HOUSE OF LORDS Library Briefing

Corporate Insolvency and Governance Bill
HL Bill 113 of 2019–21

On 9 June 2020, the second reading of the Corporate Insolvency and Governance Bill is scheduled to take place in the House of Lords.

The Corporate Insolvency and Governance Bill is a government bill being fast-tracked through Parliament. The Government hopes fast-tracking the bill will help reduce the burden on businesses and provide flexibility and breathing space to keep companies operating during the Covid-19 pandemic. Although several of the bill's provisions are new and have been designed according to the short-term conditions created by the pandemic, others are long-planned reforms the Government has previously consulted upon. These include changes to the corporate insolvency regime and restructuring measures. The bill contains a mix of permanent and temporary/time-limited measures, the latter designed to be subsequently extended or ended depending on how long they are required.

The bill's permanent measures include the introduction of a moratorium for companies in financial distress. This would allow companies an opportunity to explore rescue and restructuring options free from creditor action. The bill would also introduce provisions to allow struggling companies, or their creditors or members, to propose a new restructuring plan. Further, the bill would change the rules on when a supplier can withhold payment to struggling firms to avoid imperilling a rescue. There would be safeguards to ensure that continued supplies are paid for, and suppliers can be relieved of the requirement to supply if it causes hardship to their business.

The bill's temporary measures to support businesses through the pandemic include the suspension of parts of insolvency law to support directors to continue trading through the emergency without the threat of personal liability and to protect companies from aggressive creditor action. The bill would also allow for temporary flexibility regarding other administrative burdens such as the holding of annual general meetings (AGMs) and filing requirements.

Business bodies have welcomed the bill. These include the Institute of Directors and sector-specific organisations such as Hospitality UK. During the bill's fast-tracked consideration in the House of Commons the bill's measures were also welcomed by opposition parties. However, MPs raised concerns about the scope of some of the provisions, particularly whether employee rights were sufficiently safeguarded. Measures absent from the bill were also highlighted, including corporate responsibility reforms.

James Tobin and Chris Smith | 5 June 2020

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1. Key provisions in the bill

To ease the burden on businesses during the Covid-19 pandemic, the bill contains measures focused around three principal areas:

- Introducing greater flexibility into the insolvency regime, allowing companies breathing space to explore options for rescue whilst supplies are protected, to ensure the maximum chance of survival.
- Temporarily suspending parts of insolvency law to support directors to continue trading through the emergency without the threat of personal liability and to protect companies from aggressive creditor action.
- Providing companies and other bodies with temporary easements on company filing requirements and requirements relating to meetings including annual general meetings (AGMs).[1]

The Government previously consulted on changes to the corporate insolvency regime. In August 2018, the Government announced plans to introduce new restructuring procedures designed to help businesses to continue trading through the rescue process.[2]

1.1 Moratorium for companies in financial distress

The bill would provide for a moratorium for UK companies in financial distress, allowing them the opportunity to explore rescue and restructuring options free from creditor action. An insolvency practitioner (IP) will oversee the moratorium by acting as a monitor although the directors will remain in charge of running the business on a day-to-day basis. The aim of the moratorium is to facilitate a rescue of the company, which could be via a company voluntary arrangement (CVA)[3], a restructuring plan (as this bill would also introduce) or an injection of new funds.[4] The Government contends that such a moratorium will result in better, more efficient rescue plans that benefit all of a company's stakeholders.[5]

The bill would also introduce exclusions that will mean a company is not eligible for the moratorium, aimed to ensure that it is only used appropriately. For example, a company cannot have been in a moratorium in the previous 12 months unless a court has ordered otherwise. The company and its proposed monitor must also make statements, regarding the company's financial state and prospects for rescue, before it can enter a moratorium. The moratorium must be ended if it becomes apparent to the monitor that the company is unlikely to be rescued.

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[1] Explanatory Notes, p 5.

[2] Department for Business, Energy and Industrial Strategy, *Insolvency and Corporate Governance: Government response*, August 2018.

[3] A procedure available under the Insolvency Act 1986 that enables a company that is in financial difficulty, but not necessarily insolvent, to make a binding compromise and arrangement with its creditors.

[4] Explanatory Notes, p 5.

[5] ibid.

1.2 New arrangements/reconstructions for companies in financial difficulty

The bill would introduce provisions to allow struggling companies, or their creditors or members, to propose a new restructuring proposal between the company and creditors and members. The measures will introduce a "cross-class cram down" feature. This will allow dissenting classes of creditors or members to be bound to a restructuring plan.[6] This means that creditors or members who vote against a proposal, but who would be no worse off under the restructuring plan than they would be in the most likely outcome were the restructuring plan not to be agreed (and are thus not financially disadvantaged) cannot prevent it from proceeding.

These provisions would introduce new measures into the Companies Act 2006. This represents the culmination of policy work undertaken by the Government since a restructuring plan procedure for companies was consulted on as part of *A Review of the Corporate Insolvency Framework*, published in May 2016.[7]

There are currently two statutory mechanisms for a company to reach a compromise or arrangement with its creditors; an arrangement or reconstruction under the Companies Act 2006 (a 'scheme of arrangement') and a CVA under the Insolvency Act 1986. At present CVAs are used by companies looking to restructure, but they cannot affect the rights of secured creditors or preferential creditors without their consent. In schemes of arrangement creditors are divided into classes and each class must vote on the proposed scheme. If all classes vote in favour of the scheme, the court must then decide whether to sanction it. Not all creditors or members of a company need to be included within a scheme. A company may organise a scheme in such a way as to exclude some creditors or members from it. Those creditors or members who are not bound by the scheme retain their existing rights.

