

# PROPOSALS FOR A RESTRUCTURING MORATORIUM

**Summary of Responses**

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## **Introduction**

- 1. Forty-two businesses, individuals, and representative bodies responded to the consultation. A full list of respondents is attached at the end of this document.**
- 2. The purpose of this document is to provide a high level overview of the main points raised by stakeholders as part of the consultation. Given the large volume of responses received, it has not been possible to include in this summary every point raised, or to mention every respondent who raised each issue. For more detail, including individual respondents' views and greater discussion of the issues, we are publishing in parallel with this summary all the non-confidential responses received. These can be found on the insolvency service website ([www.insolvency.gov.uk](http://www.insolvency.gov.uk)).**

## **Proposals for a Restructuring Moratorium:**

### **Executive Summary/General Comments**

3. **In July 2010, the Government consulted on a number of proposals for strengthening the framework for company rescue, through extending the option of a moratorium for companies that need to restructure their debts.**
4. Responses were mixed as to whether there was a need for a new moratorium to assist in company rescue. It is generally felt that the existing UK insolvency framework is coping and adapting well to the challenges that the current round of restructurings are posing, and the urgency of the case for introducing a new moratorium is not fully made out. However, economic data suggests that the original drivers for change are still valid, in terms of the large amount of debt that will need to be repaid or restructured in the coming years.
5. Stakeholders suggest that although the basic proposal is welcome, more specific detail was needed on the workings of the proposed restructuring moratorium, and how such legislation might be framed.
6. This summary (and attached responses) is therefore intended to generate discussion so that the areas that are felt to be in need of development, particularly those where opinions diverge, can be further explored.
7. More work is needed to identify the specific costs and benefits of the proposals. Stakeholders found it difficult to quantify the specific benefits of the moratorium, although they felt that there would be some benefit, and considered that the costs could be higher than initially envisaged, particularly those associated with the monitor role.
8. With regard to the qualifying tests, these need to be framed so that the criteria are transparent and easy to implement whilst also protecting the interests of creditors. At the same time they should not put a burden on the company to show a level of creditor support that will require an actual restructuring proposal to be put forth.
9. Stakeholders felt more detail was required in relation to both qualifying conditions.
10. More clarity is required about the role of the monitor. Stakeholders questioned what the role should be and whether there would be greater benefits if it had more power than that proposed, although it was recognised that this would have associated cost implications. Questions were raised as to whether the monitor role would be detrimental to the purpose of the moratorium, or whether it would be sufficiently helpful to justify the cost.

11. Creditor protection is very important to stakeholders, and there was clear recognition of the importance of the courts in overseeing this. A related concern was with regard to debts incurred during the moratorium and whether they should have priority status in a subsequent insolvency procedure. Various suggestions were put forward on this point by stakeholders.
12. Associated issues raised by stakeholders were ipso facto provisions, whereby suppliers can invoke contract termination clauses on the onset of insolvency (which would most likely include the granting of a restructuring moratorium) and international recognition, as most large scale restructurings have an international dimension, where co-operation between courts and officeholders is a necessity. Both are complex areas which will require careful consideration.

## **Summary of Consultation Responses**

### **Q1 : Do you agree with the expected costs and benefits of the proposals, as set out in the Impact Assessment? Are there other benefits or costs that you believe should also be considered?**

13. Whilst four respondents felt that the costs and benefits were broadly correct, the majority felt that the costs had been understated.
14. The consultation document estimated that 5-15 companies per year would use the moratorium. Two respondents thought it would be fewer whilst six thought more would use it. Based on the low numbers and low benefits, the need for a moratorium was questioned by several respondents. A couple of respondents expected a greater number to benefit from being able to use the threat of a moratorium without actually applying for one.

