THE INSOLVENCY SERVICE

IMPROVING THE TRANSPARENCY OF, AND CONFIDENCE IN, PRE-PACKAGED SALES IN ADMINISTRATION

Summary of consultation responses

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A BIS SERVICE

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1. Introduction

1.1 Thirty-eight responses were received in response to the consultation. They were submitted by individuals and organisations representing businesses, creditors, insolvency practitioners, as well as regulators and others. A full list of respondents is attached at the end of this document.

1.2 The purpose of this document is to provide a high level overview of the main points raised by respondents as part of the consultation. Given the volume of responses received, it has not been possible to include in this summary every point raised, or to mention every respondent who raised each issue. Given the detailed and expansive nature of many of the responses received, it has been necessary to distil some of the points raised in order to present them in an accessible and consistent format.

1.3 The consultation document set out the background to the concerns surrounding the use of the pre-pack process in administration, and identified a number of possible options for change. The Government's objective was to establish the full extent and nature of the concerns and to ascertain whether any measures could be implemented to improve transparency and confidence. The document also sought to obtain evidence on the wider economic impact of the pre-pack process, whether positive or negative. Whilst the consultation did not set out to consider specific issues surrounding the adequacy of Statement of Insolvency Practice (SIP) 16, which is subject to a separate consultation by the Joint Insolvency Committee (JIC), many respondents referred to issues associated with SIP 16 which have been reflected in this summary of responses.

The consultation process

1.4 A wide range of interested parties were asked to take part in the consultation by way of email and publication on The Insolvency Service website. The consultation period lasted twelve weeks and closed on 24 June 2010. We are grateful to everyone who took the time to reply to the document. Your responses and opinions will be very useful in assisting us to clarify and further develop the Government's policy.

1.5 The views expressed in this summary do not necessarily reflect those of the Government.

Respondent categories

1.6 In total, thirty-eight responses were received. One respondent asked that their reply be kept confidential. Table 1 shows how many responses were received and the different respondent categories:

Table 1: A breakdown of the respondents into categories

Category	Number of responses	Percentage of responses (%)
Trade association (creditor)	10	26.5
Creditor	5	13
Trade association (legal/IP)	5	13
IP	7	18.5
Bank	2	5
Legal	2	5
Regulator	4	11
Other	3	8
Total	38	100

2. Executive Summary

2.1 Respondents to the consultation generally welcomed the opportunity to contribute to the debate surrounding the use of pre-packs and recognised the objective of improving confidence in the process. The consultation generated a wide range of views on the need for changes to be made to the regime governing the operation of pre-packs and on the options identified in the consultation paper. There was no overall consensus amongst respondents as to what measures could or should be implemented to address the concerns surrounding the use of pre-packs.

2.2 Broadly, views on the need for change and desirability of the options identified were polarised according to respondent type, with insolvency practitioners, lawyers and regulators advocating that no substantive change be made to the current regime. Respondents representing creditors generally favoured change by way of implementing a combination of the options identified.

2.3 The main findings in this summary are:

- The majority of respondents indicated that the current pre-pack framework either does not provide a sufficient level of confidence that pre-packs are being used appropriately, or only partially provides sufficient confidence
- The majority of respondents indicated that they believe pre-packs are either presently subject to some form of abuse, or are partly subject to abuse
- The majority of respondents indicated that the main cause of concern relates to connected party sales, or 'phoenixism', and that any measures introduced should focus on these types of sale
- In terms of the options identified in the consultation paper, the greatest support was for making no substantive change to the current regime, broadly reflecting the views of insolvency practitioners, lawyers and regulators
- There was some support from a range of respondents for introducing a measure to give statutory force to the SIP 16 disclosure requirements
- Opinion was divided on the remaining options which received some support from creditor respondents
- There was very little support for the implementation of a measure involving the use of separate insolvency practitioners to conduct pre and post appointment administration work.
- Some respondents, primarily insolvency practitioners and regulators, indicated that an approval mechanism for pre-pack sales involving creditors or the court would be unworkable, and obviate the benefits of pre-packs

2.4 A number of the respondents advocating that no change be made to the current regime (on the basis of the options identified) suggested a number of other relatively minor changes that could be made to improve the transparency

of, and confidence in, the current regime, particularly in relation to the way that companies exit the administration procedure.

2.5 There was a general consensus that the issue of confidence was primarily associated with the negative perception of pre-packs, generally negative media coverage, and reporting on levels of compliance with SIP 16. However, some respondents indicated that confidence could not solely be linked to negative perceptions surrounding pre-pack sales, but was a product of the efficacy and appropriateness of the process itself and the consequential wider economic impact.

2.6 On the issue of whether pre-packs are subject to abuse, and what the nature and extent of any such abuse is, respondents again expressed a wide range of views. Opinion was generally divided between some creditor respondents who felt that the process was wrong in principle, and therefore advocated that it be restricted in some way, and those who commented that it was not the process itself that was wrong but rather the circumstances in which it was deployed.

2.7 Many creditor respondents acknowledged the benefits of pre-packs if used in appropriate circumstances, but were concerned that circumstances were being manipulated in order to structure transactions for the benefit of existing management at the expense of unsecured creditors. There was general consensus that pre-pack sales to connected parties were the issue that generated the most concerns amongst creditors, with some respondents suggesting a more robust enforcement of, or changes to, the Company Directors Disqualification Act 1986.

2.8 Generally, whilst many respondents indicated that abuse of pre-packs was difficult to define and therefore prove, there was a consensus amongst respondents from the insolvency profession that any abuse was likely to be more prevalent amongst smaller value cases. Many creditor respondents cited what they perceived as inappropriate marketing of pre-packs which contributed to negative perceptions and encouraged directors to take the ‘easy way out’.

2.9 It was clear from the consultation responses that insolvency practitioners’ perceived non-compliance with SIP 16 is closely associated by creditors with abuse of the pre-pack process, and contributes significantly to how pre-packs are perceived by creditors. Whilst there was a widespread consensus that the introduction of SIP 16 had significantly improved the provision of relevant information to creditors, there were different views expressed as to whether it was being adequately complied with, what the purpose of it was and how it should be interpreted, and whether or not it was being properly enforced by regulators.

2.10 In terms of the wider economic impact of pre-packs, those respondents broadly in favour of making no change to the current regime, primarily insolvency practitioners, lawyers and regulators, cited the benefits to the wider economy of employment preservation and continued trading opportunities, and referred to previous academic research to support their comments. Other

respondents, particularly creditors and creditor trade bodies, cited the consequential financial difficulties experienced by suppliers and competitors who felt that market sectors were being distorted by formerly insolvent businesses trading with an unfair competitive advantage.

3. General comments and the need for change

3.1 The consultation invited views on whether the current framework provided a sufficient level of confidence that pre-packs are only being used in appropriate circumstances and with an appropriate degree of transparency, what the main concerns with the process are, and whether pre-packs are subject to abuse.

3.2 This part of the consultation generated a wide range of views and comments on many wider issues associated with pre-packs and the need, or otherwise, for changes to be made to the current framework. Although it is not possible to cover in detail every point raised, the key issues identified by respondents in determining what, if any, regulatory response would be appropriate were:

- Confidence in the pre-pack process
- Transparency of reporting and SIP 16
- Sales to connected parties
- The use of 'manufactured' pre-packs as a tool of convenience
- Large scale financial restructurings
- Abuse of the pre-pack process

Confidence in the pre-pack process

3.3 In relation to the issue of confidence, 19 respondents indicated that they did not believe that the current framework generally provided a sufficient level of confidence that pre-packs are being used appropriately, representing all types of respondent. Another 6 respondents indicated that they thought the framework only partially provided a sufficient level of confidence.

3.4 Another 10 respondents, primarily comprising insolvency practitioners and regulators, indicated that they broadly believed the framework did provide sufficient confidence.

3.5 There was a widespread consensus from respondents that the issue of confidence was primarily associated with the negative perception of pre-packs voiced by those directly affected by the process, generally negative media coverage, and reporting on levels of compliance with SIP 16.

3.6 However, some respondents indicated that the issue of confidence could not solely be attributed to negative perceptions surrounding particular business sales, but to the efficacy of the process itself and the subsequent economic impact on competitors in that market sector. Specific responses on the extent of the wider economic impact of pre-packs are considered in more detail later in this document, although it was clear that for some respondents it is an assessment of this impact which should inform any regulatory response rather

than a narrow focus on the outcome of returns to creditors in individual insolvencies.

3.7 The Association of British Insurers (ABI) expressed concern about the increased use of pre-packs and observed that the current regime risks preserving large businesses at the expense of their smaller suppliers, potentially leading to more jobs lost than saved, although they were not opposed in principle to the use of pre-packs in appropriate circumstances.

3.8 The Institute of Credit Managers (ICM) observed that in a survey of their members, 88% of respondents indicated that they did not believe the current framework provided confidence that pre-packs are being used appropriately or with the appropriate degree of transparency. The Royal Institution of Chartered Surveyors (RICS) agreed that the current framework appeared not to provide a sufficient level of confidence or transparency, although they wished to see further evidence on this. Whilst the British Property Federation (BPF) acknowledged that pre-packs were perceived negatively by creditors, they considered this should not belittle the serious concerns creditors hold about the current framework governing the operation of pre-packs.

3.9 The British Printing Industries Federation (BPIF) commented that pre-packs had rightly attracted fierce criticism, from creditors who had lost out and competitors faced with a rival who they felt had obtained un unfair trading advantage through having debts written off. They observed that the current framework undermined efforts made by legitimate businesses to meet their debt obligations.

