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“These measures come at a time when many UK companies and their directors face difficult financial decisions that could incur personal liability.”

OUR COMMENTS ON THE NEW CORONAVIRUS BUSINESS MEASURES – INSOLVENCY

The UK government has announced a set of extraordinary measures to alleviate the financial pressures facing UK businesses through the COVID-19 outbreak by temporarily suspending wrongful trading provisions and providing relief for companies from their creditors.

The temporary moratorium and broader change to the UK insolvency framework will provide a useful facility for companies undergoing rescue procedures. Notably, these provisions will remain in place after the COVID crisis subsides, providing an overall permanent change to the UK insolvency framework. The legislation is to be passed at ‘the earliest possible opportunity’ yet Parliament is currently in recess until 21 April 2020. Therefore, this note is a comment on information known currently and may change.

BACKGROUND

On 28 March 2020, Alok Sharma, the UK business secretary, announced new UK government measures to avoid businesses facing financial difficulties from being forced into insolvency proceedings. These extraordinary measures relate to insolvency rules on wrongful trading, which are to be suspended for at least 3 months. This will provide companies and their directors with some breathing space over the coming months as they try and trade through the present volatile climate where they may otherwise have been at risk of insolvency.

The measures, which will apply retroactively from 1 March 2020, provide a temporary suspension of wrongful trading insolvency provisions, described by Jonathan Geldart, director-general of the Institute of Directors, as a means of averting ‘*entirely preventable corporate collapses.*’ The measures also introduce a temporary moratorium for companies undergoing restructuring and refinancing processes. This will prevent companies from being put into administration by creditors during the crisis. Specifically, the business secretary said that ‘*our overriding objective is to help UK companies which need to undergo a financial rescue or restructuring process to keep trading.*’

SUSPENSION OF WRONGFUL TRADING PROVISIONS

The COVID-19 outbreak is presenting directors of UK companies with unprecedented challenges. Current “wrongful trading” provisions can make the director of a UK company personally liable when they “knew, or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation” or if they did not take “every step with a view to minimising the potential loss to the company’s creditors.”

Directors may then be required to cease trading and wind up a company to avoid incurring personal liability, rather than continuing to make payments to staff or suppliers in the hopes of trading through the current economic climate. Having to make such a decision runs the risk for the UK economy of putting otherwise viable companies into insolvency.

The proposed legislation will suspend these measures for three months (backdated to 1 March 2020). This will give directors of UK companies space to breathe and make the difficult decisions arising from the COVID-19 outbreak. The suspension will not apply to fraudulent trading and other legal duties incumbent on directors will not be relaxed. It will therefore be critical that directors continue to take advice from their professional advisers on potential liability, together with advice in relation to the options which will become available to them as a result of the changes which are anticipated.

TEMPORARY MORATORIUM FOR RESTRUCTURING PROCESSES

In August 2018, the UK government announced plans to strengthen the existing insolvency framework. The UK government now intend to advance these provisions during the COVID-19 outbreak. They include:

- **the introduction of a new moratorium** to help business rescue by giving financially burdened companies a period of time when creditors (including secured creditors) cannot take action against the company, allowing time to seek new investment or make preparations to restructure;
- **protection of company’s supplies** by requiring suppliers to continue supplying the financially distressed company on existing terms and not use termination clauses; and
- **the creation of a new restructuring vehicle and proposal** with the ability to bind creditors to the plan.

The benefit of these proposals comes from their consultation and development prior to the COVID-19 outbreak. They will be welcomed by many companies undergoing significant restructuring and refinancing processes through the COVID-19 outbreak. The government is looking to implement these measures as soon as possible.

FURTHER COMMENTS

The temporary suspension on wrongful trading is a helpful intervention from the UK government. It will provide directors of UK companies with the confidence to make the appropriate decisions required through the COVID-19 outbreak, without the fear of incurring personal liability, in order to help preserve viable companies for the post-pandemic economy.

The temporary moratorium and broader change to the UK insolvency framework will provide a useful facility for companies undergoing rescue procedures. Notably, these provisions will remain in place after the COVID crisis subsides, providing an overall permanent change to the UK insolvency framework. The legislation is to be passed at 'the earliest possible opportunity' yet Parliament is currently in recess until 21 April 2020.

GET IN TOUCH

Should you have any questions to the topics covered in this Client Briefing, please get in touch with your usual Rooney Nimmo contact or any of the persons below.

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