### **Estimated Benefits**

15. None of the respondents provided quantified benefits and given the additional costs suggested by the majority of respondents, the benefits of the moratorium were questioned. Two respondents felt that it was reasonable to presume there would be some cost benefit, particularly if the moratorium was used earlier in the restructuring process to negate the need for standstill negotiations. One respondent thought there would be a benefit but not necessarily a cost saving.
16. Other benefits mentioned were that the moratorium would discourage vulture funds from buying into distressed companies to disrupt restructuring negotiations or that it would prevent lenders or creditors, owed relatively small sums, from taking enforcement action or issuing proceedings against the company which may prevent a proposal being put forward for the benefit of all creditors.
17. Whilst a moratorium might benefit a company by reducing the time needed to restructure, three respondents felt that a moratorium would not achieve a time saving and may in fact prolong negotiations and that any benefit might be eroded by extensions of the moratorium.
18. It was felt that any benefit would be limited unless the issue of termination clauses was addressed, to ensure continued provision of goods and services during the moratorium (this issue is dealt with separately at the end of the document).

### **Estimated costs**

19. The consultation document estimated that the initial report to court would be in the range £6K to £50K. Eight respondents suggested figures, which ranged from £40K up to £1m.

20. The estimate suggested for the monitor costs covering 60 to 120 days was £35K to £150K. Responses ranged from £150K to £1.8m although this varied greatly depending on the envisaged role of the monitor which most respondents felt should be more enhanced.
21. Several respondents suggested the ongoing monitoring costs would be an issue. AFME suggested that the ongoing costs could be capped, but they acknowledged this could limit the availability of suitable monitors.
22. The consultation document estimated court costs at £5K to £300K. Only two respondents suggested alternative figures and those ranged from £100K to £600K, to include counsel fees, particularly if there was opposition to the application or extension of the moratorium.

### Potential Additional Costs

23. Familiarisation and industry costs; prospective lenders will need to review their standard forms to ensure that the moratorium procedure is adequately covered. Regulatory bodies will have to review their procedures and legal opinions will be required until a body of case law emerges.
24. Six respondents were concerned about the repricing of risk and the effect on the cost of finance.
25. ILA considered that the moratorium process could result in three contested court hearings to a rescue process (which would mean potentially five hearings in the case of a scheme of arrangement). It will impact not only on the costs of the restructuring, but also on court resources.
26. ICAEW and AFME made similar points; costs would arise as a result the delay whilst the directors determine whether to apply for a moratorium, rather than spending that time getting a scheme of arrangement, especially if they are then ineligible for a moratorium and/or it is too late to implement a scheme of arrangement, (or Administration or CVA). There is also a risk that this sort of scenario could lead to the erosion of assets.

**Q2 : Do you agree that in order to help safeguard creditors' rights, a company should not be eligible for a moratorium if there is an outstanding petition for winding-up unless it has a statutory compromise proposal (a scheme of arrangement or CVA) that it is ready to put to creditors?**

27. 11 respondents considered this proposal would increase the risk that creditors would petition earlier to frustrate the moratorium whereas four respondents thought the company might make a proposal to avoid a winding up petition.

28. Overall, 12 respondents felt this condition was appropriate but 21 did not, with most of those commenting specifically that it should be judged on a case by case basis.
29. How this might work in practice would certainly involve the court deciding. The proposal takes no account of disputed petitions and perhaps the petition and moratorium application could be heard at the same time. Suggestions included that the petitioner should argue why a winding up would be preferable, that the monitor could report on comparative outcomes, that the court could deal with both matters in the same way it currently handles a petition and application for administration.
30. BBA thought the proposal should be the default position, but that there should be an exception mechanism for the company to appeal on the basis that a moratorium would preserve value for the greater good.
31. CLLS Law suggested that the test might be whether the moratorium would have an unfairly prejudicial effect on the petitioning creditor. If so, the court could be required not to approve the moratorium and instead to place the company into liquidation. Otherwise the court could approve the moratorium notwithstanding the petition.

**Q3 : At the pre-proposal stage, do you agree that the two proposed qualifying conditions provide the right balance in ensuring that a moratorium is only available to companies where the core business is viable but there is nevertheless a need to restructure their debts?**

32. All stakeholders agreed on the need for qualifying tests in order for the moratorium to be available to those companies that are viable and in need of restructuring. It was noted that these are the sort of factors parties consider when a contractual standstill agreement is being considered. However, there were differences of opinion in the framing of those tests and the criteria used to satisfy the tests. The framing of the qualifying conditions will determine how useful the moratorium is and how many companies apply for it.
33. Most respondents wanted greater detail and guidance on how any proposed legislation would frame the two qualifying conditions and/or what evidence the courts will need to apply them.

