'No Evil is Without Good': A Comparative Analysis of Pre-pack Sales in the UK and the Netherlands

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Abstract

In the last decade or so, the pre-pack has been widely endorsed as a significant rescue tool across a range of European jurisdictions. Although the seamless prepack can prove to be a very attractive method of affecting a corporate restructuring, a variety concerns nevertheless arise primarily due to the lack of transparency of the process. The aim of this article is to provide an overview of the pre-pack process in two different jurisdictions commonly regarded as creditor-friendly, namely, the UK and the Netherlands. In addition, the aim of the article is to offer a comparative analysis of the approach taken in these two jurisdictions towards the pre-pack, with particular regard placed on the perspective of secured creditors.

I. Introduction

Pre-packaged insolvency proceedings ('pre-packs') have been with us for some time now, but in the last decade or so, the number of pre-packaged proceedings has increased dramatically across many jurisdictions in the European Union. From a debtor's perspective, pre-packs can be attractive for a wide range of reasons, for instance the process is quick, confidential and inexpensive. On the other hand, from an apprehensive creditor's perspective, a variety of concerns arise, primarily because of the lack of transparency of the process. However, notwithstanding the criticisms and concerns pre-packs have repeatedly received support and ultimately validation as an essential rescue tool.

In the light of pre-packs having been widely adopted by a number of European jurisdictions as a rescue tool, the aim of this article is to provide a comparative

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analysis of the approach towards pre-packs in the UK and in the Netherlands. Particular emphasis will be placed on the role of secured creditors in the pre-pack process. Moreover, the article will briefly examine whether pre-packs are proving to be a useful social policy tool. With particular regard to the UK, it could be argued that the preservation of employment and as a result the greater social prosperity is the reason behind the support of pre-packs. A comparison will then be drawn with the Dutch pre-pack regime, and the article will assess whether or not preservation of employment is also a driving force behind the Dutch pre-pack practice and will assess the implications of the recent *Estro* case.

II. Pre-packs in the UK

In the UK, pre-packs commonly fall within the context of administration proceedings. A pre-pack administration involves a pre-arranged sale of the distressed business, which will be executed immediately after the formal appointment of the administrator. The Enterprise Act 2002 (EA 2002)[1] strengthened the rescue ethos of the UK by streamlining the administration procedure and effectively making it a key restructuring tool. In particular, the EA 2002 introduced revolutionary changes to what was previously a time-consuming, expensive and complex procedure. The Act contains a series of reforms designed to make administration an effective restructuring device.

However, the EA 2002 does not make specific reference to pre-packs, as the practice was still developing when the Act was introduced. Instead pre-packs developed as a market tool to promote corporate rescue, but no legislation is directly applicable to them. A pre-pack typically involves a sale of a distressed business, seamlessly prepared outside of formal administration proceedings, which is executed immediately after the formal appointment of an administrator.

As previously stated, a pre-pack sale, albeit not expressly regulated by the relevant legislation, nevertheless falls within the context of administration proceedings. It is therefore important at this stage to provide a brief analysis of the applicable law. A significant change introduced by the EA 2002 is the fact that it makes provision for two 'out-of-court' routes to administration. Under the old law, an administrator could only be appointed by an order of the court, on a petition by the company, its directors or any creditors.[2] However, under the EA 2002, a company is able to enter administration not only by means of a court order but also by (i) an appointment by a floating charge-holder or (ii) an appointment by the company or its directors.

The EA 2002 enables the holder of a floating charge to appoint an administrator, provided that their security has become enforceable[3] and that their security interest relates to the whole or substantially the whole of the company's property.[4] The power to make an appointment must be specified by the instrument creating

1. Pursuant to the Enterprise Act 2002, Part II, Insolvency Act 86 (IA 1986) was replaced and a new Part II inserted in its place, giving effect to an additional Schedule B1.
2. Section 9(1), IA 1986.
3. Ibid., paragraph 16, Schedule B1.
4. Ibid., paragraph 14(3).

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their security.[5] The second gateway to administration is by virtue of an appointment by the company or its directors. It could be argued that, although directors can often be held responsible for the company's difficulties, nonetheless, the rationale for granting them expedited appointment rights is to provide incentives (in the form of 'sticks and carrots') for them to take drastic action, when the company is in crisis.[6] It is noteworthy that, although the floating charge-holder does not initiate this process, he is still given the opportunity to appoint his own administrator, unless the court thinks it right to refuse, given the circumstances of the case.[7] In addition, the floating charge-holder must receive at least 5 days' notice of the company's intention to appoint an administrator[8] and no appointment may be made until the notice period has expired or until the floating charge-holder gives his written permission.[9]

A remarkable change introduced by the EA 2002 is with regard to the purpose of administration.[10] The administrator must hierarchically perform his functions with the objective of

> a) rescuing the company as a going concern, b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up or c) realizing property in order to make a distribution to one or more secured or preferential creditors.[11]

Additionally, the administrator must perform his functions 'in the interests of the company's creditors as a whole'[12] and as 'quickly and efficiently as is reasonably practicable'.[13] In exercising his functions, the administrator is an officer of the court and acts as the company's agent.[14] Upon his appointment, the administrator, who must also be a UK licenced insolvency practitioner, has the power to do anything necessary or expedient in relation to the management of the affairs, business or property of the company.[15] For instance, he may challenge undervalue transactions, preferences, extortionate credit transactions and certain floating charges.[16]

Further, the EA 2002 affords creditors enhanced participation in the administration proceedings. The Act requires the administrator to submit a statement of proposals for achieving the purpose of administration,[17] which must be

5. Ibid., paragraph 14(2).
6. John Armour and Riz Mokal, 'Reforming the Governance of Corporate Rescue: The Enterprise Act 2002' (2005) *LMCLQ* 28, 32.
7. See paragraph 36, Schedule B1, IA 1986.
8. Ibid., paragraph 26(1).
9. Ibid., paragraph 28.
10. Phillips and Goldring argue that 'this provision makes it expressly clear that administration is first and foremost about rescuing the corporate entity': Mark Phillips and Jeremy Goldring, 'Rescue and Reconstruction' (2002) 15(10) *Insolv. Int.* 75, 76.
11. Paragraph 3(1)(a)-(c), Schedule B1, Insolvency Act 1986.
12. Ibid., paragraph 3(2).
13. Ibid., paragraph 4.
14. Ibid., paragraph 69. Being an officer of the court, the administrator is expected to form a reasoned and objective opinion as to whether a proposed pre-pack should be supported or not. In addition, the administrator must carry out his duties properly and to act in the interests of creditors as a whole.
15. Ibid., paragraph 59(1).
16. Ibid., sections 238, 239, 244 and 245.
17. Ibid., paragraphs 49(1), (3)–(5), which state that a copy of the proposals must be sent to all the members it applies to, no later than the end of 8 weeks from the commencement of administration.

