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RESPONSE TO HM REVENUE & CUSTOMS' PROTECTING YOUR TAXES INSOLVENCY CONSULTATION

1 INTRODUCTION

1.1 We refer to HM Revenue & Customs' consultation paper *Protecting your taxes in insolvency* published on 26 February 2019 (the Consultation). This response has been prepared by the City of London Law Society Insolvency Law Committee.

1.2 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.

1.3 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.

1.4 The Committee would be happy to discuss or expand on any of the comments made in this response, if requested.

1.5 Before answering the specific questions posed in the Consultation in Part 5 of this response, we set out in Part 2 a summary of the key conclusions we have reached and, in Parts 3 and 4, some observations on the underlying policy which are logically anterior to the answers to the specific questions.

2 SUMMARY

2.1 We do not think that a convincing case has been made out for the conversion of PAYE and VAT debts (or the analogous tax debts mentioned in the Consultation)[1] into preferential debt.

2.2 We consider that reintroduction of preferential status for any Crown creditor claims is a retrograde step which is incompatible with other Government policy and may damage the perception of UK insolvency law in World Bank rankings.

2.3 We question the extent to which the estimated yield from the planned measure (£185m per annum) takes into account lost Government revenue resulting from:

(a) other taxpayers suffering additional bad debts due to the priority payment of HMRC;

(b) the consequential loss to the wider economy resulting other taxpayers themselves becoming insolvent due to an increased burden of bad debt; and

[1] We refer only to PAYE and VAT for convenience because we do not perceive the other tax claims (and analogous deductions) to raise any different issues of principle.

(c) other creditors achieving priority to HMRC's preferential claim through increased recourse to fixed charge and asset based lending.

2.4 We anticipate some damage to administration as a corporate insolvency procedure resulting from an increased use of fixed charge and asset based lending.

2.5 We anticipate the reduced use of voluntary arrangements because of the significance of PAYE and VAT liabilities and the inability of those procedures to alter the priority of preferential debt without the consent of the preferential creditor.

2.6 We question the conclusion in the Consultation that the proposed measure will have no material impact on lending.

2.7 If the Government is minded to prioritise its claims for PAYE and VAT despite any representations by ourselves and others, we consider that the adoption of secondary or tertiary preferential creditor status for such claims to be the only viable option.

2.8 We suggest that any move to secondary or tertiary preferential creditor status for PAYE and VAT should preserve the priority of pre-existing floating charges and be limited in amount by reference to a period (or periods) prior to the commencement of insolvency proceedings.

3 THE POLICY OF ELEVATING THE PRIORITY OF CERTAIN TAX DEBTS IN INSOLVENCY

a. The justification for the policy

3.1 Without prior consultation, the Government announced at the Autumn Budget 2018 that it would introduce legislation to make HMRC a secondary preferential creditor for certain tax claims. The accompanying Budget Brief published by HM Treasury on 29 October 2018 elaborated:

"Taxes paid by employees and customers do not always go to funding public services if the business temporarily holding them goes into insolvency before passing them on to HMRC. Instead, they often go towards paying off the company's debts to other creditors.

From 6 April 2020, the government will change the rules so that when a *business enters insolvency, more of the taxes paid in good faith by its employees and customers but held in trust by the business go to fund public services as intended, rather than being distributed to other creditors such as financial institutions."*

3.2 As that quotation makes clear, the policy is to shift the burden of bad debt from the Crown to other creditors. It is estimated by HM Treasury and HMRC that the proposed measure will yield £185m per annum. Clearly the additional tax collected will not only be collected at the expense of other creditors but, to the extent that those other creditors are UK taxpayers, it will diminish HMRC receipts from those taxpayers.[2] In answer to a question raised by a member of this Committee, HMRC has confirmed that its estimate of £185m per annum is an estimate of the yield net of reduced tax receipts from other sources but has declined to explain its calculation.[3]

3.3 The statement that the tax claims in question are claims for money held in trust was not only incorrect as a matter of law but also at variance with the position adopted by the Crown in

[2] The Report of the Review Committee, *Insolvency Law and Practice* (Cm 8558, June 1982) considered this point and concluded, at para 1416, that the abolition of Crown preference would be broadly neutral in its effect on Crown revenue.