The new restructuring plan procedure is intended to broadly follow the process for approving a scheme of arrangement (approval by creditors and sanction by the court), but it will additionally include the ability for a company to bind classes of creditors to a restructuring plan, even where not all classes have voted in favour of it (cross-class cram down). Cross-class cram down must be sanctioned by the court and will be subject to meeting certain conditions. The Government note that the court "will always have absolute discretion" over whether to sanction a restructuring plan.[8] Further, although these are new measures, the Government expects that there is sufficient commonality with existing provision that the courts to draw on the existing body of case law where appropriate.

1.3 Winding-up petitions

The Coronavirus Act 2020 introduced a moratorium on commercial landlords enforcing the forfeiture of leases for unpaid rent to protect businesses from eviction. However, the Government says it has become aware some landlords have been using other measures. These include statutory demands followed by winding-up petitions, to put pressure on their tenants to pay outstanding rent immediately. The Government further note that, although enforcement action of this nature is

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[6] A 'class' of creditors or shareholders is considered to accept a plan if at least two-thirds (by value) of its members who vote on that plan cast their vote in its favour. A cram-down is the involuntary imposition by a court of a reorganisation plan over the objection of some classes of creditors.

[7] UK Government website, 'A Review of the Corporate Insolvency Framework', 25 May 2016

[8] Explanatory Notes, p 6.

currently known to be occurring amongst commercial landlords and tenants, any creditor might attempt to use these processes for debt collection purposes.

As a result, the bill would temporarily prevent winding-up proceedings being taken based on statutory demands. It would stop winding-up proceedings where Covid-19 has had a financial effect on the company that has caused the grounds for the proceedings. Therefore, the bill would prevent any statutory demands made against companies in the period between 1 March 2020 and 30 June 2020 (the deadline for the current rent moratorium) from being used as the basis of a winding-up petition at any point on or after 27 April 2020.

The bill would also create an additional condition that must be satisfied before a creditor can obtain a winding-up order against a company on the grounds that it is unable to pay its debts. During the restriction period, any creditor asking the court to make a winding-up order on those grounds must first demonstrate to the court that the company's inability to pay its debts was not caused by the coronavirus pandemic.[9]

1.4 Wrongful trading

Wrongful trading provisions in the Insolvency Act 1986 allow liquidators and administrators who are officeholders in insolvency procedures to apply to the court for a declaration that directors of the company in liquidation or administration are liable to personally contribute to the assets of the company. The declaration can be made where the directors allowed the company to continue trading beyond the point at which the insolvency procedure was inevitable and did not take every step to minimise potential losses to creditors.[10]

The Government note that the coronavirus pandemic has caused considerable uncertainty, particularly when directors are attempting to gauge the future viability of their business. Consequently, the bill would introduce measures meaning that, when the court is considering whether to declare a director liable to contribute to a company's assets under wrongful trading provisions and are considering the amount to be contributed, it will not take into account losses incurred during the period of the pandemic. The Government contends that the deterrent to continuing to trade during that period would be removed, in turn helping prevent businesses which would be viable but for the impact of the pandemic from closing.[11]

The ban would be temporary and would commence (retrospectively) from 1 March 2020 and end on 30 June 2020 or one month after the provision comes into force, whichever is the later. However, if the impact of the pandemic on businesses continues beyond the end of that period, the bill also allows for the ban to be extended for up to six months using secondary legislation. That process may be repeated, extending the suspension period further. Equally, the ban can be ended early if conditions allow.[12]

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[9] Explanatory Notes, p 7.
[10] ibid.
[11] ibid, p 8.
[12] ibid.

1.5 Termination clauses in supply contracts

When a company enters a rescue, restructuring or insolvency procedure, suppliers often stop supplying it under a contractual termination clause triggered by insolvency. The bill aims to prevent this by introducing measures prohibiting termination clauses that engage on insolvency or are based on past breaches of contract. This will mean that, subject to certain exclusions, contracted suppliers will have to continue to supply, even where there are pre-insolvency arrears. The bill would also introduce new additional provisions to existing provisions in the Insolvency Act 1986 to widen the scope of the restrictions on termination clauses in contracts. The Government contends this will prevent a wider range of suppliers from terminating a contract due to a company entering a formal restructuring or insolvency procedure, with the aim of helping companies continue to trade, maximising the opportunities for rescue of the company or the sale of its business as a going concern.[13]

The Government argues there are also safeguards for suppliers in that they can apply to the court for permission to terminate the contract on the grounds of hardship. A contract can also be terminated with agreement from the company (where the company has entered a moratorium, voluntary arrangement or restructuring plan) or the officeholder (in any other relevant procedure).[14]

Small entities as defined in the legislation would also be exempted from the provisions as a time limited Covid-19 related measure. This exemption would be in place from the bill being enacted and coming in to force until a month thereafter or 30 June 2020 whichever is later, with a power to reduce or extend this period. Where a company enters an insolvency process after the exemption expires, entities of all sizes which supply the company will be bound by the provisions unless otherwise exempted.[15]