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accompanied by an invitation to an initial creditors' meeting.[18] However, no such meeting is necessary where the administrator believes that (i) the company has sufficient property for each creditor to be paid in full[19]; (ii) that the company has insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of the statutory ring-fencing of a fund for unsecured creditors[20]; or (iii) that none of the objectives for which the administration process was initiated can be achieved.[21]

Upon consideration of the proposals, the creditors can either approve or reject them. Additionally, the creditors may approve the proposals with modifications. However, the administrator must consent to each modification.[22] Subsequently, if the administrator approves the proposed modifications and believes that they are substantial, he must call for a further meeting, where he will present the revised proposals or report any decisions to the creditors, and then report the matter to the court.[23] It should be pointed out that the requirement for administrators to set out proposals, which are in turn to be approved by the creditors at the creditors' meeting, is designed to enhance creditor participation in the re-organisation process. However, the objective of this requirement is arguably undermined by pre-packaged administrations, as, where such proceedings are involved, it is possible, and usually essential for the administrator to effect a pre-pack disposal of the company's business, or a substantial part of it, prior to a creditors' meeting.[24]

Furthermore, although the administrator will consult with the company's secured creditors prior to a pre-pack sale (in fact it is impossible to give effect to a pre-pack sale without the secured creditors' support), it has been argued that the rights of less powerful creditors may be overridden. Frisby identifies that creditors' rights of participation are subjugated to commercial considerations in a pre-pack situation and acknowledges that there is a strong possibility that the commercial advantages of a pre-pack, in the form of enhanced consideration for the business and a reduction in the costs of selling it, will probably not inure to the advantage of those creditors who are excluded from the decision-making process.[25]

As mentioned earlier, the pre-pack is a restructuring method, whereby a sale is seamlessly prepared prior to formal insolvency proceedings being commenced, with a primary aim to preserve value. However, although the popularity of pre-pack has risen dramatically, the use of the procedure has not been free from criticism. One significant point of contention in relation to the pre-pack process relates to the extent of control exerted by secured creditors, which some regard as out of line with the spirit of the EA 2002 of promoting a collective approach

18. Ibid., paragraphs 51(1)–(2), the latter stating that the meeting must be held as soon as is reasonably practicable but not later than the end of 10 weeks from the commencement of the administration process.
19. Ibid., paragraph 52(1)(a).
20. Ibid., paragraph 52(1)(b).
21. Ibid., paragraph 52(1)(c).
22. Ibid., paragraph 51(3).
23. Ibid., paragraph 54.
24. A more detailed analysis of the pre-packaged administration technique and criticism over its use is offered thereafter.
25. Sandra Frisby, *Report on Insolvency Outcomes* (2006), 72, available at:<http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/InsolvencyOutcomes.pdf>.

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to corporate rescue.[26] An analysis of some of the key criticisms is offered thereafter.

III. UK Pre-packs and the Role of Secured Creditors in the Process

One of the key changes introduced by the EA 2002 is the virtual abolition of the administrative receivership procedure. That procedure had long been criticised by ordinary creditors for providing floating charge-holders with a very strong, and potentially unfair, position in insolvency proceedings.[27] The policy aim underlying this reform, was the replacement of a somewhat 'selfish'[28] proceeding with a somewhat more collective administration procedure. In other words, it is no longer possible for a floating charge-holder to appoint a receiver, who would primarily act in the interests of his appointor. Instead, following the reforms introduced by the EA 2002, the aim of which is to promote a more collective approach towards insolvency, the floating charge-holder has an option to make an out-of-court appointment of an administrator,[29] whose statutory duty is to perform his functions in the interests of the company's creditors as a whole.[30]

It could be argued that although the legislature's intention was to promote a more collective insolvency procedure than administrative receivership, the manner in which pre-pack administration operates in practice is such that it closely resembles the administrative receivership procedure, effectively reviving the abolished procedure. In particular, some critics[31] argue that pre-packs have effectively replaced administrative receivership as the procedure of choice for the secured lender as appointor.[32]

The aim of the EA 2002 to promote corporate rescue and a collective approach towards insolvency is clearly reflected in paragraph 3 of Schedule B1 of the IA 86.

Therefore, with particular regard to the statutory purpose of administration, it could be argued that pre-packs defy the intentions of the Act, as with a pre-pack the emphasis is no longer sufficiently on rescuing the company as a going

26. See Vanessa Finch, 'Re-invigorating Corporate Rescue' [2003] *JBL* 527, 543.

27. Nevertheless, in criticising the exercise of secure creditors' rights one cannot fail, but to also note that it is vital for the industry to have access to credit on a low risk basis and also at low cost. Therefore, notwithstanding the unsecured creditors' perception of a potentially unfair process, arguably, secured creditors should not be prevented from exercising contractual rights they obtained in return for the provision of credit.

28. Although on the one hand, it could be argued that secured creditors should not be criticised for merely exercising their contractual rights; on the other hand, it could be said that the administrative receiver tended to pursue a quick sale of assets subject to a floating charge primarily for the recovery of his appointer. In addition, no mechanisms in the administrative receivership encouraged the administrative receiver to rescue the troubled company as a going concern. See Stephen Davies (ed), *Insolvency and the Enterprise Act 2002* (Jordans, 2003), 38–39. See also John Armour and Sandra Frisby, 'Rethinking Receivership' (2001) 21 *OJLS* 73, 87.

29. Paragraph 14(1), Schedule B1, Insolvency Act 1986.

30. Ibid., paragraph 3(2).

31. Stephen Davies, 'Pre-pack' (2006) *Recovery (Summer)* 16.

32. However, one could also argue that secured creditors should not be criticised for merely favouring a procedure that permits the business to be sold as a going concern, simply because this is underhand or contrary to the interests of other parties.

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concern.[33] Instead, since as part of a pre-pack sale, an agreement to sell the business is concluded prior to the administrator's formal appointment, it could be argued that a pre-pack provides a comparatively easy option so that insufficient effort is made to achieve the primary objective of administration. It is therefore apparent that the pre-pack is designed to achieve either the second or third objective of administration, where the emphasis shifts to the protection of the secured creditors' interests.

