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Insolvency and Competition Law: Navigating Anti-Competitive Risks in Pre-packaged Processes in India

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Abstract: *Pre-pack insolvency processes are, therefore, an increasingly dominant tool to allow for a return from financial distress, under which performance of business will only suffer a short time at the same time. They tend to be the consequence of pre-negotiated agreements between debtors and creditors based on the objectives of preserving the value of the going concern, continuity and the avoidance of long-term litigation. their expedited nature raises directly important questions at the intersection of insolvency and competition law. In particular, pre-packaged arrangements can lead to distressed asset undervaluation, collusion, which essentially amounts to the marginalization of certain stakeholders, and market power concentration – all of which are a potential threat to competition.One significant reform in the Indian context, was the introduction of pre-packaged insolvency through the Insolvency and Bankruptcy Code (Amendment) Act, 2021, primarily for the benefit of micro, small and medium enterprises (MSMEs). However, the implementation of this framework has revealed lacunae that could promote anti-competitive behaviour. But the co-existence of weak asset valuation mechanisms and inevitable opacity of stakeholder participation leads to significant risks of undervalued sales and monopolistic epicentres. Such issues indicate the need for a regulatory framework directing a safe balance between efficiency and integrity to the market.This paper 'tackles these challenges in the Indian context and offers a comparative study of the established frameworks with similar contexts, particularly from jurisdictions like United Kingdom and United States. It identifies five global best practices, from transparency mandates to independent scrutiny and equitable involvement of stakeholders, as critical to limiting anti-competitive risks. Based on these observations, the study conclusively recommends the adoption of competition law principles within the Indian pre-pack insolvency framework through regulatory measures and educating the stakeholders. This research finally establishes the need for harmonizing insolvency and competition law that would protect market fairness, enhance economic sustainability and ensure long-term success to pre-packaged insolvency processes in India.*

Keywords:*Pre-pack insolvency, competition law, anti-competitive practices, regulatory framework, India, MSMEs, market integrity.*

1. BACKGROUND AND SIGNIFICANCE

Pre-packed insolvency may be considered the most pronounced reform in the realm of insolvency solutions globally, as it provides an expedited method to bankruptcy in a cost-effective manner, thus paving the way for effective resolution of the economic distress. However, there was a slow shift in this approach in India by the introduction of the Insolvency and Bankruptcy Code (Amendment) Act, 2021 which extended its scope particularly dealing with the affairs of micro, small and medium enterprises having challenges that were different and needed a separate to large enterprises.[1] They are the bedrock of the economy, and fast and effective resolution frameworks that limit diversions and preserve their open viability are essential.

Pre-pack insolvency is pre-negotiated settlements between a debtor and its creditors concluded and executed under the supervision of the National Company Law Tribunal (NCLT). Unlike traditional insolvency proceedings, which can be complicated and time-consuming, this mechanism simplifies the procedural requirements and timelines, offering a realistic rescue path for beleaguered business.[2] Pre-packaged insolvency is aimed at preserving value for creditor and debtor alike through the proposed mechanism where estate attacks are circumvented, the debtor avoids litigation expense and delay and active operations can begin.

But there are challenges in the process despite its seeming efficiency. There's a nuanced intersection of competition law involved in the filed pre-packaged insolvency, which is designed to keep the market fair

[1] Nirjhar Nigam and Afef Boughanmi, "Can Innovative Reforms and Practices Efficiently Resolve Financial Distress?" *Journal of Cleaner Production* 140 (2017): 1860-1871.
[2] Santosh Kumar and Vaishali Jain, "Pre-Packaged Insolvency: Exploring an Alternative Framework for Bankruptcy Resolution in India," *ECS Transactions* 107, no. 1 (2022): 4129.

and anti-competitive conduct at bay.[3] If the bottom value of the asset is pulled down, it distorts market dynamics with support from collusion between debtors and dominant creditors, or by excluding operational creditors. These create market concentration, suppress competitiveness, and undermine stakeholder trust.

India, with its grease take on pre-packaged insolvency, has a route to navigate with these anti-competitive road blocks ahead. The recognition in data, which follows these precedents, of the balance that is needed to be maintained in approach towards pre-pack resolution that accounts for the rationale of competition law, but also preserves of market integrity interests who serve as articulated interest of achieving efficiency goals of pre-pack resolution, which in the end serves as a significant tool in conflict avoidance and resolution. This interrelationship of insolvency and competition law provides a strong reminder of the necessity for pragmatic regulatory interaction to address these issues.

