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Kirkland Alert

UK Restructuring Measures: What Could Work Even Better?

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The UK Insolvency Service today published its final evaluation report on the permanent measures under the Corporate Insolvency and Governance Act 2020 — namely, restructuring plans, the stand-alone moratorium and restrictions on contractual termination (ipso facto) clauses.

The report — based on independent research conducted by the University of Wolverhampton — follows an interim report in June (see our *Alert*). Today's final report concludes that:

- the restructuring plan continues to be seen as a success, satisfying its policy objectives;
- the latest evidence indicates ambiguity regarding the effectiveness of the stand-alone moratorium, highlighting several major areas of concern; and
- the suspension of termination clauses in supply contracts is seen as a valuable rescue tool, preventing suppliers withdrawing supply from insolvent companies, but there are concerns regarding suppliers continuing to demand 'ransom payments'.

The report includes refined suggestions of how the measures could work even better — raising potential areas for future reforms in the medium-term.

Restructuring plans: continuing success, with potential areas for further improvement

The restructuring plan continues to be seen as a success; the cross-class cram down power has been used successfully in cases where previously a scheme of arrangement alone would not have been effective. There is general trust in the court's ability to protect stakeholders, with judicial oversight offering reassurance to stakeholders.

In considering potential areas for improvement, the report notes that:

- restructuring plans are seen as too costly and time-consuming for use by all sizes of company, especially SMEs; and
- the cost of challenging a restructuring plan seems to be a stumbling block to the policy objective of protecting dissenting creditors.

Specific potential reforms include:

- reforming legislation to provide expressly that restructuring plans have extra-territorial effect, to reduce costs and create more certainty;
- allowing multiple debtor entities to be party to the same restructuring plan (as in U.S. chapter 11 proceedings), to simplify the procedure;
- dealing with simple cases at a single (sanction) hearing — or alternatively, dealing with the first (convening) hearing out-of-court, on paper;
- having an Insolvency and Companies Court judge deal with simple cases, instead of a High Court judge;
- requiring insolvency practitioners involved in a restructuring plan to ensure that more detailed and relevant information is distributed to stakeholders within a reasonable timeframe, to address concerns of information asymmetry; and
- issuing a standardised form or template restructuring plan, to reduce costs.

We broadly welcome these suggested reforms. The 'multiple debtor' concept would however require particularly careful consideration, e.g., as to whether a plan should require a consenting 'in the money' class for each debtor entity, and the question of potential substantive consolidation of debtor entities' estates.

The report found support for retaining the existing consent threshold (75% by value is required for a class to approve the plan), notwithstanding some suggestions to lower this (certain jurisdictions, e.g., the Netherlands, use lower consent thresholds). This potential reform appears unlikely to proceed.

Moratorium: not available to many larger companies, and not great for SMEs either

The report indicates it is unclear that the standalone moratorium is meeting its policy objectives. In particular:

- the fact that the moratorium does not provide a payment holiday in relation to financial creditors is seen as a major limitation in practice;
- the eligibility criteria could be amended to encourage larger companies to use the measure;[1]
- there is a general view that the duration of the moratorium (at an initial period of 20 business days) is too short; and
- the alteration of pre-moratorium creditor priority in a subsequent formal insolvency creates problems and acts as a deterrent to its use.

Suspension of ipso facto (termination) clauses: broadly positive, but continuing fears of being 'held to ransom'

This measure — prohibiting reliance on termination clauses that engage on insolvency — is broadly seen as a helpful power, helping to ensure continued supply so that a business can be turned around and jobs saved. However, there is some ambiguity as to whether it is meeting the policy objective of preventing suppliers asking for additional 'ransom' payments.

Kirkland attorneys participated in interviews with the research team as part of their 'expert sampling' research process in 'Stage One'. The final report is here.

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1. Companies party to a capital market arrangement where the company has incurred a debt of at least £10m are generally excluded from eligibility for the moratorium. This effectively excludes many large companies, mid-market companies and larger SMEs from using the moratorium. ↩

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Suggested Reading

- 21 June 2022 Kirkland Alert UK Restructuring Measures: What Could Work Even Better?
- 12 December 2022 Kirkland Alert EU Insolvency Harmonisation Proposals: Directors' Duties, Pre-Packs and Transaction Avoidance
- 17 November 2022 Kirkland Alert Enforcement via self-help remedy of appropriation upheld by English court, notwithstanding valuation dispute; notable guidance on valuation process