'Reasonable prospect'

34. Some respondents (CLLS – Law and Financial, BBA, RBS, LMA, City Law firms) wanted clearer guidance on what is meant by support “in principle” from its most senior secured creditors. They wanted detail on what level of commitment would be required and from what percentage of creditors, whilst recognising that this is one of the most difficult aspects of a restructuring. Various figures were suggested, 75%, two thirds in value (used in inter-creditor agreements – RBS). Another suggestion was to

obtain the consent of all those with an economic interest in the restructuring, however the basis for valuation would need to be determined.

35. However, it was recognised that all these approaches take time and add cost to the application, making the benefits of the moratorium less attractive.
36. It was also acknowledged that if the evidence requires extensive pre-moratorium negotiations with a wide section of creditors, this will advertise the company's difficulties at an earlier stage than desired and may enable some creditors to pre-empt the moratorium, or due to the consensus required, make the process redundant.
37. R3 suggested an alternative test of 'a reasonable prospect that a compromise or agreement can be formulated (or has already been formulated) that can be put to creditors for consideration'. They do not believe that it should be a qualifying condition for entering the moratorium that views of creditors have already been canvassed or indeed, that it is reasonable to expect directors or the monitor to predict that creditors will vote in favour.
38. GE Capital suggested that a company must be able to show that its plan for a compromise or arrangement is based on reasonable forecasts and appropriate methodology. They believe it is much easier for an appointed monitor to support such a statement.
39. AFME suggested that the court be given a wide discretion to determine, based on the facts and circumstances of a particular application, whether the tests have been met, counter balanced by the creditors having a right of notice and a chance to object to the application.
40. ILA were concerned that the test put greater responsibility on the monitor or company's financial advisor and that it might result in something similar to the pre enterprise act administration 2.2 report and the associated concerns over the length of that report and its costs.
41. The British Property Federation and had concerns over the qualifying tests and whether creditors could realistically object to the conditions at the court hearing. They also had deep concerns with regard to the effects of the moratorium and the security provided to landlords viz a viz administration, ref. Goldacre <sup>1</sup>case. This was also mentioned by representatives of Grosvenor.

#### 'Sufficient funds'

42. All respondents recognised the need to demonstrate funding and that without this, the company could not operate. However, there were

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<sup>1</sup> Goldacre (Offices) Limited v Nortel Networks UK Limited (in administration) [2009] EWCH (Ch) (Goldacre)

concerns about how the funding would be arranged and how it would rank in terms of priority with other debt.

43. It was also suggested that if this condition was not satisfied, there is a risk that the directors could be liable to fraudulent/wrongful trading actions.
44. CLLS and others wanted to know whether sufficient funds included provision for non-trading debts incurred during the moratorium, including scheduled interest, rental payments under a lease, amortisation payments and costs of redundancy and pensions contribution notices. Therefore clarity is needed on whether it is sufficient funds on a going-concern basis or also sufficient funds to meet accelerated payments as well.
45. R3 suggested that the second qualifying condition should not be just that the company is likely to have sufficient funds to carry on business, but also that the moratorium 'will be beneficial to or will not prejudice the interests of all the unsecured creditors as a class'. They gave the practice direction on validation orders as a pointer in this respect.

**Q4 : Where a company has a proposal for a CVA or scheme of arrangement and wishes to apply for a moratorium (or extend the existing moratorium), do you agree that provided the existing statutory conditions are met the only additional qualifying condition that should apply is that the company is likely to have sufficient funds to carry on its business?**

46. The majority of respondents agreed with the suggestion that where a company has a proposal for a CVA or a scheme of arrangement and is applying for a moratorium, then providing the existing statutory conditions are met, the only additional qualifying condition that should apply is that the company is likely to have sufficient funds to carry on its business. However, this was dependent on the criteria for sufficient funds being clearly defined (see comments in relation to 'sufficient funds' at Q3 above).
47. It was also mentioned that the position would be different if the monitor disagreed with the proposed nominee, in which case the court would have to be satisfied that the CVA proposal had a reasonable prospect of being approved and implemented (Linklaters).
48. Two respondents believe that more stringent tests are still required, as creditor interests could be prejudiced and it should be shown that the proposal is viable. The BBA also mentioned that while a 3 month moratorium might be appropriate in a pre-proposal scenario, if a company needs protection only prior to the formal approval stage, then a much shorter moratorium period would be appropriate.
49. A couple of respondents (CMS Cameron Mckenna, BPF and AFME) believe it would be simpler to keep the qualifying conditions consistent for all initial moratorium applications. The cost savings of dropping the first

condition will be marginal (as it has to be satisfied for the purposes of a CVA anyway).