3.10 The Institute of Chartered Accountants in England & Wales (ICAEW) observed that it is too simplistic to assume that confidence in the pre-pack process is entirely dependent upon the current framework as this alone could not address negative perceptions. They further commented that educating creditors as to the requirements of the law and Insolvency Code of Ethics, and seeking to correct misconceptions disseminated in the media, could play a vital part in increasing confidence in the process.

3.11 The Association of Chartered Certified Accountants (ACCA) considered that it was necessary to separate the issues of perception and evidence, and that a perception that the pre-pack process is dubious should not determine the regulatory response. The Insolvency Practitioners Association (IPA) felt that, if pre-pack procedures were allowed to continue, then it had to be accepted that some creditors would always object to them in principle.

3.12 The British Bankers Association (BBA) recognised that pre-packs can raise issues associated with both transparency and process leaving unsecured creditors aggrieved because of a perceived communication deficit, and that this needed to be addressed. Allen & Overy (Solicitors) acknowledged that there may have been a decrease of public confidence in the pre-pack process, whilst Ernst & Young observed that there is a continuing perception that pre-packs are not always used appropriately, and that further work is needed in order to investigate and address concerns. Zolfo Cooper (insolvency practitioners)

echoed this view, and noted that a perception had arisen that pre-pack sales were the same as 'phoenix' sales leading to a denting of creditor and public confidence which must be addressed.

3.13 The City of London Law Society (CLLS) commented that the problem was largely one of perception, and that insolvency practitioners and their regulators appear broadly satisfied with the current framework. They were of the view that the true mischief was that of selling at an undervalue, which was likely to be an issue only in smaller cases and even then probably only where the sale was to a connected party.

3.14 Begbies Traynor considered that the current framework generally provides a sufficient level of confidence that pre-packs are only being used in appropriate circumstances and with the appropriate transparency, but recognised the public had a negative perception of pre-packs arising as a result of various factors including inappropriate use of pre-packs by a small number of practitioners, failure to comply with SIP 16 and generally negative media coverage. Some respondents, including Deloitte and Grant Thornton, indicated that they believe the current framework broadly ensures that pre-packs were only being used in appropriate circumstances.

3.15 The Confederation of British Industry (CBI) and PriceWaterhouse Coopers (PWC) observed that although there are issues with the perception of the process, they were not necessarily borne out by reality and some of the concerns raised would be issues in any insolvency, not just those involving pre-pack sales.

3.16 Many respondents, including The Insolvency Lawyers' Association (ILA), ICAEW, PWC and the CBI, commented that the real root of creditor dissatisfaction is more likely the insolvency itself, rather than the process which formally recognises that state of affairs and seeks to address it. The ILA also observed that the problem is an impression of unfairness, with different stakeholders thinking that different aspects of pre-packs are unfair, but acknowledged that sceptical perceptions of pre-packs had the ability to threaten the integrity of the insolvency profession.

<u>Transparency of reporting and Statement of Insolvency Practice (SIP 16)</u>

3.17 Many respondents linked the issue of confidence in pre-packs with insolvency practitioners' compliance with SIP 16. Whilst there was a widespread consensus that the introduction of SIP 16 had made a significant improvement in the provision of information to creditors, there were different views expressed as to whether SIP 16 was being properly or adequately complied with by insolvency practitioners, how it should be interpreted, and whether or not it was being properly enforced by regulators. It was apparent that some respondents had different expectations as to the purpose of SIP 16, with some creditor respondents indicating that they regarded it as a set of requirements that practitioners must act upon, as opposed to information to be disclosed.

3.18 For some respondents whose concerns focused on the efficacy and appropriateness of the pre-pack process itself, the usefulness of SIP 16 in providing information to creditors post pre-pack sale was considered of little practical benefit.

3.19 The Association of Business Recovery Professionals (R3) indicated that SIP 16 is intended to influence the conduct of practitioners involved in setting up a pre-pack sale and should not just be a list of items to be disclosed for their own sake. The ABI observed that SIP 16 was intended to reduce the incidence of abuse by simply compelling practitioners to disclose certain information 'after the event', and had failed in this regard. CLLS observed that SIP 16 only required administrators to engage with creditors after a business had been sold.

3.20 The Insolvency Practices Council (IPC) distinguished between conducting a pre-pack for improper purposes and a failure to comply with SIP 16. PWC observed that the requirement to provide SIP 16 information encourages practitioners to ensure that a pre-pack is justifiable, but that inadequate or slow provision of information does not mean that the pre-pack itself was inappropriate or unjustified.

3.21 The majority of creditor respondents, and those representing creditor groups, were of the view that the transparency of reporting to creditors in pre-pack administrations, and consequently compliance with SIP 16, is inadequate. These respondents generally felt that information being provided to justify pre-packs is insufficient for them to make an informed judgement as to whether the sale is in their interests (or had not unfairly harmed their interests); and that there is a lack of effective regulatory control over the actions of, and reporting of information by, insolvency practitioners on the part of regulators.

3.22 The Road Haulage Association indicated that their members continue to complain that they are not given sufficient information to judge if the pre-pack sale was the best available deal. Grosvenor commented that creditors were concerned practitioners were not providing sufficient information and treating SIP 16 as a 'tick-box' exercise. Emerson Group echoed this view and observed that the level of detail provided in SIP 16 reports is not as comprehensive as it needs to be, and would wish to see a better reporting standard and better disclosure in terms of events in the lead up period to administration. The BPF commented that landlords do not believe there is an appropriate level of transparency in pre-pack sales, and whilst welcoming the introduction of SIP16 and Insolvency Code of Ethics, do not believe that the ethos of the documents are being translated into practice.

3.23 Some respondents also indicated that creditors had concerns about the timescale within which they were being provided with SIP 16 information. Emerson Group commented that there should be more impetus in the time frame required for practitioners to provide the relevant information. The IPA observed that in a forum held to discuss the options set out in the consultation document there was widespread support for a more strict interpretation as to what constituted a reasonable timescale for the provision of SIP16 information.

3.24 PWC observed that when completed properly SIP 16 information does provide creditors with a detailed explanation and justification for a pre-pack but it appeared that on occasions information is not always presented clearly to creditors, is treated as a 'tick-box' exercise, and is not always provided as quickly as it could be. The BPF also felt that practitioners were providing SIP 16 information too slowly and in varying degrees of quality.

3.25 R3 commented that they believed the vast majority of practitioners were complying with SIP 16, and that the effectiveness of SIP 16 should be judged by whether there is a decline in the number of pre-packs which are perceived as being unjustified. The ICAEW indicated that few of their members had received requests from creditors for further information after having seen SIP 16 reports, suggesting that creditors are either disinterested for reasons unconnected with the pre-pack or have all the information they need. Grant Thornton observed that, whilst they had not received any requests from creditors for further information relating to any pre-pack sale, creditors had asked why they were being sent such detailed letters.

3.26 Regulators generally took the view that there was a 'bedding in' process in relation to any new regulation and that practitioners' understanding of and compliance with SIP 16 could be expected to improve over time. This view was reflected by the ACCA, who indicated that it may not initially have been obvious exactly what level of detail was being called for, but that the subsequent publication of Dear IP No. 42 had been helpful in concentrating practitioners' minds on the level of detail expected of them.

3.27 The IPA's perception from their monitoring of practitioners' internal systems and controls was that the overall quality of information provided is likely to improve and that the introduction of SIP 16 had encouraged many practitioners to consider more carefully the rationale behind the pre-pack. The Chancery Bar Association observed that it is too early to form a clear view on whether SIP 16 will have a significant effect upon improving confidence amongst unsecured creditors. CLLS agreed that progressive improvements in compliance levels with SIP 16 should flow from greater familiarity with the requirements.

3.28 Some respondents indicated that The Insolvency Service had not been sufficiently clear about what is required of insolvency practitioners when reporting information to creditors pursuant to SIP 16. Many respondents, including the ABI, RICS, IPC and BPIF, cited The Insolvency Service's reporting of insolvency practitioners' compliance with SIP 16 as evidence of inadequate reporting by insolvency practitioners and lack of transparency in pre-pack sales. Deloitte and Begbies Traynor observed that The Insolvency Service's monitoring of SIP 16 information provides an immediate independent check that disclosure requirements are complied with.

3.29 Some respondents, including the BPIF and Grosvenor, commented that they believed insolvency practitioners were under no compulsion to comply with SIP 16, as they viewed it as only a best practice or guideline document that

lacked effective enforcement action. The BBA noted that there should be effective regulation of compliance with SIP 16 with greater consistency from regulators in terms of regulatory practice and the application of effective sanctions. The ABI indicated they believe SIP 16 is being ignored by many practitioners, with apparently little consequence, and that tighter regulation is required.

3.30 There were also suggestions from some respondents as to how additional information provided under the auspices of a revised SIP 16 could improve the transparency of, and confidence in, the pre-pack process. Emerson Group suggested that creditors also be provided with pertinent information to evidence any alleged trading problems being experienced by a company and being used as a basis to justify the pre-pack. BPF observed that The Insolvency Service should revisit what is required by SIP 16, and requested greater detail from practitioners on the marketing of businesses subject to a pre-pack, why a connected sale was preferable to any alternative offers received and when the decision was taken to enter into a pre-pack.

3.31 The IPC was in favour of amending SIP 16 to remove any ambiguities about what is required from practitioners and to incorporate the guidance issued in Dear IP No. 42. The IPC further observed that practitioners should regard SIP 16 reporting not as an administrative burden but rather as an opportunity to demonstrate their professionalism and the value of their services in individual cases. HSBC intimated support for greater guidance being given to practitioners about the format of SIP 16 information. The IPA felt that a revised principles based SIP 16 would focus practitioners' minds on the purpose of the disclosure and thus improve transparency and prompt communication.

