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Re: INSTITUTE OF CREDIT MANAGEMENT RESPONSE TO THE INSOLVENCY SERVICE CONSULTATION: REFORM OF THE PROCESS TO APPLY FOR BANKRUPTCY AND COMPULSORY WINDING UP (NOVEMBER 2011)

The Institute of Credit Management is the largest professional credit management organisation in Europe. Its members hold important, credit-related appointments throughout industry and commerce, and we feel it appropriate to comment on this consultation.

Before answering the paper's specific questions, the Institute wishes to raise a number of general and more fundamental issues:

A. The questions in the consultation paper are based on the assumption that the principle of the proposed changes is accepted. This is not true in our case and, for a number of reasons, we believe the basic premise has a number of flaws.

B. Bankruptcy is a very different process from a winding up petition and has very different impacts. Where the proposed reforms apply similarly to individual consumers (bankruptcy) and limited companies (winding up petitions), we believe they fail to adequately recognise the disparities between the two.

C. Expanding the proposed debtor petition process reforms to undisputed third party bankruptcy and winding up petition processes is also, in our view, inappropriate because the needs, processes, and desired outcomes of debtors are very different from those of third parties.

D. We question whether the responses to previous consultations have been adequately and properly reflected in the drafting of this document. We would suggest that, in at least some cases, the reflection is less than complete.

E. There is no mention of what qualifications or expertise the Adjudicator would have and yet he is being given significant power to determine the outcome of disputed petitions and whether a dispute is genuine or not. It is difficult to see how any such decisions could be as rigorous as those made by experienced, independent and legally qualified judiciary as at present.

F. The opportunity to oppose and appeal against applications, combined with the absence of qualification/expertise when compared with the judiciary at present, opens up, in our view, the opportunity for debtors to use the process as a means of avoiding creditor action by delay and protraction.

G. The independence of the judiciary is a key factor and we do not believe the Adjudicator can be seen as truly independent if he sits within the Insolvency Service which, in many cases then also acts as Trustee. Whether or not a genuine conflict arises, perception would suggest it does.

H. Improving access to debtor petitions for bankruptcy inevitably means that the process will be less onerous. For the debtor to simply state "that he/she has had an opportunity to take advice" does not sufficiently ensure that bankruptcy is the right step for the individual, nor does it give sufficient gravitas to bankruptcy which must be seen as a last resort. The principle that 'debtors who can pay, should pay' seems to be inadequately reflected.

I. We question why bankruptcy is being looked at in isolation. There are several solutions available to a debtor including bankruptcy, individual voluntary arrangement, debt relief order, debt management plan, and informal arrangement with creditors. We believe bankruptcy should be considered as one of a range of options available rather than treated entirely separately. Furthermore, there are inadequate safeguards to ensure that bankruptcy is the right solution for a debtor applying for a petition.

Responses to specific questions

Q1: Should documents relating to a bankruptcy or winding up case remain with the party who created them, and be open to inspection there by persons so entitled? If not, please explain your answer.

Yes

Q2: Do you think that a debtor should be able to pay instalments within a specified period of time after submission of his/her application, or that there should be no such time constraints but only when full payment has been made would a debtor be able to complete and submit an application form?

Yes, but what happens if – during the instalment period – there is a stay of proceedings or judgment is obtained?

Q3: If you favour a limit on the period of time during which instalments could be paid, what do you think should be the maximum period? Less than 3 months? 3 months? Or more than 3 months?

3 months

Q4: Should instalment payments be non refundable?

Yes – but this fact needs to be spelt out at the start of the process.

Q5: If not, how should the administrative costs of handling the refund be recouped?

N/A

Q6: Should there be any additional requirements for registration in order to deter abuse? If yes, please outline what you think those requirements should be.

It is not clear to us whether the additional registration requirements are simply to facilitate refunds or more generally to establish that the applicant is genuine. If the former, our response is n/a. The question of establishing whether the person applying online is indeed who they say they are remains valid and needs addressing.

Q7: Do you think it would be useful for the Post Office Ltd (or another business that provides a similar service) to offer a "check and send" service?