50. It was mentioned by some respondents that the position in a scheme of arrangement is different to that of a CVA, in that there is currently no equivalent independent assessment of the merits of a scheme of arrangement before it is sent to the relevant creditors. However, it was felt it would be very unlikely that a company would proceed with an application for a moratorium or extension of such for a scheme, unless the directors believed that there was a reasonable prospect of success, as this would result in a huge waste of costs and could result in claims for wrongful trading or breach of duty.
51. DETINI believe it would be more straightforward and simpler to make the moratorium under Schedule A1 available to all companies, and provide for Part 26 of the CA2006 to have a moratorium available in debt restructurings.

**Q5 : Do you agree that any extension of the moratorium during the period when a compromise proposal is still being negotiated should require a further court hearing?**

52. The vast majority of respondents believed that the court should grant any extension of a moratorium, believing this to be very important in protecting creditor interests, alleviating the scope of any potential abuse by directors and providing checks and balances on the whole procedure. This was considered overall the safest option. It would also hopefully result in helping set guidance and precedents.
53. However, it was acknowledged that this all depended on court time being available. Would courts be able to list applications in time? The analogy with extensions for administration applications was mentioned, and how difficult it can be to obtain hearings in a timely manner. If this was the case, would the directors have to decide early on into the moratorium period to apply for an extension, expending effort away from the main purpose of the moratorium, of coming to a successful restructuring.
54. Respondents highlighted the potential for court costs to be high if objections were made.
55. CLLS Law suggested that where possible, the same judge that heard the original moratorium application should hear the extension application, as this would provide continuity and cost efficiency.
56. DETINI mentioned that the directors should provide an account of trading during the moratorium at any extension hearing, to show no large debts being built up.

57. Other alternatives to a court hearing (which would add to the costs) were also suggested by some respondents.
58. Deloitte suggested that the company should produce a document setting out the commercial rationale for an extension and show that the qualifying conditions still exist. Provided this is the case, then the maximum extension would be for two months and then if a further extension was required, a court hearing would be required.
59. BVCA, ABI and ABFA all suggested that the monitor should decide whether an extension to the moratorium should be granted. This would save the potential high costs of a court hearing.
60. Some respondents mentioned that a lot of the complex restructurings will often take longer than 3 months and therefore extensions will be required in more than a minority of occasions. Given this position, and in order to minimise unnecessary costs and to avoid unnecessary court applications, it was suggested that the extension be automatic unless opposed by an agreed percentage of creditors (suggestions included 10%, 25%), in which case a court hearing would be required. (Linklaters, CLLS Financial, ILA).

**Q6 : We would welcome views on whether an additional court hearing should be required for the extension of a moratorium to cover the formal approval of a CVA proposal.**

61. Views were split on whether to have an additional court hearing for the extension of a moratorium to cover the formal approval of a CVA proposal.
62. 13 respondents believed that a court hearing was necessary both for consistency purposes and believing that the application could be swift with not too much additional cost.
63. 16 respondents thought an additional court hearing was not needed as it would result in unnecessary added costs. Various provisos were mentioned such as the CVA or scheme of arrangement not compromising moratorium debts, as long as the CVA proposals and notice of meeting had been sent to creditors, and that the monitor agreed with the nominee that the conditions for a CVA were in place.

**Q7 : Do you agree that the proposed role of the monitor, together with the rights of creditors and the obligations on the directors, strikes the right balance in safeguarding the interests of creditors and deterring abuse, without imposing disproportionate costs or impeding the objectives of the moratorium?**

Who should act as monitor?

64. Whilst a few respondents agreed with the proposal of an insolvency practitioner acting as a monitor, the majority queried this, with a few

suggesting that it should not be an IP and several suggesting it should not be limited to just IPs and should include corporate rescue professionals, not only because of their experience, but also because it might carry less stigma.

