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Paul Bannister
Department For Business, Energy & Industrial Strategy

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By e-mail only:- insolvencyandcorporategovernance@beis.gov.uk

Dear Paul

CITY OF LONDON LAW SOCIETY INSOLVENCY LAW COMMITTEE

RESPONSE TO DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY'S INSOLVENCY AND CORPORATE GOVERNANCE CONSULTATION

1. INTRODUCTION

(1) We refer to the Department for Business, Energy & Industrial Strategy's consultation paper entitled "*Insolvency and Corporate Governance*" published in March 2018 (the **Consultation**). This response has been prepared by the City of London Law Society (CLLS) Insolvency Law Committee.

(2) The CLLS represents approximately 17,000 City lawyers, through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

(3) The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. The CLLS Insolvency Law Committee, made up of solicitors who are expert in the field, has prepared the comments below in response to the Consultation. Individuals and firms represented on this Committee are set out in the Appendix.

(4) The CLLS Insolvency Law Committee would be happy to discuss or expand on any of the comments made in this response, if requested.

(5) Before answering the specific questions posed in the Consultation, we set out below in a summary the key conclusions we have reached together with some considerations which apply to all parts of the Consultation equally.

2. SUMMARY

(1) We do consider it important that UK insolvency law should be improved where and when possible and that it should not be allowed to rest on its laurels. On the other hand, we also consider that there should be no rush to judgement when new insolvencies hit the headlines. A number of recent insolvencies in the UK have attracted considerable attention – cases such as BHS and Carillion - but it should be borne in mind that the latter insolvencies have not yet run their course and indeed may be outliers among insolvencies generally. We would caution against implementing reforms without giving detailed consideration to their potential implications for both other complex corporate insolvencies and financing structures generally.

(2) We would also encourage the Insolvency Service, if time and resources are available in relation to the area of insolvency reform, to progress its May 2016 consultation on corporate insolvency (which the CLLS Insolvency Law Committee responded to). We would be concerned if the current Consultation were to divert focus from the significant reforms proposed in the 2016 consultation.

(3) There is a risk that the proposals contained in the current Consultation will give rise to unintended consequences and create legal and commercial uncertainty. Problems – such as conflicts of interest – will arise, creating more difficulties than the issues the proposals are designed to address. In the great majority of instances, remedies are already broadly available on the statute book or at common law. For these (and other) reasons we are not supportive of the proposals regarding sales of companies in distress and value extraction schemes.

(4) We do agree in principle that action should be taken to prevent directors from avoiding liabilities and scrutiny by dissolving their companies. We support the proposal in the Consultation to increase the powers of the Secretary of State. There is still an outstanding question as to how related investigations will be funded.

(5) The key question is why, if legal remedies are already broadly available, there is a perception that they are not being used or that they otherwise lack the necessary “teeth”. This may, in part, be related to difficulties in obtaining the necessary funding, but, with respect to value extraction schemes in particular, there may be ways to tighten – and hence make more effective – existing legislation. We consider that making the subtle, but significant, amendments suggested in our response below would be much preferable to making of dramatic changes with the attendant risks and commercial uncertainty that this entails.

(6) Many sections of the Consultation focus on perceived shortcomings in the conduct of directors of companies. In short, and for the reasons we give, we think production of codes of conduct and good practice guides would be preferable to heavy-handed legislation.

(7) There are also questions relating to the scope of the proposed reforms. It is not clear, for example, whether the proposals in the Consultation are intended to apply only to companies or whether they would also apply to other bodies such as partnerships. Also would the intention be for them to apply to all sectors, including banks, insurance companies and charities?

(8) Even amongst companies, it is not clear from the Consultation whether the reforms are intended to apply to foreign companies, and, if so, which foreign companies. In our view, the Consultation fails to consider the broader implications of the reforms on complex, multinational groups which may have subsidiaries and holding companies in a number of different jurisdictions. How, for example, would the proposal to impose liability on the directors of a parent company when selling an English subsidiary work in practice where the parent is a foreign company (with directors subject to local laws governing their directors' duties)? This is a potentially significant issue, both because groups of companies which include foreign corporations are not uncommon and because the consultation expresses concerns that the proposed provisions should not be open to "easy avoidance" - if foreign companies were to be excluded, for understandable reasons, one unintended consequence might be the development of artificial structures, involving offshore or foreign companies, to avoid the impact of the proposed provisions.

3. SALES OF BUSINESSES IN DISTRESS

Q1. Do you think there is a need to introduce new measures to deal with the situation outlined?

SUMMARY

In short, we do not think that there is a need to introduce new measures. The current framework set out in the Insolvency Act 1986 (the **IA**), the Company Directors Disqualification Act 1986 and the common law governing directors' duties provide a framework that, if used properly, can deal with directors (or shadow directors) who behave improperly and can hold them to account. In addition, the Pensions Act 2004, already creates a specific framework for addressing such issues and the ability to protect the interests of beneficiaries in relation to a defined benefit pension scheme. This has been illustrated by the Pensions Regulator in procuring some financial redress in the case of BHS and settlement with Sir Philip Green. We believe that the risk of unintended consequences with the introduction of the new measures is much greater than the supposed benefits of the reforms.

We also believe that the two fundamental assumptions which appear to underlie the proposed new measure are incorrect. Firstly, it is assumed that the sale of a subsidiary would have adverse consequences for the subsidiary in question, but this is not necessarily the case. The sale itself is neutral for the subsidiary. If there are adverse consequences then these will result from the subsequent actions of the new owner, such as a refusal to provide the same level of financial support as the previous owner. This leads to the second incorrect assumption, namely that, faced with such actions, the subsidiary has a passive role. This is not the case. The subsidiary's directors will need to consider carefully the impact of the sale on the company and its stakeholders. If the directors of an insolvent subsidiary were not satisfied that it had a viable future going forward, and the purchaser was unable to address their concerns, then (whatever the views of the previous owner or the purchaser) those directors would need to consider whether it would be appropriate to initiate formal insolvency proceedings (potentially immediately after the sale was completed).

This leads to a further concern with the proposed new measure, in that it is unclear how it would interact with existing laws and, in particular, the wrongful trading regime under Section 214 IA. Specifically, if liability were to be imposed on the directors of the parent company because it was apparent that the subsidiary's creditors would have been better off, had it entered into a formal insolvency procedure instead, how could the directors of that subsidiary avoid liability, whether under Section 214 IA or their other fiduciary or other statutory duties, if they decided to continue trading, rather than file for insolvency?