Although it appears that pre-packs undermine one of the statutory objectives of administration in practice and that the significant control exercised by secured lenders is retained post Enterprise Act, one could nevertheless argue that pre-packs could in the right circumstances constitute the most appropriate course of action. For instance, in circumstances where an insolvent company cannot be restructured as a going concern, the pre-pack constitutes a great 'value-preservation' tool, as it facilitates a discreet and quick sale of the business.[34] In particular, the pre-pack is a very valuable tool where a business has a strong brand or intellectual property, the value of which could decrease dramatically by even a hint of a formal insolvency.[35] Furthermore, a pre-pack minimises the erosion of customer confidence, reduces any damage to relationships with key employees, especially in service based companies.[36]

Whilst there is a clear advantage to be gained from the confidential nature of pre-packs, looking at the process from an apprehensive unsecured creditor's perspective, it could be said that the lack of transparency within the pre-pack process makes it very difficult to determine how a deal was struck[37] and whether the administrator has properly conducted all the necessary enquiries as well as complied with his statutory duties.[38] Furthermore, whilst unsecured creditors are generally presented with the pre-pack as a *fait accompli*, the process cannot be completed without the involvement of the secured creditors, often banks or other financial institutions. The debtor needs the secured creditor to provide a release on the encumbered assets or else they cannot be sold. Therefore, the secured creditors are always involved in the process, whereas unsecured creditors are not. Nevertheless, it is submitted that secured creditors benefit from successful pre-pack proceedings and have interest to ensure that there has not been an abuse of process. Additionally, it is rather unlikely that an administrator would willingly jeopardise his

33. It is noteworthy that successful rescue of companies normally takes place through informal rescue. Informal rescues have tended to be so successful that, if companies are to be saved, it is performed in that way, so that the ones that end up pre-packing are ones where the company could not be saved.

34. The sale is negotiated and prepared prior to entering into formal administration proceedings and is executed immediately after the appointment of the practitioner. Therefore, the process is quick and confidential and as a result the value of the business assets is preserved.

35. Martin Ellis, 'The Thin Line in the Sand: Pre-packs and Phoenixes' (2006) *Recovery (Spring)* 3.

36. Davies, above note 31.

37. Arguably, the pre-pack-sceptic unsecured creditor, with a potentially passive approach to the business's affairs is predisposed, regardless of the fact that an insolvency practitioner would take every possible step to ensure that all procedural rules have been complied with, to believe that secrecy translates into a willy-nilly arrangement to benefit the secured creditors.

38. Importantly, the administrator must perform his functions in the interests of the company's creditors as a whole and as quickly and efficiently as is reasonably practicable.

reputation (and hence his livelihood) and risk losing his licence, so as to benefit a particular creditor.

Moreover, the lack of transparency which surrounds pre-pack administration gives rise to further criticisms relating particularly to the marketing and the valuation of the business prior to a sale. It could be argued that a proposed pre-pack sale is not subjected to the competitive forces of the market, which ultimately is likely to lead to the business or assets within the business being sold at a value significantly lower than it would have been, had it been properly exposed to the market for an appropriate period. With particular regard to instances where the sale of the business is to a connected party, even where the deal offered by the connected party is the best one available in all the circumstances, unsecured creditors in particular perceive the sale to be inherently unfair.

The Graham Report,[39] which offered an overview of the criticised pre-pack elements and proposed reforms to improve the procedure, suggested that the creation of a 'pool of independent experts'[40] would effectively address problems raised by the limited marketing of the business and would provide extra checks and balances to the process. The Graham Report recommends that in connected sales, the connected party should voluntarily take the opportunity to present an outline of the deal, together with the reasons why it is necessary to proceed in a particular way to an independent member of the 'pool' prior to administration. This would create independent scrutiny of the sale, whilst retaining the much-desired secrecy before the event. Nevertheless, it could be argued that the creation of a pool of experts, which is not mandatory, only partly addresses the issue of limited marketing of a business, as it only applies to the case of a sale to a connected party. In addition, in the case of connected sales, it remains to be seen as to whether or not the creation of a pool of experts, will operate effectively.

A pre-packaged sale of a business is a common, yet a controversial, manner of using of administration proceedings. However, in order to address the perceived lack of accountability and transparency concerns often associated with pre-packs and to ensure that the insolvency practitioner profession is adequately regulated, significant steps have been taken over the last few years. A key development has been the introduction of SIP 16,[41] revised in 2013 and 2015, with the aim of addressing the transparency issues that may arise in the context of a pre-pack business sale.[42] Crucially, SIP 16 requires administrators to provide creditors with a detailed explanation and justifications of not only the reasons why they considered the pre-pack to be the best outcome but also information prior to their formal appointment.[43]

39. Teresa Graham, *Review into Pre-pack Administration* (June 2014).

40. The 'pool of experts' became operational on 2 November 2015.

41. SIP 16 was originally issued in January 2009 seeking to address the unsecured creditors' strong criticism that was directed at the role of insolvency professionals in pre-pack proceedings. Although the government has left the profession to regulate this area itself, the Insolvency Service does monitor the SIP 16 reports.

42. Insolvency practitioners must also adhere to a revised Insolvency Code of Ethics, which was introduced in conjunction with SIP 16.

43. For a detailed analysis, see Bo Xie, *Comparative Insolvency Law-The Pre-pack Approach in Corporate Rescue* (Elgar, 2016), 136–141.

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In addition to SIP 16, professional rules also aim to promote best practice regarding information disclosure in pre-pack sales. For instance the Insolvency Practitioners' Association[44] has taken a robust role in monitoring compliance with SIP 16 and where necessary, in sanctioning insolvency practitioners for dishonest conduct.[45] In addition, contrary to the negativity that sometimes surrounds pre-packs, it transpires that only a few[46] complaints relating to compliance with SIP 16 and pre-pack administrations have reached the Insolvency Service's Complaints Gateway.[47] Moreover, reports concerning compliance with the revised SIP 16 demonstrate an increased rate of compliance. In 2016 in particular, out of 385 SIP 16 statements reviewed, 232 were found to be wholly compliant with SIP 16, representing approximately 62% of the total. Also, for the majority of non-compliant statements, the breach was not deemed to be serious and was merely of a technical nature.[48] It, therefore, transpires that although unsecured creditors may not always be provided with adequate information in relation to pre-pack administrations proceedings, it is rarely the case pre-packs have been inappropriately or unjustifiably concluded.

It has been argued that although professional rules aim to promote best practice, ultimately the enforcement of the disclosure requirements depends on having in place effective monitoring and control systems, which would importantly ensure that abusive conduct is detected and also sanctioned.[49] To this effect, the Insolvency Service ensures that professional bodies regulate their members properly and that high professional and ethical standards are maintained in order to make the regulatory processes more efficient.[50]

In addition to the stringent regulatory regime which effectively discourages abuse of the pre-pack process, it is submitted that secured creditors have a vested interest to prevent an abuse of process, as they can significantly benefit from successful pre-pack proceedings. Pre-packs appear to be a 'controlled way forward' for secured creditors and one could argue that banks in particular, are very well-

44. The Insolvency Practitioners' Association is one of the seven recognised bodies for the purposes of licencing insolvency practitioners (IPs) under the Insolvency Act 1986. The other six recognised bodies are the Institute of Chartered Accountants in England and Wales, the Law Society of England and Wales, The Institute of Chartered Accountants of Scotland, the Association of Chartered Certified Accountants, The Institute of Chartered Accountants in Ireland and the Law Society of Scotland.