65. The BBA suggested a pre-approved official list of suitable people, reviewed annually. AFME suggested that it should be left to the court to determine if the monitor had the relevant experience.
66. KPMG pointed out that for large companies, the number of sufficiently independent people will be very low which could risk an inappropriate person being appointed and an increased risk of challenge to the appointment.
67. Ashurst commented that the role was high risk but also one that would attract a low fee which might affect the calibre of appointee.

#### Proposed role of the monitor

68. The proposal that the monitor would have no more than seven days to provide a statement confirming that they consider the relevant qualifying conditions are met was felt to be too ambitious. The monitor would not be able to give a statement without for example preparing a cashflow statement and perhaps talking to creditors to form an independent assessment.
69. Regarding accountability of the monitor, suggestions were for the monitor to be accountable to the court, creditors, shareholders and the company and various combinations of those.
70. Many respondents felt the proposed role did not go far enough and acknowledged that an increased role brought with it a significant increase in cost.
71. Linklaters suggested that even if the monitor relied on information provided by the directors, it would still be a very costly role, but it might still be cost effective in larger, more complex restructurings, if the monitor was able to facilitate more effective negotiations between stakeholders and therefore reduce the time stakeholders and their advisers would need to consider the restructuring.
72. Three respondents thought the role of the monitor would be confusing for involved parties, used to dealing with office holders who have responsibility for company affairs. The limits of the role would need to be clearly stated.
73. To ensure the qualifying conditions continued to be met, it was thought the monitor might need a member of staff on site. Ernst & Young suggested that a code of practice could deal with certain matters, for example the extent of enquiries and level of supervision.

74. Other specific powers were suggested: CLLS financial suggested the monitor should have the power to appoint committees, which would be appropriate where different classes of creditor held competing claims. CBI suggested the monitor should have power to apply to court for a winding up order or for administration. Ernst & Young thought the monitor should be able to apply to court for directions, or have powers similar to s235 or s236 of the Insolvency Act 1986.
75. GE Capital felt that termination is only really necessary where the company has not taken any steps to remedy the situation or the situation is not capable of remedy. Rather than the monitor having to immediately withdraw consent and terminate the moratorium, there should be a short opportunity to get the (qualifying conditions and) restructuring back on track. This would also prevent individual creditors from adopting ransom positions.
76. Other concerns raised included how the monitor could decide whether there was still a reasonable prospect of a restructuring if one of the creditors was simply engaged in a tough negotiating strategy; if withdrawal of consent was challenged, would the moratorium continue until the challenge was resolved?

#### Liability of the Monitor

77. The prospect of liability caused concern for the majority of respondents who stated that the role was too high risk given the relative lack of control. Comparisons were made with the moratorium available under Schedule A1 of the Insolvency Act 1986, stating that it was this imbalance of risk and control which had led to the unpopularity of that option.
78. The majority of respondents felt that the monitor should have statutory protection, that their liability should be limited and that they should not be liable for anything done in good faith, (remaining liable for negligence, wilful misconduct, fraud). For anyone able to challenge the monitor, the criteria would have to be clearly set out. It was felt that with the different parties involved in restructurings, all with differing interests, the monitor was in a vulnerable position and subject to challenge for withdrawing consent or failing to. A couple of responses supposed that any risk would be carried into fees making the monitor costs higher than envisaged.
79. ICAEW suggested that the monitor could act under court agreed engagement terms but acknowledged that this approach would carry additional cost. AFME suggested that the monitor's costs of defending any claim should be treated as a priority claim.

#### Role of the Monitor Pre and Post Moratorium

80. It was a key concern that the monitor should not have a conflict of interest.

81. In relation to previous involvement with the company there were suggestions that any connection should be declared or that the monitor should not be the company's financial adviser or anyone involved in satisfying the qualifying conditions. Another thought was that the monitor should not be someone who had carried out an independent business review in the previous 3 years, unless it had been on the instruction of the board.
82. For appointments after the moratorium, eight respondents considered that there should be restrictions, to prevent a monitor being perceived to be influenced by the prospect of a subsequent insolvency that might generate higher fees. Suggestions varied from precluding the monitor and his firm from acting in any subsequent appointments, to precluding the monitor from appointments for three years, to restricting the type of appointment taken.
83. CLLS Financial suggested the court could have discretion whether to make a subsequent appointment, as the potential conflict could be weighed against the likely cost saving of having an office holder appointed who would be familiar with the company's affairs.