The Consultation expresses considerable concern about the current standards of conduct of company directors. Assuming these worries are well founded, it is not going to assist directors to comply with their duties if they are made materially more complex. It would be most unfortunate if, in the face of uncertainty, directors became more inclined to put their companies into a formal insolvency procedure as the least risky option as they perceive it. Germany is a good example in this regard: concerns about personal or even criminal liability often result in the directors of German subsidiaries having to file for insolvency proceedings at an early stage, thus risking a potential rescue of the group as a whole. Formal insolvency invariably diminishes returns to stakeholders and may result in business break-up.

We do however recognise that, currently, not all actions that could be taken against directors are necessarily taken. This is often due to a mixture of lack of funding for officeholders to pursue actions and/or a lack of resources at government level as regards disqualification proceedings. Adding new tools to the existing toolbox will not change the resources available. Given that the Consultation stresses that directors would only suffer penalties in "exceptional situations", we assume that the government's intention would be to rest the burden of proof with the officeholder (although the Consultation does not make this clear). This may be a reason why an officeholder would in any event be more inclined to pursue one of the existing remedies against a director rather than use a new measure.

We further note that if actions at a subsidiary level give rise to potential claims at the parent level (e.g. under the current framework for pensions under the so called "moral hazard" powers or under contractual arrangements, such as guarantees) then the parent company board will already be taking the interests of the subsidiary into account as part of its own decision-making. We wish to emphasise that under the current framework directors of subsidiary companies do need to consider whether there is a reasonable prospect of avoiding an insolvent liquidation and to act to protect the interests of creditors. Further, to the extent that a parent company acts as a shadow director- directing and instructing the subsidiary board - then the current legal regime can hold the parent to account and to make it liable for loss caused.

We also recognise that there are directors who are not sufficiently aware of their duties and may not have the benefit of appropriate legal advice. Rather than introducing more measures that deal with situations after the fact, we would welcome proposals directed to ensuring that directors are better equipped to do their job – and that therefore a positive learning framework is established. As an example, a non-binding best practice guide for directors could be put in place. This could include best practice on a sale of subsidiaries. Such best practice could also include an emphasis on appropriate record keeping: who are the directors of each entity in the group, the details of inter-company loans and guarantees. This would enable directors of each company to have a more informed view of who the relevant stakeholders are for each company and lead to better and more informed decision-making. It may also be appropriate in such guidance to highlight that in certain circumstances a board of directors should give careful consideration as to whether it would be appropriate to have an independent director on the board – one who is not involved in other aspects of the company's parent activities or those of other subsidiaries. In other circumstances it could be appropriate (and the guidance could emphasise this) that a board of a subsidiary company ought to receive independent legal advice in relation to matters such as a sale of its shares.

These suggested measures should make directors feel better equipped to deal with difficult decision-making. It would lead to more deal certainty and a more predictable regime as well as making sure that directors are properly aware of the responsibilities that they are discharging. Please see also our replies on the corporate governance questions below.

CURRENT LEGAL FRAMEWORK

The proposal to make directors of holding companies that have a controlling interest in another large private or unlisted public company liable for losses following a sale of the group subsidiary raises a number of concerns.

Under current law, a director owes his or her duties to the company of which he or she is a director. Section 172 of the Companies Act 2006 (the **CA 2006**) sets out that a "director of a company must act in the way he considers, in good faith, would be the most likely to promote the success of the company for the benefit of its members as a whole". In doing so, a director must have regard to the factors set out in section 172(1)(a) to (f). The CA 2006 then specifically deals with the situation where a company's financial performance has deteriorated and where the directors' attention must shift from the duty to promote the success of the company for the benefit of its members to consider or act in the interests of its creditors (section 172(3)).

The current regime is based on the fundamental tenet of English corporate law that each company has its own legal personality and is separate from other entities of the group. The shift from a focus on its shareholders to a focus on its creditors is long-established at common law and is a key aspect of English insolvency and restructuring law.

The proposal to make a director of a holding company liable for losses incurred by creditors of a subsidiary will be a major inroad into the framework of both corporate and insolvency law. We deal with certain aspects of the proposal here. We also have concerns regarding the conflicts of interest for directors inherent in the proposal and we address those in our answer to Question 2.

DOES THE SALE ITSELF HAVE AN ADVERSE CONSEQUENCE?

The Consultation assumes that a sale of a subsidiary can have adverse consequences on the subsidiary. This is in fact not the case. A sale is neutral for the subsidiary. If there are adverse consequences, then these may stem from the new owner taking the business in a different direction or reduced support which could have an impact on the subsidiary's stakeholders. It is however not the sale as such that has caused any prejudice – it is the actions taken after the sale. We note that items such as the continued financial or other support by a parent company to its subsidiary are not a legal entitlement on the part of the subsidiary and a number of factors will influence a parent company's decision on such continued support. One of these may be that after a sale such support will no longer be provided, but it could equally be that the parent company reviews such provision of support independently of any sale.

RESPONSIBILITY AT SUBSIDIARY LEVEL

We also note that, on a sale, the company that is being sold (the target) will need to be involved to some degree. This brings the target company's own directors into the picture and they will need to consider carefully how the sale impacts the target and its stakeholders. Directors of the subsidiary are responsible for new arrangements after the sale, such as new financing arrangements or new contractual relationships. They will continue to be responsible for making such decisions and assessing whether the continuation of the business is in the best interests of its stakeholders. We would be supportive of a culture of openness whereby a target company's board of directors is encouraged to express concerns where there are any. It will likely be their duty to do so. We note (as mentioned above) that, where directors of a subsidiary are not taking their own decisions and a parent company is effectively taking the decisions on their behalf, a legal framework for holding shadow directors to account already exists and is available in these circumstances.

If there were to be a best practice guide for directors, this guidance could, for example, set out that on any sale the target board should be consulted and that the target board should be reminded to consider the effect of the sale on the target going forward and the factors that directors are to take into account in carrying out their duties and taking decisions, as set out in section 172 of the CA 2006.

JURISDICTION

The Consultation states that it would apply to directors, shadow directors, a person controlling a director and a person connected with a director of a "large" private or unlisted company. Given that large companies tend to be multinational it is unclear to us how the proposed measures would work where there is a foreign holding company or a foreign subsidiary involved. Is it intended that directors of a French holding company could be held to account in the UK should they authorise a sale of an English subsidiary which ultimately turns out to be prejudicial for the creditors of that English subsidiary? This raises difficult questions about how the foreign shareholders could be made accountable, and indeed what standard the directors of those foreign shareholders would be held to. It would be reasonable to anticipate that their local directors' duties (say, to act in the interests of the holding company's stakeholders) will clash with new English law duties to consider the subsidiary's creditors.