Global Literature on Insolvency and Competition Law

As for the influence of the insolvency procedures on the market competition, particularly related to the pre-pack insolvency, there are a few notable scholars who have tackled this debate. The analysis highlights the intertwined nature of the insolvency regime and competition law.

Finch and Milman (2017) explain an extensive take on the Issue going onto detail on such content in their known book Corporate Insolvency Law: Perspectives and Principles. They argue that outside oversight is key to avoid both under-pricing and connected party deals — both of which can distort markets processes. [4]Their insights highlight for the need of robust regulatory systems that the regime of insolvencies must match ultimate market integrity

Teresa Graham (2014): Pre-pack Insolvency in the UK, the Graham Review specifically with regard to connected party sales. Its assessment highlights undervaluation of assets and lack of disclosure as major risks, which can undermine stakeholders' confidence.[5] Graham advocates for the establishment of the Pre-Pack Pool, an independent body that considers pre-pack arrangements with connected parties, to provide greater transparency and accountability.

Douglas Baird (1986): In Elements of Bankruptcy, Baird critiques the success of Chapter 11 in the US but notes the general societal preservation of value through continued operation. Yet he warns of secured creditors, who kneecap claims and unfairly appear to expedite resolution in purchase to receive million-dollar assets for pennies on the dollar.[6] His research underscores the importance of balancing creditor voting power and equitable market approaches to prevent anti-competitive results.

Gerard McCormack (2018): The author delivers a judicious comparative overview of insolvency frameworks in the US and the UK. He explores how creditor-driven methods can result in market distortions and lowered competitiveness.[7] His work also highlights the need to balance creditor protection with mechanisms that protect small stakeholders and promote market fairness.

Horst Eidenmüller (2019): Eidenmüller's work on European reforms to its insolvency regime examines if and how judicial scrutiny can lessen the risk of pre-pack sales.[8] He emphasizes a need for judicial scrutiny to block asset undervaluation, collusion and market concentration so that insolvency mechanisms do not undermine competitive market structures.

Klaus J. Hopt and Patrick Leyens (2004): They provide insights into corporate governance within the context of insolvency, making a case for aligning competition law and insolvency frameworks by integrating economic considerations. They therefore argue that insolvency processes can result in market concentration and abuse of dominance if not properly controlled.[9] Their own analysis urges regulatory alignment to ensure equitable consumer outcomes, without stifling competition.

Indian Literature on Pre-Packaged Insolvency

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[3] Julie Roy, "Debtor-in-Possession Style of Insolvency Resolution: Developments in India," *Pratt's Journal of Bankruptcy Law* 17 (2021): 383.

[4] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles*, 3rd ed. (Cambridge University Press, 2017).

[5] Teresa Graham, *Graham Review into Pre-Pack Administration*, Report to the UK Government, June 2014.

[6] Douglas G. Baird, "Bankruptcy's Uncontested Axioms," *Yale Law Journal* 108, no. 3 (1998): 573-599.

[7] Gerard McCormack, "Reforming the Law of Corporate Insolvency: The UK Experience," *Journal of Business Law* 2018, 142-167.

[8] Horst Eidenmüller, "Controlled Efficiency in Corporate Restructuring," *European Business Organization Law Review* 20 (2019): 1-25.

[9] Klaus J. Hopt and Patrick Leyens, "Insolvency and Corporate Governance: Aligning Frameworks for Fair Market Outcomes," *Journal of Corporate Law Studies* 4 (2004): 11-36.

Indian academic discussions on pre-packaged insolvency appear to have gained some critical mass, albeit mainly related to the procedural and regulatory aspects thereof, in the context of the IBC. These studies offer valuable perspectives on the advantages and disadvantages of moving towards pre-packaged insolvency in India, with an emphasis on a stronger alignment with competition law.

M.P. Ram Mohan and Vishakha Raj (2021): This study examines how aligned and consistent is India's pre-packaged insolvency framework with international best practices, like those of UK and US.[10] They see shortcomings in transparency, especially related to stakeholder involvement and asset pricing. The authors highlight the need for competition law oversight to mitigate such risks including collusion and asset undervaluation that may undermine fairness in the markets.