45. See Insolvency Service, *Monitoring Report of Insolvency Practitioners' Association* (10 August 2016), 7–8, available at:<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/545031/IPA_Monitoring_Report_August_2016.pdf>.

46. The Gateway received six complaints in 2016, seven in 2015 and three between June 2013 and June 2014. See also John Wood, 'Review of the Regulatory System: How Effective has the Complaints Gateway Been?' (2017) 30(7) *Insolv. Int.* 106, 108.

47. The Gateway, which was set up in 2013, is hosted by the Insolvency Service and is responsible for receiving and where necessary referring complaints against insolvency practitioners to the Regulatory Professional Bodies. Access to the Gateway is available at: <https://www.gov.uk/complain-about-insolvency-practitioner>.

48. See Insolvency Service, *2017 Annual Review of Insolvency Practitioner Regulation* (March 2017), 7.

49. See Xie, above note 43, 109.

50. Ibid., 150. See also Vanessa Finch, 'Regulating Insolvency Practitioners: Rationalisation on the Agenda' (2005) 18 *Insolv. Int.* 17, 18.

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placed, due to their experience and vast range of resources, to provide advice on the viability of a rescue business plan and to positively influence the outcomes of a pre-pack administration proceeding.[51]

IV. The Dutch Pre-pack

The Dutch pre-pack derives from English practice, although it is different on many levels. This section offers an analysis of the Dutch pre-pack and draws a comparison with the UK pre-pack practice. In 2012, the Dutch government initiated a programme for reviewing the Dutch Insolvency Act (DIA) with the aim of modernising some of its existing provisions and also adding a number of instruments to it.[52] A significant change to the DIA is the addition of rules relating to pre-packs.[53]

Under Dutch law, there are two types of bankruptcy proceedings, namely, the suspension of payments (*surseance van betaling*), which is a restructuring proceeding, and bankruptcy (*faillissement*), which is aimed at the liquidation of the debtor's assets and the dissolution of the company. Oddly, the pre-pack falls within the context of the bankruptcy procedure. In effect, prior to a pre-pack sale, the court is requested to designate an 'intended trustee', who is present at negotiations and preparations of the sale. Once the sale is ready to be executed, subsequent bankruptcy proceedings are initiated, and the intended trustee is then formally appointed to administer the sale.

In the Netherlands, the bankruptcy procedure is used as one of the most important instruments for the reorganisation and continuation of businesses in financial difficulties.[54] A logical explanation of the significant advantage that the bankruptcy procedure has over the suspension of payments procedure in restructuring cases was to be found in the rules governing employment contracts. That is to say, the provisions in the Acquired Rights Directive (ARD),[55] safeguarding the interests of employees in the event of transfer of undertakings,[56] were thought only to apply to the suspension of payments procedure, but not to the bankruptcy procedure, as this is aimed at the winding up of the company. Thus, with regard to the bankruptcy procedure and pre-pack sales in particular, importantly, Article 5 of the ARD was believed to exclude the automatic transfer of employment contracts upon the transfer of the business.[57]

51. In particular, the London Approach suggests an influence on restructurings dating back to the 1970s.
52. See Robert van Galen, 'Developments in Dutch Insolvency Law' (2017) 14(5) *Int. Corp. Rescue* 351, 352.
53. The legislative framework for the Dutch pre-pack practice has been included in the *Wet Continuïteit Ondernemingen I*. Kamerstukken II 2014/15, 34 218, 2.
54. Dennis Faber *et al.* (eds), *Commencement of Insolvency Proceedings* (OUP, 2012), 427.
55. Directive 2001/23/EC of 12 March 2001 (ARD).
56. Ibid., Articles 3–4 provide, *inter alia*, that the transferor's rights and obligations in relation to contacts of employment, shall, by reason of the transfer, be transferred to the transferee and that the transfer does not constitute grounds for the dismissal of employees by either the transferor or the transferee.
57. Ibid., Article 5(1), implemented in Article 7:666 section 1, Dutch Civil Code (DCC).

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Whether pre-packs could continue to be successfully conducted within the sphere of the bankruptcy procedure has been thrown into doubt[58] following the preliminary reference to the Court of Justice of the European Union in the *Estro* case,[59] where the question was asked as to whether the 'bankruptcy exception' of Article 5 of the ARD applied to pre-pack cases. The solution appears to have preserved the application of the rules wherever a trustee is appointed to assess the rescue potential of the business.[60] The outcome seems to be that pre-packs in bankruptcy will be treated no differently to those occurring in other proceedings, raising some doubt over the advantages of using bankruptcy unless the domestic law were amended.

Nevertheless, although at first glance, the DIA does not seem very rescue-orientated, the bankruptcy procedure can in practice be used quite effectively for restructuring purposes. The bankruptcy procedure provides two possible routes for the continuation of the business or company. First, there is an option of offering a composition to the debtor's creditors. The composition must be offered to all ordinary creditors, who can adopt the proposal by a simple majority that together represent at least half of the debts.[61] The proposal often consists of an offer to partially pay the debts, after which the total amount of these debts will be discharged.[62] A major advantage of this procedure is that once it receives court approval and becomes binding on a dissenting minority of ordinary creditors. Following the approval of the court, the bankruptcy procedure comes to an end, and the debtor emerges from the process having avoided the liquidation of the company (Article 161 of the DIA). Therefore, the composition gives the possibility to restructure the debts within the same legal entity.[63] However, giving effect to a composition agreement is an enormous task, as creditors rarely vote. In addition, a major flaw of the composition is that it only affects unsecured creditors.[64] In practice, due to the limitations of bankruptcy compositions, they are very rarely used.[65]

The second route involves the asset transaction in bankruptcy, also known as 'restarts'. The Dutch pre-pack derives from such restarts. As part of a restart, the assets of a company are sold followed by the liquidation of the corporate entity as an 'empty shell'.[66] The big advantages of this asset sale by the trustee are the speed of the procedure and the privacy of the sale.[67] In contrast to the composition plan, the asset sale does not require public voting at a creditors' meeting. The

58. Annemarie van Groningen, 'De pre-pack onder arbeidsrechtelijk vuur' (2016/39) *ArbeidsRecht* 20; S. Peters and H. de Waele, 'Het Europese failliet van de Nederlandse pre-pack' (2018/3) *TvI* 3-11.

59. Rb. Midden-Nederland, 24 February 2016, ECLI: NL:RBME:2016:954, JOR 2016/147 (noted by W. Bouwens).

60. The Court of Justice of the European Union published its judgement on 22 June 2017, deciding that where a trustee is appointed to assess the possibility for the continuation of the business, then Article 5, ARD does not apply, hence there can be no derogation from the protection scheme provided under the Directive. See Case C-126/16 (*FNV/Smallsteps*).

61. Articles 138 and 145, DIA; an exception can be made under the conditions mentioned in Article 146, DIA.

62. Marcel Groenewegen and J. van Buren-Dee, *Tekst & Commentaar Insolventierecht* (Kluwer, 2014), Article 138 DIA, aant. 4.