3.32 The extent to which respondents viewed SIP 16 as providing a positive contribution to improving the transparency of the pre-pack process, and the extent to which they believe it has been successful in achieving this, is consequently reflected by respondents' differing expectations as to its purpose and different interpretations as to the level of practitioners' compliance with the disclosure requirements.

Connected party sales

3.33 The vast majority of respondents indicated that the main cause of concern surrounding the use of pre-packs relates to the sale of businesses to connected parties, or 'phoenixism'. There was widespread support for the view that any measures introduced should focus on improving confidence in these types of business sale.

3.34 The IPA indicated that, almost without exception, the concerns raised by creditors relate to business sales to connected parties, in particular to the directors. R3 concurred with this view, and commented that the main focus should be where the sale is to a connected party since this is the principal cause of creditor discontent. Zolfo Cooper indicated that connected sales give rise to

perception issues and that such sales should be treated differently to unconnected sales.

3.35 The BPIF observed that pre-packs are frequently used to avoid debt in connected party sales, where the directors of the company are often the prime movers in the decision to pre-pack a company, particularly if they have high levels of personal debt secured against the business.

3.36 The Road Haulage Association indicated that their members were often outraged that a pre-pack sale allowed a failed management team to resurrect a rival business and then undercut the rates of other more sound operators to unsustainable levels. They further observed that there is often a lack of information forthcoming about insolvent companies and the effortless way in which those involved appear to recommence trading.

3.37 The ABI commented that the great majority of pre-pack arrangements resulted in the transfer of the profitable parts of a business free of debt to the existing owners or another connected party.

3.38 Some respondents commented that the ability of directors of failed companies to continue in the management of a business should be considered further and the issue addressed through changes to, or more rigorous enforcement of, the Company Directors Disqualification Act 1986 (CDDA). Giles Frampton observed that with regard to creditors' dislike of failed directors starting afresh a ban would deal with such concerns, but would represent a major change in our relatively liberal insolvency laws.

3.39 Deloitte commented that a more vigorous enforcement of the CDDA would provide a more effective deterrent to abuse rather than changing pre-pack procedures and regulation. BPF suggested introducing higher penalties for directors repeatedly undertaking pre-packs with a restriction on the number allowed to be undertaken in order to prevent 'serial' pre-packing.

Use of 'manufactured' pre-packs as a tool of convenience

3.40 A significant minority of respondents, particularly creditors or those representing creditor groups, cited the issue of pre-packs being used for no apparent reason other than as a convenient means to effect solvent non-consensual restructurings for the benefit of existing management and/or senior lenders.

3.41 The BPF expressed concerns that pre-packs were being used as a means to restructure sound businesses for the benefit of existing management rather than as a genuine form of corporate rescue. This view was echoed by Emerson Group, who commented that pre-packs are being used for convenience far too much, with some being 'manufactured' to satisfy basic requirements.

3.42 Grosvenor indicated that there was concern amongst creditors that pre-packs are being used in circumstances where it would be more appropriate to dispose of profitable parts of a business whilst the company is traded in administration, company voluntary arrangement or other scheme of arrangement, and that the need to limit publicity and effect a speedy sale was not always apparent or at best based upon a flimsy justification.

3.43 Mr A Phillips, a creditor, observed that once a director realised how easy it was to manufacture a pre-pack they then had an incentive to re-use the mechanism, and that this especially disadvantaged the Crown.

Large scale financial restructurings

3.44 A minority of respondents comprising insolvency practitioners and lawyers drew a distinction between pre-packs at the smaller end of the market and those used for the purposes of large scale financial restructurings involving different layers of secured debt, where operating subsidiaries and trade suppliers were often unaffected. These respondents universally felt that such financial creditors were sufficiently informed to be able to exert the appropriate degree of influence on the process and exercise their rights to challenge when necessary.

3.45 The Association for Financial Markets in Europe (AFME) noted that their members generally used pre-packs in conjunction with schemes of arrangement as a rescue tool to restructure a company's debt, and acknowledged that transparency plays an essential role. The Association observed that at the larger end of the market the sophistication of the investors, the number of professional advisors involved, and the reputational value at stake tends to increase the scrutiny of the transaction which acts as a check and balance on the practitioner's duty to achieve the best price for the company. They further commented that the threat of a pre-pack, particularly when accompanied with the offer of an equity interest in the new company to junior creditors who would otherwise receive nothing in a pre-pack, was a useful method of securing creditor support for a consensual deal.

3.46 The ILA also observed that where the pre-pack is effected at a high level in a group's capital structure, the parties most likely to be affected will be sophisticated financial creditors, who are not shy to challenge. Consequently, directors and practitioners will be cognisant of their duties to act in the interests of all creditors and will ensure the market has been tested or a high quality valuation obtained to ensure proper value is being obtained. ILA noted there was concern that some of the measures proposed would be overkill in the context of pre-packs involving large scale financial restructurings.

3.47 Allen & Overy agreed that a number of pre-packs were essentially financial restructurings with minimal, if any, employees or trade suppliers, and that the wider concerns driving the case for reform may not apply to these pre-packs at all.

Abuse of the pre-pack process

3.48 Respondents expressed a wide range of views on what factors may constitute abuse of the pre-pack process and on the prevalence of abuse. Common factors cited, some of which are discussed in more detail elsewhere in this document, included:

- Perceived non-compliance with SIP 16
- Conflicts of interest
- Behaviour of directors in period leading up to administration
- Insufficient marketing and/or inadequate valuation of the business
- Serial pre-packs and/or ability of existing management to purchase business at a perceived undervalue
- Inappropriate and active marketing of pre-packs as a mechanism to 'dump debt'
- Insufficient penalties for improper practitioner conduct and lack of regulatory control

3.49 On the question of abuse, 12 respondents, mainly comprising creditors, indicated that they believed pre-packs are presently subject to some form of abuse. Another 12 respondents, comprising creditors, insolvency practitioners, lawyers and secured lenders indicated that they thought pre-packs were either partly subject to abuse or that any abuse was limited in nature. These respondents represented a cross section of respondent types.

3.50 Another 9 respondents, mainly comprising insolvency practitioners and regulators, indicated that they did not generally believe pre-packs were subject to abuse.

3.51 There was a general consensus, particularly amongst those responding on behalf of the insolvency profession and secured lenders, that any abuse was likely to be focused at the smaller end of the pre-pack market, as there were sufficient checks and balances in place to preclude abuse in larger cases.

3.52 HSBC commented that at the smaller end of the market they observed some practitioners making heavy use of pre-packs in cases that would probably be more appropriate to enter CVL, and that some practitioners were seeking to create reasons to justify a pre-pack for both logistical convenience and fee purposes, although given the amount of indebtedness to secured lenders in these cases there was no impact on returns to unsecured creditors. The BBA concurred with this view, and noted that at the smaller end of the market there are indications that some practitioners have made heavy use of pre-packs where another solution may have sometimes been more appropriate. CLLS agreed that there may be limited instances of abuse at the smaller end of the market but, even then, probably only where the purchasers are connected parties.

3.53 Zolfo Cooper felt that abuse is limited to a minority of cases, but accepted that there was abuse as they had declined to accept instructions to act on cases where the instructing parties' preconditions would have prevented an adequate

valuation or marketing exercise. They further commented that there may be many different reasons why practitioners have not complied with the disclosure requirements, ranging from accidental oversight to deliberate concealment of the fact that a pre-pack sale has taken place, and that a more rigorous approach by regulatory bodies to tackling and removing the minority of practitioners who are tainting the public perception of insolvency professionals would be welcomed.

3.54 Begbies Traynor did not consider that pre-packs are subject to abuse in the vast majority of cases, but recognised that there were isolated instances of abuse by practitioners who fail to follow best practice guidance, which was considered a minor problem in the context of pre-packs generally. PWC recognised that there are instances of inappropriate pre-packs in a minority of cases, and that views on the size of this minority vary depending on the interest group in question.

3.55 The BPF indicated that they felt the majority of practitioners undertaking pre-packs take their responsibilities very seriously and adhere to the regulations, but that does not mean that abuse does not occur, particularly in situations where the business is being sold to a connected party who has a vested interest in paying as little as possible for it. BPF also recognised that creditors need to play more of a part in policing any abuse of pre-packs.

3.56 Grosvenor observed that practitioners and directors may not be obviously abusing pre-packs but may not be giving sufficient consideration and due regard to obtaining the best result for all creditors because of a lack of accountability, and that creditors have little way of knowing whether the practitioner and the directors have complied properly with their responsibilities.

3.57 The Road Haulage Association commented that in their view pre-packs were open to abuse, with the continuing lack of transparency making abuse easier to perpetrate, although it was difficult for their members to assess the culpability of the various parties. The Association advised that their members firmly believed that certain practitioners will work with directors to ensure a previously agreed outcome.

3.58 The ABI felt that the problem lies in the serious conflict of interest inherent in a practitioner devising a pre-pack sale in secret in conjunction with the directors and secured lenders of a failing company. They considered that it is inevitable a large proportion of transactions will be structured so as to favour the owners of the business and their secured finance providers at the expense of unsecured creditors. The ABI further observed that it was unsurprising that those parties with privileged access to confidential discussions prior to implementation of the pre-pack seek to maximise their position by influencing the practitioner whom they have appointed, at the expense of those who are excluded.

3.59 The IPC felt that pre-packs are probably only used improperly in a small minority of cases, and were mindful of the risk of taking new initiatives aimed at preventing abuse by a minority which may interfere with the good work of the majority. They further observed that the most important issue in relation to pre-

packs, which needs to be dealt with rigorously by regulators, is that of conflict of interest, and commented that the most effective remedy to prevent abuses of pre-packs would be systematic monitoring by regulators of every pre-pack undertaken by a practitioner whom they have licensed.