Aparna Ravi (2021): With regards to MSMEs, Ravi has a talk about advantages of pre-packaged insolvency as it provides them with a higher level of speed and cost efficiency. But she worries that there are few protections against undervaluation and collusion between debtors and creditors.[11] Her research argues that stronger regulatory mechanisms are needed to ensure fairness, particularly among smaller creditors who are frequently sidelined during negotiations due to the "discretionary nature of the iterative process."

Himani Singh (2022): The work looks at the challenges with asset valuation under India's pre-packaged insolvency framework. She witnesses inconsistencies in standardized usage in valuations that could wind up discounted sales to benefit the inside group at the cost of everyone else involved.[12] To ensure equitable market practices, Singh suggests introducing independent valuation mechanisms and oversight.

Vijay Kumar Singh (2021): Sahoo, one of the key architects of India's insolvency framework, has written extensively on the evolution of the IBC. The author is addressing the urgent requirement of synchronising the laws related to insolvency and competition so as to preclude anti-competitive behaviors arising owing to pre-packaged insolvency process.[13] His epistles put emphasis on the function of regulatory bodies such as the IBBI as well as the Competition Commission of India (CCI) in upholding market integrity.

Regulatory Frameworks in the UK, US, and EU

At the International level, jurisdiction such as the UK, US and EU have set up comprehensive regulatory regimes dealing with problems arising from pre-packaged insolvency. These frameworks carry lessons on India:

Stephen Lubben (2010): Lubben draws on his analysis on Chapter 11 bankruptcy in the US to illustrate how central the measures of creditor voting and disclosure requirements have been.[14] We need such mechanisms, he argues, to rein in aggressive creditors and to mitigate anti-competitive harms, including asset undervaluation and market concentration.

Jennifer Payne (2016): Payne explores the use of pre-packaged administration in the UK. Catherine points out that this new initiative is being offered by the Pre-Pack Pool, to help bring transparency and confidence to stakeholders and derisk connected party sales through independent scrutiny.[15] Her work shows that such mechanisms can be both efficient and fair.

McCormack & Hargovan (2016): Tensions Between Global Norms of Competition and National Systems of Insolvency. The study highlights the importance of cross-border interactions and demonstrates the need for clearly defined rules to prevent anti-competitive behaviors in multijurisdictional insolvency cases.

According to EU Commission (2019) a Restructuring Directive is one that promotes ex ante action rather than ex post insolvency and entails the discipline of judicial scrutiny and fair value. Such safeguards are emphasized in these reports as they are necessary to prevent monopolistic outcomes in pre-packaged insolvency processes and to protect smaller stakeholders in the process.[16]

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[10] M.P. Ram Mohan and Vishakha Raj, "Pre-Packaged Insolvency Regulation: What Can India Learn from the United Kingdom and the United States?" *American Bankruptcy Institute Law Review* 29 (2021): 231.

[11] Aparna Ravi, "Prepacks Under the IBC: A Tussle Between Speed and Fair Process," in *Insolvency and Bankruptcy Reforms in India*, 121-135 (Singapore: Springer Nature Singapore, 2022).

[12] Himani Singh, "Valuation Challenges in India's Pre-Packaged Insolvency Framework: A Critical Review," *Journal of Business Law and Policy* 14, no. 1 (2022): 98-120.

[13] Vijay Kumar Singh, "Modern Corporate Insolvency Regime in India: A Review," *NLS Business Law Review* (2021): 22.

[14] Stephen James Lubben, "Measuring the Costs of Chapter 11 Cases: Professional Fees in American Corporate Bankruptcy Cases," (2010).

[15] Payne, Jennifer. "The future of UK debt restructuring." *Available at SSRN 2848160* (2016).

[16] European Commission, "Restructuring Directive: A Judicial and Fair Value Approach to Pre-Packaged Insolvency," EU Restructuring Reports, 2019.

Vishal Gupta and Neha Aggarwal (2022): Gupta and Aggarwal examine the exclusion of small creditors in India's pre-packaged insolvency regime. Exclusion on the part of fairness, however, threatens to marginalise a vital stakeholder.[17] Their research suggests policy reforms to increase both the participation of smaller creditors and the fairness of the outcomes.