[3] The Budget Brief appeared to suggest the contrary ie that the figure was gross, not net: *"This will ensure that an extra £185 million in taxes already paid each year reaches the government."*

litigation on the subject.[4] It was moreover not reflective of the way in which such money is understood to be collected and used in the ordinary course of business. In this respect there may nonetheless be a distinction to be drawn between taxes which an employer is required to deduct from payments and VAT which is paid by a customer in addition to the price charged by the supplier. The former are, in substance, little different from assessed taxes because they represent sums which the employer is required to pay out of its own funds whereas the latter can legitimately be characterised as additional receipts accruing by virtue of the supplier's VAT registration. It is nonetheless the case that the supplier is only required to account periodically for its VAT outputs net of its inputs. The analogy with trust money is not sustainable in either case. The question is simply one of where the burden of loss should lie.[5]

3.4 In this connection we note that no other claims based on misappropriation of assets or funds, even claims arising out of theft or breach of an express trust, attract preferential creditor status.

b. The background

3.5 Crown preference was historically an incident of Crown prerogative and, as such, unlimited, but it has been progressively regulated by statute since the Bankruptcy Act 1849. It was the subject of comprehensive review in the Cork Report.[6] The Cork Committee recommended the general abolition of Crown preference but recognised that claims for taxes collected by deduction or charge (e.g PAYE and VAT) were a special case. In the event, the Insolvency Act 1986 abolished Crown preference for assessed taxes but retained preference for PAYE deducted during the 12 months preceding insolvency proceedings and for VAT for the 6 months preceding proceedings.

3.6 Complete abolition of Crown preference resulted from amendment of the Insolvency Act 1986 made by the Enterprise Act 2002. The 2002 reform followed the Department of Trade Industry White Paper *Insolvency - A Second Chance* in which contained the following policy statement:

"*Finally, as an important and integral part of this package of measures, we will proceed with the abolition of Crown preference in all insolvencies. Preferential claims in insolvency originated in the late 19th century, but in recent years the trend in other jurisdictions has been towards restricting or abolishing Crown or State preference as, for instance, in Germany and Australia. We believe that this is more equitable. Where there is no floating charge-holder, the benefit of abolition will be available for the unsecured creditors. Where there is a floating charge-holder (in relation to a floating charge created after the coming into force of the legislation), we would ensure that the benefit of the abolition of preferential status goes to unsecured creditors. We will achieve this through a mechanism that ringfences a proportion of the funds generated by the floating charge.*"[7]

It will be noted that:

(a) Abolition of Crown preference was an integral part of a series of measures to promote productivity and enterprise.

(b) It was promoted because it was perceived to lead to a more equitable distribution in insolvency.

(c) It was intended to benefit unsecured creditors through the introduction of the prescribed part.

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4 *Attorney-General v Antione* [1949] 2 All ER 1000 (PAYE); *Re John Wilment (Ashford) Ltd* [1980] 1 WLR 73 (VAT).
5 The misdescription of such funds as money held in trust was repeated in HM Treasury's *Budget 2018: policy costings*.
6 See fn2, chap 32.
7 Cm 5234, July 2001, para 2.19.

c. Conflicting Government policies

3.7 The prescribed part is an allocation of floating charge realisations to unsecured creditors introduced by s176A Insolvency Act 1986. It is a percentage of the funds that would otherwise enure to the holder of a floating charge (in priority to unsecured creditors) up to a maximum of £600,000. Concurrently with the proposal to reintroduce Crown preference addressed in this response, BEIS is advancing a proposal to increase the maximum prescribed part in line with inflation to approximately £800,000:

"*The Government has noted the potential adverse effect on lending if the cap were to be removed but, in order to help unsecured creditors including those in the supply chain, has decided the best way to proceed is to increase the cap in a way that remains linked to the original policy intent of transferring funds given up by the Crown to unsecured creditors. The increase will therefore be linked to the impact of inflation on the current cap since it first came into effect in 2003. This approach corresponds with suggestions made by a number of respondents. Applying an inflationary increase to 31 March 2018 would result in the cap increasing from £600,000 to approximately £800,000. While prescribed part payments very rarely reach the current cap, in the small number of cases that do, it will mean that unsecured creditors will benefit from increased payments.*"[8]

HM Treasury and the BEIS are simultaneously pursuing incompatible policies.