VIABILITY OF THE MEASURES

In order to fall outside the scope of the proposed measures, directors of the holding company would need to rely on financial information provided by the purchaser of the subsidiary to assess the future viability of the business following the sale. What level of diligence would need to be required to be taken and who would bear the cost? Where a purchaser was unwilling to share any forecasts with the seller, the directors of the holding company might be more likely to place the subsidiary into an insolvency process as the best way to close off any risk. The holding company might consider a sale of the business (not the corporate entity) to the purchaser but, first, that might not be possible (for example if there are non-transferable licences or other assets) and, secondly, the price may drop, damaging returns to stakeholders.

OPEN TO ABUSE?

As the proposals are currently framed we see the potential for circumventing them whether this is by inserting a solvent subsidiary, using a foreign company structure or devising other artificial structures. While every system can be subject to abuse, in order to make the regime meaningful it would need to be very carefully drafted, making it complex for directors to understand and creating uncertainty for investors. Instead of introducing new legislation we would be supportive of best practice guidance which we consider would be likely to achieve a better outcome without the risk of unintended (but actually quite readily foreseeable) consequences.

Q2. Should the new measures be limited to the sale of a subsidiary or should a new measure extend to any act procured by the parent (through its directors), which operates to the prejudice of the creditors of the subsidiary once that subsidiary is insolvent? Might such measures create material conflicts for directors? If so, how might they be resolved?

ACTS PROCURED BY THE PARENT WHICH OPERATE TO THE PREJUDICE OF THE SUBSIDARY

Given our significant concerns about the proposed measures we strongly believe that widening these to any acts procured by a parent which operate to the prejudice of the subsidiary's creditors would be further damaging. It would cause greater uncertainty for both directors and investors. While we do not believe that new measures as outlined in the proposal are necessary or desirable, if these are limited to a **sale** of a subsidiary, then directors of holding companies would at least know when potential liability could arise. If the measures were widened to acts procured by a parent which are prejudicial it would be sufficiently difficult to know when liability could arise to encourage highly defensive actions by directors and scare off investors. It would not encourage an entrepreneurial approach or culture. We further wish to reiterate that responsibility lies with the directors of the subsidiary, who are responsible for considering whether the continuation of the business, for example, is in the best interests of the subsidiary's stakeholders.

Extending the regime to acts generally could also have the consequence of preventing a parent from ceasing to fund or provide other support to a dying subsidiary, even if it made little commercial sense to continue to provide such funding and continuation of such funding or support was not in the interests of other subsidiaries of the group. As a different example, a parent company may be prevented from placing contracts with other group members if those contracts could instead have been placed with the insolvent subsidiary (even if it made better commercial sense to place the contracts with the other group member). Lastly, extending the proposals in this way could prevent a parent from seeking repayment of an intercompany loan from a subsidiary or from charging for the provision of group services, even if it was contractually permitted to do so; all of which would cause intolerable conflicts of interests for the directors of the holding company.

We do not believe that a framework that is unclear and leaves directors exposed should be introduced. We are concerned that this would significantly hinder entrepreneurialism.

CONFLICTS OF INTEREST

The proposed measures give rise to a number of material conflicts for directors of a parent company if they could be held liable for losses suffered by a group subsidiary following its sale.

Conflicts of interest between parent and subsidiary

First, in a situation where the sale of a loss-making subsidiary is the best course of action for the parent company, but it would not necessarily be in the interests of that subsidiary – which duties would prevail? The duty owed to the parent company and its stakeholders or the duty to protect the creditors of the subsidiary?

This conflict becomes particularly acute if the parent is itself on the verge of insolvency (or would be, but for the proposed sale): how would the directors of the parent be expected to comply with both their statutory and common law duties to stakeholders of the parent and the proposed new obligation to protect the creditors of the subsidiary? This problem is inherent in the proposal.

Conflict of interest between parent and multiple subsidiaries

Secondly, in many large groups a holding company will have several subsidiaries. How are directors of the holding company to deal with a situation where a sale of one of the subsidiaries would be in the best interest of the holding company and the remaining subsidiaries but not necessarily in the best interest of the subsidiary that is sold? The stakeholders of which subsidiary or subsidiaries should be prioritised in this situation?

How might such conflict be resolved? It will be difficult to draft any new measures with the appropriate safeguards and carve outs needed to deal with any conflict that arises while at the same time introducing a clear, meaningful and comprehensible new duty on directors of a holding company.

Any proposals would need to deal with the conflicts situation and as a minimum make clear that in the latter situation the directors should focus solely on protecting their own company's stakeholders. The possibility that the directors of a company facing financial difficulties might be protecting the interests of third parties rather than the interests of their own creditors would undermine a current system which is both certain and reliable for investors. Any change here would go to the heart of creditor confidence and is likely to discourage new investment.

The proposals would also need to contain a defence that if a holding company director acted in the best interests of one of a number of subsidiaries then there would be no liability even if one or more other subsidiaries had suffered loss.

We are concerned that however carefully such a provision is drafted, the result will be material uncertainty for directors and will not lead to the best outcome for subsidiaries, other companies in the group or their respective stakeholders.

Q3. Should the target be the parent company directors responsible for the sale? If not, who else should be targeted; or who in addition?

Given our concerns with the proposed measures expressed above, we consider that there would be even more uncertainty if the measures applied not only to directors of holding companies but also to other people or entities. Any such measures would further conflict with the fundamental principle of corporate law that each company has its own legal personality: for good reason English law does not lightly pierce the corporate veil. If the real thinking behind the proposal is effectively to seek to consolidate the assets and liabilities of groups of companies that is a proposed change in English law of such magnitude that it would require full-scale consultation and a clear proposal. In any event, we would envisage widespread opposition to such a proposal across the range of interested parties. Such a change to the ecosystem of English law cannot, in our view, be justified by reference to the concerns identified in the Consultation.

We further note that the Consultation currently is not clear on whether the proposed measures would apply to directors of immediate holding companies only or whether directors of any ultimate holding companies could be held liable, too. If the proposals extended to indirect subsidiaries, how would responsibility be allocated between the directors of the holding companies at different levels in the corporate group structure?