1.6 Power to amend corporate insolvency or governance legislation

The bill would also create a time-limited provision allowing the secretary of state to temporarily amend corporate insolvency and related legislation through regulations made by statutory instrument. Amendments made under the power contained within this provision could be made to both primary and secondary legislation. The Government contends that providing for temporary legislative change in this way will mean that the insolvency and business rescue regime may quickly react and adapt to deal with significant and potentially unexpected future challenges presented by the impact of the Covid-19 pandemic on business. Such changes could include a temporary increase in flexibility in provisions within corporate insolvency and restructuring processes, or to make temporary amendments to the insolvency related enforcement regime.[16]

The Government states it currently has no specific plans to use these powers. As the full extent of the impact of the pandemic on business becomes clear, the Government says it could be exercised to "make urgent preventative or mitigative amendments".[17] Any changes would be kept under review by the secretary of state and revoked if no longer needed or revised to take account of changing

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[13] Explanatory Notes, p 9.

[14] ibid.

[15] ibid.

[16] ibid.

[17] ibid.

circumstances.

The Government concedes that the power contained in this provision is wide-ranging. However, it suggests the measures have significant restrictions, including:

- The impact of any proposed amendments on any person (such as a creditor or employee) likely to be affected by them must first be considered.
- The temporary amendments made must be proportionate to the challenges presented.
- The effect of the amendment could not practicably be achieved without legislative change.
- The provision may not be used where the proposed amendment could be made using existing provisions whilst still achieving the objective of legislating sufficiently quickly.[18]

In addition, amendments made under this provision may not create a criminal offence or a civil penalty, though they may modify the circumstances under which a person is guilty of an existing offence or civil sanction. The provision further may not be used to create or increase a fee.

Regarding parliamentary process, the explanatory notes observe:

> An SI containing regulations to temporarily amend legislation under this provision would be subject to a 'made affirmative' process, which means that the changes will be effective immediately upon the SI being made. This is necessary because the need for temporary amendments is in most cases likely to be pressing, and the time delay in seeking approval by both Houses of Parliament in the normal way could have a detrimental effect. The SI is however required to be laid as soon as possible after being made, and will require approval by both Houses within 40 sitting days or the change will cease.[19]

Again, such changes would also be time-limited:

> Temporary changes made in this way may last for a maximum of 6 months but can be extended using a similar 'made affirmative' process. The temporary changes may also be curtailed through an SI subject to a negative resolution process and they must be revoked or amended, if it is clear that the impact of the pandemic has eased sufficiently.[20]

1.7 Meetings and filing requirements

Temporary emergency measures previously introduced by the Government, including those requiring certain businesses to close and which banned public gatherings of more than two people (until the recent relaxation), have in many cases prevented companies and other bodies from being able to hold annual general meetings (AGMs) at the required time or manner. The bill would introduce temporary relaxations to allow AGMs and other meetings to be held in a manner consistent with those restrictions (for example, allowing electronic meetings and voting) and extend the period within which companies and other bodies must hold an AGM. These measures would only apply in respect

[18] Explanatory Notes, p 11.
[19] ibid.
[20] ibid.

of a temporary period which begins on 26 March 2020 and runs until the end of September. The bill contains the power to extend that period by up to three months at a time, but the temporary period cannot be extended beyond the end of the current financial year.[21]

The bill would also provide for the secretary of state to make regulations to extend deadlines for certain filings which include accounts and annual confirmation statements.[22]

2. Fast-track legislative process

The bill's passage through Parliament is being condensed through the fast-track legislative procedure.[23] The Government contends fast-tracking the bill is necessary to protect companies facing insolvency and maximise their chances of survival:

> The Government has carefully considered the implications of using the fast-track process for the passage of this bill. Due to the Covid-19 pandemic, many UK companies face the threat of insolvency owing to significant trading difficulties brought on by this crisis. Consequently, the measures in this bill need to be brought in as soon as possible to provide businesses with the flexibility and breathing space they need to continue trading during this difficult time.[24]

This section briefly examines the bill against the recommendations for the scrutiny of fast-track legislation proposed by the House of Lords Constitution Committee in its 2009 inquiry into measures of this type.[25]

2.1 Explanatory notes and accompanying oral statement

Among the committee's recommendations was that an oral ministerial statement should be made to the House of Lords to justify the fast-tracking of any primary legislation, with the information also set out in the explanatory notes of the bill. On the timing of such a statement, the committee said it should:

> Take place when the bill is introduced to the House in order to allow a debate, as early as possible on the justification for fast-tracking the bill, which does not detract from the second reading debate.[26]

At the time of writing, the Government has not made such a statement.[27]

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[21] Explanatory Notes, p 11.

[22] ibid.

[23] Further information on fast-track legislation is provided in: House of Commons Library, *Fast-track legislation*, 25 March 2020; and *Expedited legislation: Public bills receiving their second and third reading on the same day in the House of Commons*, 26 March 2020.

[24] Explanatory Notes, p 16.

[25] House of Lords Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, 7 July 2009, HL Paper 116-I of session 2008–09, pp 38–48.

[26] ibid.