#### Risk of Abuse

84. In addition to the majority view that the monitor role does not go far enough, more checks and balances seemed to be preferred. This included being clear on what remedies might be available to a subsequent office holder; having civil and compensatory sanctions against directors in addition to the criminal sanctions proposed and placing the monitor under greater obligations to pay costs, much in the same way as for liquidation, to provide greater security to creditors that the monitor role would not be abused.

#### Alternative Suggestions to the Proposed Role of the Monitor

85. Alix Partners suggested that rather than a monitor, the directors could be overseen by independent board members chosen by creditors. The directors' statement should only be supported if creditors require it, by a suitably qualified individual or firm in whom the directors and creditors have confidence. Qualification will depend on the case; an investment bank, firm of accountants or more specialist firm, likely to be retained by creditors to ensure milestones met.
86. CLLS Law suggested that the monitor should have step-in rights, to increase their role in certain circumstances. R3 suggested that the monitor could act solely as gatekeeper at start of the moratorium process, akin to an expert witness, giving opinion on whether a proposal for an arrangement should be put to creditors for consideration, but having no responsibility for the ongoing conduct of the company's affairs.

#### Creditors' Rights

87. Additional rights for creditors to apply to court were suggested; to be heard on the choice of monitor; to challenge action or inaction of the monitor; to petition for winding up where further indebtedness accrues during the moratorium period or there is evidence of dissipation of company assets; to challenge the actions of an officer of the company where interests have been unfairly prejudiced.
88. BBA, HSBC and RBS suggested that senior lenders and/or any qualifying floating chargeholders should consent to the choice of monitor. RBS suggested various rights that a qualifying floating charge holder should have; to be able to change the directors if the monitor consents, to consent to the moratorium and to consent to any additional funding granted during the moratorium which would affect their standing.
89. The BBA commented that the directors are unlikely to have had experience of restructurings, whereas senior lenders will have.

#### Obligations on directors

90. In addition to there being a specific obligation on the directors to deliver financial information to the monitor, it was felt there should be safeguards against directors providing partial and/or favourable information. Clarification was sought on whether the directors would remain liable for wrongful and fraudulent trading during the moratorium, what actions would be taken where companies repeatedly fell in and out of a moratorium and also how sanctions would be policed and/or enforced.

#### **Q8 : Do you agree with the proposals for treatment of moratorium debts in a subsequent CVA, and in any distribution undertaken in an administration or liquidation that immediately follows a moratorium?**

91. Nearly all the respondents recognised the importance of this issue. A number of respondents (BBA, LMA, and City Law Firms) were very concerned about the effects on secured creditors (possible erosion of the floating charge) and the consequential effects on lending for all companies.
92. However, it was recognised that without continued trading, a company could not undergo a restructuring. But creditors would want to be certain they will get paid if they continue to supply during a moratorium, hence the second qualifying condition.
93. Most respondents said it was important that moratorium debts are limited (and should be the case if the second qualifying condition is adhered to). There was concern that the moratorium debts could get quite large, especially if suppliers' terms are changed due to the existence of a moratorium and the possible withdrawal of trade insurance credit.

94. There was concern over what would constitute a moratorium debt. There were suggestions that they should be limited to perhaps trading debts only. However, some creditor groups would want all debts due in the moratorium period to be included, e.g. dilapidation claims, unpaid rent for the whole lease term, pensions contribution notices, etc. There was concern that if moratorium debts are not defined, there could be a risk of mischief, as creditors alter the timing of due debts to get them into the moratorium period and therefore achieve priority status.
95. There was comment that clarification was needed about bank/revolving credit facilities as set out in common law by the Clayton<sup>2</sup> case. This case ruled that payments are presumed to be appropriated to debts in the order in which the debts are incurred. The suggested proposals could result in having to set up new accounts on the moratorium date.
96. GE Capital suggested a possible solution to the issue of moratorium debts was having a cap/limit on the amount of moratorium debts/new funding that qualifies as priority. This would prevent a large erosion of the floating charge, giving some comfort to secured creditors, whilst also giving some protection to moratorium creditors.
97. Other linked issues mentioned by stakeholders were clarification of the set-off date and how it should be consistent with administration and the work being undertaken by the Financial Markets Law Committee and the Insolvency Service. The set-off date will affect trading during the moratorium and could affect hedging/netting deals, affecting cash flow available to the company during the moratorium.
98. A question was also raised with regard to what would happen to moratorium debts in a subsequent failed scheme of arrangement, as compared to a subsequent insolvency procedure.