Q4. How can we ensure that there is no impact on sales which genuinely seek to rescue distressed businesses, or bring new investment into distressed businesses?

We believe that the introduction of the outlined measures would very clearly have an adverse impact on sales which genuinely seek to rescue distressed business and on the availability (and price) of new investment for a distressed business.

We do consider there is a risk of unintended consequences resulting from introduction of the proposed measure. Directors of a holding company may decide that the only way to dispose of a subsidiary while avoiding the risk of future liability is to place the subsidiary into an insolvency process and leave the insolvency officeholder to effect a sale of the business. This may or may not be capable of being achieved as not all the subsidiary's key assets may be capable of being transferred. The fact of formal insolvency may result in loss of confidence in suppliers, customers and important employees. This will be reflected in destruction of the value in the business. Most liabilities will be left behind in the subsidiary and go unpaid or only receive a dividend on their claims in the insolvency process. If the subsidiary had been sold for £1, its new owner might have turned its fortunes around – whether through new investment, synergies with other existing businesses of the buyer or shrewder management – resulting in value preservation/creation and full payment to creditors.

In practice, in most cases the viability of the subsidiary's business plan will be considered (a) by the subsidiary's board of directors in accordance with their legal duties, (b) by the buyer itself when it makes its decision to buy, and (c) by the selling parent's board – say where intercompany obligations remain outstanding or to be performed and/or in light of reputational concerns. And it is a fact of life that, regardless of any amount of testing of a future investor's business plan, some companies will ultimately fail. If the concern is that a material hypothetical buyer may acquire a major concern with material cash flow (notwithstanding that it is making, or is likely to make, losses, has an under-capitalised balance sheet, and has, say, a pension fund deficit) and can cause it to use the cash to pay the buyer unjustifiable dividends, pay its directors excessive remuneration, and pay unjustifiable management fees to the buyer, the existing legal regime has more than enough weapons in its armoury to address such misconduct and clawback ill-gotten gains. We describe these weapons in the next section and suggest a few ways in which they may be made even more effective. But there is no need for entirely new, uncertain laws that may well lead to early, unnecessary insolvencies and consequent value destruction.

4. VALUE EXTRACTION

SUMMARY

The Consultation suggests that "*a new power to challenge value extraction schemes would better enable insolvency office-holders to tackle complex transactions that strip companies of their value prior to an insolvency, or place certain parties in an unfairly advantageous position when assets are distributed after a company has become insolvent.*"

We do not agree with the suggestion that a new power of this type is required as (a) it will create unnecessary uncertainty, which may have wide ranging commercial implications, (b) it is likely to deter the provision of turnaround funding and (c) any potential benefits would be limited by the fact that investors determined to extract value from a company are likely to try to structure around the new power, even if it is "*broadly formulated to prevent easy avoidance.*"

We would instead recommend that the issues identified in the Consultation could be addressed by a number of subtle, but significant, adjustments to existing legislation, which would make it easier for a liquidator or administrator to challenge a commercially unjustifiable transaction where a controlling shareholder or director had extracted value from a company, to the detriment of its creditors. While our proposed adjustments may not appear as radical as the creation of a new power to address value extraction, we consider that they offer a more effective, and less disruptive, solution to the concerns set out in the Consultation if, and to the extent, the existing regime needs improvement. Although of course even these subtle changes would require amendments to primary legislation and therefore any changes contemplated ought to be assessed to ensure that they do in fact constitute a proportionate response to the potentially very rare instances of abuse that may arise in the future.

Q5A. Are new tools needed to enable insolvency office-holders to better tackle this behaviour?

The Consultation highlights "*management fees, excessive interest on loans, charges over company property being granted, excessive director pay or other payments and* sale *and leaseback of assets*" as examples of the types of potentially suspect transaction that the new power could be used to reverse. Transactions such as these can already, depending on the relevant facts, be challenged successfully by an insolvency officeholder using existing statutory antecedent recovery powers.

(9) The payment of a management fee which was commercially unjustifiable, the payment of excessive director remuneration, and the sale and leaseback of assets where the company did not receive proper value, can all be challenged under either section 238 of the IA, as a transaction at an undervalue, or under section 423 IA, as a transaction defrauding creditors, if the relevant statutory conditions are satisfied.[1]

(10) Section 244 IA allows loans bearing excessive rates of interest to be challenged on the basis that they constitute "*extortionate credit transactions*". A loan requiring the payment of

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[1] See, for example, *Re HHO Licensing Ltd* (in Liquidation) [2007] EWHC 2953 (Ch) in relation to excessive management fees

commercially unjustifiable interest rates may also potentially be challenged under section 238 IA, as a transaction at an undervalue, or under section 423 IA, as a transaction defrauding creditors.

(11) The creation of a charge over a company's property may, if the relevant conditions are satisfied, be challenged under section 239 IA, as a preference, under section 423 IA, as a transaction defrauding creditors, or under section 245 IA, if the security included a floating charge.

(12) The existing preference legislation contained in section 239 IA is specifically intended to allow an insolvency officeholder to challenge transactions that "*place certain parties in an unfairly advantageous position when assets are distributed after a company has become insolvent.*"

(13) In addition, the directors of a company in financial difficulties are also required, under section 172(3) of the CA, to consider the interests of the company's creditors before entering into any transaction of this type.

The potential application of existing statutory antecedent recovery powers is highlighted by the example outlined on page 15 of the Consultation, which describes a £20 million secured loan made by an investor at a high rate of interest, such investor also receiving a management fee. As noted above, an insolvency officeholder could potentially use a combination of section 238 IA, section 244 IA and section 423 IA to challenge that series of transactions, if they were considered to extract value excessively, to the detriment of the company's other stakeholders. Action could also be taken against the company's directors for breaching their statutory and fiduciary duties.

It is, in our experience, not the lack of tools which is the problem, but rather the cost and uncertainty surrounding any proceedings that an administrator or liquidator might bring with a view to reversing an antecedent transaction, given that any challenge will inevitably be very fact specific and would therefore involve considerable time and cost.

Q5B. Could existing antecedent recovery powers be expanded to ensure this behaviour is tackled?

There are a number of potential defences under both statute and common law which make it more difficult for an insolvency officeholder to successfully challenge an antecedent transaction. There is a good argument that these are currently tilted too far in favour of the relevant beneficiary and that a number of adjustments could be made, in order to improve the prospects of a successful challenge by an insolvency officeholder. These potential adjustments are described below.