3.60 Darbys Solicitors indicated that they felt pre-packs were definitely subject to abuse, citing the example of a case where directors had deliberately built up stock levels, knowing that the 'phoenix' company would subsequently benefit from purchasing the stock at a 'fire sale' valuation, after they had approached the putative administrator for advice. Darbys also felt there was a clear potential for conflict of interest, and observed that the Insolvency Code of Ethics is not effectively policed.

3.61 The RICS observed that abuse, whether perceived or actual, arises from how directors have behaved in the period leading up to the administration, and in how business sales are valued by practitioners and reported to creditors.

3.62 The ILA observed that there is a lack of confidence in the depth of marketing and valuation exercises conducted by a small number of practitioners. ILA further commented that it is perceived by some that there are a small number of practitioners who become too close to the insolvent company's directors to remain impartial, and others who may align themselves too readily with a 'quick deal' or a senior secured debt solution, but that they were not aware of any actual cases of abuse.

3.63 The ICAEW indicated that none of the complaints sent to them by The Insolvency Service had revealed any misconduct on the part of practitioners, beyond a perceived failure to comply with SIP 16, and that The Insolvency Service has not identified any greater incidence of director misconduct in pre-packs than in other procedures. The IPA questioned how widespread the suspicion of abuse is and whether there have been any identified examples of pre-pack abuse. Chartered Accountants Ireland (CAI) indicated that they were not aware of any systemic abuse of pre-packs in Northern Ireland.

3.64 Royal Bank of Scotland (RBS), Deloitte and Grant Thornton indicated that they did not believe pre-packs were subject to abuse. The CBI considered that the current framework is basically sound and, although there may be isolated instances of inappropriate pre-packs, generally they were only being used in appropriate circumstances.

3.65 There was a general consensus from all categories of respondent that some of the marketing being deployed to advertise the 'benefits' of pre-packs is, at best, inappropriate, and is contributing significantly to the generally negative perception of pre-packs. Few creditor respondents drew a distinction between advertising promulgated by debt advice or introducer companies to that of licensed insolvency practitioners, given that the advertising usually either implies or refers to the involvement of a 'trusted' licensed practitioner.

3.66 Mr J Fennell, a creditor, observed that practitioners openly market pre-packs as a way of cutting debts and obtaining a fresh start, which is inherently flawed as it has become a business proposition favouring poor managers.

3.67 The ABI noted that it was clear that pre-packs are now being actively marketed by restructuring advisers as a convenient way in which to ‘dump debt’ and start afresh free of troublesome creditors, and that it appears from some of the marketing statements that the potential abuse of pre-packs is in danger of becoming institutionalised. The BPIF concurred with this view, and noted that practitioners had proactively targeted failing businesses to offer the owners an easy way out of debt.

3.68 The IPA noted that there are unregulated advisors on the internet marketing themselves as being able to help directors successfully retain a business via a pre-pack. They thought that there have been occasions where directors approach practitioners having already decided to proceed with a pre-pack after having taken advice on how to organise affairs so that it is probable their offer to purchase the business will be successful, whilst possibly knowingly continuing to trade to the detriment of suppliers.

3.69 Begbies Traynor expressed concern that some intermediaries appear to be targeting the directors of companies in financial difficulty and advocating the use of pre-packs in inappropriate circumstances, They further understood anecdotally that a limited number of practitioners have been willing, when approached by these intermediaries, to accept appointments in order to facilitate the pre-pack transaction.

3.70 The BPF was concerned that the penalties imposed by regulators for breaches of insolvency procedure are not strong enough to enforce greater compliance with SIP 16, or prevent abuse of the system where it occurs. The IPC concurred and questioned whether the Insolvency Code of Ethics was being applied by practitioners and regulators with appropriate rigour.

4. Option 1: No change

4.1 This option sought views on whether the current legislative regime governing the operation of pre-packs should essentially be left unchanged, with consideration being given as to how the current regime may be subject to improved transparency by virtue of the recent introduction of a mechanism to recover pre-appointment administration costs.

4.2 Many respondents, particularly insolvency practitioners, lawyers and regulators indicated that their preferred option would be that of no change to the current legislative regime, subject to various suggestions about how the reporting and regulation of pre-packs may be improved by mainly non-legislative means. This option received the most support from respondents primarily constituting insolvency practitioners, regulators, banks and insolvency lawyers.

4.3 For those respondents who had indicated that the main problem with pre-packs was that of negative perception, it was generally not thought appropriate to make legislative changes solely to counter such perceptions where there may otherwise be a lack of sufficient supporting empirical evidence. Other respondents felt that the options proposed in the consultation paper were either undesirable or unworkable, and on that basis preferred to make no change.

4.4 On the issue of whether the new pre-appointment cost recovery mechanism will lead to an improvement in transparency, respondents expressed a mixed selection of views, with some respondents indicating that the new mechanism would improve transparency whilst others disagreed.

4.5 Many of the respondents who expressed a preference for making no change did so on the basis that improvements could or should otherwise be made to the method by which pre-pack transactions are reported by practitioners and regulated by the authorising bodies, or suggested some other minor procedural changes or restrictions. These other suggestions for change are generally covered towards the end of this document in Chapter 10: Alternative Suggestions and Options.

Respondents' comments on Option 1

4.6 The ILA indicated that they would not be in favour of the introduction of any hasty or costly measures until SIP 16, properly monitored and enforced by the regulatory bodies, has been allowed to mature and a fact based assessment of its impact has been conducted. Allen & Overy indicated a preference to make no changes to the existing legislative framework and to focus instead on increasing understanding as to why a pre-pack may be the best option for creditors, and emphasised that any legislative or other reform should focus on better policing of the pre-pack process, as opposed to imposing additional controls or restrictions on all pre-packs.

4.7 The IPA indicated a preference for making no changes to the legislative framework until more consideration is given and research undertaken into the extent and source of concerns, and observed that some minor adjustments to current processes would improve transparency and confidence. The ICAEW agreed and suggested some changes to procedures that could improve transparency.

4.8 R3 indicated that, taken together, SIP 16 and the new pre-appointment cost recovery mechanism already encourage transparency and support the option of making no change to the current regime. Zolfo Cooper also supported making no change on the basis that the current regime is fit for purpose and there are significant disadvantages in all of the alternatives that would render reorganisation procedures significantly less effective for relatively little advantage.

4.9 Ernst & Young observed that in light of the continuing concerns about pre-packs, the option of making no change is not a desirable one. The ICM indicated that in a survey of their members, only 2.5% of respondents indicated a preference for making no change to the current regime.

4.10 The ILA observed that the new pre-appointment cost recovery mechanism may not add much to what creditors will or should already have been told, so its value in providing greater transparency for creditors may be more imagined than real. PWC and the CBI felt that the new mechanism will contribute to transparency and confidence but it remained to be seen whether it will have a significant effect. They observed that including a statement in the administrator's proposals as to the purpose of the pre-appointment work would be unlikely to add much to the information which should already have been disclosed by virtue of SIP 16.

4.11 The Chancery Bar Association, CLLS and Grant Thornton felt that it was unlikely the new mechanism alone would have a significant effect upon transparency and confidence. The IPA agreed, and observed that the new mechanism would result in disclosures being made too late in the process to meet creditors' expectations, and that creditors should already have relevant information by virtue of SIP 16.

4.12 The BPF indicated that the new mechanism would be unlikely to have a significant effect on transparency and confidence since they were in the main technical changes only, and creditors have more underlying concerns on the use of pre-packs which need addressing.

4.13 The BPIF observed that the new mechanism would facilitate the involvement of two practitioners for different aspects of a pre-pack sale since they would both be able to recover their costs from the estate.

4.14 The ABI felt that the ability of practitioners to recover pre-appointment costs from the insolvent estate will serve to increase the prevalence of pre-packs, and further worsen the position of unsecured creditors. Mr J Fennel, a creditor, observed that the new mechanism would reduce confidence as

recovery of pre-appointment costs will be seen as an additional financial incentive for practitioners to incur additional fees.

4.15 Ernst & Young, Deloitte, HSBC and the BBA felt the new mechanism should make a significant positive contribution to transparency and confidence.

5. Option 2: Giving statutory force to the SIP 16 disclosure requirements

5.1 This option sought views on whether the SIP 16 disclosure requirements should be given statutory force, whether penalties could be introduced for non-compliance, and what effect such a change would have on transparency and confidence. The potential impact on returns to creditors and whether the relevant information should be filed at Companies House was also considered.

5.2 Respondents who indicated that giving statutory force to the SIP 16 disclosure requirements would be their preferred option represented a range of interests including insolvency practitioners, creditors and trade bodies representing creditor interests. This was the option that received the most support after that of making no substantive change.

5.3 Many other respondents, including those advocating a preference of no change, indicated that they would be prepared to support giving statutory force to SIP 16 disclosure requirements as an alternative option. Other respondents, particularly those representing creditors, suggested that this option be introduced alongside some of the other measures proposed.

5.4 Respondents in support of this measure were generally of the view that such a measure would lead to an improvement in transparency and confidence. Various suggestions were made as to how such an outcome could be achieved in practice. Those in support of such a measure felt that practitioners would be likely to take statutory disclosure requirements more seriously than those prescribed by a SIP.

5.5 Those respondents not in support of such a measure observed that it would be unlikely to produce improved information for creditors and in some instances may result in a deterioration in the quality and quantity of information disclosed, particularly if an additional requirement to file the information at Companies House was introduced. Concerns were also expressed that any assessment of compliance with statutory disclosure requirements would necessarily require subjective judgements being made and that any statutory penalty would not be as flexible as the range of sanctions available to regulators.