3.8 According to the Budget Brief which is referred to in para 3.1 above (a statement which is repeated at para 1.4 of the Consultation), HM Treasury's policy is to use Crown preference to fund public services at the expense of individual creditors. That is a reversion to a former policy which attracted pointed judicial criticism:

"*...the principle is inequitable. In the case of Palmer Lord Macnaghten justifies the doctrine on the ground that its assertion results in the benefit of the general community (that is, the general body of taxpayers) although at the expense of the individual. I should have thought this was a reason for condemning the principle. Why should individuals be made to suffer for the general good, especially in a case like the present, where the general benefit is infinitesimal but the individual loss substantial?*" [9]

That criticism of the justification for general Crown preference was expressly endorsed by the Cork Committee[10] (albeit recognising PAYE and VAT as special cases where preference could nonetheless be justified on the different ground that the debtor was to be regarded as a tax collector rather than a taxpayer).

3.9 The clash of policies highlights the double jeopardy for floating charge-holders. Their pre-2003 priority was broadly maintained because the effect of the abolition of Crown preference was neutralised by the introduction of the prescribed part. If both the policies of HM Treasury and BEIS are implemented, the value of floating charge security will be simultaneously diminished, first by the new tax priority and, secondly, by the uplift in the prescribed part. Since the prescribed part was introduced to ensure that floating charge-holders were not the beneficiaries of the abolition of Crown preference, a more consistent approach to the reintroduction of Crown preference would be the abolition of the prescribed part.

3.10 The conclusion in the Consultation that the proposed measure will have no material effect on lending contrasts uncomfortably with the caution of BEIS in proposing only an inflationary uplift in the maximum sum available to unsecured creditors through the prescribed part. If BEIS are

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[8] Department of Business, Energy and Industrial Strategy: *Insolvency and Corporate Governance, Government response,* 26th August 2018, para 1.84.

[9] *Admiralty v Blair's Trustee* [1916] SC 247 at fn2.

[10] At para 1411.

correct to accept the potential for an adverse effect on lending of a larger increase of the prescribed part, it cannot be the case that the much more substantial effect of making PAYE and VAT claims preferential can be dismissed as immaterial.

d. International considerations

3.11 Reintroduction of Crown preference will be at variance with emerging international norms. The UNCITRAL *Legislative Guide on Insolvency Law* comments:

"*In some recent insolvency laws there has been a significant reduction in the number of these types of priority right, reflecting a change in the public acceptability of such treatment. A few States, for example, have recently removed the priority traditionally provided to tax claims. In others, however, there is a tendency to increase the categories of debt that enjoy priority. Maintaining a number of different priority positions for many types of claim has the potential to complicate the basic goals of insolvency and to make efficient and effective proceedings difficult to achieve. It may create inequities and, in reorganization, complicates preparation of the plan. In addition, it should be remembered that adjusting the order of distribution to create these priorities does not increase the total amount of funds available for creditors. Rather, it will only result in a benefit to one group of creditors at the expense of another group. The larger the number of categories of priority creditors, the greater the scope for other groups to claim that they also deserve priority treatment. The greater the number of creditors receiving priority treatment, the less beneficial the treatment becomes.*"[11]

3.12 The World Bank's *Principles for Effective Insolvency and Creditor/Debtor Regimes* is potentially of even greater significance given the desire of the Government to improve the ranking of UK insolvency law in World Bank rankings.[12] Those principles include the following statement:

"*Following distributions to secured creditors from their collateral and the payment of claims related to the costs and expenses of administration, proceeds available for distribution should be distributed pari passu to the remaining general unsecured creditors, unless there are compelling reasons to justify giving priority status to a particular class of claims. Public interests generally should not be given precedence over private rights. The number of priority classes should be kept to a minimum.*"[13]

3.13 Equally pertinently, given that the proposal to which we are responding appears directed solely to prioritising UK tax claims, the *Principles* state as a key objective and policy of an insolvency system that it should:

"*Provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors.*"[14]

e. Perverse incentives

3.14 The reintroduction of Crown preference will inevitably stimulate interest in both taking fixed charge security and asset-based financing instead of relying upon floating charges. It is not clear whether this has been taken into account in estimating the annual yield of the measure as being £185m. The proliferation of such arrangements (already seen in response to the decision of the House of Lords in *Re Spectrum Plus Ltd*[15] in relation to the efficacy of fixed

11 2004, Part Two, V, B.1.(c)(iii) §69 (p271).
12 See, for example, The Insolvency Service: *A Review of the Corporate Insolvency Framework,* May 2016, at 2.3 and *Summary of Responses,* September 2016, at 1.1.
13 2016 at C12.3.
14 *ibid* at Cl. See also Cl5.
15 [2005] 2 AC 680.

charges on book debts) will be especially detrimental to administration where the administrator has a general power to deal with property which is subject only to a floating charge but no equivalent powers in respect of fixed charges or property owned by third parties.

4 COMPANY VOLUNTARY ARRANGEMENTS

4.1 We consider that the proposed prioritisation of claims for PAYE and VAT by according them the status of secondary preferential creditor claims has special significance in the context of voluntary arrangements.

4.2 Secondary preferential debts are preferential debts which rank behind ordinary (other) preferential debts but ahead of floating charges and unsecured creditor claims. The division of preferential debts into ordinary and secondary preferential debts was introduced with effect from 1 January 2015 in the context of introducing new preferential creditor claims relating to eligible deposits. Such claims arise in the context of credit institution insolvencies. The proposal under consideration in this response would bring the distinction between ordinary and secondary preferential creditors into play in the generality of insolvencies. In principle, and with a view to maintaining the coherence and intelligibility of UK insolvency procedures, we are opposed to measures which complicate the waterfall of distributions in insolvency unless there are compelling arguments for change. In this we distinguish the existing classes of secondary preferential debt where prioritisation was a necessary adjunct to depositor protection and the implementation of an EC Directive. No such justification can be advanced for the policy to revive Crown preference.

4.3 The special significance of making claims for PAYE and VAT claims for secondary preferential debts in the context of voluntary arrangements is that a voluntary arrangement (whether an individual or company arrangement) cannot alter the priority of a secondary preferential debt without the concurrence of the creditor, whereas the ability to restructure tax debt has hitherto been recognised as one of the potential benefits of a voluntary arrangement.[16]

4.4 The increased priority of claims for PAYE and VAT and the consequential reduction in the funds that can be made available to unsecured creditors will have a profound effect on the viability of voluntary arrangements leading to companies that might otherwise have achieved an arrangement going into administration or liquidation. The potential significance of prioritising PAYE and VAT claims in this way is compounded by the fact that they account for a very substantial proportion of HMRC's claims in voluntary arrangements. In answer to a parliamentary question in 2016, the then Financial Secretary to the Treasury said:

"*HM Revenue and Customs is a creditor in a majority of company voluntary arrangements, usually in respect of the two main withholding taxes, VAT and PAYE*."[17]

4.5 There are already some concerns about HMRC's use of its existing voting power (as an unsecured creditor) in voluntary arrangements. In particular, it has been suggested that HMRC uses its voting power in voluntary arrangements to pursue policy objectives in addition to financial recoveries. A study of company voluntary arrangements carried out on behalf of R3[18] recorded that:

"*A number of practitioners observed that if the company had previously a poor history of compliance with HMRC, HMRC would vote against a CVA seemingly as a matter of policy."*

and referred to

[16] See, for example, House of Commons Library: Briefing Paper No 6944, 31 May 2018, Box 9.
[17] House of Commons Written Question No 51958, answered on 16 November 2016.
[18] R3: *Company Voluntary Arrangements: Evaluating Success and Failure,* May 2018.