[27] On 28 March, the Secretary of State for Business, Energy and Industrial Strategy, Alok Sharma, announced the Government's intention to introduce as legislation the measures in the bill to reform the insolvency framework and to

The Government does provide further information in support of the necessity of using the fast-track procedure in the explanatory notes to the bill, consistent with the Constitution Committee recommendation. This includes a justification for the fast-tracking of each area of the bill. Those sections are not recreated here for brevity but are available on pages 16 to 17 of the explanatory notes.[28]

2.2 Pre-legislative scrutiny and opportunities for opposition parties, committees, and outside groups to influence the policy proposals

The Constitution Committee recognised there would be time constraints that restricted how much pre-legislative scrutiny could be conducted on fast-tracked legislation.[29] However, it said that mechanisms should be put in place, for example to consult parliamentary committees and other stakeholders, and further contended this should be possible in "in all but the most extreme circumstances".[30]

As above, the Government notes the results of consultation on the insolvency measures in the bill were published in August 2018.[31] However, the emergency provisions in the bill brought forward because of coronavirus were not included in that consultation. On those measures, the Government says:

> Discussions have been held with opposition parties to inform them of the content of the bill and a draft of the bill was sent to, amongst others, the Shadow Secretary of State for Business, Energy and Industrial Strategy, and the Convenor of the Crossbench Peers.[32]

The explanatory notes also state that the Government has engaged with the chair of the House of Commons Business, Energy, and Industrial Strategy Committee prior to the introduction of the bill.[33]

On specific provisions in the bill, the Government states that consultation has taken place with outside groups on the measures relating to general meetings and filing requirements.[34] In relation to the provisions on statutory demands and winding up provisions, the Government says that prior consultation would have been undesirable, because:

> Advance knowledge of this measure could have led to some creditors bringing forward winding-up petitions to avoid being caught by the restriction and therefore undermining the policy objective of protecting businesses.[35]

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suspend the liability for wrongful trading (Department of Health and Social Care et al, 'Business Secretary's statement on coronavirus (COVID-19)', 28 March 2020).

[28] Explanatory Notes, pp 15–17.

[29] House of Lords Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, 7 July 2009, HL Paper 116-I of session 2008–09, p 39.

[30] ibid.

[31] Explanatory Notes, p 17.

[32] ibid.

[33] ibid.

[34] ibid, p 18.

[35] ibid.

2.3 Maximising parliamentary scrutiny

The Constitution Committee said that the explanatory notes should set out the efforts made to maximise the time available for parliamentary scrutiny.[36] In the notes accompanying this bill, the Government contends that "royal assent needs to be secured as soon as possible" in order to meet the need generated by the pandemic.[37]

2.4 Sunset clauses

The Constitution Committee recommended that the Government should set out whether the bill includes a sunset clause and any appropriate renewal procedure and, if not, why not. It argued that for fast-tracked legislation there should be "presumption in favour of the use of a sunset clause".[38]

In this bill, the insolvency framework measures (subject of the 2018 consultation) do not contain a sunset clause.[39] However, other provisions do have such clauses, as follows:[40]

- The suspension of wrongful trading liability, and statutory demands and winding-up petitions measures will expire on 30 June 2020 or one month after the coming into force of the bill, whichever is the later.
- The AGM measures will expire on 30 September 2020.
- The filing requirements measure will expire on 5 April 2021.

The explanatory notes observe that several provisions in the bill would be extendable. It would be possible to extend some provisions while letting others expire if the Government deems them no longer necessary.[41]

2.5 Post-legislative scrutiny

The committee also recommended that the Government should explain whether mechanisms for effective post-legislative scrutiny and review are in place, contending that there should be a presumption in favour of post-legislative review "ideally within one year, and at most within two years".[42]

The bill's explanatory notes state that the non-time-limited measures "will be reviewed as and when

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[36] House of Lords Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, 7 July 2009, HL Paper 116-I of session 2008–09, p 44.

[37] Explanatory Notes, p 17.

[38] House of Lords Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, 7 July 2009, HL Paper 116-I of session 2008–09, p 46.

[39] Explanatory Notes, p 18.

[40] ibid.

[41] ibid.

[42] House of Lords Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, 7 July 2009, HL Paper 116-I of session 2008–09, p 48.

appropriate".[43]

2.6 Use of existing legislation

The Constitution Committee recommended that the Government state whether it has considered the use of existing legislation to deal with any or all of the issues in the bill.[44] The Government has said that, following a review, it concluded that existing legislation was not sufficient to deal with the measures that the bill addresses.[45]

2.7 Fast-track timings

The House of Commons approved the bill's second reading and all remaining stages in a single day on 3 June 2020.[46] For the House of Lords, on 4 June 2020, the House agreed a business motion to set aside standing order 46, which states that no two stages of a bill may be taken in the same day.[47] This motion has the effect that no amendments will be admissible at third reading, in accordance with standing order 48. In moving the business motion, the Leader of the House of Lords, Baroness Evans of Bowes Park, said that the second reading debate in the Lords would take place on 9 June, committee stage on 16 June and report and third reading on 23 June.[48]

3. Reaction and commentary

Businesses and practitioners in insolvency law have largely welcomed the bill. Jonathan Geldart, director-general of the Institute of Directors, said the bill would provide "some reassurance" that those who act responsibly will not be caught out by the insolvency system. Mark Phillips QC said the provisions meant "everyone can now focus on how best to restructure debts and rescue struggling companies".[49] Similarly, UK Hospitality has welcome the respite the measures in the bill will provide for commercial tenants, with the organisation's chief executive, Kate Nicholls, stating:

> This is a very important piece of legislation from the Government […] The bill should provide businesses with some very welcome respite from aggressive landlords and valuable breathing space to restructure their businesses.[50]

Commentators have also observed the significance of the changes for the sector, with Jennifer Marshall, partner at Allen and Overy, describing them as "the most significant insolvency reforms in the UK for a generation".[51] Similarly, Olga Galazoula, restructuring and special situations partner at

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[43] Explanatory Notes, p 18.

