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The City of London Law Society Insolvency Law Committee: Response to the consultation on Corporate Civil Enforcement Reforms published on 25 March 2026 (the *Consultation*)

Introduction

We welcome the opportunity to provide feedback on the Consultation.

The City of London Law Society (the ***CLLS***) represents approximately 21,000 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. The CLLS responds to a variety of consultations on issues of importance to its members through its 22 specialist committees. This response is submitted on behalf of the CLLS Insolvency Committee (in collaboration with the CLLS Company Law Committee). Links to lists of the individuals represented on the Insolvency Law Committee are set out at the end of this response.

We have also included at the end of this response the members of the working group of both the CLLS Insolvency Law Committee and the CLLS Company Law Committee who were involved in drafting it. Any member of the working group would be happy to discuss or expand on any of the comments made in this response. Alternatively, please feel free to contact the Chair of the CLLS Insolvency Law Committee, Catherine Balmond, whose details are set out below.

The CLLS has focused on those areas of the Consultation that are concerned with directors' conduct and antecedent transaction reform. Where a question is not answered, this indicates a neutral view or that others are better placed to comment on the particular proposal.

Overarching comments

1. Directors' Conduct

1.1 Overall, the CLLS is supportive of the focus on directors' conduct to ensure that directors who are responsible for misfeasance or improper conduct in office are sanctioned.

1.2 However, while recognising that resource constraints are real and of concern, resourcing cannot drive decisions that result in a loss of access to justice for individuals with far fewer resources themselves in many cases. In addition to any changes raised in the Consultation, proper management of director misconduct requires proper resourcing of those tasked with seeking disqualification against directors, and proper enforcement of the disqualification once made. It is noted that a number of previous changes, around compensation orders and the Economic Crime and Corporate Transparency Act 2023, may not yet have had their intended effect.

1.3 The Consultation should also be considered against the Government's wider growth and competitiveness objectives. If the cumulative effect of these reforms is to make board service materially more risky, more burdensome or less predictable, there is a real danger that the UK becomes a less attractive place in which to start, run and rescue businesses. That would sit uneasily with the UK's long-standing reputation for taking a commercially workable approach to director decision making and corporate distress.

1.4 The concern is not limited to directors who engage in misconduct. The broader effect may be to make responsible directors unduly cautious in periods of difficulty which could be to the detriment of shareholders, creditors and the economy generally, to discourage capable individuals from taking appointments as a director (particularly as a non-executive director where expertise and experience are often most valuable in circumstances where a company is in difficulty), and to increase the frictional cost of doing business in the UK with an increased requirement for professional advice to seek to mitigate any actual or perceived increase in the risk of being judged with the "curse" of hindsight. The failure of companies and recycling of capital to more efficient undertakings is an important part of our capitalist system. Entrepreneurialism is about risk-taking, trial and error and perseverance. Companies - and their directors - need to be able to fail and the Government should take care not to suggest that the failure of a company is inherently wrong or career-ending for a director.

1.5 Additionally, it is important that the changes do not result in directors who conduct businesses properly in difficult circumstances being under additional pressure to take steps towards an early insolvency process, due to increased concern about personal liability. The UK's relatively commercial approach to directors' conduct is part of its success as a restructuring jurisdiction and can be contrasted with, for example, Germany where trading whilst insolvent gives rise to criminal sanctions. All directors of properly run businesses are concerned by conduct issues and a regime to sanction a minority should not have an undue effect on the majority of responsible directors.

1.6 It should also be noted that the proposed changes would make this jurisdiction an outlier within Europe if director disqualification or sanctions could be imposed without a court process, as this [report](https://op.europa.eu/en/publication-detail/-/publication/3eb2f832-47f3-11e6-9c64-01aa75ed71a1) makes clear (https://op.europa.eu/en/publication-detail/-/publication/3eb2f832-47f3-11e6-9c64-01aa75ed71a1). This is contrary to the UK's stated desire to be "open for business" and perhaps at odds with the proposed re-domiciliation which is designed to attract business to the UK.

1.7 In addition, the CLLS is of the view that particular care needs to be taken not to include turnaround directors within the scope of the director restriction proposals. It would be necessary to define "turnaround" directors in order to carve them out from the director restrictions regime. We would describe a turnaround director as:

(a) an individual who specialises professionally in "turnaround", i.e. in returning underperforming businesses and organisations to being sustainable and viable rather than being left to formal insolvency and/or in helping to achieve an orderly wind-down once formal insolvency has become inevitable; and

(b) in order better to perform their role, has become a director of one or more of the companies concerned.

Of course, turnaround directors who engage in misconduct or otherwise abuse their position should not be exempt simply because of the carve-out.

1.8 It is of concern that the Consultation focuses on the effect on errant directors but not the effect that the regime changes would have on the administration of business for all businesses and further, on turnaround activity. The proposed changes are potentially useful but access to justice and the balance of resource and fairness must be maintained.

1.9 The misconduct categories in scope for restrictions include multiple corporate failures within a set period, without additional evidence required of deliberate abuse. Turnaround directors (if not excluded entirely from this potential new regime, as we suggest) who join a company late, where insolvency is inevitable, but the aim is an orderly wind-down, would be penalised for outcomes they did not cause, potentially stifling corporate rescue and turnaround activity – as can also be seen by the direct quote obtained on an anonymous basis from such a turnaround director (see below).

1.10 It is the CLLS's view that director education could have a role for minor infractions and post-insolvency but we also suggest that director "education" / awareness at the point of registration of a company upon appointment could be more effective without creating a barrier to business. Companies House could include in the mailing they already send to new directors notifying them of their appointment a short guide/link to a short (to be paid for but at reasonable cost) 1 hour training video, produced by the Insolvency Service, covering directors' duties and an overview of insolvency issues. It would not be possible in practice to monitor the extent to which directors read the guide, but at least it would be accessible to them and their attention would be drawn to it at the outset. An additional option would be to add a reporting question to the directors' reporting by insolvency practitioners (once in office) recommending whether mandatory training is required.

2. Antecedent transactions

2.1 The current antecedent transaction regime has stood since the IA 1986. A significant change to a regime that has operated for that period should be justified on evidence with proper consideration of adverse consequences.

2.2 We recognise the policy objective of facilitating recovery of value for creditors in insolvencies and improving the effectiveness of the antecedent transaction regime. We also acknowledge that in its response to the March 2018 consultation paper entitled "*Insolvency and Corporate Governance*" (the ***2018 Consultation***), the CLLS Insolvency Law Committee offered some tentative support for possible adjustments to existing antecedent recovery powers which now are broadly reflected in Proposal 4 to the Consultation.

2.3 We think it right to revisit the Committee's earlier position carefully in light of the present proposals, the developments since the 2018 Consultation and the broader context in which they appear. Since the 2018 Consultation, there have been a number of developments in the law which, taken together, facilitate the bringing of antecedent transaction claims and mitigate the case for the measures proposed in the Consultation:

(a) **Removal of the fixed limitation period.** The Supreme Court's recent decision in *THG Plc v Zedra Trust Company (Jersey) Ltd* [2026] UKSC 6 appears to have removed the fixed statutory limitation period for antecedent transaction claims, replacing it with a discretionary fairness-based approach. This means that officeholders may potentially be able to bring clawback claims which they had previously considered to be time-barred.

(b) **Narrowing of the transaction and consideration analysis under s238.** In *Taqa Bratani Ltd v Fujairah Oil and Gas UK LLC* [2025] EWCA Civ 1669, the Court of Appeal clarified, overruling the High Court, that the focus of a s238 claim must be on the specific transaction entered into by the company itself. While a transaction under s238 may form part of a wider commercial arrangement, mere linkage is insufficient to bring the wider arrangement within the scope of the claim. When assessing the existence and quantum of any undervalue, a court will take into account only consideration which formed part of the bargain for the specific transaction entered into by the company; amounts received under the wider arrangement of which the transaction may have formed a part will not be brought into account to reduce the undervalue. The Court of Appeal further clarified that the s238(5) good faith defence must be assessed from the perspective of the company itself, and not by reference to the interests of the wider group. Taken together, these clarifications prevent defendants from using the broader commercial context to dilute the undervalue or to bolster the good faith defence and broadly favour officeholders bringing claims.

(c) **Improved access to Companies House records.** The Information Sharing (Disclosure by the Registrar) Regulations 2024 improve the ability of officeholders to obtain non-public information about corporate entities and their directors where the Registrar is satisfied that the provision of such information is required for the purposes of clawback-related claims, including claims under sections 238, 239 and 244.

(d) **Development of remedies against insolvency deepening activity.** The Supreme Court in *Re Sequana SA* [2022] UKSC 25 emphasised that "*insolvency-deepening activity*" can amount to a breach of the creditors' interests duty even at a time when insolvent liquidation is not inevitable and there is no wrongful trading liability. The High Court in *Re BHS Group Ltd* [2024] EWHC 1417 (Ch) found that the taking out of expensive loans on onerous terms ultimately at the risk and expense of the unsecured creditors constituted, on the facts, insolvency-deepening activity and was misfeasant trading. While fact specific, this novel finding illustrates how expensive lending may be dealt with outside the terms of the extortionate transaction provisions.

(e) **Lawful dividends as transactions at an undervalue.** The Court of Appeal confirmed in *Re Sequana SA* [2019] EWCA Civ 112 that the payment of a lawful dividend can constitute a transaction at an undervalue for the purposes of s238. The subsequent

Supreme Court decision [2022] UKSC 25, further clarified that the fact that a dividend is lawful as a matter of company law does not insulate directors from liability for breach of the duty owed to protect the interests of creditors.

2.4 Each of these developments is broadly favourable to officeholders. Collectively, they expand the circumstances in which antecedent transaction claims can be brought, improve access to the information needed to support them, narrow the defences available to respondents, and potentially extend the period within which claims may be pursued. Against that backdrop, the case for the measures proposed in the Consultation is materially weaker than it may have appeared at the time of the 2018 Consultation, although there may be merit in pulling all of the developments together into clear, consistent legislation. The Government should assess the cumulative effect of these developments before legislating, and consider whether the existing regime, as clarified and extended by recent authority, is already capable of achieving the policy aims the Consultation identifies. Furthermore, these and other relevant developments should form part of any education programme that is implemented so as to ensure that directors are aware of the nature and extent of their responsibilities in situations where the company in question is facing financial or trading difficulties.

2.5 On reconsideration in light of the developments since the 2018 Consultation, we also think greater weight should be given to the principled reasons why the existing law:

(a) provides for an insolvency presumption for connected party transaction at undervalue (***TUV***) but not connected party preferences; and

(b) does not presume that the value a connected person provides to a company is significantly less than the value which they receive from the company.

2.6 These are important distinctions. We address these points in some detail below, as it is fundamental to our assessment of the questions being asked, but in essence: the insolvency presumption for connected party TUVs ensures that the officeholder need not establish insolvency in order to recover assets transferred to a party who was not entitled to the benefit - whereas for preferences, insolvency cannot be presumed without removing the very condition that makes the payment wrongful in the first place (i.e., contrary to the *pari passu* principle of distribution).

2.7 Additionally, the present proposals go further than those considered in the 2018 Consultation and do not sit in isolation. The interaction with the proposals on director disqualification raises compound concerns. The significance of this in the present context is that clawback liability is one of the matters relevant to whether a director is unfit, and a finding - or presumptive finding - of a connected party preference or TUV would feed into disqualification proceedings. A director could accordingly find themselves disqualified by the body that investigated them, after a process that presumes the key elements of the underlying conduct, with recourse only to a tribunal appeal after the disqualification has already taken effect. The cumulative effect of these proposals on a director who has acted in good faith is significant and the Consultation fails to acknowledge this.

2.8 Finally, we consider that the proposal to lower the threshold for bringing a claim under s244 IA 1986 (extortionate credit transactions) would likely have a chilling effect on rescue finance for the reasons explained in more detail below.

3. Impact on cash pooling

3.1 We do not believe that any benefit in the form of increased recoveries to unsecured creditors would outweigh the substantial uncertainty these reforms would create for the use of cash pooling arrangements in the ordinary course for company groups.

3.2 Groups of companies will often use cash pooling arrangements. The types of arrangements can vary depending on the particular requirements of the group, e.g., while some may involve netting off of balances of different accounts across jurisdictions and the use of cross-guarantee structures (to manage interest payments on the net balance), others may involve cash sweeps and the moving of money between accounts resulting in the creation of intercompany loans.

3.3 The entry into a cash pooling arrangement, the giving of cross-guarantees, the netting off of balances, and the transfer of cash balances can already give rise to transactions at an undervalue and preference concerns. However, the reversal of the burden of proof as to value (for connected party transactions at an undervalue) and as to insolvency (for connected party preferences) could make the use of such arrangements by English companies significantly more difficult – in particular because of the evidential difficulties in rebutting such presumptions (highlighted at paragraphs 8.9, 8.10 and 8.20 below). Given the inevitably fluid and fluctuating nature of cash pooling arrangements, group companies will not typically be evidencing value or solvency to combat antecedent transaction risk unless there are concerns about solvency. However, a company entering into cash pooling transactions cannot know at the time of any individual transaction whether that transaction will ultimately fall within a future two-year look-back period. Every cash pooling transaction would carry presumptive risk from the moment it is entered into. Under the proposed regime, the burden of evidencing value and solvency would be permanent and rolling rather than confined to any defined period of financial difficulty. That would risk making the use of group treasury arrangements unworkable in practice - for example, in an international group context, a foreign parent would have reduced certainty of being validly repaid by an English subsidiary, since each repayment would carry presumptive risk as a connected party transaction at an undervalue and as a preference. A company excluded from cash pooling arrangements because of such concerns could face reduced access to intragroup liquidity and, potentially increased external borrowings (and associated interest costs) which in the case of a struggling company could have the effect of precipitating an earlier onset of insolvency (potentially resulting in worse rather than better outcomes for the unsecured creditors the reforms are intended to benefit).

3.4 Other ordinary course intra group dealings could also be impacted for similar reasons.

4. Potential areas for further consideration

4.1 We consider that the combined effect of the proposed new restrictions regime (which, as proposed, could apply for negligent conduct falling short of deliberate wrongdoing), enhanced information-gathering powers for live companies and extended limitation periods may collectively incentivise directors to commence insolvency processes earlier than commercially optimal to avoid personal exposure: potentially to the detriment of stakeholders who might benefit from continued trading.

4.2 We further note that the consultation explicitly positions the reforms as aligning UK practice with international best practice, referencing the World Bank Principles for Effective Insolvency and Creditor Rights and UNCITRAL Legislative Guide on Insolvency Law. However, there are aspects of the proposals that diverge from or exceed the approach taken in continental

European jurisdictions, as noted in our overarching comments above. In France the courts remain the primary decision makers in respect of sanctions against directors whilst in Germany, director disqualifications are court triggered and strictly codified. The administrative model proposed in the UK may be perceived as lacking the procedural safeguards and judicial independence valued by international investors. The proposed new restrictions regime would be novel with no clear comparators in major European jurisdictions.

4.3 In relation to any of the proposals, the CLLS is of the view that there would need to be transitional provisions included in any legislation to bring these into effect. To do otherwise, for example, by them applying to insolvency proceedings commenced after the changes come into effect, would create considerable uncertainty as it would be unclear whether an assessment should be made having regard to transactions or conduct that predated their implementation.

5. Detailed questions and responses

Annex B Consultation Questions - Business as Usual

Question 1: Would reforming civil powers help the Insolvency Service tackle a wider range of misconduct? Please explain your answer.

5.1 Our comments in the Overarching Comments section stand as an answer for Question 1. The most important step is that disqualification action is properly funded and enforced and that any measures taken are proportionate and do not have the effect of dissuading responsible directors from running businesses.

Question 2: How could the Government raise directors' awareness of the civil enforcement regime to prevent misconduct, without legislative change?

5.2 The Government might wish to consider whether an annual mailing to directors with a summary of the regime and/or a link to a short video presentation – similar to the approach suggested in paragraph 1.10 would work to raise directors' awareness. In addition (or alternatively) Government could consider the publication of guidance notes or "warning notices" (such as the ones that regulators such as the SRA or FCA issue) in respect of significant cases aimed at directors as a group and sent out to companies via the email addresses registered at Companies House.

Proposal 1: Disqualification on Public Interest Grounds

5.3 The CLLS understands that there were 52 winding-ups in the public interest in the most recent reporting period. Notwithstanding the small number of cases, the CLLS does not agree with the automatic disqualification of any individual, in any circumstances including on a public interest winding-up. The removal of the opportunity to act as a director is a serious sanction and should be individually examined by reference to a person's own conduct, rather than being for an individual director, who may or may not have means to do so, being required to appeal. This is of even greater concern if that appeal is through a tribunal process where the appealing director would have to meet their own costs, even if they are successful. This would likely result in fewer directors appealing when they may otherwise have done so.

5.4 While many companies wound up in the public interest have acted unlawfully, not all have done so. Some companies will have been run by a mixture of statutory and non-statutory directors, not all of whom can be identified at the point of liquidation. Additionally, there may be innocent parties involved in an improperly run company, who would not be disqualified if their conduct is examined on an independent basis. The ability to appeal does not remedy this harm. Finally, there may be directors who have served in the relevant period but resigned, and where the conduct of the business changed from a lawful business to an improper business.

5.5 If the courts have concerns around this, it may actually delay the winding-up of the company, rather than speed up the disqualification of the directors.

5.6 We query whether automatic disqualification would constitute a breach of the right to access to justice under the European Convention on Human Rights.

5.7 It is also unclear how the proposal would interact with the court's ability to accept undertakings to cease the relevant business in place of winding-up. If the winding-up would result in disqualification, the court may consider that it can never take an alternative route, even though doing so might result in the desired outcome of ceasing the improper business quickly and more cost efficiently.

5.8 The CLLS is opposed to the proposal in its entirety. Alternatively, the courts should have the option to decline to make the disqualification in relation to individual directors in their discretion. Finally, if an appealing director is successful, they should be able to recover their reasonable costs.

Question 3: In what circumstances should a director be able to appeal their disqualification? Please explain your answer.

5.9 As set out above, the CLLS is opposed to directors being forced to appeal a mandatory imposition of disqualification. If such a regime is nonetheless introduced, all affected persons should have the right of appeal, and not only in narrow circumstances.

Question 4: Does this proposal balance the need to act quickly to protect the public, whilst treating directors fairly? Please explain your answer.

5.10 The proposal does not strike a fair balance between the public and directors. The public's interest is served by liquidating improperly run companies and seeking to fast-track disqualification proceedings and then enforcing that disqualification. While one can see that automatic disqualification may serve a purpose in some circumstances, the risk of harm to legitimate parties previously or innocently involved in improper business is of greater concern.

5.11 Additionally, the automatic imposition of a remedy with regard to some parties, and the limitations of resources, may actually mean that directors are not pursued for a <u>longer</u> period of disqualification and that persons not caught by the automatic imposition of disqualification (for example, shadow directors not identified at the point of liquidation) are never pursued, even in circumstances where they should be due to their conduct.

Question 5: The proposed length of disqualification would be a set period of 5 years. Is this appropriate? If not, what do you think it should be? Please set out your reasoning.

5.12 The period of remedy is secondary to the fairness of the process. Noting that the average period of disqualification of public interest winding-up is 9 years, 5 years would seem proportionate save for the point made above, namely that it may lead to cases that deserve a longer period of disqualification not being pursued.

6. Proposal 2: Director Restrictions

6.1 The CLLS's overarching comments on this section are as follows:

(a) The case for a new restrictions regime must be tested by reference to necessity and proportionality. A sanction which may in practice prevent a person from acting effectively as a director, even if it does not do so formally, is a serious measure. If introduced, it should therefore be confined to clearly defined cases and should not become a lower-process route to something which is, in commercial terms, close to disqualification.

(b) There is also a wider policy concern. A restrictions regime will add to the regulatory burden on directors generally, including those acting properly in difficult circumstances, and may have adverse effects on board recruitment, turnaround activity and ordinary commercial risk. That is not a proportionate trade-off where the case for intervention is not clearly made out, particularly when balanced against the Government's wider growth and competitiveness objectives.

(c) We also question whether a further regime is needed at this stage given the recent expansion of Companies House powers under the Economic Crime and Corporate Transparency Act 2023. Those powers are still relatively new and their practical effect has not yet been fully seen. There is a real risk of duplication, inconsistency and overlapping sanctions if a parallel restrictions regime is introduced before the operation of those changes has been properly assessed.

(d) As noted in the overarching comments, the CLLS considers that director education alone would be a more proportionate response to the mischief concerned (see the Overarching comments to the response for our comments on this aspect).

(e) Although the context of the questions in the Consultation refers to conduct in the run-up to insolvency, the regime outlined does not itself appear to be limited to application following an insolvency. While this is consistent with the disqualification regime where persistent breach can lead to disqualification, sanctions that can be imposed for administrative breaches without proper examination of the circumstances could give rise to unfair outcomes.

(f) It is the view of the CLLS that any restriction regime should be an alternative to the disqualification regime based on the same factors, rather than having a lower entry point to application. For example, where a case could have resulted in a disqualification but the conduct of the director in question was less serious, the restrictions regime could be applied to sanction the director instead of a disqualification. The restrictions regime could replace 'lower level disqualifications' rather than be an additional sanction for conduct, such as failure to comply with filing requirements, which can already be addressed by Companies House through the powers given to it under the Economic Crime and Corporate Transparency Act 2023.

(g) Any imposition of restrictions based on administrative action – based behaviours must have suitable carve-outs and protections for professional turnaround directors and other independent directors who are appointed to "steady the ship" who are frequently placed on boards of companies that, not through the action or inaction of the relevant individual, either have or will breach Companies House filing requirements, HMRC return requirements and other administrative requirements, often on multiple occasions. Introducing a restriction risk based on multiple insolvency/restructuring roles (including where there may be multiple insolvencies in a group situation) will be deeply unhelpful to the profession and will either likely result in (i) such directors not taking appointments where their skill set could be invaluable or (ii) cause directors to file for insolvency sooner and where this could be value destructive and not in the best interests of creditors. For professional turnaround directors, who are often licensed accountants or solicitors, it would be wrong to regard the "guardrails" proposed by the restrictions such as them not being a sole director or signatory on a company's bank account as being of lesser consequence than disqualification.

(h) The CLLS Insolvency Law Committee has sought the views on a no-names basis of a professional directors on the proposals and their response is instructive:

"I have acted as a director of companies facing restructuring or insolvency since my retirement as a restructuring solicitor and have been appointed to a large number of businesses, many of them household names. With a career in restructuring, spanning thirty five years, I am well placed to join boards of companies facing financial difficulties, guiding them through the process in conjunction with professional advisers. Sometimes I am appointed as sole director with previous management having departed. Whilst it is always desirable in those circumstances to avoid formal process, sometimes that is unavoidable. Indeed, I am often appointed to the board when a prepack is the best outcome for creditors, sometimes to assist the proposed administrator in assessing competing bids where one is from management. I act as independent arbiter in those circumstances where management should not see competing bids.

It goes without saying that any automatic disqualification process resulting from appointment to a set number of companies which had failed would prevent me from operating as I do, and would result in companies being unable to take advantage of professional appointees. This would, in my view, most likely result in two outcomes:-

1. Companies would have to file for insolvency earlier, particularly in circumstances where former management had exited the business- meaning a potential sale of a trading business or managed wind down could not take place; and/or

2. Perversely, others would be kept out of process for longer in circumstances where members of the current board had been involved in previous failures, as they would seek to avoid automatic disqualification. That, in turn, may be wholly inappropriate in the particular circumstances and might encourage the very behaviour the threat of disqualification is seeking to prevent.

In my view, the disqualification regime should remain focused on an objective assessment of poor director behaviour as a precursor of disqualification proceedings."

(i) Failure to pay HMRC is already a risk factor for disqualification and as a risk factor could be included here. However, having a rigid rule around HMRC payments could lead to further pressure to prefer HMRC in the run-up to insolvency, contrary to its position as an unsecured creditor with no special role or priority (subject to the secondary preferential regime).

Question 6: Do you support the introduction of a director restrictions regime to address low-level misconduct? Please explain your answer.

6.2 The current disqualification regime can be disproportionate where the conduct is negligent or incompetent rather than dishonest or deliberate. A restrictions regime could therefore provide a useful middle ground if based on the same thresholds. However, the regime should not become an automatic sanction for ordinary business failure nor should it cover actions by turnaround directors that form part of their usual role.

6.3 It should not be a less examined route to disqualification for what is not serious misfeasance in office.

6.4 The restrictions themselves need to be achievable. It should also be acknowledged that, although the restrictions do not prevent a director from continuing in office, in practice one would expect many directors involved in medium to large businesses commercially to find it impossible to serve in such role while subject to a restriction, or struggle to obtain suitable D&O insurance (the market for which is already challenging). In such circumstances, directors might choose to cease their position rather than continue without cover. There is also the potential for customer and third-party confidence to be undermined where a director's restriction is public. Therefore, it remains a serious sanction. This can be distinguished from professional body restrictions or charity restrictions, as being a director of a company is fundamental in many cases to carrying on business.

6.5 The Section 1157 Companies Act defence should apply to any proposed sanction under the director restriction regime.

6.6 We would also again emphasise that any such regime should be assessed in the context of the Government's wider competitiveness objectives and the recent expansion of existing corporate enforcement tools.

Question 7: Is 3 years a suitable timeframe for a restriction? If not, what should it be?

6.7 3 years is a reasonable maximum, but there should be flexibility to impose a shorter period.

Question 8: What other types of misconduct should be considered for inclusion in the restrictions regime?

6.8 Our suggestion would be that the same risk factors as apply to disqualification proceedings are relevant to restrictions, so that the restriction process is an alternative outcome to disqualification rather than applying to a lower level set of criteria. We note, for example, that the number of breaches proposed (2) is lower than that required for disqualification (3). The concern with a prescriptive list of categories is that there may well be circumstances where they do not capture wrongdoing and other circumstances where they are too narrow a focus. For example, it is commonly the case that audit filings for companies facing financial difficulties are delayed (or may not be achievable) due to the processes of the auditors or the need for parental support or other external actions, rather than wrongful action on the part of the directors themselves. Imposing sanctions upon directors, where compliance may be largely outside of their control, does not seem appropriate. Forcing directors to remedy a non-filing of accounts in those circumstances could create unforeseen outcomes and arguably for turnaround directors the criminal offence under section 451 of the Companies Act 2006 could already penalise them unfairly for a state of affairs not of their making.

6.9 The regime should not include ordinary commercial misjudgement, failed rescue attempts, or business failure absent identifiable neglect or default in respect of legal or financial responsibilities. Companies must be allowed to fail.

6.10 If it is a separate regime, additional categories that could be considered include:

(a) Failure to co-operate with an officeholder after insolvency, where the conduct falls short of deliberate obstruction but causes cost or delay.

(b) Failure to maintain basic financial hygiene, such as absence of management accounts or separation of client/company funds.

Question 9: Do you think that restrictions provide sufficient weight to deter negligent behaviour? Please explain your answer.

6.11 The proposed restrictions include that a restricted director: could not act as sole director, could not be sole bank signatory, and any company of which they are director must have paid up capital of a certain amount.

6.12 It is doubtful that the restrictions will deter persistent negligence in directors but they will mitigate the harm that such directors can cause in future trading by exposing their actions to other directors.

6.13 However, it is much more likely that the existence of restrictions will place additional pressure on directors conducting business legitimately and increase the regulatory burden on the majority. We consider that this pressure is unhelpful to business and consequently suggest restriction as an alternative outcome rather than alternative regime. A person could be required to disclose whether they are subject to any restrictions on any Companies House forms relating to new director or other appointments.

6.14 There is also a balance to be struck to avoid deterring restructuring professionals from accepting appointments in distressed companies.

Question 10: Are there additional restrictions you think should be considered to protect the public and prevent repeat misconduct? Please explain your answer.

6.15 Possible further restrictions include a requirement to notify other company directors and the company's lenders of the restrictions, and enhanced record keeping obligations, including management accounts and board decisions/meetings.

6.16 It is important that any restrictions do not unduly fetter legitimate future business, especially where the original misconduct is not of sufficient seriousness.

Question 11: Should there be consequences for any co-director if an individual breaches their restrictions? Please explain your answer.

6.17 No. Liability for co-directors would be unfair and could deter individuals from acting as co-directors of companies with restricted directors and result in disqualification by the back door. It may already prove difficult for a director who is subject to a restriction requiring a co-director to be appointed to find someone willing to take up the role. Consequences should apply only where the co-director knew or ought reasonably to have known of the breach and either facilitated or actively failed to prevent the breach, such that it amounts to an independent breach of duty. There should also be a defence where the co-director can show that they took reasonable steps to avoid that outcome.

Question 12: Does this proposal provide sufficient opportunity for directors to challenge the decision to apply restrictions? If not, what else should be done?

6.18 The Consultation proposes that the director may request an independent Insolvency Service review, followed by a right of appeal to the court, and that restrictions would come into force 21 days after notification.

6.19 This requires a director to show that the restriction is not reasonable. Depending on the scope of the regime, this could impose an unfair burden on directors. The process could include an automatic stay on the restrictions pending review/appeal, unless there is an urgent public-protection reason.

6.20 The Section 1157 Companies Act defence should apply to any sanction under the director restriction regime.

Question 13: What are your views on offering a post-insolvency educational course as an alternative to placing restrictions on a director? Please explain your answer.

6.21 Our answers are set out above. We suggest that pre-appointment/recurring guidance (for those that are not turnaround directors skilled in this area) would be better than post-event training but, if that is not desired or feasible then, yes, education would be helpful for first time, low level failings. Education is likely to be more effective than restriction where the issue is lack of understanding rather than deliberate disregard or negligence.

Question 14 Please provide any thoughts you may have on the following: a. What should the aims of post insolvency director education be? b. What types of content should be included? c. How should education be delivered? d. Who should deliver the education? e. How should it be funded? f. How should outcomes be measured?

6.22 If a post-insolvency course is introduced, it should be educational rather than punitive. It should focus on basic directors' duties, governance, financial controls, record-keeping, warning signs of distress and when professional advice should be sought. It should also explain, in practical terms, the way in which the courts apply the relevant regime and the consequences of non-compliance, including disqualification and compensation mechanisms.

6.23 If a post-insolvency course is introduced, delivery should be practical and proportionate. A largely online format with some assessed element would likely be most efficient (although in-person sessions could also be made available). Completion should require some demonstration of understanding rather than passive attendance. The course should be delivered independently or with professional body involvement, on a cost-recovery basis rather than as a revenue exercise, and should be evaluated by reference to completion, participant feedback and whether there is evidence of better conduct thereafter. Parallels may be drawn with speed awareness or drink drive awareness courses but overall we believe that antecedent education and training is preferrable to simply having a post-event course.

7. Proposal 3: Secretary of State to replace court as decision maker for disqualification

Question 15: Would the proposed system effectively improve the current court-based system? Please explain your answer.

7.1 No, the proposed system would not improve the current court-based system and would introduce additional potential unfairness. The existing court-based system brings with it specialist judicial experience built up over many years in assessing contested conduct allegations, individual culpability and appropriate sanction. That experience contributes to predictability and confidence in the regime. In a jurisdiction that seeks to remain attractive for business, investment and restructuring activity, replacing specialist court determination with executive decision-making in defended cases would be a significant and unnecessary step. A shift from court-based adjudication means the Insolvency Service would act as both investigator and decision-maker (albeit through separate departments), creating fair process concerns that may deter responsible directors from remaining in post during periods of financial difficulty.

7.2 If timeliness is the concern, that is better addressed through procedural reform and resourcing than by removing the court from the very cases where independent determination matters most.

7.3 As evidenced in the recent case of *Secretary of State for Business and Trade v Aurel Stan* [2026] EWHC 1164 (Ch) (Re ADS14 Ltd), the Insolvency Service does not necessarily view matters consistently with the court. In this case, the Insolvency Service considered that the director's conduct required a 10 year disqualification period. Chief ICC Judge Briggs instead found that it merited a 4 year period and considered that there was, contrary to the Insolvency Service’s view, no reason to impose a greater responsibility on this director than others with similar conduct.

7.4 It is also noted that over 80 per cent. of disqualification proceedings are already determined by undertakings rather than court proceedings. For opposed disqualification proceedings, it is not appropriate that disqualification is determined in the first instance by the Secretary of State. It is already the case that the undertaking regime places significant pressure on directors to accept an undertaking and in cases with significant political attention, there would be a real risk of unfair outcomes for directors.

7.5 The change would also place the burden on the director to show that disqualification was incorrect, rather than it being right to impose disqualification. Disqualification is a serious sanction and should not just be imposed more easily due to resource constraints.

7.6 As noted above, we do not consider that the comparison with the charity regime is correct, given the far wider application of companies law to the general economy, and its relevance to all directors and not just those that are non-compliant. We understand that fewer than 40 trustee disqualifications were made in the most recent period for which there is data, compared with over 1000 for director disqualification.

Question 16: Should appeals against a decision to disqualify be heard in the First-tier tribunal? If no, please provide reasons and alternatives.

7.7 The strong preference of the CLLS would be to retain disqualification jurisdiction with the specialist insolvency judges in the business and property courts (noting the proposals for reform). Those judges are best placed to consider contested disqualification proceedings. As stated above, the court’s role in defended cases is not merely procedural but an important source of independence, predictability and confidence in the regime.

7.8 However, a tribunal-based system could work, with suitable specialist involvement, with a further appeal to an appropriate upper tribunal or the business and property courts.

7.9 We query whether a properly staffed tribunal would in practice save significant costs for the Insolvency Service. However, it would impose significant costs on directors if they were required to bear their own costs, even where they are successful. This is also likely to increase costs of directors' and officers' insurance for small and medium sized businesses.

Question 17: Are there circumstances where you believe a tribunal-based approach would not be appropriate? Please provide details.

7.10 As above, we consider specialist insolvency judges to have the right expertise to hear these matters. As set out further in the next question, the impact of costs on individuals is also disproportionate and inhibits access to justice.

Question 18: Does the proposed system give a fair way for directors to appeal/challenge disqualification? Please explain your answer.

7.11 A tribunal system that requires directors to bear their own costs, acknowledging that many small businesses will not have insurance (and that these measures may make insurance more expensive), so that even where they are appealing an automatic/in-house decision of the Insolvency Service, and win, they are out-of-pocket, would be unfair and contrary to access to justice.

8. Proposal 4: Ensuring fair distribution of a company's assets upon insolvency

Question 19: Will reversing the burden of proof by making the recipient demonstrate to the liquidator or administrator that the transaction was for value increase the effectiveness of these powers for the benefit of creditors? Please explain your answer.

8.1 We acknowledge, as a starting point, that reversing the burden of proof would make the bringing of a claim under section 238 more attractive to officeholders, at least on its face. Under the current regime, an officeholder must establish that the consideration received was significantly less in money or money's worth than the consideration provided by the company. That is not always straightforward, particularly where the relevant assets are difficult to value or the evidence of contemporaneous market value is incomplete.

8.2 We also acknowledge that it may be reasonable to assume that there would be a deterrent effect on connected party transactions and that this might improve corporate governance, an explicit aim of the proposal. However, a deterrent effect is only beneficial if the transactions deterred are ones at an undervalue which cause harm. Connected party transactions at full value - which are frequent and commercially legitimate – could also be deterred. The presumption would apply equally to both types of transaction. Any connected party will, on the face of it, need to document and preserve evidence of value at the time of the transaction, regardless of whether there is any other ground for concern. A presumption of undervalue in connected party transactions would be a blunt and, in our view, disproportionate instrument.

8.3 For the following reasons, we do not consider that those potential benefits provide a sound justification for reversing the burden.

Borderline cases

8.4 A reversal of the burden would remove the threshold obstacle referred to above and allow an officeholder to commence proceedings without first having to satisfy itself that it can prove undervalue. We recognise that the proposed change directly responds to concerns (as highlighted in the 2018 Consultation response) about the cumulative deterrent effect of the existing tests on officeholders in borderline cases.

8.5 However, there will be borderline cases where an officeholder cannot clearly determine whether a transaction was at an undervalue, and where the connected party recipient, facing the costs and disruption of contested proceedings, chooses not to challenge the presumption. Recoveries to creditors in such cases would be improved but it does not follow that such recoveries would correspond to any actual undervalue. In such borderline cases, it will not be obvious whether the economic reality of litigation has discouraged a meritorious rebuttal. It would be wrong to assume that cases where connected parties would not challenge the presumption would be cases where wrongdoing has occurred. The cost of rebuttal may exceed the benefit.

8.6 The borderline case is, by definition, one where it is genuinely uncertain whether undervalue has occurred - the transaction may well have been at full value as assessed at the relevant time. If it is difficult for an officeholder to prove undervalue, it will frequently be equally difficult for the connected party to disprove it, but with materially different consequences. To presume undervalue in connected party cases would be to presume the core substantive wrong: it is the depletion of the estate which is the central element of the cause of action. A reversal of the burden, particularly in borderline cases, effectively shifts the risk of evidential uncertainty from the officeholder (who asserts the wrong) to the connected party (who may be entirely innocent of wrongdoing). That is contrary to the basic principle that the party asserting a wrong must prove it.

8.7 This concern is compounded by the practice of assigning clawback claims to litigation and claims acquisition companies. We support this ability, which is a genuine benefit to officeholders who are thereby able to monetise claims that they cannot fund themselves. However, in such cases, a connected party would not simply be facing a resource-constrained officeholder but a professional litigant with deep pockets and a commercial incentive to pursue a claim where all of the constituent elements are presumed in its favour. In those circumstances, the prospect of litigation costs would play a more significant role in the decision whether to pursue a rebuttal, to rely on the good faith defence, or to admit the claim.

8.8 The practical consequence of reversing the burden of proof in borderline cases can be illustrated by reference to a recent TUV claim. In *Manolete Partners PLC v Howarth (Re One Legal Services Ltd)* [2025] EWHC 2294 (Ch) Manolete failed to discharge its burden of proving undervalue - it adduced no documentary evidence in support of its contended loan balance - and the s238 claim was dismissed. Had a connected party presumption of undervalue applied, Manolete would have had a prima facie case by virtue of the respondent's connected party status alone, and the burden would have shifted to the respondent to disprove undervalue. Yet the respondent had no access to the company's server which held the key records needed to do so, access having been terminated by the administrators. The outcome could have reversed entirely without any change to the underlying merits.

Evidence

8.9 We are not persuaded that the proposed change will necessarily lead to materially greater recoveries for the benefit of creditors. A rebuttable presumption does not eliminate the need for a factual inquiry into value; it merely determines who bears the burden of advancing evidence on it. Whether full value was given will still need to be investigated because if a connected party successfully rebuts the undervalue presumption, it will be for the officeholder to prove any undervalue. This will be particularly significant in high value borderline cases which are both the most likely to be contested and the cases in which the promise of improved recoveries is most consequential - yet it is exactly those cases which do not turn on the burden of proof and where the presumption is least likely to reduce the burden on officeholders.[1]

8.10 There is also a subtler point: the quantum of evidence required to rebut a presumption is not necessarily the same as that required to prevent a claimant from proving its case, even though the formal standard - balance of probabilities - is identical in both directions. Where a claimant bears the burden, a defendant need do nothing more than prevent that burden from being discharged. As such, a passive approach, exposing gaps and weaknesses in the claimant's evidence, may suffice. However, where a presumption operates, that passive approach is no longer available. A presumption operates as a provisional conclusion that must be displaced by contrary evidence.[2] A defendant must affirmatively prove the contrary position, and the same evidence that would have been sufficient to cast doubt on a claimant's case may fall short of the higher task of carrying full affirmative persuasive weight in rebuttal. This creates a potential for injustice providing a powerful reason why reversing the burden of proof should not be undertaken lightly.

Good faith defence may not be an adequate safeguard

8.11 The Consultation relies on the section 238(5) good faith defence as the safeguard for connected parties who cannot rebut the presumption of undervalue (or insolvency, which is already presumed in connected party TUV claims). We do not consider that to be an adequate or reliable protection for claims where both insolvency and the harm (undervalue) have been presumed. A connected party who cannot rebut the presumption of insolvency or undervalue would be compelled to fall back on a defence that is uncertain in scope, very difficult to establish on the facts and in respect of which there is limited judicial guidance. In addition, it is not obvious what the new fairness test will add to the existing legislative framework. The Consultation states that "it will be up to the connected party to prove the deal was fair". Would this be intended to add to the good faith defence in section 238(5) or introduce a new element? It is also worth noting that s240(2) does not contain a carve-out from employees, in contrast to s240(1)(a).

8.12 We acknowledge that in the *Howarth* case referred to above at paragraph 8.8, the judge found, as an alternative basis for dismissal, that the s238(5) good faith defence would have succeeded on the facts. However, the defence is fact-sensitive and uncertain in scope, and there appear to be no reported cases in which the section 238(5) defence has been successfully made out where undervalue has been established.[3] Indeed, the Court of Appeal recently noted in *Taqa Bratani Ltd v Fujairah Oil and Gas UK LLC* [2025] EWCA Civ 1669 that "*it is very difficult to see how, taken in isolation, a transaction at an undervalue could ever reasonably be believed to benefit an insolvent company.*" Its availability on the particular facts in *Howarth* cannot be assumed to be replicable across the generality of connected party cases in which a presumption of undervalue would operate.

Limitation periods

8.13 We note the Supreme Court's recent decision in *THG Plc v Zedra Trust Company (Jersey) Ltd* [2026] UKSC 6 appears to have removed a fixed statutory limitation period for antecedent

1 See, e.g., the recent decision in *Re Food Retailer Operations Ltd (in liquidation)* [2026] EWHC 1228 (Ch) where the High Court had to consider connected party transaction at an undervalue and connected party preference claims and made clear that the case did not turn on the insolvency presumption applicable to the former – the judge considered the evidence going each way and made his conclusion accordingly.

2 *Re Casa Estates (UK) Ltd* [2014] EWCA Civ 383, also discussed briefly at paragraph 8.20 below.

3 As noted in *Re Food Retailer Operations Ltd (in liquidation)* [2026] EWHC 1228 (Ch).

transaction claims, replacing it with a discretionary fairness-based approach. In that context, a presumption of undervalue operating alongside a potentially open-ended limitation period places connected parties in a significantly more exposed position. A connected party required to disprove a presumed undervalue many years after the transaction, in respect of a claim that cannot readily be time-barred, faces a materially different landscape. We consider that the combination of a reversed burden and an uncertain limitation period is particularly inappropriate.

Summary

8.14 For these reasons, while we accept that reversing the burden of proof would increase the nominal effectiveness of the provision for certain categories of claim, we do not consider that this increase in effectiveness is appropriate, proportionate, or consistent with the principled basis on which the TUV regime operates. We are concerned that the proposed change would deter commercial activity and connected party transactions generally, impose disproportionate litigation risk on parties who have transacted at full value, and generate more uncertainty than it resolves.

Question 20: How might reversing the burden of proof improve corporate governance and company conduct overall? Please explain your answer.

8.15 For the reasons discussed, we are sceptical that reversing the burden of proof for TUVs will materially improve corporate governance or company conduct, and we would caution against the Consultation's assumption that it will do so.

8.16 Directors and connected parties who are properly advised are already aware of the risk of challenge to connected party transactions. What would improve governance is certainty - knowing where the line falls and what constitutes an acceptable transaction. Presuming undervalue in every connected party transaction within a two-year window, with the burden on the connected party to prove otherwise, does not create certainty; it creates pervasive uncertainty and potential litigation risk across a wide range of ordinary commercial transactions.

8.17 Requiring solvent companies to maintain evidence sufficient to rebut a presumption of undervalue for every connected party transaction within a rolling look-back window – which might, e.g., include contemporaneous valuations, paper trails, legal advice – risks imposing a significant administrative and cost burden on companies. In practice, that is likely to be felt most acutely by smaller businesses with limited administrative resource.

8.18 A deterrent effect depends on awareness, education and clear norms, not on a reversal of the burden of proof. We would encourage the Government to consider whether improvements to guidance for directors on connected party transactions, including online resources accessible to directors of SMEs, would be a more proportionate and effective mechanism for improving conduct.

Question 21: Should there be a presumption that a company is insolvent when a preference is made to a connected party? If possible and appropriate, please share examples or evidence of how the market is currently acting, or to demonstrate how this will work in practice.

8.19 No. We do not consider that a presumption of insolvency for connected party preferences is justified, and we have substantial concerns about its effects. Our reasons are both principled and practical. The points made above in relation to connected party TUVs on the evidential concerns reversing the burden of proof would raise (at paragraph 8.9 and 8.10) and the impact of Supreme Court clarification on the appropriate limitation periods to clawback claims apply equally to the proposal to reverse the burden of proof for connected party preferences.

8.20 We would also highlight the decision in *Re Casa Estates (UK) Ltd* [2013] EWHC 2371 (Ch), on appeal [2014] EWCA Civ 383. It demonstrates the evidential difficulties that a connected party will have in rebutting a presumption of insolvency where the issue concerns future debts because the further forward the issue goes, the more difficult it becomes for the connected party to prove (on a balance of probabilities) that the company can reasonably be expected to meet its liabilities. While that difficulty currently exists in the context of connected party transactions at an undervalue, it would in our view be disproportionate to introduce it for connected party preferences where desire to prefer is already presumed and bearing in mind the substantive concerns we raise below.

8.21 We would also like to highlight the fact that the law on when a company is insolvent is difficult and very fact based and that therefore rebutting the presumption will be very difficult.

Understanding why insolvency is currently presumed for connected party TUVs but not connected party preferences

8.22 The existing regime under sections 238, 239 and 240 reflects a deliberate and principled balance. It might at first glance appear anomalous that insolvency is not presumed for connected party preferences but is presumed for connected party TUVs. The apparent anomaly, on closer examination, reflects a principled distinction.

8.23 Before insolvency, a company may discharge its liabilities in any order it sees fit (subject to contractual restrictions). English law does not prohibit a solvent company from paying one creditor before another – the *pari passu* principle does not apply. It is only on insolvency that the *pari passu* distribution principle becomes engaged. It is the disruption of that principle - by putting one creditor into a better position than they would otherwise have been in an insolvent liquidation or administration - that is the vice of the preference. A preference by a company that remains solvent causes no harm and the *pari passu* principle is not engaged. Insolvency is therefore not a background eligibility condition for a preference claim - it is the factual precondition without which there is no harm to undo. With a preference, the concern is to ensure that assets are shared in accordance with the statutory scheme and the *pari passu* distribution principle.

8.24 With a preference, provided that the debt was incurred bona fide, the recipient (whether or not connected) is entitled to the benefit of being paid – there is a debt owed. By contrast, with a TUV, the recipient (whether or not connected) is not entitled to the benefit (the undervalue).[4] The state of insolvency circumscribes when an officeholder may challenge a TUV – it is an eligibility condition for bringing the claim. Undervalue transactions by a solvent company may also be harmful but challenging them is not within the remit of insolvency officeholders. While the fact of insolvency renders a preference harmful (by disturbing the *pari passu* distribution principle), insolvency does not determine the harm resulting from a TUV – that is present by virtue of the transaction being at an undervalue.

8.25 As such, the insolvency presumption for connected party TUVs ensures that the officeholder need not establish insolvency in order to recover assets transferred to a party who was not

[4] As noted, e.g., in *Doyle, Keay and Curl: Annotated Insolvency Legislation 2025 (13th edition)*.

entitled to the benefit - whereas for preferences, insolvency cannot be presumed without removing the very condition that makes the payment wrongful in the first place.

8.26 By presuming desire to prefer for connected parties but requiring proof of contemporaneous insolvency, the existing regime focuses the officeholder's attention on the moment when the preference actually becomes harmful, rather than treating every connected party payment as presumptively suspect. That is in accordance with principle. It is consistent with our point made in 8.5 above that the party asserting a wrong must prove it – hence, an officeholder should be required to show undervalue for a connected party TUV and to show insolvency for a connected party preference. Those elements are not procedural but constitutive of the harms s238 and s239 are targeted towards correcting.

Impact on connected party emergency funding

8.27 A presumption that a company is insolvent when a preference is made to a connected party risks having a chilling effect on emergency funding provided by shareholders and group companies because any loan repayment made would be presumptively voidable for a two year look back period. Parent companies and shareholders providing bridge finance or interim liquidity support to distressed subsidiaries would face materially greater exposure. This is likely to reduce the availability of connected party rescue funding precisely when companies need it most.

8.28 We note that the Consultation itself acknowledges, in the context of the proposed reform of extortionate credit transactions, that lenders to distressed companies take on greater risk and that this will be reflected in the price the borrower must pay. That acknowledgement sits uneasily alongside the preference presumption. Connected party lenders who price their increased legal exposure to preference vulnerability into their lending terms – e.g., by charging higher interest rates - may find that those terms are subsequently challenged as "commercially disproportionate" under the proposed revised s244 test. The Consultation does not address how these two proposals interact. A connected party lender who increases its rate to reflect the genuine additional risk created by the preference presumption should not thereby expose itself to liability under a lowered extortionate credit test; but the Consultation provides no assurance to that effect. The combined effect of the two proposals, taken together, creates an environment in which connected party rescue finance becomes simultaneously riskier to provide (all repayments would be presumed voidable) and more difficult to price at a rate that reflects that risk - an outcome directly contrary to the Government's stated aim of not deterring rescue finance.

Risk for unconnected creditors benefitting from connected party guarantees

8.29 Discharge of a guarantor's liability through repayment of the primary obligation can constitute a preference in favour of the guarantor. While the form of any court order will depend on the facts, it could involve repayment by the creditor and reinstatement of the guarantee. A regime in which insolvency is presumed would cast a shadow over legitimate payments to unconnected creditors in discharge of debts properly due to them and who could face increased exposure if their debt benefitted from a connected party guarantee, for example from the borrower's parent. Parent guarantees of subsidiary borrowings are of course common. The consequences of an insolvency presumption for connected party preferences could extend well beyond the connected party relationship. Consideration should be given to whether this may affect finance terms and practice more broadly.

Rejection of a notional cessation of payments

8.30 The Cork Committee expressly rejected the adoption by English insolvency law of a concept of "cessation of payments" - a date after which all transactions by a debtor should be impeachable. The effect of presuming insolvency for connected party preferences, combined with the existing presumption of desire to prefer, would be to create in effect a notional cessation of payments period earlier than the commencement of formal insolvency proceedings. Every payment by a company to a connected party within the two-year look-back period would be presumptively impeachable on its face. This would be a fundamental departure from a deliberate legislative policy choice.

Rebutting desire

8.31 As the law stands, a director can rebut the desire presumption in a connected party preference by showing that they had no contemplation of an insolvent liquidation at the time of giving a preference. A presumption of insolvency as an objective fact would sit uneasily alongside evidence as to the director's subjective state of mind regarding that state of affairs, and a court might face an awkward reconciliation exercise which does not arise under the present regime.

Summary

8.32 For these reasons, we do not consider that the proposal to presume insolvency for connected party preferences is appropriate, proportionate, or consistent with the principled basis on which the preference regime operates. We are also concerned that the proposed change would deter commercial activity, including significantly the provision of connected party emergency finance.

Question 22: Have you used, or tried to use, the extortionate credit provisions? If possible and appropriate, please share examples.

8.33 We would typically consider the extortionate credit provisions in the context of providing advice on a prospective transaction. Challenges under this section are rare. However, this does not necessarily suggest there is a defect in the section – e.g., it could also be because the types of transactions contemplated by that section are uncommon in practice. One possible reason cited by commentators for the scarcity of cases (in a corporate context) is the highly regulated and competitive nature of the financial market. [5]

8.34 The CLLS would like to note that legal opinions are a common practice and required for certain financial transactions, such as netting and close-out netting. Would the Government intend for there to be exclusions, for example, the safe harbours are set out in the new EU Directive on harmonisation (see Article 7(3)(e)). As a point of comparison, the EU Directive on harmonisation expressly contains a carve out for carve out for rescue finance being held to be void or voidable in Article 36.

Question 23: What, if any, are the unintended consequences on businesses of the above proposal?

8.35 See our response to Question 24 and 25 for the effect on origination lending, as well as rescue finance (and potentially other types of transaction as well).

[5] Transaction Avoidance in Insolvencies (3rd ed), R Parry et al pg198

Question 24: Should section 244 Insolvency Act 1986 be revised to allow "commercially disproportionate" (or similar wording) transactions to be challenged in court? Please explain your answer.

8.36 No. The proposal to lower the threshold to "commercially disproportionate" (or similar wording) would create a materially less stringent test (as acknowledged by the Consultation) and consequently would bring into scope legitimate conduct not contemplated by original provision, it would also introduce legal uncertainty, both of which could have significant consequences - without principled justification. Contrary to the Consultation's suggestion, we do not consider the proposal would enact Parliament's original intention for this measure and would as a consequence, have a deleterious effect on the availability of rescue finance.

8.37 It is clear from the Cork Report that the Committee's intention was to set an officeholder's power to challenge lending arrangements at a high threshold, modelled on the Consumer Credit Act 1974 which itself used "*grossly exorbitant*". The proposal to revise s244 to allow "commercially disproportionate" transactions to be challenged would be a significant departure from this intention and we are concerned that it conflates legitimate risk pricing with exploitation. We are not aware of systemic or wide scale misuse of commercially disproportionate funding to companies that subsequently become insolvent which would justify such departure and in the absence of evidence to that effect we do not support the proposal, particularly as it is not limited to connected parties but would extend to all lending. Further, the provision needs to be considered alongside the law on penalties and the Makdessi test (see *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67 and its application for example to default interest provisions (see *Houssein v London Credit Ltd* [2025] EWHC 2749 (Ch)) and where the Court's focus is on whether the provision is extravagant or unconscionable in the circumstances. As noted in our introduction above, in the case of BHS – an unusual case in which the cost of lending was firmly in focus - a remedy was available within the existing legal framework.

8.38 Furthermore, there is a qualitative difference between lending that is grossly exorbitant and lending that is merely commercially disproportionate. The object of s244 is to enable lending to be challenged where it is excessive and confers an undue benefit on the lender. The grossly exorbitant threshold signifies lending that is so unfair as to be oppressive. It is not aimed at offering a company protection from bad bargains. Even if, under the proposal, it were possible for the particular circumstances to be taken into account in assessing whether lending is commercially disproportionate, such that nominally large percentage rates should not be taken out of context (for example in the case of rescue finance where urgency and /or the risk profile may legitimately drive higher pricing and tighter terms than in the ordinary course), the lower threshold would inevitably – and by design - catch a wider range of lending arrangements. Section 244 was not intended to provide officeholders with a general review power over commercial lending terms.

8.39 Also, the threshold for an extortionate transaction in s244 (as currently drafted) should not be viewed in isolation. Consideration must be given to the exceptionally broad scope of the other components of the provision:

(a) All credit transactions are in scope. The term "credit" is not defined in the IA 1986 and it has the potential to encompass a wide range of transactions, including any transaction involving a deferred payment. This could for example include the sale of goods or services, and hire purchase agreements where there is an element of deferred consideration, as well as a broad range of financing arrangements. [6]

(b) There is a three-year look-back period which is "generous"[7] in comparison with other provisions pertaining to antecedent conduct, and applies in all cases not only to connected party transactions.

(c) There is no requirement to show that the company was insolvent at the time of the credit transaction or became so as a consequence.

(d) All credit transactions are presumed to be extortionate.

8.40 Consequently, an officeholder (or their assignee) need simply demonstrate that the company entered into a credit transaction within the three year period. There is no requirement to show that the transaction was extortionate. The onus is on the creditor to establish that the transaction was not extortionate. This is an exceptionally low bar for bringing a claim under s244. The current high threshold as to what is extortionate makes clear to transacting parties that only extreme cases will be in scope, and deters opportunistic claims. Materially lowering the threshold, when considered together with the component parts of the provision, will encourage claims would fundamentally alter the scope and approach of potential claimants to this provision.

8.41 We refer also to our comments at paragraph 8.28 about the interplay with the proposal to presume insolvency for connected party preferences which could affect pricing for rescue finance at the same time as the s244 threshold is lowered.

Question 25: How might "legitimate" rescue finance be affected by this change? Please explain your answer.

8.42 The practical consequence of lowering the threshold would be significant for legitimate rescue finance and beyond : bringing in a wide range of ordinary corporate transactions, made up to three years prior and at a time when the company was not insolvent and there may well have been no concerns whatsoever as to the company's financial position, materially increases the exposure of lenders and other contracting parties to claims under s244 (whether meritorious or not). This will be factored into the cost of providing credit and the appetite to provide credit at all. It is worth noting that commentators have suggested that the current high threshold to be met in s244 was likely driven, at least in part, by an awareness of the importance of commercial certainty and a desire not to stifle the credit market. [8]

8.43 As set out above under s244, it is presumed that a credit transaction is extortionate and so the burden of proof lies with the provider of credit to prove to the contrary. We assume that a "commercially disproportionate" standard would apply similarly. That would, in effect, require lenders (or any party to whom a deferred payment is to be made), to market test every provision of "credit" (whether a facility advanced or a sale or hire purchase agreement or other arrangement involving an element of deferred consideration) or find (and fund) another way to demonstrate that the terms are not commercially disproportionate (e.g. independent financial advice and benchmarking which will increase cost and have a lead time). In some cases that will simply not be possible and in many cases it will be wholly

[6] Transaction Avoidance in Insolvencies (3rd ed), R Parry et al

[7] Transaction Avoidance in Insolvencies (3rd ed), R Parry et al

[8] Transaction Avoidance in Insolvencies (3rd ed), R Parry et al

unrealistic (not limited to the distressed sphere, although it is well documented that the difficulties associated with market testing are often exacerbated in that context). This also appears unjustified in the absence of any identified mischief.

8.44 In addition, any new threshold test under s244 would give rise to a period of significant uncertainty. It would require time (potentially several years) for case law to develop to determine the scope and limits, what factors the court should consider and what evidence will suffice to demonstrate that the provision of credit was not "commercially disproportionate", before credit providers could be confident in their assessment and mitigation of the risk of challenge in any given scenario.

8.45 We consider therefore that the proposal would have a chilling effect on the pricing and availability of credit, not only for legitimate rescue finance but also for origination lending and potentially for a range of other transactions. It is likely to limit the availability of finance in certain scenarios and to make it considerably more expensive in others, as credit providers will need to factor in: (i) the need for additional work at origination to evidence that the transaction is not commercially disproportionate (e.g. market testing or independent advice); (ii) the cost of defending a claim if brought; and (iii) the risk of such a claim being upheld.

8.46 It can be difficult to obtain finance in a distressed scenario, both interim finance to provide liquidity while a plan is formulated and exit finance to fund the company post restructuring. Making lending more expensive, and potentially entirely inaccessible in some cases, may increase instances of premature entry into an insolvency process by viable businesses. The committee is of the view that this would be counterintuitive at a time when the UK does not have a formal rescue finance regime, unlike several notable jurisdictions, and should be encouraging the provision of legitimate rescue finance to foster a culture in which viable businesses can be rescued.[9]

Question 26: Should the legislation be amended to make it clear that misfeasance actions against shadow directors of companies in liquidation are possible?

8.47 Yes, we would support this measure.

Question 27: Is there any doubt about the application of other sections of Chapter X Insolvency Act 1986 to shadow directors? Please explain your answer.

8.48 We have not carried out a review of Chapter X but would in principle support its application to shadow directors.

9. Proposal 6: Expansion and legal clarification of examination powers for live companies

Question 31: Should the Secretary of State's powers under section 447 Companies Act 1985 be clarified to explicitly require any person to respond to investigators' questions? Please explain your answer.

9.1 Yes, in principle. If the purpose is simply to remove doubt and make clear that relevant persons must answer proper questions, that is likely to assist investigations. However, any clarification should be accompanied by express preservation of legal professional privilege and the privilege against self-incrimination, together with an express ability for interviewees to

[9] See for example The Case for Further Reform to Strengthen Business Rescue in the UK and Australia, South Square Digest, December 2020

have legal representation. Clear guidance should also be given on process and scope so that the power is exercised predictably and proportionately.

10. Proposal 7: Modernisation of disclosure gateways

Question 32: Should the Insolvency Service review the section 447 Companies Act 1985 disclosure framework? Please explain your answer setting out the positives and negatives of the current framework.

10.1 Yes. The existing framework appears dated and there is a sensible case for reviewing whether it remains fit for purpose in the current enforcement landscape. A more modern structure may improve cooperation where there is a legitimate need for information sharing. That said, any widening of disclosure powers must be carefully controlled, as unjustified dissemination of information during investigations may prejudice companies and individuals.

Question 33: How can the Insolvency Service best balance the need for confidentiality with the requirement for transparency and accountability in investigations under section 447 Companies Act 1985? Please explain your answer.

10.2 The starting point should remain confidentiality during a live investigation. Beyond that, there is likely to be merit in a clearer and more flexible mechanism for onward disclosure for defined purposes and to defined recipients, subject to suitable safeguards. Consideration should also be given to allowing disclosure to officeholders once a company has entered an insolvency process where that is genuinely needed for recovery or investigation purposes. At the same time, there should be transparency at an aggregate level about how the gateways are used, together with appropriate protection for confidential material and sources.

11. Proposal 8: Information gathering powers for investigating the conduct of directors of live and solvent companies

Question 34: Should the Secretary of State have the power to request additional information from directors of solvent companies before initiating disqualification proceedings under Section 8 Company Director Disqualification Act 1986? If no, please explain your answer.

11.1 In principle, yes, provided the power is used for a defined investigative purpose and with proper controls. It may be sensible for the Insolvency Service to be able to obtain information before deciding whether proceedings are justified. The concern is that such a power should not become an unnecessarily broad tool in areas where other regulators or enforcement bodies are better placed to act. Its use should therefore be disciplined and proportionate.

Question 35: Should, as proposed, the powers mirror those in Section 7(4) Company Director Disqualification Act 1986? If no, please explain your answer.

11.2 There is an argument for consistency, but solvent company investigations are not the same as post-insolvency investigations. In the solvent context the company remains in business, and requests for information may have a more immediate operational and commercial impact. If the powers are mirrored, that different context should be recognised in how they are framed and exercised.

Question 36: Are there any limitations or safeguards you think should be included? If yes, please explain your answer and, if possible, provide suggestions.

11.3 Yes. At a minimum, the power should only be exercisable where there is a reasonable basis for considering that disqualification proceedings may be appropriate. Requests should identify the conduct under review, explain why the material is relevant, and allow a reasonable time to respond. Legal professional privilege and the privilege against self-incrimination should be preserved. There should also be a mechanism for representations on scope and timing, protection for commercially sensitive information, and some form of oversight or review where the use of the power is disputed.

Question 37: Do you believe the proposed powers would improve the effectiveness of director disqualification investigations? Please explain your answer.

11.4 Subject to safeguards, yes. Used properly, such powers may enable the Insolvency Service to make better-informed decisions before proceedings are commenced and to distinguish more fairly between differing levels of responsibility among directors. That should improve case selection and reduce the risk of proceedings being brought on an over-inclusive or under-developed basis.

Question 38: Should the proposed clarification in proposal 6 be replicated in section 7(4) Company Directors Disqualification Act 1986 and for section 8 Company Director Disqualification Act 1986 disqualifications? Please explain your answer.

11.5 Yes, subject to the same safeguards. There is merit in consistency across the various information-gathering regimes, provided the underlying protections are also carried across. That would reduce uncertainty and avoid unnecessary distinctions in practice.

Point of contact

Should you have any queries or require any clarification in respect of our response, please feel free to contact our chairperson or any of the members of the working group set out below.

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https://clls.org/committees/insolvency.html

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https://clls.org/committees/company.html