SECTION 238 IA

The key arguments surrounding any challenge under section 238 IA normally concern:

(14) whether the consideration received by the company was significantly less than the value, in money or money's worth, of the consideration provided by the company;

(15) whether the company which entered into the transaction did so in good faith and for the purpose of carrying on its business at a time when there were reasonable grounds for believing that the transaction would benefit the company; and

(16) whether or not the company was unable to pay its debts at the relevant time.

The cumulative effect of these tests is, in some cases, to deter insolvency officeholders in borderline cases from pursuing an action. We believe that such deterrent effect would be reduced if section 238

IA were to be amended, so that there was a (rebuttable) presumption, when considering a transaction entered into with a connected person, that:

(a) the value which the connected person provided to the company was significantly less than the value which they received from the company; and

(b) the transaction was not entered into by the company in good faith and for the purpose of carrying on its business at a time when there were reasonable grounds for believing that the transaction would benefit the company.

The effect of these amendments would be to put the onus on the connected person to justify the relevant transaction and would mirror the approach already adopted in both section 240(2) IA (where there is a rebuttable presumption that a company was unable to pay its debts when entering into a transaction at an undervalue with a connected person) and section 239(6) IA (where there is a rebuttable presumption that a company which preferred a connected person had the necessary desire to prefer).

We would, however, strongly recommend that the proposed new rebuttable presumptions should, in order to reflect the intention underpinning the Consultation, be limited to directors and controlling shareholders, and should not extend to employees (tracking the existing carve-outs in section 239(6) IA and section 240(1)(a) IA), given that ordinary employees would not normally have control over a company's business decisions.

There is an argument that the rebalancing of the existing legislation in favour of an insolvency officeholder could be further assisted if the test of what constituted a "*relevant time*" were to be amended, so as to adopt the approach currently contained in section 245(4) IA (with the company's solvency at the relevant time only providing a defence if the floating charge was created in favour of an unconnected party). We do, however, consider, for the reasons set out in the answer to Question 6B below, that the existing requirement that the company be unable to pay its debts at the relevant time should be retained in all cases, in the interests of commercial certainty.

THE "RELEVANT TIME" TEST FOR SECTION 239 IA

Section 240(2) IA provides that "*where a company enters into a transaction at an undervalue or gives a preference…that time is not a relevant time for the purposes of section 238 or 239 unless the company (a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference, but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company.*"

It is not entirely clear why the burden of proof lies with the insolvency officeholder in the case of an alleged preference under section 239 IA, but with the connected party in the case of an alleged transaction at an undervalue under section 238 IA. It would be more consistent if the same rebuttable presumption, that the company was unable to pay its debts, applied whether a transaction involving a connected person was being challenged under section 238 IA or under section 239 IA.

SECTION 244 IA

Section 244(3) IA provides that a loan is extortionate, and may therefore be successfully challenged, if "*having regard to the risk accepted by the person providing the credit, the terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of the credit.*"

On its face, section 244 IA should provide a remedy where excessive interest is charged, particularly as section 244(3) IA contains a presumption that, unless the contrary is proved, the relevant interest rate was extortionate.

Challenges under this section are, however, relatively unusual, probably because insolvency officeholders and those advising them will typically, when considering what amounts to a "*grossly exorbitant*" payment, look for guidance to Consumer Credit Act cases where the same term is used. These cases normally involve significantly higher interest rates than those which might be considered excessive by a company's creditors.

Existing case law on section 244 IA can also act as a deterrent, with Floyd J in *White v Davenham Trust Ltd* [2] referring to Dyson L.J's view in *Paragon Finance Plc v Nash*[3] (a Consumer Credit Act case) that while "*it may be said that [the interest rates under consideration] were high, even unreasonably high, that is insufficient*."

In order to encourage insolvency officeholders to use section 244 IA, where appropriate, one solution might be to amend this section, so as to:

(17) replace the words "grossly *exorbitant*" with the words "*commercially disproportionate*", at least in the case of payments to connected persons; and

(18) include the following statutory safe harbour, to make it clear that the section is not intended to prevent the directors of a company from borrowing on the best terms that they could find, even if the margin and fees involved might seem excessive:

> "*A payment shall not be treated as being commercially disproportionate for the purposes of this section if it can be shown that the company was unable, within the available timetable, to obtain equivalent funding at a lower rate from other sources and that there were reasonable grounds for believing that borrowing on those terms would benefit the company*."

ADDITIONAL STEPS

In addition to the possible legislative amendments described above, there may be merit in providing guidance to insolvency officeholders, in order to highlight specific transactions that could potentially be caught by existing statutory antecedent recovery powers, with a particular focus on what may be perceived as "problem" issues, such as the giving of guarantees and the payment of dividends.

Q6A. Do you agree the Government should introduce a value extraction scheme reversal power as outlined above?

No. We consider, as explained above, that the legislative tools necessary to deal with the issues identified in the Consultation are already broadly in place and that these could, particularly with the modifications outlined above, be used to successfully challenge the types of unfair value extraction identified in the Consultation. Importantly, the existing provisions are well understood and provide statutory protections for legitimate commercial transactions.

We have identified five main concerns with the proposed value extraction reversal power (in addition to the belief that it is unnecessary) namely that:

(1) It is likely to cast an unwelcome shadow of doubt over bona fide commercial transactions, particularly if it is "*broadly formulated*", contains subjective terms such as "*unfair*" and

[2] [2011] B.C.C 77

[3] [2002] 1 W.L.R.685

"*excessive*",[4] leaves open the question of what constitutes "*value*" for these purposes[5] and leaves much to the discretion of the relevant insolvency officeholder.

(2) As identified in the Consultation, the new power could, particularly if broadly drafted and including subjective tests, deter potential rescuers of companies in financial distress, incentivising them to allow the company to go into an insolvency process and then to buy the business (potentially at a much lower cost) from its administrators or liquidators.

(3) It is unclear how the new power would work alongside existing statutory provisions which, to a large extent, would overlap with it.

(4) The proposed power requires there to have been a "new investment" and proposes a two year lookback period, but it is unclear whether such two year period runs from the date on which the new investment is made, or from the date on which value was extracted. If the former, the investor would be free, as far as this power was concerned, to strip the company of its assets after two years. If the latter, there could be a gap of decades between the investment and the transaction in question, with the result that this power could catch (for example) dividends paid to long standing shareholders.

(5) The underlying policy objective appears confused – why should the new power catch a management fee paid to a new investor who was keen to turn the business around, but not (it appears) catch exactly the same fee paid to an existing shareholder who was not planning to devote anywhere near the same amount of time to the company?