"*...the general concern that HMRC is often the most engaged creditor in the CVA process but also the most likely to vote against a CVA, possibly due to policy rather than commercial concerns.*"

In this HMRC's interests may not necessarily be aligned with those of other creditors - a position which will be exacerbated if it holds a de facto veto.

4.6 There is some evidence that HMRC's approach to voluntary arrangements already restricts their use:

"*The role of HMRC in this decision making is of interest. In five of the 100 cases reviewed, HMRC was cited as a reason for choosing a pre-pack over a CVA. This included two instances where the administrator considered that HMRC would reject a CVA proposal given the company's prior compliance issues with Time To Pay arrangements and a further case where HMRC rejected a CVA as the major creditor.*"

and

"*Over half of the IPs surveyed believe that a lack of support from HMRC is one of the main reasons which prevents a possible CVA being put to the creditors...The responses were slightly different for cases where the CVA fails to proceed having been formally proposed, with nearly 60% of IPs identifying a lack of support from HMRC as a major factor.. .Although most engaged, HMRC is seen by 71% of IPs as the stakeholder most likely to oppose a CVA ...*"[19]

5 QUESTIONS AND ANSWERS

5.1 **Q1. The government is committed to increasing the priority of certain tax debts in insolvency. Should they be ranked as a secondary preferential creditor, an ordinary preferential creditor, or protected in some other way in the event of insolvency?**

There are four ways in which priority can be achieved: ordinary or secondary preferential creditor status, the creation of a new category of tertiary preferential debt and the imposition of a statutory trust on funds in the hands of the debtor. We consider that secondary or tertiary preferential creditor status, whilst both undesirable for the reasons already stated, is the only viable option. Although the distinction between ordinary and secondary preferential debts is irrelevant to floating charge-holders and unsecured creditors, ordinary preferential creditor status would compete with employees and the Crown's own subrogated (ordinary) preferential claims for sums for sums defrayed out of the National Insurance Fund. A statutory trust would be impractical.[20]

The possibility of creating a new class of tertiary preferential debt is prompted by two considerations - albeit it is mooted with reluctance because of the same objections already advanced to complicating the waterfall of distribution in insolvency. The first consideration is whether, as a matter of policy, it is desirable for the Crown to compete with depositors with secondary preferential claims under the existing law.[21] As between the introduction of secondary or tertiary preferential status, the only benefit to the Crown of secondary claims would be to take a share of the dividends otherwise payable to depositors in the small number of cases where there are such depositor claims and where there are insufficient funds for the payment of both those claims and the Crown's claims in full. The second consideration is

[19] *ibid.*

[20] The Cork Report made the same observation at para 1418. The facts of *Re Lehman Brothers International (Europe)* [2012] Bus LR 667 (SC) illustrate some of the potential difficulties of a statutory trust over a fluctuating fund.

[21] The Insolvency Act 1986 provides that secondary preferential debts rank equally as between themselves.

whether according secondary preferential creditor status to the Crown for PAYE and VAT would be compatible with the UK's obligations under art 108 Directive 2014/59/EU.[22]

5.2 Q2. Would any of the taxes included in this measure pose any particular challenges to insolvency office holders when they process HMRC claims?

Although, for simplicity, we have referred to the relevant claims as being claims for PAYE and VAT throughout this response, we appreciate that the proposal goes wider in its application to other analogous "withholding" taxes. We do not think that those other taxes raise any different points of principle but we recognise that the computation of liability might be more difficult in some cases than in others. We defer to the views of insolvency practitioners in that respect.