### **Other issues raised by respondents:**

#### International Recognition

99. Several respondents commented that without international recognition the moratorium would be of little benefit. Opinions were divided about how to achieve this.
100. The 'recognition' factor of UNCITRAL and being included in Annex A of the ECIR were appealing to some but others considered they may not be suitable. The ECIR for example would restrict proceedings to companies with a UK COMI. Other suggestions were to use the in personam jurisdiction or the 'sufficient connection' test, currently used by non UK companies to get a scheme of arrangement.

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<sup>2</sup> Devaynes v Noble (1816) 1 Mer 572

101. Concern was also raised in respect of multiple proceedings; where a moratorium is granted, what would be the effect of a subsequent main proceeding elsewhere.

Ipsso facto clauses/provisions:

102. A large number of respondents stated that one of the biggest obstacles to a successful restructuring is the rights of suppliers to invoke contract termination clauses on the onset of insolvency (which would most likely include the granting of a restructuring moratorium). Most of the respondents who made this point believe this should not be possible, if the company has continued to meet all its obligations in terms of payment and other contractual obligations. This would give the restructuring company certainty in going forward and stop some suppliers demanding 'ransom' terms for continuing supply.

103. However a counter argument made by some respondents is that this would go against contracts which have been freely entered into by both parties (long history of English contract law) and the increased risks will be factored into the price for all companies, not just those which are insolvent. It could also increase the price of trade credit insurance for all companies.

104. R3 and CLLS recognise that if some action is taken, then an extension of s233 IA86, essential services could be considered. Question of who are essential suppliers, telecom providers, credit card machine providers, intellectual property, software licence providers, etc.

105. We recognise these are complex issues, which will affect all contracts and will carefully consider the points made on this.

## ANNEX – List of Respondents to the Company Moratorium Consultation

1. Alix Partners – Stephen Taylor
2. Ashurst LLP
3. Asset Based Finance Association (ABFA)
4. Association of British Insurers (ABI)
5. Association of Corporate Treasurers (ACT)
6. Association for Financial Markets in Europe (AFME)
7. Atkinson, Nigel (Turnaround Specialist)
8. Baister, Stephen (Chief Bankruptcy Registrar)
9. Begbies Traynor Group Plc
10. Better Capital LLP (Jon Moulton)
11. British Bankers Association (BBA)
12. British Property Federation (BPF)
13. British Venture Capital Association (BVCA)
14. Chartered Accountants Ireland
15. CIFAS – UK's Fraud Prevention Service
16. City of London Law Society (CLLS) – Financial Law Committee
17. City of London Law Society (CLLS) – Insolvency Law Committee
18. CMS Cameron McKenna LLP
19. Confederation of British Industry (CBI)
20. Deloitte LLP
21. Department of Trade and Enterprise, Northern Ireland (DETINI)
22. Ernst & Young LLP
23. GE Capital EMEA
24. Grant Thornton UK LLP
25. HSBC Bank plc (endorsement of BBA response)
26. Insolvency Lawyers' Association (ILA)
27. Insolvency Practitioners Association (IPA)
28. Institute of Chartered Accountants in England and Wales (ICAEW)
29. Institute of Credit Management (ICM)
30. KPMG LLP
31. The Law Society
32. The Law Society of Scotland

33. Linklaters LLP
34. Loan Market Association (LMA)
35. Nabarro LLP (on behalf of Grosvenor – property company)
36. R3 (Association of Business Recovery Professionals)
37. R3 Scottish Technical Committee (STC)
38. Royal Bank of Scotland Plc
39. Squire, Sanders & Dempsey LLP
40. Tods Murray LLP (Dr Hamish A Patrick)
41. Wilton, David (turnaround specialist)
42. Zolfo Cooper LLP