We believe the analogy with the checking of passport applications to be unhelpful and inappropriate. We see little benefit in a "check and send" service – the advice sector and/or intermediaries would

surely be better placed to give meaningful advice rather than simply check that all the boxes have been ticked.

Question 8: Do you think that there should be a fully electronic process for third parties who submit applications for individuals' bankruptcy or for companies to be wound up? If you think not, can you explain why not?

Yes but the system needs to be robust, reliable and effective.

Question 9: Do you think that there should be differential pricing according to whether an application is submitted by a third party in paper form or electronically? Please explain your answer.

N/A

Question 10: Do you think that third parties should only be able to pay application fees electronically? If not, can you say why not and suggest alternative or additional means of payment?

Yes, in line with our response to question 8.

Question 11: Do you think that there is scope for a pre-action process to encourage greater settlement of debt claims before a creditor resorts to bankruptcy or compulsory liquidation?

We would welcome any process that encourages settlement as long as it is not draconian or onerous, and is not allowed to become a vehicle of avoidance. There is already a requirement for individuals to be signposted to sources of advice prior to the commencement of action, and we agree that any pre-action notice should be combined with service of a Statutory Demand in order to avoid extending timescales.

Question 12: Is 21 days an adequate time period within which debtors can respond to a pre-action notice? If not, please suggest a more suitable period and explain your reasoning.

Yes, as long as the period runs concurrently with the Statutory Demand.

Question 13: Can you suggest any additional matters that you think ought to be included in the pre-action process? Is there anything listed that should not be included? Please give reasons for your answer.

No

Question 14: Do you think that the pre-action process should be mandatory or discretionary?

If a pre-action process is to be introduced, we believe it would have to be mandatory but, as per our response to question 12, should run concurrently with the Statutory Demand.

Question 15: Do you think that there should be sanctions for a creditor who indicates it has complied with the pre-action process when it has not? Do you think those sanctions should be civil (such as costs or more onerous requirements for filing future applications) or criminal or do you think there should be the option of both?

Yes – civil

Question 16: Do you think that these questions would be helpful to applicants in deciding whether they are entitled to make an application on the grounds of a debtor's COMI?

The question refers to "questions" following text which talks about guidance. We are not clear what questions we are being asked to comment on.

Question 17: Can you suggest any other matters that the guidance could usefully cover to further help applicants?

It is not clear from the document what the 'guidance' on which we are being asked to comment would be.

Question 18: How likely is it that a third party such as a creditor will know, or be able to find out with reasonable accuracy, a debtor's email address and/or mobile telephone number?

Good credit management practice would include the capturing of email addresses and mobile telephone numbers prior to the commencement of the trading relationship. However, a debtor may fail to provide updated details, either inadvertently or deliberately as an avoidance tactic, and this calls into question the degree of reasonable accuracy that can be achieved. Such details can be easily and frequently changed.

Question 19: Is it reasonable to require a creditor to re-serve a if more than 4 months have elapsed between service of the demand and making the application?

Yes

Question 20: Who do you think should be responsible for sending a copy of the bankruptcy application to the debtor and eliciting his/her response?

The Adjudicator, as long as he sits outside of the Insolvency Service.

Question 21: Do you think that a prompt by text message (which would only be sent if a debtor consents to the use of his/her mobile telephone number in this way) would be an effective mechanism to help alert the debtor to the imminent arrival of further information by post and/or email? Please explain your answer.

Yes but we question why consent would be needed if the information being conveyed was simply that correspondence was likely to be received shortly. We have concerns at the level of administration and resource required to manage such a process effectively.

Question 22: Do you agree that the only dialogue between the debtor and the Adjudicator should be to confirm correct contact details, and to establish whether the criteria for making a bankruptcy order are met. e.g. whether the application process has been complied with by the creditor; whether there is a debt that exceeds the bankruptcy level; and whether the jurisdiction criteria are satisfied. If not, can you suggest what other dialogue might need to take place and why?