5.6 The vast majority of respondents who indicated a preference for giving statutory force to SIP 16 disclosure requirements, and those who would otherwise support or not object to the measure as a secondary option or partial measure, intimated general support for the relevant information being filed at Companies House subject to some caveats surrounding commercial confidentiality. Other respondents considered that filing the relevant information at Companies House would serve no useful purpose or be inappropriate.

5.7 Many respondents agreed that it would be appropriate to create a statutory offence in circumstances where statutory disclosure requirements are not adequately met by practitioners.

5.8 Whilst creditors felt that introducing a statutory offence with penalties would be a way of increasing the accountability and censure of practitioners, other respondents, particularly lawyers, regulators and insolvency practitioners, expressed reservations as to how such an offence could be enforced in practical terms. Particular concerns were expressed by these respondents as to what would constitute a breach, what level of sanction would be appropriate and how this would be determined, and how such a regime would fit with other statutory offences already contained within insolvency legislation.

5.9 On the issue of whether a statutory disclosure requirement would increase costs and impact on returns to creditors, many respondents indicated that there was unlikely to be any significant impact on costs or returns to creditors, with a small minority disagreeing. The majority of respondents indicated that, since practitioners would be required to disclose relevant information pursuant to SIP 16 in any event, a statutory requirement to produce the same or similar information would be unlikely to have any material impact on costs.

Respondents' comments on Option 2

5.10 The BPF commented that introducing statutory disclosure requirements would send a message to practitioners, and the creditor community, that practitioners must undertake their disclosure duties, which would be enhanced by the introduction of stiff penalties. The BPF further commented that introducing statutory disclosure requirements would present an opportunity to address the comprehensiveness of the information being provided to creditors.

5.11 The ILA observed that a statutory disclosure requirement could have the opposite of the intended effect and run the risk of less flexibility in what are fluid commercial situations. The ILA further observed that such a measure may drive more practitioners to the caution of requiring court endorsement for their intended actions, potentially increasing costs and diminishing creditor returns.

5.12 ICAEW observed that it is unlikely that a statutory requirement alone would result in better information being provided and that, as with SIP 16, any assessment of compliance would necessarily involve value judgements being made on the level of information disclosed.

5.13 PWC, Ernst & Young, Grant Thornton commented that it was not clear why introducing statutory disclosure requirements would result in better information for creditors, since the requirements are already set out in SIP 16 which they believe regulators regard with equal importance to legislation. Deloitte and the CBI agreed, but noted that giving statutory force to requirements already in place may increase confidence in the accuracy and reliability of the information provided, thereby increasing confidence in the procedure itself.

5.14 The CLLS commented that SIP 16 information engages in a level of detail that would be inappropriate for legislation, and suggested that a compromise solution may be to include a statement of underlying principle in legislation (with a duty to observe it), leaving SIP 16 to articulate the more detailed requirements.

5.15 Darbys Solicitors noted that it would be appropriate for relevant details to be filed at Companies House, including a copy of the sale and purchase agreement, and observed that commercial confidentiality issues should be overridden by the need to restore public confidence and transparency. HSBC commented that SIP 16 information, including details of any deferred elements of the business sale, should be filed at Companies House with 7 days of the business sale.

5.16 The RICS observed that details should be filed at Companies House to improve transparency and to provide future creditors with full information to assist in making trading decisions.

5.17 Allen & Overy noted that the disclosure requirements could be added to the prescribed list of information to be included within the administration proposals and subsequently filed at Companies House, which would not impact on the administrator's ability to preserve value or impose any additional administrative burden. PWC and Ernst & Young noted that, in many cases, practitioners were already appending SIP 16 information to their administration proposals and filing at Companies House.

5.18 The IPC observed that relevant information should be filed at Companies House in order to facilitate external research on pre-packs. The IPA noted that a requirement to file at Companies House could easily be achieved by a small change to SIP 16 to ensure that the administration proposals include the relevant information.

5.19 The ILA commented that the intention of SIP 16 was to improve transparency to unsecured creditors and stakeholders affected by the administration, and that filing of the relevant information at Companies House would not address concerns about timely engagement on the part of the practitioner.

5.20 Grant Thornton observed that there may be Data Protection issues with certain matters being placed on the public record, and that it was not clear why third party purchasers should have to disclose extensive details to the wider world. Deloitte saw no benefit or reason to file relevant details at Companies House given that creditors already receive the information by virtue of SIP 16. CLLS agreed that such a filing would only serve to inform those who would not otherwise receive notice and that there is no need for wider public dissemination of the information.

5.21 Grosvenor commented that in order for a statutory requirement to have any affect, there must be an element of compulsion and thus penalties for failures to comply. The ABI agreed, and indicated that stronger sanctions are

required. The BPF observed that there is a common perception amongst creditors that the current SIP 16 disclosure requirements are 'toothless', and that this perception could be addressed by the creation of a statutory offence where disclosure requirements are not adequately met.

5.22 The Chancery Bar Association observed that it would be appropriate for a statutory offence to be created, as the introduction of statutory disclosure requirements would otherwise have only marginal effect. The Association also noted that such an offence would provide an incentive for practitioners to not only comply with the disclosure requirements but to test carefully with directors the accuracy of information provided in the course of preparations for the pre-pack sale.

5.23 The ICM indicated that in a survey of their members, 12% of respondents supported introducing statutory SIP 16 disclosure requirements with penalties for non-compliance.

5.24 The ILA questioned whether any comparable offences in insolvency legislation had ever resulted in the imposition of penalties, and observed that unless resources were allocated to enforce any new statutory offence, enshrining the SIP 16 disclosure requirements into statute would have no greater effect than the under current arrangements. The ILA further commented that it was naïve to think that creating a statutory offence for non-compliance (in addition to professional sanctions) would not create a more cautious initial response from practitioners.

5.25 PWC observed that since regulators are already able to impose a range of sanctions it was unlikely the existence of a statutory offence would itself encourage practitioners to provide better information than they do now. The CBI agreed, and pointed out that the creation of an offence where a timely disclosure is made but does not contain all required details would be difficult, particularly if the breach is minor, or there are issues of interpretation as to the nature of the disclosure or level of detail required. HSBC noted that there would be difficulty in defining what would constitute an adequate disclosure and which body would have enforcement responsibility.

5.26 R3 noted that the introduction of statutory disclosure requirements would imply that the regulatory bodies are not currently taking effective action in cases of non-compliance in respect of which they are not aware of any evidence. They also noted that the range of sanctions that the regulatory bodies are able to impose include fined in excess of the statutory penalties laid down for breaches of insolvency legislation. The IPA agreed, and observed that such a measure would, at best, have no discernable effect and, at worst, may detract from the need to provide adequate reasons and justification for the pre-pack if 'checklist' type statutory requirements were to be introduced.

5.27 Zolfo Cooper commented that statutory sanctions for breaches of insolvency legislation are purely financial, whilst the range of sanctions available to regulators include financial penalties, censure and, ultimately, the threat of license withdrawal. They further observed that it would be more difficult to

legislate effectively against a breach of disclosure and to prosecute on the basis of that law than it would to regulate and discipline on the basis of compliance principles and guidelines.

6. Option 3: Provide for the automatic scrutiny of the directors' and administrators' actions in pre-packs by the Official Receiver

6.1 This option sought views on whether exit from administration should be restricted for all companies subject to a pre-pack so that the only available exit route would be through compulsory liquidation, so as to provide for automatic scrutiny by the Official Receiver.

6.2 The responses to this option reflected a wide range of views, and generated a variety of different suggestions as to how procedures governing the process of exiting from administration could be amended. Although a variety of different permutations involving exiting via liquidation were considered, no respondents indicated a preference for the introduction of this option as proposed without it being introduced alongside other measures. Some creditor respondents indicated support for this option alongside the introduction of either a statutory SIP 16 disclosure regime and/or a court approval mechanism for pre-pack sales.

6.3 Respondents not in support of the option as proposed expressed a variety of reservations about the effectiveness and appropriateness of introducing a second mandatory insolvency process following administration. Generally the concerns expressed focused on the costs associated with the compulsory liquidation process, in particular the ad valorem fee payable to the Secretary of State, and whether the Official Receiver would have the appropriate resources and experience to conduct investigations of this nature. Amongst some creditor respondents concerned with the efficacy of the pre-pack process itself, it was felt that an 'after the event' scrutiny of the transaction would add little value or comfort that the transaction had legitimately been in their interests.

6.4 There was some support amongst respondents for encouraging the use of creditors' voluntary liquidation as an exit route from administration, with restrictions on the acceptance of liquidation appointments where a practitioner had acted as administrator in a pre-pack. Some respondents also commented that the process of companies moving automatically from administration to dissolution should be subject to the approval of creditors or the court where there had been a pre-pack sale to a connected party. Other respondents noted that it would be necessary to define what constituted a pre-pack transaction if companies involved in such sales were to be subject to different exit routes from administration, and that this could be unworkable.

Respondents' comments on Option 3

6.5 The ABI and the RICS felt that exit via compulsory liquidation could increase confidence in the pre-pack process, as all creditors would have the comfort of knowing that the actions of the administrator and directors in devising and effecting the pre-pack sale would be scrutinised by an independent party after the event to verify that no malpractice had occurred. The ABI further observed that the measure would have a deterrent effect in terms of abuse, and that the additional expense arising from compulsory liquidation would be more

than justified by the benefits. The BPIF observed that confidence in pre-packs would be improved as the Official Receiver will not have been involved in the pre-pack negotiations and can therefore take a more independent view of the directors' conduct.

6.6 The ICM indicated that in a survey of their members, 24% of respondents supported a restriction on exiting administration to compulsory liquidation following a pre-pack sale.

6.7 The BPF noted that the further scrutiny added by the involvement of the Official Receiver would be welcome, but that the value of a forensic investigation into a pre-pack deal which had already been done, losses crystallised, and businesses moved on was questionable. They believed it more important to ensure that the appropriate value is obtained for the business at the time of sale rather than following the transaction. Grosvenor agreed that Official Receiver scrutiny would come too long after the event to be meaningful for creditors.

