A Review of the Corporate Insolvency Framework response form

The consultation response form is available electronically on the consultation page: https://www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework (until the consultation closes).

The closing date for this consultation is 06/07/2016.

The form can be submitted online/by email or by letter to:

Policy Unit
The Insolvency Service
4 Abbey Orchard Street
London
SW1P 2HT

Tel: 0207 291 6879
Email: Policy.Unit@insolvency.gsi.gov.uk

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

Information provided in response to this consultation, including personal information, may
be subject to publication or release to other parties or to disclosure in accordance with the
access to information regimes. Please see page 9 for further information.

If you want information, including personal data, that you provide to be treated in confidence, please explain to us what information you would like to be treated as confidential and why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

I want my response to be treated as confidential ☐

Comments:

Questions

Name: Jukka-Pekka Joensuu and Tyrone Courtman

Organisation (if applicable): EUROPEAN ASSOCIATION OF TURNAROUND PROFESSIONALS (EACTP)

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	Respondent type
X	Business representative organisation/trade body
	Central Government
	Charity or social enterprise
	Individual
	Large business (over 250 staff)
	Legal representative
	Local Government
	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)
	Small business (10 to 49 staff)
	Trade union or staff association
	Other (please describe)

An Impact Assessment is also available online. In addition to responses to the questions below, we would welcome comments and further recommendations for change with supporting evidence, referencing the evidence provided in the Impact Assessment.

Please identify any unintended consequences or other implications of the proposals and provide comment on the analysis of costs and benefits. Are there any alternatives to the changes and regulations proposed?

The Introduction of a Moratorium

1) ***Do you agree with the proposal to introduce a preliminary moratorium as a standalone gateway for all businesses?***

   Yes.

2) ***Does the process of filing to court represent the most efficient means for gaining relief for a business and for creditors to seek to dissolve the moratorium if their interests aren't protected?***

   Yes.

3) ***Do the proposed eligibility tests and qualifying criteria provide the right level of protection for suppliers and creditors?***

   Yes.

   However, we are concerned with one of the proposed eligibility tests, being that "the company must demonstrate that it is already or imminently will be in financial distress or is insolvent", may lead to companies leaving it too late before seeking to implement the preliminary moratorium. Companies need to be persuaded to seek help sooner rather than later if the prospective benefits of a turnaround are to be given the best chance of being realized.

   Further, continuing liquidity is critical to any turnaround, as envisaged by paragraph 7.22 We consider a more appropriate criteria may simply be "*for the company to demonstrate that financial difficulty or insolvency is in all probability likely".*

   As regards the proposed qualifying condition set out at 7.23 we believe it is critical for the company to be able to demonstrate, as part of its application for a moratorium, that there is a realistic prospect that a compromise or arrangement can be agreed with its creditors. Presumably there will be an obligation on the Supervisor to express such a view independent of the company's Directors?

4) Do you consider the proposed rights and responsibilities for creditors and directors to strike the right balance between safeguarding creditors and deterring abuse while increasing the chance of business rescue?

Yes, but we would comment as follows;

The preliminary moratorium will provide an immediate stay on creditor enforcement actions. A wide spread promotion to all creditors of the moratorium should be avoided and should be limited only to those wishing to exercise enforcement actions, after which they can then make an application to court to challenge the moratorium, if they are able to demonstrate that the moratorium is wholly prejudicial to them.

Directors prospective liability for wrongful trading should continue during the preliminary moratorium. They should be obliged to take every reasonable step to ensure that the position of creditors is not adversely prejudiced during the period for which the moratorium is in force, and making adequate provision to achieve this should form part of their and the Supervisors assessment both of the company's viability whilst the moratorium is in force and of the efficacy of the restructuring that is anticipated to be implemented during that time.

5) Do you agree with the proposals regarding the duration, extension and cessation of the moratorium?