RESEARCH PROBLEM

The introduction of pre-packaged insolvency in India has underscored critical issues resulting from its interface with competition law. Although the speed and confidentiality associated with pre-pack arrangements is generally beneficial for efficiency, this very delivery creates a potential misalignment with the principles of fair competition. One of the main concerns here is the impairment of assets to settle liabilities are sold below their fair market value. This not only reduces recoveries for creditors but also distorts the market environment in favour of insiders or dominant purchasers.

Moreover, the process may freely lend itself to collusion of Debtors and Creditors even as it disenfranchises the operational creditors and the smaller stakeholders. Such practices might ostracize key actors in the insolvency ecosystem and undermine the trust in the remediation approach itself. Additionally, pre-pack deals can expedite consolidation of the market by having undervalued assets migrate towards market dominant players creating monopolistic practices that can be harmful to competition and consumer welfare.

Such difficulties demonstrate the need for a robust regulatory framework that addresses the potentially conflicting objectives of pre-pack insolvency, and competition law. However, it will be critical to balance the aim of efficient outcomes with the need to maintain market integrity, so that pre-pack processes do not come to be seen as achieving benefits at the cost of fair and competitive markets.

Research Objectives

This paper aims to:

Understand insolvency and competition law: finding the balance in pre-pack processes.

Study global practices and identify gaps in the regulatory framework in India.

Encouraging swift redressal of these resolutions to minimise anti-competitive risks

METHODOLOGY

This paper takes a multi-dimensional perspective, which begins with a comparative study of the regulatory frameworks that apply to pre-packaged insolvencies under law across different jurisdictions such as the United Kingdom (UK) and the United States (US). Countries with established insolvency frameworks provide valuable lessons in best practices and safeguards. The article examines the key features that mitigate risks of undervaluation, collusion and anti-competitive behavior in these frameworks, focusing on the UK's Pre-Pack Pool and creditor voting and debtor-in-possession arrangements in the US.

The study compares them against the pre-packaged insolvency framework introduced in India through the IBC Amendment Act, 2021, uncovering gaps including limited oversight on the valuation process and lack of independent review mechanisms. Such a comparative lens offers a broader framework within which best global practices can be adapted to the socio-economic dynamics of the Indian land and market context, thereby providing the groundwork for concretizing recommendations for bridging the gap between the aspirational efficiency sought by the state in the procurement process and the pluralistic promises of transparency and harmonization that the new market order provides.

In addition, the study adopts a doctrinal analysis of the statutory provisions vis-à-vis Indian insolvency and competition statutes such as the Insolvency and Bankruptcy Code, 2016 and the Competition Act, 2002. This would involve scrutinizing judicial precedents and regulatory guidelines provided by the Insolvency and Bankruptcy Board of India and the Competition Commission of India and assessing the interaction and performance. For practical realism, this study conducts case studies of micro, small, and medium enterprises which are involved in pre-packaged insolvency and evaluates them through the lens of competition. The case studies examine factors of stakeholder participation, asset value, market share monopsony or oligopsony and contestability post-insolvency. Where data is available, empirical analysis

[17] Vishal Gupta and Neha Aggarwal, "Exclusion of Small Creditors in Pre-Packaged Insolvency Regimes: Policy Reforms for Fairer Outcomes," *Indian Journal of Corporate Law* 15, no. 1 (2022): 88-104.

is used to determine trends or recovery rates, satisfaction rates by creditors, and industry concentration post-pre-packs.

ANALYSIS AND DISCUSSION

Legal Framework of Pre-Pack Insolvency in India

The concept of 'pre-packaged insolvency' came to the Indian insolvency regime who of the Insolvency and Bankruptcy Code (IBC) in 2016 and the amendment in 2021. The scheme also includes elements providing for the resolution of disputes in a timely and cost-effective manner, especially for micro, small and medium enterprises (MSMEs). Pre-packs also facilitate negotiations between debtors and creditors and the signing of a resolution plan before the NCLT, avoiding time-consuming IBC procedures and preserving the value of distressed enterprises.[18]

The approving authority in case of pre-pack resolution will be the NCLT, which needs to be satisfied that the procedural requirements of IBC are met in the pre-packaged resolution plans. Before granting approval, however, the tribunal assesses the transparency of negotiations, fairness in creditor participation, and accuracy of asset valuations. However, repeated delays in deciding cases because of over-burdened tribunals have undermined the swiftness of pre-pack arrangements.