[44] House of Lords Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, 7 July 2009, HL Paper 116-I of session 2008–09, p 44.

[45] Explanatory Notes, p 18.

[46] HC *Hansard*, 3 June 2020, cols 890–953 (second reading); and cols 956–72 (remaining stages).

[47] HL *Hansard*, 4 June 2020, col 1448.

[48] ibid.

[49] *Financial Times* (£), 'Insolvency law shake-up to protect UK companies during pandemic', 20 May 2020.

[50] UK Hospitality, 'Insolvency Bill provides respite for tenants', 20 May 2020.

[51] Allen and Overy, 'The Corporate Insolvency and Governance Bill—the most significant insolvency reforms in the UK for a generation', 22 May 2020.

Ashurst, said they were the "biggest reform of the UK's restructuring and insolvency framework in more than 15 years".[52] The latter added that these measures were welcome but "the jury is still out, and will be for some time, on how widely they will be used in the current environment".[53]

However, some have expressed reservations about the plans. The insolvency and restructuring trade body R3 has voiced concerns over the scope of the proposals, highlighting the fact that the wrongful trading provisions are to protect creditors and expressing the view that a blanket suspension could risk abuse.[54] The Institute of Chartered Accountants in England and Wales has also cautioned directors of companies in financial difficulty to seek professional advice:

> This is a pragmatic move and a useful addition to the government's strategy to protect employment and will definitely help some businesses to survive. But we would encourage any directors with concerns about their company to seek professional advice at the earliest opportunity.[55]

4. House of Commons stages

4.1 Second Reading

Government

Introducing the bill at second reading in the House of Commons, the Secretary of State for Business, Alok Sharma, said it contained a range of permanent and temporary measures designed to help businesses through the Covid-19 pandemic and beyond.[56] He drew particular attention to the provisions on corporate restructuring and the fact that they had previously been consulted upon, which he said meant they had been considered "in some detail".[57] When questioned whether the bill contained the right combination of measures which had been previously planned and those designed at short notice to assist in the period of the pandemic, and whether sufficient consideration had been given to the latter, Mr Sharma said:

> The permanent measures have already been consulted upon, and they enjoy broad support. The temporary measures are of course temporary, and if we were to look to extend any of them, we would have to do so by way of regulation—we would have to come to the House with statutory instruments, and there would be an opportunity, if colleagues in the House felt it was not right to extend them, for them to voice their concerns. So, I do think we have managed to get the balance right in this case.[58]

Turning to the key provisions in the bill, Mr Sharma noted the moratorium proposed for businesses

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[52] Bloomberg, 'UK introduces Insolvency Bill to help Covid-hit companies', 20 May 2020.

[53] ibid.

[54] Birketts, 'The effect of COVID-19 on directors' duties and creditor action', 26 May 2020.

[55] House of Commons Library, *Coronavirus: changes to insolvency rules to help businesses*, 31 March 2020; and British Chambers of Commerce, 'BCC responds to changes to insolvency laws', 28 March 2020.

[56] HC *Hansard*, 3 June 2020, cols 890–3.

[57] ibid.

[58] ibid.

would allow those threatened with insolvency temporary respite for an initial period of 20 days, which can then be extended. He noted there would be a time-limited easing of the eligibility criteria for a company to enter into a moratorium, to make it more accessible during the Covid-19 response period, which will be in place a month after the bill gains royal assent.[59]

He noted the second part of the new permanent restructuring measures would allow companies in financial difficulty to propose a rescue plan to restructure complex debt arrangements, and to bind creditors to it, provided certain thresholds are met. Mr Sharma stated that meant viable companies struggling with debt obligations will be able to restructure under the new procedure. However, he added there would be "significant safeguards and protections for creditors", including that the plan must be sanctioned by the court and, indeed, any dissenting creditor class bound to a plan must not be made worse off than it would have been in the next most likely outcome.[60]

Turning to prohibiting termination clauses, Mr Sharma said this would prevent suppliers from ending contracts or raising prices just because a company has entered an insolvency procedure or a moratorium. In recognition of the fact that requiring companies to supply under those circumstances may cause them financial difficulties, Mr Sharma said the Government had built in several protections, including terminating the contract on the grounds of hardship and exempting small suppliers during the pandemic.[61]

On the bill's temporary measures, Mr Sharma reiterated the provisions that would place a suspension on the serving of statutory demands and restrict winding-up petitions would address the issue of a small number of landlords using aggressive debt recovery tactics to put pressure on tenants, including through the use of statutory demands and threats of winding up.[62] On the similar temporary measure of wrongful trading rules, Mr Sharma contended this measure would give company directors the confidence to use their best efforts to continue trading without the threat of personal liability should the company ultimately go into insolvency, and argued that it had received "considerable support" from stakeholders since being announced in March 2020.[63]