6.8 The Chancery Bar Association observed that exit via compulsory liquidation would seem likely to increase confidence but, even if it were possible to arrive at a satisfactory definition of a pre-pack sale, such a measure could cause a significant increase in costs and add significantly to the burdens of the Official Receiver. CAI also queried the practicality of having a statutory definition of a pre-pack sale, and noted the possibility of transactions being 'shoe-horned' to fit one or other side of an artificial boundary.

6.9 HSBC questioned whether the Official Receiver would have adequate resource and commercial expertise to carry out effective 'post-mortem' investigations, and that few cases would be likely to attract practitioners to act as liquidator.

6.10 The ICAEW noted that the choice of exit route from administration would not in itself impact on any dissatisfaction with the pre-pack deal, and any exit restriction would undermine the flexibility of the administration process. They also observed that such a restriction may simply move the pre-pack to a different insolvency process such as voluntary liquidation, and that an alternative solution may be to require a meeting to be called at the end of the administration where exit via voluntary liquidation is proposed, in all administrations.

6.11 The R3 Scottish Technical Committee considered it inappropriate to restrict exit to compulsory liquidation and to use this as a method of scrutinising the actions of an administrator, and pointed to the existing remedies available to creditors who are dissatisfied with an administrator's conduct. The Committee also noted that, in Scotland, there is no direct equivalent to the Official Receiver in corporate insolvencies.

6.12 RBS observed that exit via compulsory liquidation would add an extra layer of costs that in many instances would be borne by the bank, and that the quantum of these additional costs would appear to be disproportionate to the risk that any wrongdoing would not be detected and dealt with under the existing regime. The BBA agreed and questioned the viability of the proposal given the

uncertainty as to how it would be funded which may impact on returns to secured creditors.

6.13 Allen & Overy also expressed concern about the cost of compulsory liquidation and the potential impact on the quantum and timing of returns to secured and preferential creditors if administrators were required to set aside funds to cover a subsequent compulsory liquidation. They further commented that establishing whether a sale was conducted at an undervalue some months after the event will be difficult, and that the Official Receiver may need to obtain the approval of secured or preferential creditors to instigate legal proceedings which may be unlikely to be given.

6.14 Grant Thornton observed that allowing practitioners' decisions to be automatically revisited with the benefit of hindsight was unlikely to promote confidence, and may inhibit the willingness of practitioners to undertake pre-packs.

6.15 PWC, Grant Thornton and Deloitte considered that a mandatory exit via compulsory liquidation would not be appropriate because of the cost to the estate and questioned whether the Official Receiver would be sufficiently resourced to investigate. PWC further commented that creditors should be given the opportunity for an independent liquidator to be appointed to scrutinise the pre-pack which, although currently possible by way of obtaining modifications to the administration proposals, could be made easier by requiring administrators to summon a meeting in every case where there had been a pre-pack or by not obliging creditors to meet the cost of requisitioning a meeting in such cases. PWC also noted that if a mandatory exit via compulsory liquidation was introduced, any obligation placed upon the administrator to present a winding up petition within a set period of time could prejudice the outcome of an administration.

6.16 Zolfo Cooper commented that exit via compulsory liquidation would not improve confidence in pre-packs, as there is not a significantly greater confidence in the investigatory resources of a compulsory liquidation than a voluntary liquidation. They observed that the negative perception creditors have of such sales, particularly to connected parties, would not be addressed.

6.17 The IPA noted that exit via compulsory liquidation would be a disproportionate, and costly, response, requiring significant additional resource on the part of the Official Receiver. The IPA also observed that confidence may be damaged since, under the existing regime, creditors have the opportunity to seek the appointment of a practitioner of their choice to act as liquidator by proposing modifications to the administration proposals. They further noted that an alternative scrutinising party would be a different practitioner acting as voluntary liquidator, and that a prohibition on an administrator subsequently becoming voluntary liquidator in circumstances involving a pre-pack could be introduced by amending the Insolvency Code of Ethics.

6.18 The ILA and Ernst & Young commented that exit via compulsory liquidation would not be economically viable or beneficial in terms of creditor

returns. Both respondents agreed that there may be merit in preventing an administrator in pre-pack cases (or in any administration where a business is sold before the creditors' meeting) from accepting appointment as liquidator in any subsequent voluntary liquidation, unless creditor or court approval has been obtained.

6.19 The ILA further observed that such a measure would result in the administrator and directors involved in a pre-pack knowing that their conduct is likely to be reviewed by an independent practitioner in a subsequent liquidation, and provide creditors with the comfort of an impartial second opinion. The ILA and Ernst & Young agreed that, where there has been a connected party pre-pack sale, there may be merit in preventing such a company exiting administration via dissolution without a specific resolution at a creditors meeting.

6.20 R3 commented that, where there has been a connected party sale, administrators should not be able to take the dissolution exit route or be allowed to act as liquidator unless creditors are content for this to happen, but that exit should not be restricted to compulsory liquidation because of the effect of the ad valorem fee. R3 also advocated increasing creditor involvement by requiring administrators to explain the proposed exit route to creditors and to obtain their approval shortly prior to the end of the administration.

7. Option 4: Require different insolvency practitioners to undertake pre and post administration appointment work

7.1 The consultation sought views on whether practitioners providing insolvency advice and subsequently accepting formal appointment as an administrator have an inherent conflict of interest, whether a requirement for a second practitioner to be involved would improve confidence, and what the potential impact on costs and returns to creditors would be.

7.2 Responses to the question of whether a conflict of interest exists were mixed. Many respondents stated that they believed no such conflict exists. Those respondents were generally insolvency practitioners, lawyers and regulatory bodies, and commented that an insolvency practitioner is an independent party and when acting as administrator has a statutory duty to act in the best interests of creditors as a whole.

7.3 Other respondents stated that in their view there is a conflict of interest. These respondents were generally unsecured creditors or trade organisations.

7.4 On the issue of whether a conflict of interest extends to circumstances where the insolvency practitioner has had an ongoing prior relationship with the company, such as in the context of undertaking review work for a secured lender, most respondents did not differentiate their responses to that given on the question of a general conflict of interest.

7.5 There was some agreement that the implementation of this option could improve confidence in the pre-pack process. Whilst some respondents felt that this option would improve confidence, several expressed concern that any increase in confidence would be outweighed by the additional cost of having a separate insolvency practitioner (or two further joint administrators) involved.

7.6 Many respondents also felt that this option would increase delay and costs to the extent that otherwise viable business sales would be frustrated and no longer viable, with the loss of any economic value in the business and employment. While few respondents were able to give an estimate of the impact, many commented that the involvement of a further insolvency practitioner would add to the costs of the administration. In addition, the time taken by the subsequent practitioner to familiarise himself with the company and review the proposed sale would cause a delay which could reduce the value of assets, particularly goodwill, which would ultimately reduce the return to both secured and unsecured creditors.

Respondents' comments on Option 4

7.7 Grosvenor commented that they did not believe a conflict of interest exists, providing that insolvency practitioners are open and honest in disclosing any matters which may appear to create a conflict.

7.8 Zolfo Cooper agreed that there could be limited scope for a conflict of interest; however they believe that any such risk is addressed by the Insolvency Code of Ethics to which every insolvency practitioner is required to have regard when considering an appointment, and noted that the Code is probably the most thoughtful and sophisticated ethical code of any professional insolvency body in the world.

7.9 The ABI observed that a conflict of interest arises where the insolvency practitioner gives advice to the directors or secured creditors of a company and may recommend a pre-pack sale from which unsecured creditors will receive no benefit, then on accepting formal appointment must act in the interests of all creditors. They further noted that the initial advice given by the insolvency practitioner may conflict with the subsequent statutory duties of an administrator, and that the conflict in this regard is obvious.

7.10 Some creditor respondents, including EDF Energy, expressed concern that the potential conflict arises where the advice of the insolvency practitioner may be influenced by the prospect of fee income from a pre-pack sale. Darbys Solicitors agreed that there is potential for conflicts of interest to arise, and expressed concern about the interpretation of the Insolvency Code of Ethics by insolvency practitioners and questioned whether it is properly enforced by regulators. They further noted that the insolvency profession still appeared to be grappling with the challenges of ethics and that the Code has insufficient teeth.

7.11 The BPIF commented that a conflict did exist since the secured lender will have a commercial interest in the new company, which will have been enhanced by the business being released from previous liabilities.

7.12 The IPC felt that perceived conflicts of interest are the most important issue surrounding pre-packs. They commented that it is essential that an insolvency practitioner form a genuinely independent and objective view that a pre-pack is in the best interests of creditors, and that while the Insolvency Code of Ethics is sufficient to deal with the question of conflicts; they question whether it is being applied by practitioners or regulators with sufficient rigour.

7.13 The BBA indicated that in their members' experience there was no evidence of insolvency practitioners feeling conflicted.

7.14 On the involvement of a second insolvency practitioner to execute a pre-pack sale, Grant Thornton observed that the increased delay would reduce asset values and noted that by the time the replacement practitioner had examined all the options and made his own judgement, the moment would have been lost, with the extent of the increased costs and reduced realisations being fact-specific to each case.

7.15 HSBC highlighted that the involvement of two insolvency practitioners would cause a duplication of effort, delay and an increase in costs, which may not be in the best interests of creditors, since it made commercial sense for one person to act throughout.

7.16 Both HSBC and the BBA estimated that costs in smaller cases could increase by 20% and in larger cases 45%, though they have no data on the likely increases. The BPIF noted that there is no reason why costs should increase, given that the overall amount of work to be performed would be unchanged.