63. Jan Adriaanse, *Restructuring in the Shadow of the Law: Informal Reorganisation in the Netherlands* (Kluwer, 2005), 16.

64. Idem.

65. van Galen, above note 52, 351.

66. Ibid.

67. Lukas Kortmann, 'Improved Pre-packs: Going Dutch' (2012) *Corporate Rescue and Insolvency* 225.

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consent of the supervisory judge is required and so is the permission of key secured creditors to sell the encumbered assets which are secured by their security rights.[68] Most restarts of business are asset transactions within bankruptcy. The Dutch pre-pack is essentially an adapted version of these restarts where an insolvency practitioner is appointed before the formal bankruptcy procedure is commenced.

Similarly to the UK, the lack of transparency that surrounds the pre-pack process is often also criticised in the Netherlands. Particularly, the concerns in the UK are focussed on 'connected party sales', the potential conflict of interest of an insolvency practitioner, as well as the lack of involvement of the unsecured creditors. Instead, in the Netherlands, the main concern has been the applicability of the ARD. Since the *Estro* case, Dutch pre-pack practice has come to a halt awaiting the response from the legislature and the outcome of several court proceedings. In *Estro*, the ECJ held that – in order to meet the exception in Article 5(1) of the ARD – three requirements should be met: (i) the transferor must be the subject of bankruptcy proceedings or any analogous insolvency proceedings; (ii) those proceedings must have been instituted with a view to the liquidation of the assets of the transferor; and (iii) the proceedings must be under the supervision of a competent public authority.[69] With regard to the pre-pack in the *Estro* case, the ECJ ruled that

> […] it is apparent from the order for reference that a 'pre-pack' procedure, such as that at issue in the main proceedings, is aimed at preparing the transfer of the undertaking down to its every last detail in order to enable a swift relaunch of the undertaking's viable units once the insolvency has been declared […]. In those circumstances, and subject to determination by the referring court, it must be held that since such a procedure is not ultimately aimed at liquidating the undertaking[…].[70]

and

> Although appointed by a court, at the request of the insolvent undertaking, the prospective insolvency administrator and the prospective supervisory judge have no formal powers. Accordingly, they are not supervised by a public authority.[71]

Since the pre-pack in *Estro* does not seem to meet the second and third requirement for the exception under Article 5 of the ARD, the ECJ rules that the ARD applies.[72] In response, the Dutch Minister of Security and Justice has asked the Senate to temporarily suspend the handling of the WCO I in order to discuss the implications of *Estro* with a group of representatives from both the Unions and insolvency practitioners.[73]

In the first court-ruling after *Estro* – the *Bogra* case[74] – the ECJ decision has been interpreted rather restrictively. In *Bogra*, employees who were not employed by the

68. Ibid., 226.
69. Case C-126/16 (*FNV/Smallsteps*), paragraph 44.
70. Idem, paragraphs 49–50.
71. Idem, paragraph 55.
72. After the ECJ ruling, Smallsteps (the NewCo) settled with the Unions for EUR 11 million, for which see Teri van der Heijden, 'Smallsteps treft schikking van 11 miljoen euro met FNV' (*NRC*, 21 December 2017).
73. *Kamerstukken I* 2017/18, 34 218, I, 4.
74. Ktr. Noord-Holland 12 October 2017, ECLI:NL:RBNHO:2017:8423, *JAR* 2017/28.

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NewCo claimed severance payments and transition payments based on the *Estro* case. In *Bogra*, however, there is nothing that indicates that the company, or the intended trustee on its behalf, reached agreements with the buyer prior to the declaration of bankruptcy about the takeover and transfer of the business, let alone that agreements about such a takeover were made and prepared down to the last detail. The claim is therefore rejected by the court. In essence, the court rules that the ECJ ruling should be interpreted in such a way that it only affects asset sales that have been prepared in every detail *before* the declaration of bankruptcy. Furthermore, the court considers that – contrary to *Estro* – there was no permission from the (intended) supervisory judge nor was the sale effected immediately after the bankruptcy. The sale was effected weeks after the bankruptcy, although it has been argued that this plan was previously determined.[75] The *Bogra* ruling implies a limited scope of the *Estro* ruling, as has also been advocated in literature, and offers prospects for the future of the Dutch pre-pack.[76]

As part of the proposed Dutch pre-pack, a debtor who approaches insolvency, but is not yet technically insolvent,[77] can request the court to designate/pre-appoint an intended (silent) trustee. The intended trustee is an insolvency practitioner, who is likely to be appointed as trustee in case of impeding bankruptcy proceedings.[78] The rationale behind the appointment of the intended trustee is to enable him to get acquainted with the company prior to the opening of formal proceedings, participate in negotiations with key stakeholders, such as the company's management and secured creditors, and to take part in the negotiations of an asset deal, which would be given effect once formal bankruptcy proceedings have been opened. The pre-appointmentpractice can be particularly useful[79] in cases on large restructurings, where the preservation of value and jobs is crucial, and the risk of value destruction is much greater.[80]

Following the debtor's request for the appointment of an intended trustee, it must be proven that such appointment will provide 'added value'. Added value can be shown in at least two cases: (ii) when the debtor can show that the preparation by an intended trustee can limit the damage for the stakeholders in the case of a potential liquidation procedure, or (ii) when it can be shown that preparing an asset deal during the pre-appointment stage and importantly on a confidential

75. Gidi Pols, 'Doodskistenbouwer ontdekt mogelijke sluiproute om verbod op flitsfaillissementen te omzeilen' (*Volkskrant*, 1 November 2017).

76. See, for example, Nico Tollenaar, 'De implicaties van *Estro* voor de pre-pack en WCO I' (2018/6) *TvI* 21-31; Ilan Spinath, 'De beperkte reikwijdte van het Smallsteps-arrest' (2017/11) *MvO*.

77. Proposed Article 363 sub 1, DIA. The debtor may not yet be insolvent since he has to be able to pay the salary of the intended trustee as well as the debts that fall due in the short term.

78. Ibid., proposed Article 363 sub 1 first sentence.

79. Although most courts recognised the benefit of appointing intended trustees, the courts of Middle Netherlands and Limburg did not make such appointments, on the basis that this practice is not codified in the DIA. Except for the case of *Bogra*, the authors are not familiar with any appointments of an intended trustee after the *Estro* ruling.

80. For instance, the practice was successfully applied in the *Heiploeg* restructuring: Rb. Overijssel 28 July 2015, ECLI:NL:RBOVE:2015:3589, *JAR* 2015/220.

