



Bar Council response to the BIS 'Review of the Corporate Insolvency Framework' consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business, Innovation and Skills consultation paper entitled A Review of the Corporate Insolvency Framework.¹

2. The Bar Council (respondent type: professional body) represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Government is here proposing and seeking comment upon a new way of establishing a "breathing space" for distressed companies. The proposed procedure will establish a moratorium for trading companies of all sizes with the exception of companies, generally those trading in the financial markets. The intention is to introduce a 3-month (but extendable) moratorium to enable refinancing steps to be promulgated and established. During the moratorium, the company will be under the control of the board but with an independent supervisor. The moratorium procedure would be initiated by the issue of proceedings in Court and the Court will be in overall control of the moratorium.

¹ the Department for Business, Innovation and Skills 2016, [A Review of the Corporate Insolvency Framework consultation paper](#)

The Introduction of a Moratorium

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

4. The Bar Council considers that this will be a very useful addition to the general armoury available to companies in financial difficulties. The standalone gateway will provide a very useful method of enabling companies in difficulties to achieve a breathing space.

Question 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?

5. The Bar Council considers that a filing in Court will permit a company to act swiftly and in the interests of its creditors and shareholders where the need arises. However, care must be taken to ensure that, where necessary, the Court(s) involved must be in a position to respond quickly and appropriately to the initial application. In relation to this, the High Court can move very swiftly when necessary; other Courts are less able to do so.

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

6. The Bar Council considers that, save for one point, the proposed eligibility tests and qualifying criteria do provide appropriate protection for suppliers and creditors. The exception to which we refer above affects the suggestion in paragraph 7.20 that the procedure should not be available to any company which is subject to a winding up petition. On the basis that no winding up order has been made, we can see no reason why the fact of the existence of a winding up petition should preclude a company proposing a moratorium. Indeed, there could be circumstances where the existence of a winding up petition will "hold the ring" pending an application to propose a moratorium.

7. Further, the Bar Council considers that it would be appropriate to provide within the legislation for a review of how the proposals are working after 2 years so that if there are matters which require change or fine-tuning, those steps may be taken.

Question 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?

8. Yes.

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

9. The Bar Council is concerned that the proposed duration and extension of the moratorium may not, in some cases, provide sufficient time for plans to be put in place and

would prefer to see more flexibility in that regard, particularly as the proposals are intended to be available to companies of all shapes and sizes.

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

10. Yes.

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

11. Yes.

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

12. The Bar Council considers that as the current proposal is intended to be available for all businesses, save in broad terms financial institutions, creditors should be entitled to seek and obtain information subject to the points raised in paragraph 7.48 of the Consultation. The Bar Council considers that, ideally, there should, particularly in the case of larger companies, be a creditors' committee through which all creditors should be able to seek information from the supervisor if the creditors' committee considers it appropriate.

Helping Businesses Keep Trading through the Restructuring Process

Question 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?

13. The Bar Council is concerned about the fact that "essential contracts" will cover a wide variety of circumstances, each going to be different in individual cases. However, provided that the criteria listed in paragraph 8.15 of the Consultation are followed, the proposal to extend "designated contracts" is sensible.

Question 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?

14. Yes

Developing a Flexible Restructuring Plan

Question 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?

15. The Bar Council considers that it is sensible to provide the restructuring plan as a standalone procedure rather than an extension of some other procedure. At least initially the Court is likely to be kept, we consider, quite busy working through the detail of the proposed restructuring and the procedure should be kept separate. It may be that in due course, once

any wrinkles have been smoothed out, the procedure could be amalgamated with some other so that Court supervision or control is no longer thought necessary or desirable.

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

16. Yes. The purpose of the restructuring exercise is to assist in the rescue of the whole or part of a business. Without binding in all affected creditors it must be unlikely that a rescue would be achieved.

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

17. Yes.

Question 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?

18. The Bar Council considers that this is the hardest question to answer in the Consultation. The question of how to value liabilities will depend very much upon the circumstances of the particular company under consideration and the circumstances of the market of which that company forms part. Whilst it may be possible to provide for a “minimum liquidation valuation”, the law should also provide what is to happen, as regards voting on and/or being bound by the moratorium where the valuation is “zero”. These creditors will need still to be bound into the moratorium.

Rescue Finance

Question 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?

19. The Bar Council consider that, as part of a culture intended to assist in the rescue of a company in difficulties, the providers of necessary finance should be given the opportunity to gain a “super priority” where secured creditors of the ailing company are not prepared to provide further assistance. The Bar Council recognises that this proposal represents a distinct change in culture for rescue attempts, but can see no other option if further finance is to be provided, particularly in circumstances where the timescale is relatively short.

20. The Bar Council also recognises and would not wish to underestimate the difficulties attached to the question of valuation which is the subject of question 16, below.

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

21. The Bar Council considers that the value to be attributed to property should either be agreed between the relevant charge holders and the supervisor or, if that is not possible within

a relatively short space of time, the matter should be aired before a Court which should have power to fix the maximum value to be attributed to the property the subject of the charge.

22. Alternatively, those proposing to provide the rescue finance should be given the opportunity to buy out or otherwise deal with the charge holders in order to enable rescue finance to be provided.

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

23. The definition of "rescue finance" should be left flexible. As the discussion paper makes clear, it could take various forms. The Bar Council suggests that the supervisor should explain in a report to the Court what will constitute "rescue finance". This report should define the "rescue finance" very tightly but leave the supervisor with the opportunity to return to the Court to broaden the definition as necessary.

Impact on SMEs

Question 18: Are there any other specific measures for promoting SME recovery that should be considered?

24. The Bar Council has no particular proposals to put forward to promote the recovery of SMEs.

Question 19: 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.

25. The Bar Council has no other comments to add.

**Bar Council²
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