certain stakeholders that secured creditors should be carved out (consistent with the approach of the Graham Review). However, the Insolvency Service concluded that, in recent years, there had been a number of high-profile pre-packs involving secured lenders. Accordingly, given that the Regulations are intended to ensure greater transparency and scrutiny of pre-pack sales to connected persons, the UK government refused to include a carve-out for secured lenders. While this result creates

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<sup>19</sup> Regulation 6(a)(iii).

additional hurdles for lenders intending to enforce or otherwise pursue loan-to-own strategies, given the typical runway to implementation for more complex situations, the requirement to obtain a report in these circumstances is unlikely to undermine or otherwise derail the implementation of any such strategies.

Overall, and notwithstanding the above concerns, the proposed changes have generally been welcomed by the market on the basis that the UK government recognises the value of, and has not sought to ban, pre-packs. Given the perception of connected party pre-packs by the public and in the media, the Regulations seek to achieve a delicate balance between improving transparency and accountability while at the same time not impeding the utility of this popular restructuring tool. It is hoped that the Regulations will deter those connected party pre-packs that are not in the best interests of a company's creditors while at the same time ensuring that those transactions that do proceed are more transparent and subject to higher levels of public scrutiny.

## **APPENDIX 1**

# About the Authors

### **Adam Plainer**

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Adam Plainer is a partner and co-chair of Dechert's global financial restructuring group. He represents leading accounting firms, UK clearing banks, US investment banks, hedge funds, private equity firms and corporate boards of directors in large-scale, complex restructurings and reorganisations. Adam also has extensive experience advising distressed investors, junior and senior lenders and top insolvency practitioners on a wide range of high-profile restructurings, including contingency planning and formal insolvencies.

Adam is consistently recognised as an outstanding lawyer by top legal publications. He is featured in the 'Hall of Fame' in *The Legal 500* UK 2022, *IFLR1000* 2021 recognizes him as a 'Market Leader' and he is ranked as a leading lawyer in the Global, UK and Europe editions of *Chambers*, which describes him as a 'fantastic practitioner' who is an 'outstandingly practical, pragmatic, client-focused lawyer who actually provides added-value advice . . . and is able to create imaginative solutions in complex scenarios'.

Adam is the past president of the Insolvency Lawyers' Association (ILA) and the Turnaround Management Association (TMA) UK.

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Kay Morley is a partner in Dechert's global financial restructuring group. She advises stakeholders on all aspects of insolvency and corporate restructuring with a particular focus on European special situations and complex cross-border restructurings. Kay's clients include hedge funds and other distressed investors, advising them on the acquisition of loan portfolios and the implementation of

'loan to own' strategies. She also regularly provides advice to sponsors, ad hoc committees, debtors in distress and private equity portfolio companies and represents insolvency practitioners in domestic and offshore situations.

Kay is consistently recommended by *Chambers UK* and *The Legal 500 UK* in corporate restructuring and insolvency, in addition to being recognized as a 'notable practitioner' by the *International Law Review*. She is ranked in the 2022 edition of *Chambers UK* for restructuring/insolvency, with one client stating 'Kay is remarkable. She is calm, measured and unflappable – qualities you need in spades in the restructuring space', while another remarks, 'she is a very technical and impressive performer'. She is also noted for her expertise in corporate restructuring and insolvency by *The Legal 500 UK 2022*.

### **Ola Majiyagbe**

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Ola Majiyagbe is an associate in Dechert's global financial restructuring group. He advises financial institutions, private equity sponsors, corporate borrowers, insolvency practitioners, directors and other key stakeholders in relation to cross-border restructurings, formal insolvency proceedings, contingency planning and corporate governance matters. Ola regularly authors and contributes to articles relating to various restructuring matters, having covered topics such as company voluntary arrangements, foreign recognition of English insolvency proceedings and the restructuring by sponsors of portfolio companies.

Ola received his LLB from the University of Leeds and was admitted to the roll of solicitors of England and Wales in 2018, having completed his training contract at a 'magic circle' law firm. He is a member of the Insolvency Lawyers' Association (ILA), the Turnaround Management Association (TMA) NextGen, and the Association of Business Recovery Professionals (R3).

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'Pre-packs' remain a hot topic in the world of restructuring but the details differ greatly depending on where one practises. Until now, there hasn't been a book that cuts through the surface elements to the underlying common traits. This guide solves that.

*The Art of the Pre-Pack* draws on the wisdom of 30 pre-eminent practitioners from around the world to distil the essence of a successful pre-pack. It is a companion to Global Restructuring Review's *The Art of the Ad Hoc*, on how to work successfully with the ad hoc committees. Find both volumes on [www.globalrestructuringreview.com](http://www.globalrestructuringreview.com).

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