The concerns outlined above can be encapsulated by the example of a new investor agreeing to acquire a majority stake in a distressed company for a nominal amount and to provide a secured loan at a broadly commercial rate, as part of a turnaround strategy. The effect of the security would clearly be to protect the new investor in the event that the rescue failed and the company went into a formal insolvency process, but would this be "*unfair*"? The Consultation suggests, by listing the granting of charges over the company's property as an identified area of concern, that it might be. If so, when would requiring a distressed borrower to provide security for a new loan ever be "*fair*"?

Even if the creation of security was not, in itself, "*unfair*", it appears that there would be a level of interest payment which, while falling short of being "*grossly exorbitant*", would still be "*unfair*". How would this be tested, particularly where no other sources of funding were available? Perhaps more importantly, how could a new investor providing rescue finance ever get comfortable that it would be repaid the amount agreed and that injecting new funding therefore offered it a better commercial return than acquiring the business through a pre-pack insolvency sale?

While the suggested power may have the unintended consequence of deterring a range of new investments, it is unclear whether it would achieve the stated objective of deterring those attempting to extract value unfairly from a company, particularly as the proposed power appears to include loopholes that do not exist under the existing claw-back legislation. Specifically:

(a) If the proposed new power only relates to transactions entered into with connected parties, there would seem to be an obvious risk, particularly as the Consultation focusses on "*complex investment schemes*", that an investor wishing to protect itself from the impact of the new power would (for example):

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4 The Consultation does not state whether any proposed "*unfairness*" test would be similar to section 238(5) IA, protecting bona fide transactions where there were reasonable grounds to believe that they would benefit the relevant company or, if not, how "*unfairness*" would be tested.

5 The text of the Consultation focusses on transactions where an insolvent company" *had value extracted in a transaction or series of transactions designed to the benefit of that investor or those connected to it, without adding value to the company*" but the example provided on page 15 illustrates a case where the company clearly received value, in the form of additional liquidity and, potentially, a chance of survival offered by that financial lifeline.

(i) provide funding via a (non-connected) intermediary and then enter into a separate, back to back, transaction with that intermediary, possibly by means of a credit risk swap or risk participation agreement; or

(ii) advance new funding at a high interest rate, and require the company to pay a significant up-front management fee out of such funding, the transaction being completed on the day before it invested in that company.[6]

(b) The new power appears to apply only where the company in question has received a new investment. What if the investment was instead received by its parent company (which might have been created specifically for these purposes) with the company then guaranteeing its parent's obligations to the new investor?

The proposed two year limit might simply encourage investors, particularly if they have first ranking security over the company's assets and are being paid an above-market rate of return, to do just enough (for example by deferring interest payments in order to assist the company's liquidity position) to keep the company going for two years and a day post-sale.

Q6B. Do you agree that the insolvency test in the current powers is not appropriate in the circumstances outlined above?

There may be circumstances in which it is appropriate to remove the requirement that a company be unable to pay its debts before a transaction with a connected party can be challenged, as illustrated by the "*relevant time*" test currently employed in sections 245(3) and 245(4) IA when considering the validity of certain floating charges.

We do not, however, believe that the removal of the insolvency test in relation to a wider range of transactions would be appropriate, as parties to bona fide commercial transactions often rely on the fact that the relevant company is solvent in order to address any insolvency claw-back concerns. This offers a neat and easily understood solution to what is often a very theoretical concern, given the facts of the transaction in question. The position would become much more difficult if the counterparty had to rely instead on the fact that they were not a connected party, given the scope and complexity of this test.

To take a practical example, a company issuing listed secured bonds would not necessarily know whether any of the new bondholders were connected persons. The relevant prospectus would therefore, if it was not possible to rely on the fact that the issuing company was demonstrably solvent, have to highlight the risk that the structure could potentially be challenged, depending on the composition of the bondholder group (details of which would often not be known by either the issuing company, its advisers or other bondholders). It is difficult to see how this would not have a deterrent effect on some potential investors.

We do, however, believe, as noted in our answer to Question 5B above, that a case can be made for modifying the insolvency test where there has been an alleged preference, so as to put the onus on a connected party to demonstrate that the company was solvent at the relevant time and to bring the section 239 IA "relevant time" test in line with that for section 238 IA.

Q7A. Could the proposal adversely affect the availability of finance for distressed companies?

This will, in part, depend on whether the making of a secured loan constitutes a "*new investment*" or whether the making of an investment also requires the lender to take an equity stake in the relevant

[6] It may be possible to address this risk by providing that any transaction taking place when a new investment was contemplated would also be caught by this power, but this would simply add to the already high levels of unwelcome uncertainty surrounding the scope of this power.

company. If *any* lender is caught, it is difficult to see how the power could fail to have a significant dampening effect on a distressed lending market that is still in the early stages of development, as lenders would face uncertainty as to their eventual return, should they provide funding as part of a failed attempt to turn the company around.

If only funding provided by shareholders were caught, the impact of the power on those providing funding to distressed companies might be more limited, but there will be cases where a company's controlling shareholder is the only realistic source of funds. Assuming that any such shareholder would be reluctant to be make additional funding available unless it was clear that doing so offered it a better overall return than would have been the case had it simply acquired the company's business in a pre-pack sale, the existence of a power which made it more difficult to get comfortable on this point could well encourage it to go down the pre-pack route.

Faced with the uncertainty caused by the new power, it is possible that investors may price the risk of a successful challenge into their investments, with the result that rescue funding could become more expensive for distressed companies. Ironically, this could potentially result in a rate of return which would previously have been viewed as excessive and unfair becoming market standard (because of pricing changes triggered by the power) with the result that such rate of return could no longer be challenged under the new power on the basis that it was "*unfair*".

Q7B. Could the proposal have other adverse effects? If so, how might the proposal be modified to mitigate these effects? Are there any protections that should be given to investors?

Turning to other potential adverse effects, there is, as noted above, a real concern that the introduction of the new, "*broadly formulated"*, provisions incorporating subjective and untested terms would create considerable commercial uncertainty, particularly if much was left to the discretion of the insolvency officeholder. The impact of this uncertainty would be magnified if the provisions were to extend to transactions entered into by solvent companies, as theoretical risks would arise (and would be to be highlighted in fund raising documents) despite the fact that it was clearly never intended that the transaction in question should fall within the scope of statutory antecedent recovery powers.