5.3 **Q3. Do you foresee additional administrative burdens falling upon individuals, businesses or insolvency practitioners as a result of this measure? If any, how might they be lessened?**

We do not consider that the prioritisation of claims for PAYE and VAT will, of itself, cause any additional administrative burden because of the need for insolvency practitioners to quantify the claims whether they rank as secondary (or tertiary) preferential debt or as unsecured debt entitled to participate in the prescribed part.

The more obvious burden resulting from the measure will be the financial burden cast upon other creditors, not an administrative burden.

5.4 **Q4. Do you consider the objectives of any type of formal insolvency procedure will be adversely affected by this measure? If so please evidence or explain why. Please suggest how we could mitigate against this.**

We believe that rescue and rehabilitation by means of voluntary arrangements will be adversely affected for the reasons given in Part 4 of this response. We believe that an indirect consequence of the measure will be to reduce the proportion of a corporate debtor's property secured by floating charges and that this will, in turn, have an adverse impact on administration. It would not be possible to mitigate those adverse consequences whilst also maintaining the claim to priority.

5.5 **Q5. Are there any transitional issues that we need to take into consideration in implementing this measure?**

There is no indication in the Consultation of any intention to distinguish between floating charges taken before and after the introduction of the measure. This contrasts with s176A(9) Insolvency Act 1986 preserving the pre-existing priority of floating charges on the introduction of the prescribed part. Attention should be given to similar protection upon the reintroduction of preferential status - not least with regard to potential issues in respect of the right to property enshrined in the Human Rights Act 1998. If proceeding without protecting antecedent floating charges, careful attention will also need to be given to the interaction with s176A(9).

The potential for injustice is not only one of injustice to lenders. It is possible that in some cases the reintroduction of Crown preference ranking in priority to floating charges that have previously been taken in support of advances that have already been made will constitute a material adverse change, or even an event of default, triggering lenders' rights for reasons wholly outside the borrower's control.

There is also no indication in the Consultation that the implications for rated transactions have been taken into account. In the context of pre-existing transactions it is foreseeable that the

[22] The Bank Resolution and Recovery Directive.

reintroduction of Crown preference could lead to rating agencies downgrading bonds previously issued as part of a secured transaction. This would make refinancing harder and, if the effect of a downgrade was to take the rating from investment grade to below investment grade, there might be market disruption resulting from forced sales by investors who are not permitted to hold sub-investment grade bonds.

5.6 Q6. In your view, are there any other considerations, or other potential impacts that HMRC should take into account in implementing this measure?

We refer you to the reservations expressed in Parts 3 and 4 of this response about this measure and how it sits with other Government policies and with international norms.

We note that, in contrast to the more limited priority for PAYE and VAT claims under the Insolvency Act 1986 as enacted (and prior to amendment by the Enterprise Act 2002) there is to be no time limit on the claims which will attract secondary preferential creditor status. This will make it more difficult for floating charge-holders to value their security and for all other creditors to determine the creditworthiness of debtors. Those problems will be compounded in cases where the borrower is part of a group registration for VAT purposes such that lenders may be unwilling to lend to such companies in reliance upon floating charges.

An alternative approach to a time limit would be to apply a financial limit to the element of a total claim which is to have preferential status.[23]

5.7 Q7. Do you have any comments on the assessment of equality or other impacts?

This measure is intended to promote inequality by abrogating the pari passu principle of distribution in insolvency. It will shift the burden of loss from the Crown to the general economy by an amount which the Crown estimates at £185m per annum - an estimate which we have been unable to review. The Consultation characterises this burden as a burden which will be substantially born by banks holding floating charges (neglecting its impact on depositors with secondary preferential claims). It makes the point that £185m is a very small fraction of total lending (although it is not clear what part or parts of the lending market have been taken into account in making that observation). What is beyond question is that £185m is a very small proportion of Government revenue and that the State is better placed to redistribute the burden of its losses more equitably across the wider economy.

[23] The restriction of employees' preferential claims under the Insolvency Proceedings (Monetary Limits) Order 1986 provides a model for this approach. Unrestricted preferential status for PAYE, in particular, would appear anomalous when contrasted with the restriction on employees' claims.

APPENDIX

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