7.17 HSBC noted that the involvement of two insolvency practitioners could reduce the number of pre-pack sales which in turn could increase the number of liquidations and job losses, and estimated that business sales effected by a pre-pack sale could reduce by 25% as a result.

8. Option 5: Require the approval of the court or creditors, or both, for the approval for all pre-pack business sales to connected parties

8.1 The consultation sought views on whether it would be appropriate for unsecured creditors to influence pre-pack sales to connected parties, regardless of whether they stand to receive a dividend; whether a court or creditor approval mechanism should be introduced, and what the impact on costs and returns would be. Other issues considered included the potential impact on the number of pre-pack sales, whether any such mechanism should be applied to other insolvency procedures and whether liability and associated restorative measures could be introduced for sales executed without the requisite approval.

8.2 Respondents expressed a divided range of views on the measures proposed in this option. Unsecured creditors, trade organisations and creditor organisations were generally supportive of the suggested creditor or court approval mechanism; whereas secured creditors, insolvency practitioners, regulators and insolvency lawyers opposed it on grounds of principle and practicality.

8.3 Many respondents indicated that it would not be appropriate for unsecured creditors to influence a pre-pack sale where they have no economic interest in the outcome. Other respondents were of the view that unsecured creditors should be able to influence such a sale, regardless of whether they stand to benefit, in order to satisfy themselves that the proposed sale is truly the best available.

8.4 In considering whether approval for pre-pack sales should be exercised by unsecured creditors or the court, all those respondents who had indicated that it would be inequitable for unsecured creditors to have an influence over a pre-pack sale opposed any measure for prior approval of the sale. The prevailing view amongst these respondents was a concern that such a measure would introduce delays and costs, which together could render all pre-pack sales unviable, even where such a sale represented the best return for creditors. In particular, there was concern that the judicial system is generally disposed towards resolving disputes between parties and is not suited, or willing, to make commercial decisions.

8.5 Some respondents indicated that approval should be sought from unsecured creditors in the first instance, with recourse to the court if necessary, whilst a minority felt that approval should be granted by the court only.

8.6 In relation to the issue of whether confidence in pre-packs would be improved by the introduction of an approval mechanism, the majority of respondents agreed that prior approval of the pre-pack sale would increase confidence. This view was reflected across all categories of respondent. However, many respondents commented that the increased confidence would come at a disproportionate cost in terms of increased costs, delay, and potentially reduced returns to creditors.

8.7 On the issue of whether a creditor or court approval would reduce the number of pre-pack sales, the majority of respondents observed that such a measure would reduce the number of pre-packs. Many of those respondents believed that prior approval would make the pre-pack procedure a less useful tool, and that the increase in costs and delay could mean that an otherwise advantageous sale would no longer be commercially viable, to the detriment of creditors. However, a minority of creditor respondents felt that an approval mechanism would act as a deterrent to unscrupulous directors from engineering a pre-pack sale for cynical reasons, and that a reduction in any such sales would be a positive outcome.

8.8 There was no clear consensus amongst respondents on the issue of whether any approval mechanism should be extended to business sales in other types of insolvency procedure, or on the scope of any such extension. Those respondents who believed that any approval mechanism should be extended to other insolvency procedures cited the need for consistency to prevent regulation being circumvented. Respondents not in favour of extending the scope of any approval mechanism were opposed to any approval mechanism being implemented in relation to pre-pack administrations in the first instance and cited a prohibitive cost or did not believe that the proposal was viable.

8.9 On the issue of whether liability should attach to directors or connected parties where business are purchased without the requisite approval, and whether any restorative measures could be implemented, those respondents in favour of the introduction of an approval mechanism were generally in favour of the attachment of personal liability, but not of sales being declared void. Respondents commented on the need for a sanction to deter connected parties from entering into a sale transaction without obtaining the requisite approval.

8.10 Those respondents addressing the question of whether sales executed without the requisite approval should be declared void were mainly opposed to such a measure. The main reason given being the impact on the new company which could be forced to cease trading and the effect on creditors who could be left with further losses as a result.

8.11 Respondents who did not support this measure referred to the existing remedies available under the Company Directors Disqualification Act 1986. Some also cited that the responsibility for obtaining approval would lie with the insolvency practitioner appointed as administrator, rather than the directors or any connected party.

Respondents' comments on Option 5

8.12 The CBI commented that it would be inequitable for unsecured creditors to influence a process from which they do not stand to benefit, which would in most cases defeat the whole rationale for entering into a pre-pack (delay, and notice to creditors resulting in a diminution of value), rendering the proposal totally impractical.

8.13 HSBC observed that creditors who stand to lose money could frustrate the pre-packaged sale out of resentment, even if it offered the best possible realisations, which would be counter productive to the wider economy.

8.14 The ABI commented that while they may not stand to benefit from a proposed sale, unsecured creditors are nevertheless entitled to ensure that the sale is in the best interests of all creditors; that it has not been structured at their expense; and should be allowed to test the assumption that they would receive no dividend even if the sale were conducted in an alternative way (for example by marketing the company rather than selling to a connected party through a pre-pack). The BPIF echoed the comments made by the ABI, stating that unsecured creditors have a legitimate interest where those who are in debt to them are likely to benefit from a transaction which releases them from those debts. EDF Energy commented that the prospect of the sale requiring court approval would act as a deterrent to those using the pre-pack sale as a mechanism to avoid debt.

8.15 The ICM indicated that in a survey of their members, 59% of respondents supported the proposal to require the approval of creditors, or the court, for all pre-pack business sales to connected parties, but recognised the difficulty of adopting the proposal in a workable way.

8.16 In relation to the role of the court in any approval mechanism, Begbies Traynor observed that the Courts have generally expressed the view that their role is not to make commercial decisions: that it is the insolvency practitioner's role to exercise his professional judgement in his capacity as a regulated professional and as an officer of the court; and that any court involvement inevitably leads to increased costs and delay. Several other respondents agreed that the judiciary is reluctant to disturb commercial arrangements or make judgements on commercial decisions, as widely reported in case law. R3 observed that it is hard to see what a judge would be expected to do when confronted by a statement from an insolvency practitioner that the proposed pre-pack is in his judgement the best option for the creditors, especially in the absence of any argument to the contrary.

8.17 The BPIF stated that court approval in particular would significantly increase costs and reduce returns to creditors, and for that reason favoured creditor approval in the first instance.

8.18 The IPA observed that a court or creditor approval mechanism would improve confidence in the pre-pack process, but commented that due to the increased cost and delay such measures would not be proportionate. They further noted that the increased costs would reduce returns to creditors but were unable to estimate the impact on each class of creditor. Deloitte agreed that an approval mechanism could improve confidence, but that it would not be commercially viable and could result in no pre-packs being undertaken. They also noted that costs would increase either in preparing for a court hearing or creditors meeting, and the delay in completing the sale could result in reduced asset values or the loss of the buyer. This view was echoed by Grant Thornton.

8.19 HSBC commented that the increased legal costs could reduce recoveries for secured lenders in 67% of cases, and where unsecured creditors would stand to receive a dividend this would be eroded for little benefit.

8.20 In relation to the potential impact on costs and returns to creditors, the ABI agreed that the introduction of an approval mechanism would inevitably cause delay and costs. They estimated that the greatest impact would be on secured creditors, though any reduction in returns to them would be relatively modest, and that this would not seem an unfair price to pay for increasing confidence in and preventing abuse of the system given the privileged position enjoyed by secured creditors in the process. The ABI further noted that unsecured creditors would stand to gain significantly through increased transparency, and through a reduction in irregular or unjustified pre-packs which do harm them financially.

8.21 The ICAEW commented that the delay in gaining approval could reduce realisations as the business would have to be traded pending the court hearing, and the associated publicity would have an impact on the businesses' value, potentially making the pre pack sale unviable. The CBI agreed that there would be less pre-pack sales as an approval mechanism would prejudice otherwise viable sales which are in the best interests of creditors.

8.22 R3 noted why confidential sale negotiations are desirable, and that in most cases negotiations for a pre-packaged sale have to be carried out in confidence which by definition takes place in the period before the company enters formal insolvency. They further commented that if the pre-pack strategy is to be successful and the business is to survive, it is crucially important to avoid precipitate action by creditors which would be the likely outcome of any such approval mechanism, rendering such a measure an unrealistic option.

9. Further questions to inform Impact Assessment on the wider economic impact of pre-packs

9.1 The consultation sought views on the likely wider economic impact of introducing measures that may restrict the number of pre-pack sales, what the positive and negative impacts of this would be, and asked for evidence to support any comments made. The potential effect on the behaviour of secured lenders was also considered.

9.2 Most respondents were unable to provide detailed responses to the issues raised about the potential wider economic impact of measures that would reduce the number of pre-pack sales.

9.3 Generally, those respondents broadly in favour of making no change to the current regime cited the benefits to the wider economy of employment preservation and continued trading opportunities, and referred to previous academic research to support their comments. These respondents also frequently commented that the perceived 'dumping' of debts is a consequence of insolvency generally and not uniquely a feature of pre-packs.

9.4 Other respondents cited the consequential financial difficulties experienced by suppliers and competitors who felt that market sectors were being distorted by formerly insolvent businesses trading with an unfair competitive advantage. There was a view amongst some respondents that a greater degree of research and evidence would be required before any definitive conclusions could be drawn about the wider economic impact of pre-packs.

9.5 On the question of whether pre-packs make a positive or negative contribution to the economy, many respondents indicated that in their view there is a positive impact overall, although that positive impact is subject to pre-packs only being used in appropriate circumstances.

9.6 On the issue of whether secured lenders would alter their behaviour if measures were introduced to either restrict the use or increase the cost of pre-packs, some respondents commented that any such measure would be likely to result in reduced forbearance on the part of lenders and could ultimately increase the cost of lending.