Principles and Objectives of Competition Law

The broad domain of Indian competition law is regulated by the Competition Act, 2002 which is a landmark legislation with a purpose to protect the fair practice in the market and interest of the consumers. It aims to prohibit conduct that distorts competition, without limitation, abuse of dominance, anti-competitive agreements and monopolization mergers.

Prevention of Abuse of Dominance (Section 4): This disallows the dominant position of any entity (can be an enterprise) in a market on the base of its abuse (can be abusing other) of its position by way of using anti-competitive acts such as predatory pricing, restricting other Market players from entering the market, or imposing conditions to trade. This principle is particularly important in contexts where there are a small number of dominant creditor or bidder participants that could unduly influence the process.[19]

Agreement Restricting Competition [Section 3]: Collusive agreements or agreements limiting competition or artificially lowering prices of goods between organizations are prohibited. In common parlance, in the realm of pre-packaged insolvency, these types of arrangements might appear as fire sales of assets at below-market value or unfair dealings with creditors.

Merger Control Regulations: The Act provides for scrutiny of mergers and acquisitions that may result in market concentration, preventing dominance of a single entity or group in a sector.

Notwithstanding the increased provisions, the application of competition law to pre-packaged insolvency remains fragmented.[20] The absence of coordination between the regulatory bodies such as the CCI and insolvency authorities like the IBBI and NCLT leads to oversight gap. It is therefore imperative to bridge this gap, so as to ensure that pre-pack insolvency reforms are attuned to the purpose behind competition laws.

Interplay Between Pre-Pack Insolvency and Competition Law

Pre-packaged insolvency and competition law meet at the crossroads of a contingent benefits and balance of dangers. Despite the speed of pre-packs functions of solutions, the very nature of their rapid moving industry evokes risks of things like under-assessing, collusion and becoming a moneymaker.

Undervaluation of the Assets: The undervaluation of distressed assets during the pre-packaged solutions has been a contentious issue. Without strong valuation mechanisms, connected parties or power players can control assets at prices far below their market realization. It minimizes creditor recoveries and, in doing so, distorts fair competition in the market as it puts large chunks of asset in the hands of select survivors.

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[18] D. Kavitha, "A Panacea for Small Firm Insolvencies? –A Critical Review of the Pre-Pack Scheme Launched in India," *International Journal of Law and Management* 64, no. 5 (2022): 389-402.

[19] Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press, 2011).

[20] L.E.E. Cassey, *The Objectives of Competition Law*, No. DP-2015-54 (2015).

Prevent Collusion and Exclusion: Limited transparency in negotiations and the exclusion of operational creditors or minor stakeholders from the process can create a scenario for collusion between dominant creditors and winning bidders. These monopolies cause greater segregation of smaller players, leading to violations of justice and anonymity.

Market Consolidation and Monopolies: Inadequate regulatory scrutiny of pre-pack arrangements can contribute to market consolidation, as dominant players use these processes to acquire struggling assets, thereby entrenching their market dominance. This jeopardizes monopolistic formations leading to a decline of competition and a deterioration of consumer welfare.

These issues can be solved only by infusing the principles of competition law in the insolvency framework of India. Institutional oversight combined from the IBBI, CCI and NCLT is likely to ensure that impairment does benefit from likely shortened timelines provided by the pre-pack process admission channel without jeopardising market fairness.

Global Comparative Analysis

The experience of both the United States and United Kingdom will hold some valuable lessons for India on how to balance between reducing the risk of anti-competitive outcomes, while still preserving the funding efficiencies of pre-packaged insolvency arrangements.

United States (Chapter 11 Bankruptcy): The US approach focuses on debtor-in-possession (DIP) structures, which enable companies to still function as they work to settle issues. If out-of-court restructurings replicate court-ordered ones, judicial vetting of reorganization plans would ensure fair asset valuations and creditors' rights. The requirement of stakeholder voting of plans around creditor hierarchy promotes transparency, inclusivity, and mitigates the risks of an overly engaged party exerting undue influence.