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basis, can preserve value and jobs[81] to such an extent that both the fact that all the preparatory work preceding the sale of the assets is not conducted publicly.[82] Where the court is convinced that added value is present, an intended trustee can be appointed for a maximum time of 2 weeks.[83] Furthermore, the court shall make the appointment of the intended trustee subject to the condition that the workers' representatives shall be involved in the preparation process, unless the involvement of the workers' representatives is contrary to the interest of the undertaking.[84]

V. The Role of Unsecured Creditors in Dutch Pre-packs

In most pre-packs, unsecured creditors are 'out of the money' and receive very little, if anything at all, from the empty shell distributions.[85] The statutory priority of claims in respect of distributions in insolvency places the unsecured creditors almost at the bottom of the list both in the UK and the Netherlands. In the Netherlands, the intended trustee and the intended supervisory judge are involved in the process to supervise the debtor and ensure that the interests of the unsecured creditors and employees are not neglected.[86] Since most of the creditors are not involved in the preparation process, the responsibility on the intended trustee and intended supervisory judge is even greater than would be in the event of an 'ordinary' liquidation procedure.[87] The intended trustee and intended supervisory judge must ensure that the interests of all affected parties are taken into account. This is very significant as unsecured creditors and employees are not involved in the process. In addition to the interests of creditors as a whole, the intended trustee should keep in mind the 'interest of the society as a whole', which could include preservation of employment knowledge and the productivity.[88]

VI. The Role of Secured Creditors in Dutch Pre-packs

Secured creditors have a very significant role to play in the pre-pack process both in the UK and the Netherlands. However, neither the Graham Report nor the Dutch proposed legislation explicitly examine the role that might be played by secured creditors in a pre-pack.[89] It has been argued that it is the degree of certainty and control for the secured creditors in a pre-pack that makes the procedure so attractive and successful.[90] It could be argued that, as long as key lenders, such

81. It has been submitted that, following a study of 48 appointments of intended trustees, the average number of jobs safeguarded through a pre-pack sale was 68%. In comparison, job preservation following an asset sale effected post-bankruptcy was only 24%. See Jordy Hurenkamp, 'Failliet of fast forward? Een analyse van de pre-pack in de praktijk' *Tvl* 2015/50.
82. Proposed Article 363 sub 1 third sentence, DIA.
83. Ibid., proposed Article 363 sub 3. For the extension of the period, the debtor has to prove once again that the appointment will have added value. Before the extension of the period, the court will hear the intended trustee and the intended supervisory judge.
84. Ibid., proposed Article 363 sub 4; *Kamerstukken II* 2014/15, 34 218, 3, 14 (*MvT*).
85. 'Out of the money' meaning that after the expenses and return to the preferential and secured creditors, there will be no return for the unsecured creditors.
86. *Kamerstukken II* 2014/15, 34 218, 3, 7 (*MvT*).
87. Idem.
88. Ibid., 18.
89. 'Secured creditors' and 'banks' will be used thereafter interchangeably.
90. Stephen Harris, 'The Decision to Pre-Pack' (2004) *Recovery (Winter)* 27.

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as the banks, do not suffer too much from the insolvency of the company, they are quite keen on keeping the lending in place for the company (NewCo) which will emerge following the business sale.[91] It stands out that most of the critical literature is focused on the lack of transparency or the role of the unsecured creditors, and it seems that the role played by the secured creditors is relatively untouched.

Contrary to the position in the UK, an out-of-court appointment (by secured creditors) of an intended trustee is not possible in the Netherlands. This could indicate that there might be less influence of the secured creditors on the insolvency practitioner. Moreover, the Dutch proposed pre-pack cannot be commenced by any party other than the debtor himself.[92] However, this does not necessarily mean that the banks will not have influence in the process. The banks in the Netherlands that have security rights on the assets of the debtor will have a position as a '*separatist*' in liquidation procedures.[93] This essentially means that, at any moment of default, either during or outside liquidation, the pledgees and mortgagees may exercise their rights as if it there was no liquidation procedure.[94] They may exercise these foreclosure rights without having to obtain a court approved enforcement order.

This provides the secured creditor with a very strong bargaining position,[95] since the debtor and trustee will always have the threat of the secured creditor taking recourse at the assets when the debtor is in default. The secured creditor thereby has the possibility to block the going concern sale of the business.[96] Moreover, post-petition financing shall only be provided by these banks if they are optimistic about the continuation of the business. Therefore, it can be argued that there is in fact little power in the hands of the debtor or the trustee.[97] It should be noted that the banks are within the group that have expressed their support in the development of the Dutch pre-pack.[98]

An essential part of the pre-pack in both the UK and the Netherlands is the continuation of finance after the respective administration or bankruptcy procedure, respectively, has started. Although it could be said that banks are more inclined to continue financing the ailing company and crucially the NewCo, where they are in a position to exert significant control over the outcome of the pre-pack; it is more realistic to argue that the continuation of financing in NewCo has very little to do with the recovery of the bank's loans from OldCo and everything to do with the business plan of NewCo. Nevertheless, some authors argue

91. Winnibald Moojen, 'Banken ook bij pre-pack bepalend voor uitkomst' *FD* 18 September 2014.
92. It is of course possible that banks will exercise pressure on the debtor to start a procedure.
93. Article 57, DIA.
94. Articles 3:248 and 3:268, DCC; Article 57, DIA.
95. It could be argued that in comparison to secured creditors in the Netherlands, secured creditors in the UK do not enjoy the same levels of control or influence in the pre-pack process. For instance, in the UK, pursuant to paragraph 43, Schedule B1, IA 1986, secured creditors must obtain the permission of the court prior to enforcing their security rights. Crucially, the court ensures that the interests of the general body of creditors are balanced and that secured creditors are restricted from enforcing their rights, to the detriment of the administration procedure and the prospect of a successful restructuring.
96. Jochem Hummelen, 'Het verkoopproces in een pre-packaged activatransactie' (2015) 2 *TvI* 14.
97. J. Timmermans, 'De curator en het boedelkrediet', in J. Princen and A. van der Schee (eds), *De ondernemende curator* (Kluwer, 2011), 68.
98. M. van Vugt, 'De Nederlandse pre-pack: time-out, please!' (2014) 1 *FIP* 26.

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that the bank is more likely to continue providing the NewCo with credit, where there is a prospect it will receive (almost) all of their outstanding credit out of the business sale.[99]

In comparing the position of secured creditors in the pre-pack process in the Netherlands and the UK, that is to say, the position of the separatist in the Netherlands to the floating charge-holder's in the UK, it can be argued that the Dutch secured creditors have a more powerful position. The Dutch secured creditors may simply ignore the bankruptcy procedure and enforce their foreclosure right without using the court or a formal insolvency procedure.[100] However, there is the possibility of a moratorium for the maximum period of 4 months ordered by the supervisory judge.[101] In this period, the secured creditors will not be allowed to take recourse to the assets of the debtor without the approval of the supervisory judge. In neither of the jurisdictions, the pre-pack can be executed without the release of the banks. In the UK, the enforcement of the floating charge has to be executed via the administration procedure, giving the banks a major degree of leverage in both jurisdictions.

