Consultation Response

A review of the corporate insolvency framework

July 2016

About Co-operatives UK

Co-operatives UK is the network for Britain’s thousands of co-operatives. We work to promote, develop and unite member owned businesses across the economy. From high street retailers to community owned pubs, fan owned football clubs to farmer controlled businesses, co-operatives are everywhere and together they are worth £34.1 billion to the British economy.

1 Do you agree with the proposal to introduce a preliminary moratorium as a standalone gateway for all businesses?

1.1 We agree that a preliminarily moratorium would be beneficial. It will provide more space and incentives for actions aimed at saving potentially viable businesses.

1.2 We anticipate that government plans to introduce this moratorium for UK businesses with an amendment to company law. But for it to be available for all business government will need to take additional steps to provide this moratorium for co-operative and community benefit societies (collectively referred to as ‘societies’). These are mutual businesses registered under the Co-operative and Community Benefit Societies Act (2014), a distinct legal framework that it is too often overlooked and under-maintained. Failure to make such a provision will add to existing disparities between the company and society legal frameworks.

1.3 Thought should also be given to building societies and friendly societies, which also have distinct legal frameworks. Credit unions have a legal framework which is in part attached to that of co-operative and community benefit societies.

1.4 There is no logical reason for not applying a preliminary moratorium to societies and other mutuals. It would be in the interests of good government to ensure that it is applied across all legal forms.

1.5 Responsibility for the Co-operative and Community Benefit Societies Act sits with HM Treasury, not the Department for Business Innovation and Skills (BIS), so some cross departmental collaboration is likely to be required.

1.6 Section 118 of the Co-operative and Community Benefit Societies Act (‘Power to apply provisions about company arrangements and administration’) gives HM Treasury the power to apply new insolvency provisions for companies to
societies. Meanwhile Section 134 of the Co-operative and Community Benefit Societies Act (‘Power to amend this Act to assimilate to company law’) gives HM Treasury a more general power to assimilate useful changes government makes to company law. We believe these sections provide government with a straightforward means of applying a moratorium to societies through secondary legislation.¹

1.7 The Insolvency Service, BIS and HM Treasury should work together to ensure a preliminary moratorium is provided for under the Co-operative and Community Benefit Societies Act.

4 Do you consider the proposed rights and responsibilities for creditors and directors to strike the right balance between safeguarding creditors and deterring abuse while increasing the chance of business rescue?

4.1 Government should note that while the preliminary moratorium should certainly be provided for co-operative and community benefit societies, these businesses make use of a special form of equity capital that will require specific attention.

4.2 Societies issue something called ‘withdrawable share capital’ which provides equity for the business but can under normal circumstances be withdrawn by shareholders at par value. The right to withdrawal is not absolute and a society can impose restrictions and how and when capital is withdrawn, including a total suspension of withdrawal rights.

4.3 Society directors have a duty to act in the interests of the society and its members, and in practice this includes taking the decision to limit or suspend withdrawals if needs be. It would clearly damage the interests of creditors and the viability of the business if a board failed to take such action and the triggering of the preliminary moratorium acted as a signal for shareholders to withdraw their capital en mass.

8 Is there a benefit in allowing creditors to request information and should the provision of that information be subject to any exemptions?

8.1 While the interests of creditors are clearly vital in the insolvency process, the interests of the members of co-operatives should also be considered. Members democratically own and control the business and derive benefits from its activities. Crucially members’ primary stake in their co-operative is not financial, so they must be considered differently to shareholders in a company.

8.2 Thus supervisors should also be required to make information available to the members of a co-operative or community benefit society.

18 Are there any other specific measures for promoting SME recovery that should be considered?

18.1 There is growing interest in the UK in enhancing the role of employee and management buyouts in recovery strategies. It is widely accepted that employee buyouts are most likely to be effective in SMEs.

18.2 Thus we suggest that the insolvency tools available should be calibrated so as to improve the chances of a successful employee or management buyout for SMEs in particular. This will require employees to be recognised as an important stakeholder group in insolvency processes; to be kept informed and to be given opportunities to play an active role in restructuring and rescue.

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