Yes, but we would comment as follows;

In the event of the company entering administration after the moratorium, we do not see why the period of the administration should be adversely prejudiced (reduced by the preliminary moratorium timeframe) by the failed moratorium actions of the incumbent directors.

As regards an extension. Consent from all secured creditors could be problematic in complex capital structures and does create opportunities for parties to buy debt with the intention of taking a

ransom position. As drafted it appears a charge holder could frustrate an extension even if they have no monetary interest and/or might eventually be crammed down.

6) Do you agree with the proposals for the powers of and qualification requirements for a supervisor?

Yes, but we would comment as follows;

We believe the choice of supervisor should be the choice of the company's directors or shareholders and be independent of creditors, e.g. secured creditors. It is critically important for the supervisors to be independent, objective and for him to act in the best interests of the company.

We welcome the proposal that supervisors do not have to be licensed Insolvency Practitioners, but recognize the importance of them meeting certain minimum standards and qualifying criteria; having relevant expertise in restructuring and be a member of a regulated professional body.

There are a number of highly experienced turnaround practitioners working in the UK with a history of dealing with consensual restructurings and they are an important resource to ensure the objectives of this proposal are met.

We believe the minimum standards and qualifying criteria for a supervisor should be extended to include the Certified Turnaround Professional (CTP) qualification of the European Association of Certified Turnaround Professionals. This is a UK/European version of the American CTP qualification which has long been recognized in the USA for working on Chapter 11 type restructuring processes.

We believe its members, many of whom operate on their own account, provided they are appropriately insured, could offer at least the same level of expertise and assurance at a cost which is considerably less than some of the larger business advisory practices operating in this arena.

Supervisors ought to be held to account for concluding as part of its application for a moratorium, that there is a realistic prospect that a compromise or arrangement can be agreed with its creditors, of its viability during the preliminary moratorium and to ensuring that the qualifying conditions continue to be met**.**

Further, it should be recognized that a supervisor is a professional advisor, advising the directors and not managing the business. However, the concept of "shadow director" exists and turnaround professionals are well versed in acting in full knowledge of directors' responsibilities and liabilities.

We are strongly supportive of the proposal in 7.45 that an Insolvency Practitioner acting as a supervisor be prevented from taking a subsequent formal insolvency appointment were the company to enter formal process. That would be a clear conflict of interest.

7) Do you agree with the proposals for how to treat the costs of the moratorium?

Yes, but we would comment as follows;

We agree that the costs of paying the supervisor be treated the same way as costs in an administration, and that any unpaid supervisor's costs be treated as a first charge if the company proceeds to enter a formal insolvency process after the moratorium has ended.

The supervisor's remuneration will be agreed by Creditors, and to the extent Creditors are repaid in full, its Directors.

We do not consider it is appropriate for any unpaid preliminary moratorium debts to be treated as a first charge if the company proceeds to enter a formal insolvency process, albeit such claims may give rise to a wrongful trading claim against the company's Directors by a subsequently appointed Administrator or Liquidator.

8) ***Is there a benefit in allowing creditors to request information and should the provision of that information be subject to any exemptions?***

Yes, although best practice in consensual restructurings tends to initiate regular communication with all creditors in any event.

Exemptions will be required for commercially sensitive or confidential information, disclosure of which would be prejudicial to the debtors' interests and may be subject to confidentiality agreements, e.g. negotiations to sell some or all of the business. And also there should exemption for information that is not readily available and be too time consuming and costly to prepare.

Helping Businesses Keep Trading through the Restructuring Process

9) ***Do you agree with the criteria under consideration for an essential contract, or is there a better way to define essential contracts? Would the continuation of essential supplies result in a higher number of business rescues?***

Yes, but would comment as follows;

Would it not be easier in practice to simply outlaw the refusal by any former supplier to a company the subject of a preliminary moratorium or administration or Liquidation on anything but the same terms as the company enjoyed previously, except in so far as the timing of any payments to be made in respect of those new supplies.