One could say that the banks in the UK have a major influence on the pre-pack since an out-of-court administrator is often appointed at the prompting of the banks. However, the banks strive to avoid being directly associated with a failed company. Therefore, it will most likely be the company or directors that appoint the administrator, *albeit* at the prompting of the banks. In the Netherlands, on the other hand, the banks have a very strong position and many influences in the process as separatist. However, the court, intended supervisory judge and intended trustee are involved in the procedure to provide the necessary checks and balances. However, in general, the blessing of the banks is required in both jurisdictions since the secured creditors have to release their assets for the sale. Therefore, a pre-pack seems to be impossible in the UK as well as the Netherlands without the blessing of the secured creditors.

It has been argued that the fact that under the proposed Dutch legislation it is the debtor, and no one else who can request for the appointment of an intended trustee, can be seen as an advantage over the English procedure.[102] Where the English out-of-court appointed administrator might create the perception of a bias towards the secured creditors or management, the Dutch intended trustee is court appointed and subject to control of the intended supervisory judge. This difference in manner of appointment and the degree of court control can create the perception that the Dutch intended trustee is less biased. However, the secured creditor will always be at the table together with the debtor, purchaser and insolvency practitioner.[103]

99. Christopher Mallon and Shai Waisman (eds), *The Law and Practice of Restructuring in the UK and US* (OUP, 2011), 237–238.

100. Article 57, DIA, although a certain duty of care has to be taken into account before the banks will enforce their security rights.

101. Ibid., Article 63a.

102. Pieter Frölich, 'Redding en sanering: monomaan of modern paradigma? Over de pre-pack en dergelijke' (2015) *AA* 192, 197.

103. Hummelen, above note 96.

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The position of the secured creditor is not subject to much discussion at the moment in either the UK or the Netherlands. The qualified floating charge-holder in the UK has an important role to play through the out-of-court appointment of the administrator and the post-petition financing of the debtor. The Dutch secured creditors will always be involved at a certain stage of the process since they have the possibility to take recourse on the assets at any moment of default. Without the consent of the banks, there is no way the debtor will be able to sell the assets, let alone the business in a pre-pack. The first and far most reason being that in both jurisdictions the secured creditor has to provide a release in respect of the assets being sold.[104] In combination with the over-collateralisation, this means that the bank will have to provide a release on (almost) all assets of the debtor. Therefore, the banks will always be involved in the process.

It seems that it is in fact 'he who pays the piper that calls the tune'.[105] The pre-pack provides the banks with an assured return and a high level of influence in the procedure.[106] It can be argued that banks exert significant control over pre-pack sales, and it is highly unlikely that a sale could be given effect in the absence of the secured creditors' support.[107] Nevertheless, as argued previously, although banks have a vested interest to ensure that a pre-pack sale is successfully completed; at the same time, it is in their best interests to ensure that there is no abuse of process and that the legality of the pre-pack process shall not be questioned.

VII. A Comparison of the Anglo-Dutch Pre-pack

The economic crisis has prompted a move towards a more debtor friendly oriented insolvency regime in the European Union. The concept of rescue itself is being revisited[108] and business rescue is ranked at the top of the European insolvency law related agenda. The European Commission published a recommendation on a new approach to business failure and insolvency 'to encourage Member States to put in place a framework that enables the efficient restructuring of viable enterprises in financial difficulty' and to 'give honest entrepreneurs a second chance'.[109] The Dutch have followed this route set out by the European Union and are moving their insolvency regime from the traditional 'pay what you owe' towards 'business rescue' by introducing the pre-pack in their insolvency regime.[110] With the pre-pack, the Dutch are introducing a procedure that is already heavily criticised in the country of origin.

104. Mallon and Waisman, above note 99, 232.
105. Davies, above note 31.
106. Alexandra Kastrinou, 'An Analysis of the Pre-pack Technique and Recent Developments in the Area' (2008) *Company Lawyer* 262.
107. Peter Walton, 'Pre-packaged Administrations – Trick or Treat?' (2006) 19(8) *Insolv. Int.* 121.
108. Paul Omar, 'Upstreaming Rescue: Pre-insolvency Proceedings and the European Insolvency Regulation' (2014) 25(1) *ICCLR* 20.
109. All the EU member states were invited to implement the principles of the recommendation. In the evaluation of this recommendation dated 30 September 2015, the Member States were asked to communicate to the Commission, on a yearly basis, data concerning the insolvency procedures. This evaluation can be found on <http://ec.europa.eu/justice/civil/files/evaluation_recommendation_final.pdf>.
110. Frölich, above note 102, 193.

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The Dutch pre-pack is essentially an adapted version of the asset transaction in bankruptcy, also known as a 'restart'. In the practice of an ordinary restart, the debtor will prepare the sale of the business, together with his own advisors, before filing for bankruptcy proceedings. In the proposed pre-pack, the debtor has the opportunity to formally involve an intended trustee and an intended supervisory judge in the process of preparing the business sale.[111] Since the intended trustee and intended supervisory judge are involved early in the preparation, they will not be confronted with a prepared asset transaction at the moment of the formal appointment as trustee and supervisory judge in liquidation.

The Dutch intended trustee is court-appointed, and therefore, it can be argued that his independence is guaranteed.[112] The appearance of a biased trustee might therefore not, or at least to a lesser degree than in the UK, be part of the Dutch procedure. However, the Dutch secured creditors do have a powerful position in the pre-pack because of their position as *separatist*. The secured creditors in the Netherlands can take recourse to their encumbered assets as if there is no bankruptcy procedure. To protect the intended trustee and the debtor from the powerful secured creditors, the Dutch intended trustees are appointed by the court, and the secured creditors do not have influence on the appointment itself or on the person who is going to be assigned as intended trustee. The intended trustee is supervised by the intended supervisory judge from the moment of appointment and his appointment can be made subject to certain conditions.

Finally, a key difference between the Dutch and the UK pre-pack is in relation to the protection of employment contracts and, in particular, the application of the ARD. Although it could be argued that it is difficult to facilitate corporate rescue through a pre-pack and at the same time protect the employees' interests, one of the main justifications in favour of the pre-pack in the UK is the fact that it often results in the preservation of jobs. In fact, SIP 16 statements cite the preservation of jobs as one of the primary reasons to pre-pack. Furthermore, in the early case of *DKLL*,[113] the court expressed its support, or at least accepted that there is a legal justification for the pre-pack process, primarily because of its effect on preservation of employment. Furthermore, the Graham Report[114] found that, in most cases, (almost) all jobs are preserved after the use of a pre-pack.

