Association of Business Recovery Professionals

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The Rt Hon Oliver Dowden CBE MP
Deputy Prime Minister and Chancellor of the Duchy of Lancaster

Email only - nsipolicy@cabinetoffice.gov.uk

15 January 2024

Dear Mr. Dowden,

CALL FOR EVIDENCE - NATIONAL SECURITY AND INVESTMENT ACT ('ACT')

1. INTRODUCTION

1.1 R3 is the trade association for the UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession. Our members work across the spectrum of the profession, from global legal and accountancy firms through to smaller, local practices.

1.2 The insolvency, restructuring and turnaround profession is a vital part of the UK economy. The profession rescues businesses and jobs, creates the confidence to trade and lend by returning money fairly to creditors after insolvencies, investigates and disrupts fraud, and helps indebted individuals get back on their feet. Our members have direct experience of insolvencies and their impact on the UK economy and insolvent companies' stakeholders.

1.3 This response has been prepared by R3 in collaboration with members of its General Technical Committee. The Committee deals with issues of general importance and significance to the profession in the United Kingdom, keeping under review all UK and EU legislation, prospective and other matters relating to insolvency law. The Committee is multi-disciplinary and is made up of representatives from across the insolvency and restructuring profession, including practising insolvency practitioners, lawyers (including those specialising in advising regulated entities), academics, and others.

2. GENERAL OBSERVATIONS

2.1 We welcome the UK Government's Call for Evidence to consider changes to the National Security and Investment regime, in particular the proposal to extend the current exemptions to other officeholders dealing with a process set out in the Insolvency Act 1986 ('IA86').

2.2 The insolvency related questions in the Call for Evidence are from 26 to 28. Whilst these general observations do not provide direct answers to those questions, we wish to express our views on the Act from an insolvency perspective.

Administration

2.3 The exemption provided by the Act in respect of the appointment of administrators is welcomed. The appointment of an administrator is often in a time pressured situation and the exemption helpfully avoids the appointment being impeded or delayed to the detriment of assets and creditors.

2.4 Whilst the exemption to the appointment of administrators is welcomed, a member of the technical committee has raised a query about the current wording of the Act in relation to the exemption. We have attached this query at **Appendix one** and we would very much like your views on their thoughts.

Liquidation

2.5 We believe the exemption should be extended to liquidators. The appointment of a liquidator is like that of an administrator; the appointment does not change the ownership of assets or shareholdings held by the company in liquidation. The appointment is merely a change of the human mind exercising control over the voting of shares owned by the company in liquidation, or a decision to dispose of the shareholding or other assets.

2.6 The existence of the exemption for administrators at present only causes serious doubt about the position of liquidators.

2.7 With regard to liquidators, it is possible under section 145 of IA86 [1] for the liquidator to seek a court order that the company's assets (including shareholdings) be vested in the liquidator personally. The section applies to a winding up by the court, although is accessible to a liquidator in a voluntary liquidation[2]. We are unsure whether the section has often been used in practice. If an application for vesting were to be made, it appears that notification under the Act in relation to any relevant shareholdings would be required and this would not be 'impossible' under s6(3) of the Act as the application to court for vesting would be a voluntary step of the liquidator. Ideally an exemption would be given in this situation also.

2.8 An exemption should be in respect of a liquidator in a creditors' voluntary liquidation and a compulsory liquidation.

2.9 With regard to an Official Receiver, there are practical and policy reasons for exempting such appointments also.

Special Administration

2.10 The exemption should also be extended to special administrators. Each special administration regime operates according to its own legislative terms, but there is generally involvement by the relevant Secretary of State or statutory regulators in relation to the appointment, as an additional protection in a manner that does not feature in relation to an ordinary administration.

Bankruptcy

2.11 The text within the Call for Evidence briefly mentions, ahead of questions 26 to 28, a "bankrupt individual", however, the document fails to mention the position of a trustee in bankruptcy whereas it clearly states that the UK Government is considering extending the current administrator exemption to liquidators and special administrators.

2.12 Whilst we agree that the exemption should be extended to liquidators and special administrators, it should also be extended to trustees in bankruptcy (including the official receiver). In a bankruptcy the assets of the individual bankrupt, including any shareholding in an entity to which the Act applies, automatically vest in the trustee immediately on appointment taking effect or, in the case of the official receiver, on becoming trustee[3].

[1] Section 145 of the Insolvency Act 1986
[2] Section 112 of the Insolvency Act 1986
[3] Section 306 of the Insolvency Act 1986

2.13 Immediately on appointment there is a change of legal ownership and the trustee in bankruptcy can either require himself to be entered on the share register, thereby enabling him or her to vote in respect of the shares or can direct the bankrupt (if co-operative) how to vote. It is unclear whether the Act overrides the IA86 to make the vesting of the shares in the trustee in bankruptcy void by reason of non-notification, in which case the shares remain with the bankrupt, or whether the notification requirement is disapplied by s6(3), on the basis that it is practically 'impossible', at least prior to the event.

2.14 If the vesting of the shares in the trustee in bankruptcy is considered void, we cannot imagine there being a policy reason to deprive the creditors of the bankruptcy of the value of this asset, whose subsequent sale would be subject to the Act in any event.

2.15 If the notification requirement is disapplied, the protection should be made clear otherwise the Act is leaving all those concerned to interpret section 6(3) of the Act in this way, and hope that they are correct, with risks of a subsequent sale unravelling after the event (even though approved under the Act) on the basis that the trustee in bankruptcy never in fact owned the shares and was accordingly unable to sell them.

Administrative Receivership

2.16 Whilst the appointment of an Administrative Receiver, who will be an authorised insolvency practitioner, is rare, appointments can still occur under IA86. Therefore, the exemption should also extend to this type of process.

2.17 With regard to other types of receivers, this merits further review as to inclusion in the exemption.

3. CALL FOR EVIDENCE – RESPONSE

3.1 Please find attached our response at **Appendix two** 'NSIA Call for Evidence - Offline version of Response Form'. This letter is in addition to the appendix.

4. CONCLUSION

4.1 We consider that the exemption to the appointment of administrators to be helpful and should be extended to liquidators, special administrators, administrative receivers, and trustees in bankruptcy as it makes sense from both a policy perspective and a practical operational perspective.

4.2 We note that the exemption in relation to foreign insolvency proceedings is widely defined by paragraph 6(3)(c), which makes the restriction of the UK exemption only to administration all the more inexplicable.

4.3 We would welcome your views on the observations set out in Appendix one by a member of the technical committee.

4.4 Members of the Technical Committee would be happy to discuss our response further with you or a member of your team. If you would like to meet or if you have any other queries, please contact me at ben.luxford@r3.org.uk or on 020 7566 4218.

Yours sincerely,

Ben Luxford
Head of Technical
R3, The Insolvency and Restructuring Trade Body

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Appendix 1

R3, General Technical Committee – member query

1.1 Paragraphs 6(2) and (3) of schedule 1 to the Act –

"Rights exercisable only in certain circumstances etc.

6(1)Rights that are exercisable by a person only in certain circumstances are to be treated as held by the person only—

(a)when the circumstances have arisen, and for so long as they continue to obtain, or

(b)when the circumstances are within the control of the person.

(2)But rights that are exercisable by an administrator or by creditors while an entity is in relevant insolvency proceedings are not to be regarded as held by the administrator or creditors even while the entity is in those proceedings.

(3)"Relevant insolvency proceedings" means—

(a)administration within the meaning of the Insolvency Act 1986,

(b)administration within the meaning of the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405 (N.I. 19)), or

(c)proceedings under the insolvency law of another country or territory during which an entity's assets and affairs are subject to the control or supervision of a third party or creditor.

(4)Rights that are normally exercisable but are temporarily incapable of exercise are not for that reason to be treated as not being held."

1.2 The above exemption relates to the rights incoming to an administrator. It does not, however, relate to a disposal by an administrator, and we understand that there should be no such exemption merely because a disposal happens to be made through the agency of a company's administrator.

1.3 The Act requires notification of the disposal of substantial shareholdings or assets in specified sectors. We are unable to see that the appointment of an administrator triggers any transfer of rights to the administrator (or elsewhere). The appointment of an administrator does not change the ownership of assets or shareholdings held by the company in administration. Ownership remains with the company and the administrator is an agent of the company[4]. As an agent of the company, the administrator becomes the human mind behind the company and can exercise voting rights in respect of shareholdings or decide to dispose of the shares (or other assets).

1.4 It may be that paragraph 3(1) to (3) of schedule 1 of the Act[5] captures an administrator as a "dominant" person under paragraph 3(3)(d) of schedule 1 of the Act. If that is the legislative intention, this provision will also capture the appointment or removal of a dominant director to or from the board of a solvent company, whatever may be meant in law by a director being dominant.

[4] Paragraph 69 of Schedule B1 of the Insolvency Act 1986

[5] Schedule 1 of the National Investment and Security Act 2021

1.5 Even if the appointment of an administrator may be a notifiable event by reason of paragraph 3 of schedule 1, this appears to apply only where there are subsidiaries as paragraph 3(3)(d) of schedule 1 of the Act feeds back into subparagraphs (1) and (2) rather than it being a standalone provision relating to the administration company itself.

1.6 The concept of a person with "dominant influence or control" and its implications for the workings of the Act would appear to merit reworking to achieve some clarity of what may be intended by the obscure paragraph 3(3)(d).

1.7 We would welcome your views on the above observations.