On the powers provided to make other temporary amendments to insolvency law or the new restructuring plan to deal with the effects of Covid-19, Mr Sharma argued such measures would allow the insolvency and business rescue regime to react quickly to the challenges presented by Covid-19. Noting that power would expire on 30 April 2021, he said that due to the potential unforeseen circumstances relating to Covid-19, the expiry date of this power could be extended if deemed necessary. However, he added that, if such an extension was sought, the House "will of course have an opportunity to scrutinise it".[64]

On the final set of temporary measures on meetings and company filings, Mr Sharma noted that the flexibility in terms of these meetings and filings would apply from 26 March until 30 September. He added the measures would also enable AGMs to be postponed until 30 September this year, where necessary. Regarding filing requirements, Mr Sharma said the extensions to the various filing

[59] HC *Hansard*, 3 June 2020, col 894.
[60] ibid.
[61] ibid.
[62] ibid.
[63] ibid.
[64] ibid, col 896.

requirements would be set out in regulations to be laid once the bill receives royal assent. He added:

> We will be giving businesses the maximum period allowable under the powers in the bill for filing their accounts, confirmation statements and event-driven updates. We will also extend the period within which charges should be registered with Companies House to 31 days, which I believe strikes the right balance between providing businesses with breathing space and ensuring that lenders are protected.[65]

In conclusion, he said the Government believed "the package of measures that the Bill introduces will give businesses the best opportunity to survive the effects of the Covid-19 crisis and lay the foundations for a bounce-back in the UK economy".[66]

Labour party

Shadow Secretary of State for Business, Ed Miliband, said his party welcomed measures in the bill to help reduce insolvencies and would support the bill's passage through Parliament. He specifically referenced the moratorium for businesses threatened by insolvency and temporary measures in the bill such as the suspension of personal liability for wrongful trading while insolvent. This, he said, was desirable, albeit "for a strictly time-limited period".[67]

However, Mr Miliband also argued that the bill did not do enough to address the dangers for "less powerful interests", particularly employees, when it comes to insolvency and the new restructuring provisions.[68] In particular, he noted the provisions had a wide scope and were not just for companies that are insolvent, but for those who fear they might become so. Therefore, he said they must not be used "to ride roughshod over the rights of employees, including their pensions".[69] Given the uncertainty caused by the Covid-19 pandemic, Mr Miliband said it was essential there were proper safeguards and to that end said his party would be moving an amendment at committee stage (new clause 5) to ensure mandatory discussions with the trade unions take place once a company entered a restructuring process. He contended this would ensure employees are provided with all the information made available to the court and fully consulted on any restructuring plan.[70]

Mr Miliband said his party was also concerned about similar issues regarding insolvency. In particular, he argued unsecured creditors were often left to bear most of the risk of insolvency and "at the back of the queue" when it comes to being protected.[71] He contended greater protection of unsecured creditors could be provided through strengthening the ring-fencing of the proceeds of sale of assets when a company becomes insolvent, increasing the proportion of the proceeds reserved for them to 30 percent, and removing the financial limit as proposed by another Labour amendment to be moved at committee stage (new clause 1). Mr Miliband further contended that pension schemes should be made priority creditors in the event of insolvency so that they have a role as a class of shareholder,

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[65] HC *Hansard*, 3 June 2020, col 897.

[66] ibid.

[67] ibid, col 898.

[68] ibid.

[69] ibid.

[70] ibid, col 900.

[71] ibid.

which may not otherwise occur.[72]

Further, Mr Miliband argued there were two sets of issues the bill did not cover. First, he noted that in 2018 the Government consulted on a set of corporate governance safeguards in the wake of liquidation of the construction and facilities management firm Carillion. Such measures included greater accountability of directors in group companies, legislation to enhance powers for insolvency practitioners, and further raising standards by ensuring an explanation about the affordability of dividend payments. Mr Miliband noted the absence of any such provisions from the bill, adding, "given that this crisis makes corporate distress more likely, it is strange that the Government have not chosen to introduce such measures".[73] Again, he said Labour would be moving amendments with the aim of inserting such provisions into the bill.

Secondly, Mr Miliband argued the bill could be used to strengthen the powers of the small business commissioner to help businesses that are struggling with cashflow and liquidity, particularly when a large business fails to pay a smaller supplier.[74]

In closing the debate at second reading, Paul Scully, Parliamentary Under Secretary of State and Minister for Small Business, Consumers and Labour Markets**,** responded to the point about protecting employees as part of restructuring plans. Mr Scully said Mr Miliband raised a "fair point".[75] However, he said if employees should find themselves as creditors as part of a restructuring plan, they would be protected the same as other creditors, adding:

> Importantly, a court can refuse to sanction a plan if it is not fair and it is equitable to do so. When making this assessment, one would expect the court to be mindful of the interests of employees in any pension schemes affected by that plan. If a restructuring plan is not agreed, it is worth remembering that the company might enter an insolvency proceeding, which would almost certainly produce a worse outcome overall for all involved. The company might stop trading altogether, which would put all employees at risk of losing their jobs.[76]

The bill subsequently received its second reading without division.

4.2 Committee stage and remaining stages

In keeping with the fast-track legislative procedure, the committee stage and all remaining stages of the bill followed directly after the second reading debate on 3 June. A sizeable number of amendments were moved in committee, all of which were debated at the same time. Paul Scully, Parliamentary Under Secretary of State and Minister for Small Business, Consumers and Labour Markets, moved the government amendments and responded to those tabled by opposition parties.