Although the prospect of administration or bankruptcy proceedings is rarely well conceived by the employees, it might nevertheless be comforting for English employees that the pre-packs do not constitute insolvency proceedings within the meaning of the ARD, effectively meaning that the protection afforded to employment protection rights under the ARD, applies to the pre-packs.[115]

The Dutch, on the other hand, have taken a different view with regard to the applicability of the ARD on their procedure. Although the best practice rules of

111. *Kamerstukken II* 2014/15, 34 218, 3, 7 (*MvT*).
112. Frölich, above note 102, 197.
113. *DKLL Solicitors* v *Revenue and Customs Commissioners* [2007] EWHC 2067 (Ch); [2007] BCC 908 (Ch D).
114. See above note 39.
115. The ARD was implemented in the UK by means of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).

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Insolad[116] and the explanatory memorandum also point out the possible preservation of jobs as a justification for the pre-pack,[117] the applicability of the ARD was subject to many discussions in the period of drafting the Dutch legislation. It had been argued, till *Estro*, that the ARD provisions did not apply to the pre-pack.[118] Since what was to happen to the undertaking (i.e. continuation or dissolution) would only become apparent *after* the company entered into the liquidation procedure in a pre-pack procedure, Articles 7:662-7:666 of the DCC implementing the ARD did not apply to the proposed pre-pack procedure.[119] However, the outcome of the *Estro* proceedings stated differently and will prove crucial in the future success of the Dutch pre-pack. In that light, the Senate in fact argued that the formal introduction of the pre-pack should be postponed until after the ECJ ruled on the matter.[120]

A decision has to be reached in the Netherlands as to whether the procedure is aimed at liquidation *or* at the continuation of the business.[121] In the English administration procedure, this distinction only becomes apparent when the administrator declares what statutory objects he is following. Since the outcome only becomes apparent when the proposals are filed, the Court has opted for an 'absolute' rather than a 'fact based' approach in order to increase the legal certainty and ensure the easy approach of the procedure. It was held in *OTG*[122] that the line between the procedures aimed at liquidation and at continuation in the UK is a less clear cut than the difference between liquidation and suspension of payments in the Netherlands.[123]

The UK court chose the 'absolute' approach because it is otherwise too difficult to take a 'fact based' approach in determining the outcome of every different case.[124] One could argue that such an absolute approach should also be applied in the Netherlands and that, therefore, the ARD should not apply to any case of liquidation. However, when one looks at the Dutch liquidation procedure, the 'fact based' result will be different from the formal goal of the liquidation procedure in many cases, especially pre-packs.[125] Looking at the Dutch practice and the possibilities for a trustee, most of the time the liquidation procedure is the only possibility, within the insolvency laws, to truly achieve corporate rescue. The suspension of payment procedure has not proven to be a successful restructuring mechanism. This does not mean that every time the liquidation procedure is used, it is used to restart the company. It is however not uncommon that the liquidation of the

116. Insolad is the Association of Dutch insolvency lawyers.
117. *Kamerstukken II* 2014/15, 34 218, 3, 27–30 (*MvT*).
118. Ibid., 34–37 (*MvT*).
119. Idem.
120. *Kamerstukken I* 2015/2016, 34 218, B, 4.
121. *Kamerstukken II* 2014/15, 34 218, 3, 34–37 (*MvT*).
122. *OTG Ltd v Barke* [2011] BCC 608.
123. Ibid., [8.4], where the court refers to the *Abels*-case, where the Dutch suspension of payments structure was held to be aimed at the continuation, but the Dutch liquidation procedure was not.
124. Idem. See also Alexandra Kastrinou, Orla Gough and Neeta Shah, 'An Analysis and Evaluation of the Impact of the Transfer of Undertakings Protection of Employment Regulations 2006 on Corporate Rescue Proceedings' (2011) 32(5) *Company Lawyer* 131.
125. But this might also be the case in the 'ordinary' restarts. See, for example: J. Fliek and F. Verstijlen, 'De eerste stappen voorbij Estro' *TvI* (2018/7) 32–37; L. Verburg, 'Smallsteps; over de vraag of de gewone doorstart uit faillissement nog toekomst heeft' *FIP* (2017) 334.

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company (the corporate shell) is the result, but the procedure was in fact aimed at the rescue of the business and not the liquidation of the company.

VIII. Conclusion

In conclusion, it appears that pre-packs have become an established practice in the UK. Although it could be argued that pre-packs were also in the process of becoming a dominant restructuring mechanism in the Netherlands, it appears that the decision in *Estro* has brought such developments to an abrupt halt. Evidently, since the *Estro* ruling the approach towards prepack has changed dramatically in the Netherlands, with both courts and practitioners currently keeping their hands off the process. It could be argued that the future of the pre-pack in the Netherlands very much depends on a range of factors, such as (i) the outcome of the ongoing negotiations with the Minister of Justice; (ii) whether the Senate will decide on the legislative proposals; and (iii) how the Dutch Supreme Court will ultimately decide *Estro* should be interpreted.

Whilst review of the pre-pack process in the Netherlands is still ongoing, it is still noteworthy that both the Netherlands and the UK have been referred to as creditor friendly jurisdictions, implying that secured creditors exert more influence in the process than ordinary creditors. Nevertheless, it appears that, in both jurisdictions, many safeguards are in place, so as to ensure that the various interests in the pre-pack process are well-balanced. It appears that, in the Netherlands, the court has a more proactive role to play in the process than its UK counterpart. In the UK, the court's involvement is more limited and the insolvency practitioner is in the driver's seat from the very outset.

Insolvency practitioners have a crucial role to play in the pre-pack process in both jurisdictions, and it is important that the profession is adequately regulated, so as to enhance the prospects of more trust and confidence been built in, on what is perceived to be an obscure process. Although the regulation of the profession of insolvency practitioners differs from one jurisdiction to another, it is important that mechanisms are in place which ensure that the role of insolvency practitioners is improved by means of enhancing their accountability or maybe putting in place a sanctioning system, in order to effectively capture the already rare instances of improper behaviour in the insolvency practitioner profession. The profession of insolvency practitioners is highly sophisticated both in the UK and the Netherlands. Although, insolvency practitioners might have in the past been criticised for completing pre-packs in a shadowy way, in both jurisdictions insolvency practitioners are heavily regulated, and very few instances of 'bad apples' have been recorded in relation to the use of pre-pack sales.

It could be argued that the swift and confidential manner, in which a pre-pack sale in given effect to, shall inescapably often triggers the suspicion of ordinary creditors, who tend to have a more passive role in, what in their view is, an obscure process. Although 'pre-pack-sceptics' might be unavoidable, it is important to note that the continuous need, to have safeguards in place which ensure that the pre-

pack process is not abused, has been recognised in both jurisdictions. Accordingly, a number of steps have already been taken in the UK in order to review the operation of pre-packs and to assess the adequacy of the existing regulatory system. It remains to be seen whether the much-awaited review of Dutch pre-pack will bring the process to an end, or whether reforms will be introduced which shall aim to address the identified shortfalls and to enhance transparency of the process.

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