Such concerns are best mitigated by not pursuing the proposal and instead amending existing legislation in the manner described in the answer to Question 5B above, so as to provide an insolvency officeholder with more effective tools when there is evidence of unfair value extraction.

Q8. How could the proposal be developed to ensure that only those schemes which unfairly extract value and harm the interests of other creditors can be challenged by the insolvency office holder? Should concepts such as "unfair" and "excessive" be defined or left to the courts to develop through case law?

For the reasons outlined above, we consider that, rather than introduce a new provision which (1) overlaps significantly with existing legislation, (2) would inevitably create commercial uncertainty and (3) may well deter new investors, it would be better to amend existing legislation in the manner described in the answer to Question 5B above.

5. DISSOLVED COMPANIES

Q9. Do you agree that there is a problem in this area and that action should be taken to prevent directors from avoiding liabilities and scrutiny by dissolving their companies?

We understand that the Insolvency Service has experienced a problem in some such cases but we are not well placed to judge the scale of the problem. We agree in principle that action should be taken to prevent directors from avoiding liabilities and scrutiny by dissolving their companies. The efficacy of such measures relies heavily upon their having a deterrent effect. *We add the general observation that deterrence depends on the resource available to the relevant authorities to take action in suitable cases and the will to exercise available powers.* In that connection, we note the widespread concern that the present disqualification regime has from time to time been insufficiently funded and the perception that many less serious cases of provable unfitness are not pursued.

Q10. Do you agree that director conduct in a dissolved company should be brought within the scope of the Secretary of State's investigatory powers? Do you have any other comments on the proposal?

Yes. The absence of powers to take action in respect of dissolved companies which are directly comparable to the powers available in the event of liquidation and administration is anomalous. We have further comments in respect of two aspects of the specific proposals advanced in the Consultation:

(6) The paper suggests that the Insolvency Service should have an examination power equivalent to an office-holder's powers under s236. Issues of privilege can arise in connection with the exercise of such powers and we observe that the question of what may reasonably be required of a former director where the Insolvency Service is gathering information with a view to taking action against that former director may not be the same as what may reasonably be required of an examinee in the course of an office-holder's more general investigation into a company's affairs, business and property.

(7) The paper also suggests that the Insolvency Service should have the power to seek an order that former directors financially compensate creditor(s) for losses resulting from their actions. We recognise that, as a result of recent amendments to the Company Directors Disqualification Act 1986 made by the Small Business, Enterprise and Employment Act 2015, hypothecated compensation orders are already possible but we are mindful that the Insolvency Service has stated that there is no intention to usurp the asset recovery role of an office-holder (whose recoveries from former directors would augment the insolvent estate). We also recognise that the case for hypothecated orders is necessarily stronger where there is no office-holder administering an insolvent estate. We nonetheless consider that it should not be assumed that there would always be identifiable creditors who could justly be singled out to be the beneficiaries of a compensation order and that the powers of the court should therefore include the power to restore the company to the register as a company in compulsory liquidation for the purpose of effecting a distribution in accordance with the insolvency scheme.

6. STRENGTHENING CORPORATE GOVERNANCE IN PRE-INSOLVENCY SITUATIONS

Q11. Are stronger corporate governance and transparency measures required in relation to the oversight and control of complex group structures? If so what do you recommend?

We refer to the CLLS Company Law Committee's response to this question.

Q12. What more could be done through a revised Stewardship Code or other means to promote more engaged stewardship of UK companies by their investors, including the active monitoring of risk? Could existing investor initiatives to hold companies to account be strengthened (e.g. through developing the role of the Investor Forum)? Could better arrangements be made to ensure that lessons are learned from large company failings and controversies?

We refer to the CLLS Company Law Committee's response to this question.

Q13. Do you consider reforms are required to the legal, governance and technical framework within which companies determine dividend payments? If so what reforms should be considered? How should they be targeted so as not to discourage investment?

We refer to the CLLS Company Law Committee's response to this question. However, we would add that there are already a number of rules in place that can prevent a company from paying a dividend when it is in financial difficulty, such as a director's duty to promote the success of the company under section 172 of the Companies Act 2006.

In addition to the above, the case of *BTI 2014 LLC* v *Sequana SA* [2016] EWHC 1686 (**Sequana**) established that the payment of a dividend can constitute a transaction at an undervalue for the purposes of section 238 of the Insolvency Act 1986[7]. A successful challenge of a transaction at an undervalue can result in an order requiring any property transferred as part of the transaction to be re-vested in the company, which in the case of a dividend would result in the repayment of the dividend proceeds to the company.

One of the requirements for challenging a transaction at an undervalue is that the company must have been insolvent at the time of the transaction. Section 240(2) of the Insolvency Act 1986 states that, where the relevant transaction was made with a person connected to the company, there will be a presumption that the company was insolvent at the time of the transaction (unless it can be shown otherwise). In many cases it may be relatively straightforward to demonstrate that one of the recipients of the dividend was connected with the company (for example, because a director owns shares in the company and receives the proceeds of the dividend). Accordingly, this provision could be relatively accessible where a company pays a dividend shortly before it enters into an insolvency process.

Therefore, we would stress that, through the Sequana case, English law already allows for the challenge of a dividend paid by a company that later enters into an insolvency process. However, it could be considered whether it might be worthwhile codifying these common law principles under new legislation.

In conclusion, therefore, we would echo the points made in the CLLS Company Law Committee's response to this question in relation to the disclosure of distributable profits and the possibility of introducing a forward-looking solvency test. In addition, we would note that English law already contains common law rules allowing for the challenge of a dividend paid by a company that later enters into an insolvency process, and that it could be considered whether it would be appropriate to codify these rules under statute.

Q14. There are perceptions that some directors may not be fully aware of their duties with regard to commissioning and using professional advice. Do you agree, and if so, how could these be addressed?

We refer to the CLLS Company Law Committee's response to this question. However, we would note further that the directors of a company in financial distress may need to seek professional advice to help them navigate the company's difficulties. We are concerned that any new rules requiring directors to constantly question and challenge experienced professional advisers may make it more difficult for directors to make a decision or may even lead to paralysis amongst the board in distressed contexts. Instead, we would recommend exploring whether it would be possible to produce guidance for directors on when it would be appropriate to rely on or challenge professional advice. This guidance could also remind directors that professional advisers, by virtue of the fact that they are not involved in the day to day management of the company, may lack some key

7 We note that the claim in Sequana was brought under section 423 of the Insolvency Act 1986 (transactions defrauding creditors). However, it is widely considered that, since both sections 423 and 238 refer to "transactions at an undervalue", Sequana establishes that a dividend can be a transaction at an undervalue for the purposes of both sections 423 and 238.

information or insight that the directors will possess, and so the directors are ultimately best placed to make decisions for the company. We would also suggest that this guidance includes a recommendation for companies in financial difficulty to ensure that the board of directors has the necessary skills and expertise to navigate the company's financial difficulty and, if it does not, to appoint new directors with the necessary expertise. However, we would suggest that this takes the form of guidance, rather than new legislation.