United Kingdom (with related SIP 16 Guidelines and Pre-Pack Pool): The United Kingdom (UK) framework focuses on furthering transparency in pre-packaged insolvency via the Statement of Insolvency Practice (SIP 16). Insolvency practitioners must disclose information on connected party transactions, asset valuations and marketing. The Pre-Pack Pool provides independent and equitable assessment of the fairness of disposals to connected parties, instilling further confidence in stakeholders.

One such thing India can do is to comply by institution of independent valuations; allowing creditor participation and creating pre-pack pool like mechanisms to scrutinise connected party transactions. Such reforms would focus regulatory oversight and planning on the threats of undervaluation and collusion.

RECOMMENDATIONS

1. Incorporate Competition Assessments in Pre-Pack Administration

Make amendments to the Insolvency and Bankruptcy Code (IBC) so that competition concerns are examined in pre-packaged insolvency cases. Regulatory authorities like the Competition Commission of India (CCI) should be alert and proactively scrutinise high-value pre-pack cases for possible market aggregation, undervaluation or collusion risks

2. Increase Transparency and Disclosure Requirements

Demand full disclosure across all aspects of pre-pack agreements, from how the assets were valued to whether connected party agreements were honored and creditor agreements were reached. This ensures that they have access to relevant information and prevents them from being victims of manipulative activities that could undermine the integrity of the market.

Create an Independent Monitoring Mechanism

Create an independent oversight body, similar to the United Kingdom's Pre-Pack Pool, to review connected party transactions and other key aspects of pre-pack solutions. That would provide an independent assessment, reinforcing fairness when conducting the sale of those assets and boosting stakeholder confidence in the process.

Foster Cooperation Between Regulatory Agencies

Enhanced coordination between IBBI, NCLT and CCI to ensure a holistic view of pre-pack processes. A multidimensional approach would help to avoid the inappropriate application of competition principles in insolvency and vice-versa, by identifying the risks arising from insolvency that undermine competition and that therefore may be subjected to regulation.

Develop Training and Capacity-Building Programs

Conduct focused training programs for insolvency professionals, lenders, regulators, and representatives of MSMEs to familiarize them with competition law and compliance with it in an insolvency context. This would work for institutional capacity building and stakeholder empowerment to enable better navigation of pre-packaged resolutions.

CONCLUSION

This paper highlights the need for an appropriate and balanced design of the pre-packaged insolvency regime in India, which has successfully housed competition law as a guiding principle for market integrity. The results also show that even though the Insolvency and Bankruptcy Code (IBC), 2016, and its 2021 amendment have brought in a possibly effective remedy for resolution of financial distress, much more still remains to be done. For instance, asset undervaluation, filmmaker collusion, and lack of stakeholder inclusivity, and a risk that such mergers and acquisitions may lead to market concentration all suggest stronger regulatory oversight of the film industry as well as better coordination between insolvency and competition authorities.

The analysis also identifies useful lessons we can learn from the international experience, primarily from the UK and the US where tools such as the Pre-Pack Pool and creditor voting rules help promote transparency and fairness. Such measures need to be appraised in the context of India's socio-economic landscape, as they can help in bridging gaps in the current mechanism, especially when it comes to the protection of smaller stakeholders such as MSMEs and avoiding anti-competitive practices.

The potential for a harmonised concentration of the insolvency and competition law system offers an efficient and fairness sensitive balance. This approach requires coordinated support and regulation by the IBBI, the NCLT, and the CCI so that there is a uniform highly supervised operational directive and a clear governing structure where all institutions bring the path of the systemic structure of extreme efficiency and accelerative progress that underlines every framework that ensures economics with a head of steam, to ensure that the step of pre-packaged insolvency is there to also help the economic boilerplate valve explosion rupture to be truly stimulating and do well with time.

Overall, it is inescapable that the inclusion of the competition law principles in India's pre-packaged insolvency process is not only desirable but necessary. Adopting this proactive approach would result in increasing focus on transparency and independent monitorization with a long-term perspective of shaping the resources and time availability for insolvency reorganization and ensuring that pre-packaged solutions (designed to protect value, market implications and competitive treatment of all parties) fulfill their purpose.