Comments

9.7 Many respondents, including R3, ICAEW, IPA, ACCA and the CBI referred to the academic research undertaken by Dr Sandra Frisby as demonstrating the benefits of pre-packs to the wider economy.

9.8 R3 also referred to a recent survey of their members that considered the extent to which pre-packs may create market distortions and financial difficulties for competitors. R3 commented that whilst the survey results indicate that there are a few examples of pre-packs causing job losses or financial difficulty for

competitors ‘upstream’, the numbers of occasions where this happens appear to be considerably lower than many commentators suggest.

9.9 PWC, Grant Thornton, Zolfo Cooper and the ILA all agreed that a positive contribution was provided to the wider economy by the sale of viable parts of failed businesses, the preservation of employment and generation of future tax revenues and trading opportunities.

9.10 PWC and the ILA noted that the ‘dumping’ of debts is a consequence of insolvency generally, and that pre-packs which allow businesses to continue to trade enable suppliers to make profits from the ongoing business, often recouping some of their previous losses. Grant Thornton commented that markets will always be skewed by the insolvency of a business and that if pre-packs are considered to give an unfair advantage it is no different to the business being sold at a later stage as a going concern. Deloitte agreed with this view, and noted that any business sale out of an insolvency process, irrespective of whether it is a pre-pack, could be perceived as creating a market distortion. ICAEW noted that whoever purchases the business of an insolvent company will do so free of the pre-existing debt and therefore gain advantage.

9.11 Zolfo Cooper noted that there are provisions in insolvency law for businesses that seek to ‘dump’ debts, and that these should be applied against them and their directors and not obscure the value of a correctly motivated pre-pack. The CBI observed that, notwithstanding the possible impact on competitors, the priority in the public interest should be in facilitating rescues of viable businesses and saving jobs.

9.12 The BPIF observed that, in an over-capacity sector such as printing, the fact that unviable businesses can be resurrected from failure through pre-packing, thereby ‘dumping’ debts and gaining an unfair competitive advantage over rivals, does create market distortion. They further noted that pre-packs militate against necessary industry consolidation that would otherwise improve the trading position and future prospects of other companies, with any jobs preserved through the pre-pack often outweighed by those lost in competitor companies.

9.13 The ABI noted that the benefits to the wider economy of a properly employed pre-pack are subject to significant caveats, and that in practice pre-packs were having the effect of preserving jobs at larger companies at the expense of smaller trade creditors, who are frequently unable to absorb significant write-offs. They further observed that in a properly functioning market, demand for a viable product will be satisfied by a more efficient producer if the inefficient or poorly managed company is allowed to fail, with pre-packs therefore being seen to subsidise inefficiency, create market distortions and hinder innovation at the expense of smaller trade creditors.

9.14 The BPF observed that in their view pre-packs can create very real market distortions, especially in a real estate context, where rental concessions obtained by purchasing companies increases the pressure on landlords from

other tenants irrespective of the market rent for the properties which constituted a market distortion.

9.15 The CLLS acknowledged that pre-packs play a useful role in preserving businesses which would be destroyed by exposure to the open market; but observed that the frequently claimed benefit of job preservation needed to be treated with some scepticism, since the practical effects of saving jobs in insolvent businesses may, to some extent, result in over-capacity elsewhere in the economy. The Chancery Bar Association also noted that in their experience some distortion of the market occurs when a pre-pack disposal allows purchasing companies controlled by connected parties to trade free of historic debt.

9.16 In relation to the issue of whether economic value may otherwise transfer to alternative ventures in the absence of a pre-pack, Zolfo Cooper noted that this may well be the case but that there would probably be a significant dislocation of resources, and evaluation of such a transfer is virtually impossible because of the number of variables that would need to be considered. The IPA observed that any transfer of economic value would not be complete, so pre-packs must represent a better outcome overall.

9.17 The CLLS noted that pre-packs were attractive to secured lenders because of the control they exert over costs and the certainty of outcome, so any measures introduced to restrict the process would be likely to result in reduced forbearance. Zolfo Cooper observed that the cost-effective enforcement of secured creditors' rights is critical to the optimum provision of credit to the economy, and that it is therefore important to ensure restructuring procedures remain competitive and effective if secured lenders are to continue to promote them.

9.18 HSBC indicated that the proposed measures would be unlikely to have an impact on lending policy, and result in only minor modifications to recovery protocols. RBS observed that any measure which made the process more costly for secured lenders would impact upon their capacity and willingness to lend, with certain business sectors becoming less attractive to secured lenders.

9.19 The BPF noted that there is a dearth of up-to-date research on the benefits of pre-packs, and that it would be timely for The Insolvency Service to sponsor further research to better understand the benefits. The IPA observed that the relative effect on jobs saved in the failed company against those lost elsewhere in the economy is essentially an issue for economists to set their mind to and for Government to reach a conclusion based upon the evidence.

10. Alternative measures and suggestions

10.1 The consultation sought views on whether any alternative measures ought to be considered that would have the effect of improving the transparency of, and confidence in, pre-pack sales in administration.

10.2 Many of the respondents who advocated making no changes to the current legislative regime governing the operation of pre-packs suggested a number of relatively minor amendments that could be made to the process by which pre-packs are reported and monitored by regulators in order to counter negative perceptions and improve confidence. Generally, regulators' suggestions focused primarily on how compliance with SIP 16 may be improved with a view to increasing transparency.

10.3 Other respondents considered market based solutions that may be employed by insolvency practitioners to demonstrate proper value has been achieved for a business, such as the adoption of conditional sale agreements with a period of post appointment marketing.

10.4 Other suggestions including how restrictions may be imposed on exit routes from administration, and how connected party sales may be restricted through changes to or more rigorous application of the Company Directors Disqualification Act 1986, are covered in relevant sections earlier in this document.

Comments

10.5 The IPA made a number of suggestions as to how confidence in the current regime may be improved, including but not limited to: a revision of SIP 16; the use of conditional sale agreements; the extension of section 216 of the Insolvency Act 1986; the provision of more guidance from regulators in relation to the pre-pack process; decisive action against practitioners and unregulated advisors carrying out abusive practices; and increased awareness of creditors' rights to complain or challenge the pre-pack. The IPA also noted that, if pre-pack sales to connected parties were to be prohibited, a positive outcome could be the increased use of CVAs which may incentivise directors to seek assistance and engage with creditors at an earlier stage when a CVA may be more viable.

10.6 Ernst & Young also suggested that conditional sale agreements may encourage 'best' offers at an early stage, as purchasers are generally not willing to risk losing the business or assets to a subsequent higher bid, but that provision would have to be made for trading costs (and possible losses) incurred in the period before the sale became unconditional.

10.7 The Chancery Bar Association observed that the introduction of 'super-prioritised' rescue finance would have the effect of reducing – at least in some cases – the scope for those seeking to justify a pre-pack sale on the basis that

the urgency of the company's financial situation did not permit marketing of the business or the consideration of any alternative measures.

10.8 The IPC suggested that a more rigorous and methodical approach be taken by regulators with a view to addressing conflicts of interest. They considered that insolvency practitioners should consider more carefully whether their pre-appointment role has compromised their independence and objectivity. They further observed that the regulators should monitor compliance with SIP 16 and the Insolvency Code of Ethics in every case where a pre-pack has been undertaken by a practitioner whom they have authorised.

10.9 The BPIF suggested that the remit of insolvency practitioners involved in pre-packs should be more akin to that of an auditor, with greater requirements imposed upon them to consider matters of wider public concern such as the relative risk of trading with particular directors/shareholders involved in pre-packs, details of which should be filed at Companies House.

10.10 The BPF observed that an alternative way of achieving the scrutiny afforded by a creditor approval process would be the establishment of an independent auditor to examine the details of pre-pack sales to connected parties. Allen & Overy suggested the creation of a pre-pack Ombudsman who could investigate the pre-pack and facilitate redress for any disenfranchised creditor.

10.11 Allen & Overy further suggested that consideration be given to the establishment of a separate pre-pack regime for small companies if abuse was occurring. Given that this was the end of the market where most concerns were being raised, and that unsecured creditors in smaller value cases often lacked the knowledge, resources and financial means to make use of the existing legislative machinery, they noted that such a regime could be beneficial.

Alphabetical List of Respondents and Abbreviations

Allen & Overy LLP
Association for Financial Markets in Europe (AFME)
Association of British Insurers (ABI)
Association of Chartered Certified Accountants (ACCA)
Begbies Traynor
British Bankers' Association (BBA)
British Printing Industries Federation (BPIF)
British Property Federation (BPF)
Chancery Bar Association
Chartered Accountants Ireland (CAI)
City of London Law Society (CLLS)
Confederation of British Industry (CBI)
Darbys Solicitors
Deloitte LLP
EDF Energy
Emerson Group
Ernst & Young LLP
Fennell J Mr
Gordon Brothers Europe
Grant Thornton LLP
Grosvenor
HM Revenue & Customs *[not published]*
HSBC Bank Plc
Independent Print Industries Federation
Insolvency Lawyers Association (ILA)
Insolvency Practices Council (IPC)
Insolvency Practitioners Association (IPA)
Institute of Chartered Accountants in England and Wales (ICAEW)
Institute of Credit Management (ICM)
Interested Party *[respondent requested confidentiality]*
Pension Protection Fund *[not published]*
Phillips A Mr
PricewaterhouseCoopers LLP (PWC)
R3 (Association of Business Recovery Professionals)
R3 Scottish Technical Committee
Richard J Smith & Co
Road Haulage Association
Royal Bank of Scotland (RBS)
Royal Institution of Chartered Surveyors (RICS)
Zolfo Cooper LLP