For the Opposition, Lucy Powell said Labour would not pursue its amendments, on the basis that the minister "undertakes to address the concerns of the trade unions".[77] None of the Liberal Democrat

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[72] HC *Hansard*, 3 June 2020, col 900.

[73] ibid, col 901.

[74] ibid.

[75] ibid, col 951.

[76] ibid, col 952.

[77] ibid, col 971.

amendments were moved to a division. The government amendments were made to the bill and all other amendments were withdrawn. The bill proceeded through all its remaining stages without debate or division.

4.3 Government amendments made to the bill

- **Amendment 15** ensures that powers to apply part A1 of the Insolvency Act 1986 to certain entities, ie those other than companies, can also be used to apply schedule 4 to the bill.
- **Amendment 16** removes the repeal of paragraph 6 of schedule **1** to the Insolvency (NI) Order 2002, as the amendment made by that paragraph remains relevant for certain limited purposes. **Amendment 17** applies the same provision as amendment 16 to Northern Ireland.
- **Amendments 18 to 25** are consequential amendments and minor drafting changes.[78]

Mr Scully said amendments 18, 19, 21, 22, 23 and 25 intended to deal with the Cape Town convention, an international treaty that seeks to lower the cost of finance for various high-value, mobile assets, including aircraft. He said the Government was aware of the significant impact the pandemic was having on the airline sector. An overriding aim of the bill, he said, was to make it as easy as possible for affected companies to get the breathing space that they need to weather the impact of Covid-19. Mr Scully said it was right to ensure the legislation covered the sector.[79]

Regarding amendment 15, dealing with the temporary changes to the moratorium specifically for England, Wales and Scotland, Mr Scully explained that these amendments sought to clarify which types of entity could obtain such a moratorium:

> While the schedule 4 temporary measures are in place, it is important that these can be applied consistently to each type of entity that can obtain a moratorium. If eligibility for the temporary measures changed depending on what sort of entity was seeking the moratorium, that would patently not be the case. As drafted, there are two entities for which schedule 4 would not otherwise apply: limited liability partnerships and co-operative and community benefit societies. This amendment would add a small fifth section to schedule 4, consisting of two paragraphs to make limited liability partnerships and co-operative and community benefit societies eligible for the temporary moratorium measures. That ensures that these entities can also be brought within the scope of the schedule and make best use of the breathing space that the measures offer.[80]

Speaking to the corresponding amendment 16 for Northern Ireland, Mr Scully said the amendment further dealt with an erroneous repeal of Northern Ireland provisions that were still required.[81] Amendment 17 was also related to these measures and would ensure that the temporary modifications that have been made to the moratorium process can be applied to limited liability

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[78] HC *Hansard*, 3 June 2020, col 971.

[79] ibid, col 966.

[80] ibid, col 967.

[81] ibid.

partnerships and certain types of registered societies in Northern Ireland.[82]

Mr Scully further explained that amendments 20 and 24 were minor and technical amendments, intended to make a clarificatory point to ensure that it is clear that at the point when a company proposes a restructuring plan coming out of a moratorium that the company should contact all creditors with an explanatory note of a proposed restructuring.[83]

4.4 Other amendments debated

Labour amendments

- **Amendment 1**: would have included trade union views among the relevant documents which must accompany an application by the directors of the company to the court for a moratorium.
- **Amendment 2**: would have extended the moratorium for small business facing insolvency from 20 days to 30 days.
- **Amendment 3**: would have extended to 30 September 2020 the period since 1 March 2020 during which a court in Great Britain is to assume that a person is not responsible for any worsening of the financial position of the company or its creditors that has occurred, following the onset of the coronavirus pandemic. **Amendment 4** would have applied the same provision as amendment 3 to Northern Ireland.
- **Amendment 5**: would have extended to 30 September 2020 the period since 1 March 2020 during which section 233B of the Insolvency Act 1986 (to be inserted by clause 12 of this bill) does not apply in Great Britain in relation to a contract for the supply of goods or services to a company where the company becomes subject to a relevant insolvency procedure, and the supplier is a small entity at the time the company becomes subject to the procedure. **Amendment 6** would have applied the same provision as amendment 5 to Northern Ireland.
- **New clause 1**: would have created a requirement that at least 30 percent of the proceeds from the sale of assets of businesses (after the deduction of the amounts owed to preferential creditors and the fees/expenses of the insolvency practitioners) in administration and liquidation shall be ring-fenced for payment to unsecured creditors.
- **New clause 3**: would have paved the way for the introduction of measures proposed in the 2018 consultation on insolvency and corporate governance.
- **New clause 4**: would have made pension scheme deficits a 'priority creditor' in the event of insolvency and therefore due to be paid before unsecured creditors.
- **New clause 5**: would have required mandatory discussion with trade union representatives once a company has entered the restructuring process.
- **Amendment 7**: would have extended to 30 September 2020 the period after this Act comes into force during which the secretary of state may by regulations made by statutory instrument provide for any temporary modifications to primary legislation in relation to moratoriums in Great Britain made by part 2 of schedule 4 to cease to have effect. **Amendment 8** would have applied the same provision as amendment 7 to Northern

[82] HC *Hansard*, 3 June 2020, col 967.
[83] ibid.

Ireland.[84]

- **Amendment 9**: would have extended to 30 September 2020 the period in relation to which petitions for the winding up of a registered company may not be presented on or after 27 April 2020 on the statutory grounds specified in section 123(1)(a) or section 124 of the Insolvency Act 1986 (that a written demand has not been paid within three weeks) where the demand was served during that period.
- **Amendment 10**: would have extended to 30 September 2020 the period in relation to which petitions for the winding up of a registered company may not be presented on the grounds specified in part 2 of schedule 10 to this bill (except where coronavirus had not had an effect on the company). **Amendments 11 and 12** would have applied the same provisions as amendment 10 to Northern Ireland.[85]

Introducing the Labour amendments, Lucy Powell (Labour MP for Manchester Central) tackled what she described as the 'self-explanatory' measures first, namely amendments 3 to 12, which would extend the time limits of the Covid-19-specific provisions in the bill. She said the retrospective nature of the provisions in the bill were welcome, but with particular regard to the suspension of the wrongful trading liability and statutory demands and winding-up petition measures, they should be extended to the same date as when the AGM and company account filing measures are valid, namely until 30 September. She added:

> Clearly, there was a sense from Government when the bill was being drafted that on 30 June, most things would be back to business as usual. It is now clear that many sectors will not even be partially open for business again by that deadline […] Rather than having to spend time on a statutory instrument in only two or three weeks' time, ministers could and should take the opportunity to get this done today by agreeing to our amendment.[86]

Regarding amendment 2, to extend the moratorium for small businesses from 20 days to 30 days for businesses facing insolvency, Lucy Powell observed that the Federation of Small Businesses had called on the Government to extend the moratorium period for small businesses because it did not believe that the 20-day period in the bill was sufficient. She said her party backed such calls. Noting a further Labour amendment not selected for debate concerning the powers of the small business commissioner (new clause 2), she said her party would seek to return to the issue in the House of Lords.

On the subject of restructuring, Lucy Powell said several Labour amendments were also aimed at "a number of omissions from the 2018 consultation", particularly concerning corporate responsibility.[87] Other measures sought to safeguard funds for unsecured creditors, protect pension schemes, and protect employees by giving trade unions a voice in any restructuring plans. In addition, on the subject of new clause 1, which would have required 30% of the proceeds from the sale of assets of businesses in administration or liquidation to be ring-fenced for payments to unsecured creditors, she said it explored a way for unsecured creditors to be guaranteed some assets so that they do not miss out. Further, she argued new clause 4, about making pension scheme deficits a priority creditor, could

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[84] House of Commons, *Committee of the Whole House Amendments as at 3 June 2020*, 3 June 2020.

[85] ibid.

[86] HC *Hansard*, 3 June 2020, col 961.

[87] ibid, col 962.

make employees' votes count and offer them some protection. Finally, on new clause 5, concerning mandatory discussion with trade union representatives, Lucy Powell contended US evidence demonstrated that restructuring plans often hit employees hardest, with wages reduced and employment terms changed. Arguing that the Government would not wish this as an "unintended consequence" of the bill, she said that Labour's amendment would help to prevent against it.[88]

Liberal Democrat amendments

- **New clause 6**: would have terminated the free-standing moratorium provision for Great Britain on 30 September 2020, subject to temporary renewal for up to one year.
- **New clause 7**: would have terminated the free-standing moratorium provision for Northern Ireland on 30 September 2020, subject to temporary renewal for up to one year.
- **New clause 8**: would have terminated the new restructuring plan provisions on 30 September 2020, subject to temporary renewal for up to one year.
- **New clause 9**: would have terminated the widening of ipso facto (termination) clauses in supply contracts on 30 September 2020, subject to temporary renewal for up to one year.
- **Amendment 13**: would have allowed the secretary of state to make consequential, incidental or supplementary or transitional provision or savings in connection with NC6, NC7, NC8 and NC9.
- **Amendment 14**: consequential amendment to clarify the temporary nature of the bill's provisions.

Speaking to her party's amendments, Sarah Olney (Liberal Democrat MP for Richmond Park) said that the Liberal Democrats supported the temporary measures in the bill. However, she also said that support was contingent on them being temporary measures. She said the Liberal Democrats opposed the "bundling into the legislation" permanent changes to insolvency and corporate governance processes, arguing such permanent changes should be subject to a greater level of scrutiny and debate.[89] Therefore, Liberal Democrat amendment 14 would have put all such changes on a temporary footing, able to be renewed, but also allowing the proposed permanent measures to be reintroduced to Parliament at such time when they could be given more consideration.

Sarah Olney added her party was concerned by the ipso facto clause. These clauses can be triggered if an insolvency effectively ends a contract to supply. She argued this transferred the risk from a business to its suppliers. She argued it was "unethical" to require that a supplier continue to provide services in circumstances where they cannot withdraw to secure their own financial viability. This provision would, she argued, have a particularly detrimental impact on small suppliers.[90]

> The Government also intends to put forward a further consultation on audit and corporate governance reform, taking into account the recommendations of three independent reviews of audit, the views of the Business, Energy and Industrial Strategy Committee and a recent industry development, so we do not believe that a separate review is necessary.[91]

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[88] HC *Hansard*, 3 June 2020, cols 962–3.

[89] ibid, col 970.

[90] ibid.

[91] ibid.