Q15. Should Government consider new options to protect payments to SMEs in a supply chain in the event of the insolvency of a large customer? Please detail suggestions you would like to see considered.

We would caution against introducing measures that might have a negative impact on a distressed company's cash position, such as those highlighted in the Consultation at page 33. This is because, when a company is experiencing financial difficulty, effective cash management can be the difference between survival and insolvency. Accordingly, at best, the company may avoid making payments into Project Bank Accounts in order to save cash and, at worst, such payments may hasten its insolvency – which would be a worse outcome for all stakeholders, including small suppliers. Therefore, we consider that specific legislation aimed at protecting payments to small suppliers may have the effect of increasing the number of corporate insolvencies, which would be the opposite of the overall intention of the Consultation.

Similarly, a measure aimed at protecting payments to small suppliers at the expense of other creditors may have an adverse impact on the provision of rescue finance. This is because providers of rescue finance are only likely to do so if they can be given an acceptable level of certainty that their investments will be protected. These measures would erode some of that certainty, which may result in a general increase in the cost of rescue finance or even an overall decrease in investors' willingness to provide rescue finance. Therefore, these measures risk creating unintended consequences which run counter to the overall aim of the Consultation.

Instead, we would suggest introducing measures that build on the Payment Practices and Performance Reporting (PPR) requirements, which are aimed at increasing transparency and awareness of payment terms amongst suppliers and customers alike. We feel that it could also be considered whether large companies should be required to provide similar information to that contained in the PPR in their annual accounts. Similarly, we would suggest that small suppliers are made aware of service providers like Experian or Dun & Bradstreet, which can provide credit reports and other commercial data and analysis that can assist suppliers with due diligence before entering into an arrangement with a large customer. These measures could be coupled with improved guidance for small suppliers to ensure that they are aware of the various opportunities for them to learn more about their potential customers.

We consider that measures aimed at increasing transparency and disclosure should help to ensure that small suppliers are better informed, which may help them manage risk and increase their ability to protect themselves. This would address the concerns highlighted in the Consultation without giving rise to the unintended consequences outlined above.

Q16. Should Government consider removing or increasing the current £600,000 cap on the proportion of funds that can be ring-fenced and paid over to unsecured creditors (the prescribed part) or enabling a higher cap in larger insolvencies? What would be the impact of increasing the prescribed part?

We note that the origin of the prescribed part comes from the 1982 Cork Committee review on insolvency law, which recommended that 10% of the net proceeds of assets subject to a floating charge should be required to be surrendered to constitute a fund available to ordinary unsecured creditors. Whilst this recommendation was not adopted at the time, it resurfaced later in the form of the prescribed part under section 176A of the Insolvency Act 1986 (which was inserted by the Enterprise Act 2002 and which came into force in September 2003). The current £600,000 cap on the prescribed part has been in force since the introduction of the prescribed part in 2003.

We also note that the introduction of the prescribed part coincided with the abolition of Crown preference. At the time, part of the justification for the prescribed part was that it was felt that the benefit of the abolition of Crown preference should go to unsecured creditors rather than floating charge holders.

Since the cap on the prescribed part is already nearly 15 years old, we consider that there could be some justification in increasing the cap above £600,000, possibly on the basis of inflation since its introduction in 2003. However, we would caution that further analysis and consultation would be necessary before doing so. This is because an increase in the cap on the prescribed part might lead to a reduction in lending, higher interest rates or a reduction in the use of the floating charge, which might be harmful to smaller business in particular. Furthermore, we note that it is common for a charge purporting to be a fixed charge to actually be held to be a floating charge (see for example *Ashborder BV* v *Green Gas Power Ltd* [2004] EWHC 1517 (Ch)). Accordingly, the impact of an increase of the cap on the prescribed part and its corresponding impact on floating charge holders may be even greater than initially foreseen or intended.

Q17. Is the current corporate governance framework in the UK, particularly in relation to companies approaching insolvency providing the right combination of high standards and low burdens? Apart from the issues raised specifically in this consultation document, can you suggest any other areas where improvements might be considered?

We refer to the CLLS Company Law Committee's response to this question.

In addition, we note that the UK has always prided itself on having an effective and efficient insolvency regime that facilitates overseas investment in the UK. However, several EU states are currently changing and developing their own insolvency regimes, and there remains the threat that many companies would prefer to restructure their business under the US Chapter 11 rules rather than in the UK. Accordingly, we would caution that, unless proposals for reform are considered extensively and holistically, there is a danger that the UK could lose out to the US and the EU. We believe that this Consultation, along with the May 2016 consultation on the UK insolvency regime, should be used as an opportunity to improve the UK insolvency regime. In particular, we note that Brexit could provide an opportunity for the UK to cherry pick the best aspects of the US and EU regimes, without being subject to the EU harmonisation regime.

Finally, I would like to thank you for the extension of time granted in which to submit this response; the committee and I are very appreciative.

Yours sincerely

Jennifer Marshall
Chair, Insolvency Law committee
City of London Law Society

APPENDIX

Ms Jennifer Marshall (Allen & Overy LLP)(Chair)
Ms C. Balmond (Freshfields Bruckhaus Deringer LLP) (Deputy Chair)
H.Anderson (Norton Rose Fulbright LLP)
J. Bannister (Hogan Lovells International LLP)
G. Boothman (Ashurst LLP)
A.Cohen (Clifford Chance LLP)
S. Frith (Stephenson Harwood LLP)
I. Johnson (Slaughter and May)
B. Klinger (Brown Rudnick LLP)
B. Larkin (Jones Day LLP)
D. McCahill (Skadden Arps Slate Meagher & Flom (UK) LLP)
R.Miller (Simmons & Simmons LLP)
B. Nurse (Dentons UKMEA LLP)
K. Pullen (Herbert Smith Freehills LLP)
J.H.D. Roome (Akin Gump Strauss Hauer & Feld LLP)
P. Wiltshire (CMS Cameron McKenna Nabarro Olswang LLP)
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