

## The Association of Corporate Treasurers

Comments in response to  
***Proposals for a Restructuring Moratorium***  
**The Insolvency Service consultation**  
July 2010

18 October 2010

### The Association of Corporate Treasurers (ACT)

The ACT is a professional body for those working in corporate treasury, risk and corporate finance. Further information is provided at the back of these comments and on our website [www.treasurers.org](http://www.treasurers.org).

Contact details are also at the back of these comments.

We canvas the opinion of our members through seminars and conferences, our monthly e-newsletter to members and others, *The Treasurer magazine*, and our Policy and Technical Committee.

### General

The ACT welcomes the opportunity to comment on this matter.

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## Response

We are writing to you in response to your request for consultation on the proposals for a Restructuring Moratorium. We welcome the fact that you are addressing the need for a moratorium for larger companies however we believe the practical implications are fraught with difficulty and it is still not clear how it is going to work in practice.

It has long been our belief that the UK insolvency regime is not achieving the aim of creating a 'rescue culture' that actively helps companies to be saved, rather than pushed over the brink into insolvency. We therefore welcome this current attempt to give further help to failing companies that need to restructure in order to survive.

We envisage that the circumstances when a company may wish to invoke the proposed moratorium are relatively limited because of the qualifying conditions but nonetheless the proposals are helpful. For example a company that was struggling to reach agreement on a restructuring but just wanted a little more time might fail the reasonable prospect test, likewise a company getting to within three months of a critical loan repayment might fail the sufficient funds test.

We have answered your consultation questions as follows:

*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?*

We are unable to comment on the expected costs or benefits of a Restructuring Moratorium.

*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?*

We have been advised by members of our larger companies that it is relatively easy to put in place a winding-up petition against a company. Some larger companies are presented with winding-up petitions from very small creditors a number of times a year, which are eventually resolved. The current proposal of ineligibility for moratoriums if there is an outstanding petition for winding-up, does not take into account the current practice that larger companies can be presented with winding-up petitions on a regular basis. However as long as the process for clearing a winding up petition can remain relatively swift we believe this should not be a major impediment to gaining the moratorium.

Alternatively you may like to consider whether it is strictly necessary to have any automatic restriction based on the existence of winding up petitions. Would it not be possible for the court to form a view on whether a winding up petition should be an obstacle or not, with the presumption that it would not be an obstacle?

*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?*

Your two proposed qualifying conditions are:

1. The company must be able to demonstrate that there is a reasonable prospect that a compromise or arrangement can be agreed with its creditors; and
2. The company must be able to show that it is likely to have sufficient funds to carry on its business during the moratorium.

We agree with the spirit of the two qualifying conditions. However the proposal does not provide sufficient detail or define what is “a reasonable prospect” when demonstrating that a compromise or arrangement can be agreed with its creditors.

*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?*

No comment

*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?*

We agree that the extension of a moratorium should require a further court hearing. This would give creditors the chance to voice any objections to such an extension.

*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.*

We believe an additional court hearing provides a further check to ensure that the two qualifying conditions are still in place.

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

We agree with role of the monitor to oversee and protect the rights of the creditors, however he/she also has a responsibility to the company. From a practical perspective it is also difficult to see how this will work. The directors remain in control of the company’s affairs so that the monitor will need to agree with the directors what information is required, and how often it should be provided. Without this control it is difficult to see how the monitor is able to fulfil his/her responsibilities.

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

There is a risk that due to “material adverse change” clauses in contracts, a creditor decides not to continue supplying goods once a company has applied for a moratorium as they risk non-payment of maturing trade credit. Continuity of suppliers is critical for the survival of a business. The super-priority status of debts incurred during a moratorium process goes some way in mitigating the risk of non-payment, however it does not guarantee payment and hence there is a real risk of non-supply of goods. Of course payment in advance gives an alternative protection to on-going trade creditors and this can be allowed for in the forecasts that demonstrate that the company has sufficient funds to carry on its business.

## The Association of Corporate Treasurers

The ACT is the international body for finance professionals working in treasury, risk and corporate finance. Through the ACT we come together as practitioners, technical experts and educators in a range of disciplines that underpin the financial security and prosperity of an organisation.

The ACT defines and promotes best practice in treasury and makes representations to government, regulators and standard setters.

We are also the world's leading examining body for international treasury, providing the widest scope of benchmark qualifications and continuing development through training, conferences and publications, including *The Treasurer* magazine and the annual *Treasurer's Handbook*, and online.

Our 4,000 members work widely in companies of all sizes through industry, commerce professional service firms.

Further information is available on our website (below).

Our policy with regards to policy and technical matters is available at <http://www.treasurers.org/technical/manifesto>

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*The Association of Corporate Treasurers is a company limited by guarantee in England under No. 1445322 at the above address*