We agree in principle that the only dialogue between the debtor and the Adjudicator should be for the reasons suggested but our concerns, as expressed in paragraph H of our introductory comments below is that the debtor is only making a statement that "he/she has had an opportunity to take advice". This does not ensure that bankruptcy is the appropriate solution in the circumstances and furthermore, unless the Adjudicator is wholly independent of the Insolvency Service, there could be an inherent interest in increasing the volume of petitions being granted.

Question 23: Is there any other way in which a dispute might be resolved before the court becomes involved? Or do you think that it is appropriate that a judicial decision is given at this stage in the proceedings?

No – we believe disputes should always go to court and we question how the Adjudicator will be qualified adequately to determine whether a dispute is valid or not.

Questions 24: Do you agree with the way we suggest that applications to which there is neither consent nor opposition should be handled? If not, can you explain why not and suggest an alternative solution?

Yes

Question 25: What period of time would it be appropriate to allow the debtor to communicate his/her response to the Adjudicator? 14 days? Less? Or more?

14 days

Question 26: Do you think a third party applicant should be able to request to withdraw its application at any time up to the point at which it is determined?

Yes

Question 27: Should any appeal against the decision of the Adjudicator be made in the first instance to the county court, or is there a benefit in retaining the existing provision that allows an appeal to be made in the first instance, in certain circumstances, to the High Court?

We believe appeals should be made to the court that would have otherwise dealt with the matter.

Question 28: How important is it for the reforms proposed in this document that there is a Liquidator of Last Resort for Scotland?

We believe this is important though the question of funding is clearly key.

Question 29: If you think that it is important that there is a Liquidator of Last Resort, which organisation do you think should provide that office and how should it be funded?

We would suggest the Liquidator of Last Resort should be provided by the Accountant in Bankruptcy and should be funded by the State.

Question 30: Do you think that the Adjudicator's role should be limited to determining applications for winding up on the grounds that the company is unable to pay its debts or where the company has passed a valid special resolution that it be wound up? If not, would you please explain your reasoning.

Yes

Question 31: Are you able to suggest the proportion of petitions that are currently presented to the courts on grounds other than the company's inability to pay its debts; the company having passed a valid special resolution that it be wound up; and that winding up is just and equitable?

No, we are not best placed to suggest this level of detail.

Question 32: Who do you think should be responsible for communicating notice of the winding up application to the company and eliciting its response to the proceedings?

The Adjudicator, as long as he is sitting outside of the Insolvency Service.

Question 33: Who should send notice to specified interested parties?

As per question 32

Question 34: When should notice be sent to these interested parties?

Simultaneously

Question 35: Do you think that a winding up application should be advertised under these new proposals? If yes, please provide reasons for your answer.

We firmly believe winding up applications should be advertised. It is inappropriate for them to be a private matter and other creditors need to be aware. The impending advertisement encourages negotiation to take place earlier, addresses the avoidance issue, and is likely to encourage resolution since its impact can be significant.

Question 36: Can you foresee any circumstances in which it would be appropriate for the Adjudicator to seek further information from the applicant? If yes, please provide details and suggest how frequently this might occur.

Yes, for procedural matters such as when filing is incomplete or unclear, although the onus should be on the applicant to ensure the submission is complete and accurate.

Question 37: What period of time should be sufficient for a company to communicate to the Adjudicator its opposition? 14 days? More? Or less?

7 days – the pre-action process is already giving more than sufficient time for responses or challenges to have been raised.

Question 38: Do you think that a creditor should be able to request to withdraw its application at any time up to the point at which it is determined?

Yes

Question 39: Should any appeal against the decision of the Adjudicator be made in the first instance to the county court, or is there a benefit in retaining the existing provision that allows an appeal to be made in the first instance, in certain circumstances, to the High Court?

As per our response to question 27, appeals should be made to the court that would ordinarily have dealt with the matter, although we have concerns that the level of expertise in the county courts in relation to winding ups may not always be adequate, particularly when the issues are complex.

Impact Assessment

We do not believe we are best placed to comment in detail on the numbers contained in Annex C but, from conversations with other organisations, we believe the numbers cannot be wholly relied upon. We would urge that submissions raising specific issues are reviewed in detail.

Yours faithfully

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