This would avoid having to consider what is essential and provided the suppliers have a right to challenge the supply request in Court, should provide adequate protection for suppliers if such a continuity is considered to be so adversely prejudicial to their interest in doing so?

We believe such continuity of supply regulations would result in a

greater number of business recues.

Furthermore, termination clauses in contracts should be limited to maintaining the status quo (i.e. reimbursement of consequential losses) had the contract continued, not to enabling suppliers to profiteer from a company's failure.

This is particularly prevalent within the provision of Asset Based Lending ("ABL"), where the company's demise can provide more profits for the supplier than its survival. In such situations many ABL's are motivated for the company to fail

10) Do you consider that the Court's role in the process and a supplier's ability to challenge the decision, provide suppliers with sufficient safeguards to ensure that they are paid when they are required to continue essential supplies?

Yes, but subject to our comments in response to question 9.

Developing a Flexible Restructuring Plan

11) Would a restructuring plan including these provisions work better as a standalone procedure or as an extension of an existing procedure, such as a CVA?

In our opinion a restructuring plan would work better as a standalone procedure, albeit such a preliminary moratorium could be utilized to provide protection as a for runner to a CVA being agreed with Creditors

A CVA is an insolvency procedure and as such has a certain stigma to creditors, employees and customers. We believe this should be a separate procedure with the "insolvency" word not used at all. All stakeholders need to be aware that this is not an "Insolvency" process but a "Commercial" process, and is in fact intended to avoid insolvency and destruction of enterprise value.

12) Do you agree with the proposed requirements for making a restructuring plan universally binding in the face of dissention from some creditors?

Yes.

This is a problem that currently impacts larger companies with multi-layer capital structures. Experience in the UK, Europe and even more so in the US is that hold-outs by out of the money creditors or opportunist hedge funds and buy-out specialists can be a real problem which delay restructurings and significantly add to costs. Schemes of Arrangement are a useful tool but are expensive.

In reality the threat of such mechanisms should mean that all but the most contentious are agreed consensually and never have a need to go anywhere near a court.

13) Do you consider the proposed safeguards, including the role of the court, to be sufficient protection for creditors?

Yes.

14) Do you agree that there should be a minimum liquidation valuation basis included in the test for determining the fairness of a plan which is being crammed down onto dissenting classes?

Yes, but we would comment as follows;

Where a plan is being crammed down onto dissenting classes, then the evaluation of the minimum liquidation valuation should be provided by a Licensed Insolvency Practitioner independent of the company's Directors and its Supervisor.

Rescue Finance

15) Do you think in principle that rescue finance providers should, in certain circumstances, be granted security in priority to existing charge holders, including those with the benefit of negative pledge clauses? Would this encourage business rescue?

No. We would comment as follows;

In our experience most DIP funding comes from existing senior lenders and only where there is some collateral still available. Alternatively, alternative lenders do have the option of replacing the existing lender(s) and providing new and increased facilities where sufficient collateral exists but where the existing lender was unwilling to do so.

We are concerned that the availability of super priority funding could be contrary to the stated objective of encouraging debtors to seek early advice while some liquidity is still available.

16) How should charged property be valued to ensure protection for existing charge holders?

At its open market value.i.e. assuming a disposal within a 3-6 months' time frame

17) Which categories of payments should qualify for super-priority as 'rescue finance'?

No comment

Impact on SMEs

18) Are there any other specific measures for promoting SME recovery

that should be considered?

Promoting the critical importance of seeking professional support early when financial distress is anticipated.

Promoting a mechanism that provides access to professional advice that is affordable.

Unfortunately, there will always be some businesses that are too small to avail themselves of such help.

We would reiterate our comments in response to question 6 that professionally accredited experienced turnaround professionals be encouraged to help small businesses avail themselves of this new framework.

Do you have any other comments that might aid the consultation process as a whole? Comments on the layout of this consultation would also be welcomed.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒ Yes ☐ No