

April 29th 2020

To UK Members

Proposed new UK Insolvency legislation

In 2015, anticipating the EU Directive that required member states to introduce pre insolvency consensual restructuring processes the UK Government undertook a review of Insolvency Law and entered into consultation with interested parties. EACTP commented on the process and an EACTP member was involved in the consultation process. By 2018 the “final draft” was ready but put on hold with all the parliamentary time dominated by legislation to leave the EU.

The key point for EACTP members was the provision for a pre insolvency moratorium under a supervisor to seek a consensual restructuring. We lobbied hard for turnaround managers to be recognised as “suitably qualified professionals” to act as supervisors but in the final draft only licensed IP’s were recognised, a result of intense lobbying by the Insolvency Practitioners and the big Accounting firms. We had raised the issue of conflict of interest between acting as a supervisor and then as appointed Insolvency Practitioner. The legislation skirted round this by prohibiting an individual IP taking both roles but not IP’s from the same firm.

As President I wrote to several MP’s and ministers on April 8th bringing to their attention that the UK needed this legislation urgently and whilst I did not receive a response we should be pleased to see that the process has gained momentum and new legislation is expected in the coming two months. We await the drafts of the proposed legislation but at this stage we must presume the starting point will be the 2018 draft. On behalf of EACTP’s UK members I have taken a pre-emptive approach and put our point of view to the Business minister in the letter below. I have also approached the shadow business minister. It is important to us that professionalism gets due recognition and I will continue to lobby on your behalf.

You will note that in the text I also refer to the Institute of Turnaround (IFT). Whilst I have always been of the opinion that to be recognised as a profession we need to be exam based which IFT will not be, we are not quite there yet (we will make a formal announcement very soon on the progress of our forthcoming agreement with Leiden University as faculty and moving to an entry by examination only basis later this year). This is a UK emergency and we will not be alone in making representation. Whilst we all have our personal views this is a time for broad cooperation. IFT have strong local support in some of the larger institutions and have a voice.

Feel free to make similar approaches to your local MP or any government connection that you have. You are clearly free to put your personal views but should you enjoin EACTP membership in your approach please restrict mention of the EACTP position to those two points that I have raised below.

When we have access to the new draft legislation we will keep UK members updated. I would also be happy to hear your views. Bear in mind that this legislation is on fast track and we need to act with speed.

I look forward to your support in this important matter.

Communication sent today April 29th 2020.

“Dear Minister

I wrote to you on April 8th expressing my organisation’s concern at the lack of a pre insolvency moratorium in the UK and the missed opportunity for companies to restructure under qualified professional supervision with a period of stay from creditor action. The European Association of Turnaround Professionals (EACTP) membership practicing in UK are pleased to see the positive actions by the Government to provide loans and other reliefs in this difficult period. We are also heartened by reports that proposed changes to the UK Insolvency Law which were put on hold in 2018 are soon to be passed into legislation. I would like to draw your attention to two issues that at the time, and as commented on by EACTP members in the consultation process, we believed detracted from best practice.

Restructuring of near insolvent companies is best achieved by professionals with turnaround management skills. Turnaround embraces operational management experience, financial expertise and knowledge of the legal protections of creditor rights. In the UK there are a number of such turnaround professionals who are not licensed Insolvency Practitioners (IP’s) by choice but who are members of professional organisations such as EACTP and the Institute for Turnaround (IFT), who have been accredited by these organisations through demonstrated performance. They are a pool of talent that should be drawn upon to guide distressed companies to survival, stability and resilience in these unpredictable economic circumstances. Turnaround professionals do recognise that an unviable and insolvent company must file for insolvency. They will recommend such action in accordance with the law acting as “shadow directors” with all the legal obligations to creditors and potential liabilities that statutory directors have. But they prioritise consensual restructurings of companies in the “zone of insolvency” ahead of insolvency, and have the operational skills to guide management to survive and thrive without the collateral damage and domino effect of an insolvency filing.

There are only a limited number of IP’s in UK and most publicly admit that they do not have the operational management experience that the current situation demands. The draft legislation in 2018 stipulated that only IP’s could be supervisors in a moratorium. It precluded turnaround managers as “suitably qualified professionals”. We believe that this should be reconsidered and professionals such as accredited turnaround managers should also be recognised, both for the more relevant management skills that they possess and importantly because they add to and complement the available pool of restructuring talent. 2020 is not 2018. Times have changed and we believe that the time is right for UK legislation to recognise the benefits of turnaround professionals acting as supervisors in a moratorium in saving corporate value.

During the consultation period the inherent conflict was raised of professionals acting as both a pre insolvency supervisor and subsequently accepting an insolvency appointment. Insolvency is not a bright line event but a finely balanced judgment. It requires an independent mind balancing all stakeholder interests without eroding creditor rights. The draft legislation went half way to recognising the conflict but fell short of rationale. It recognised that an individual IP could not act in both capacities but did not restrict connected parties such as members of the same firm in these roles. We believe this to have been a compromise too far to protect vested interests and is not in the best national interest. Whilst we do not object to IP’s acting as supervisors in a moratorium we believe that complete professional independence at individual and firm level be required in the supervisory capacity and the insolvency role.

We appreciate the heavy responsibility that your department bears at this moment. We also appreciate the support that the government is giving to business. EACTP membership and other turnaround professionals are equipped with the experience and skills to play a key role in preserving as much enterprise value as can be saved. We hope that this government can now address these concerns.

We are ready to act and request your consideration of the above so that our professionalism can be of maximum value to the country.

With best regards

Yours sincerely

Alan Tilley

President

European Association of Certified Turnaround Professionals

Mobile; + 44 (0) 7950 808777

atilley@bmandt.eu

www.eactp.eu

