

## Response ID ANON-B5JP-4ESD-1

Submitted to **Insolvency and corporate governance**

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### About you

#### What is your name?

**Name:**

Glen Bullivant FCICM, Chair of CICM Technical Committee

#### What is your email address?

**Email:**

governance@cicm.com

#### What is your organisation?

**Organisation:**

Chartered Institute of Credit Management

#### Are you happy for your response to be published?

Yes

#### Would you like to be contacted when the consultation response is published?

Yes

#### (optional) How did you hear about this consultation?

**Where did you hear of this consultation?:**

Email from BEIS

**Other (please specify):**

### Sales of Businesses in Distress

#### 1 Do you think there is a need to introduce new measures to deal with the situation outlined?

**Comment here.:**

Yes.

#### 2. Should the new measures be limited to the sale of a subsidiary or should a new measure extend to any act procured by the parent (through its directors), which operates to the prejudice of the creditors of the subsidiary once that subsidiary is insolvent? Might such measures create material conflicts for directors? If so, how might they be resolved?

**Comment here.:**

The new measures should extend to any act that may be to the detriment of the creditors.

We do not believe there is any material conflict and, if there is, it can be resolved by the disqualification and personal liability measures. It may also be appropriate for directors to protect stakeholders and employees by way of a guarantee.

#### 3 Should the target be the parent company directors responsible for the sale? If not, who else should be targeted; or who in addition?

**Comment here.:**

Yes, the target should be the parent company directors, and "protected" shareholders might also be considered.

#### 4 How can we ensure that there is no impact on sales which genuinely seek to rescue distressed businesses, or bring new investment into distressed businesses?

**Comment here.:**

Applying a 'reasonableness' test should ensure no impact. The sale of BHS should have failed such a test. Paying a secured lender at the expense of ordinary creditors should also not be considered reasonable.

### Value extraction schemes

**5 Are new tools needed to enable insolvency office-holders to better tackle this behaviour? Or could existing antecedent recovery powers be expanded to ensure this behaviour is tackled?**

**Comment here.:**

Yes, new tools are required to complement and expand the existing antecedent recovery powers.

**6 Do you agree the Government should introduce a value extraction scheme reversal power as outlined above? Do you agree that the insolvency test in the current powers is not appropriate in the circumstances outlined above?**

**Comment here:**

Yes. We do not agree that the insolvency test is inappropriate; rather, it may need some modification and to be applied more rigorously.

**7 Could the proposal adversely affect the availability of finance for distressed companies? Could it have other adverse effects? If so, how might the proposal be modified to mitigate these effects? Are there any protections that should be given to investors?**

**Comment here:**

We believe there may be some adverse effect but, for the most part, this will impact on lenders who have little interest in the well-being of the company and their discouragement would be beneficial. Investors may be able to seek protection after a suitable qualifying period.

**8 How could the proposal be developed to ensure that only those schemes which unfairly extract value and harm the interests of other creditors can be challenged by the insolvency office holder? Should concepts such as “unfair” and “excessive” be defined or left to the courts to develop through case law?**

**Comment here.:**

The ultimate decision should be derived through the judicial system, and the Insolvency Practitioner should present the case using their professional expertise. Any stakeholder should have the right to bring a case.

## **Dissolved companies**

**9 Do you agree that there is a problem in this area and that action should be taken to prevent directors from avoiding liabilities and scrutiny by dissolving their companies?**

**Comment here:**

Yes.

**10 Do you agree that director conduct in a dissolved company should be brought within the scope of the Secretary of State's investigatory powers? Do you have any other comments on the proposal?**

**Comment here:**

Yes, and the six year statute of limitations period should apply.

## **Strengthening Corporate Governance in Pre-Insolvency Situations**

**11 Are stronger corporate governance and transparency measures required in relation to the oversight and control of complex group structures? If so what do you recommend?**

**Comment here:**

Yes; companies should be required to declare corporate governance arrangements and there should be a clear definition of 'interconnected liability'.

**12 What more could be done through a revised Stewardship Code or other means to promote more engaged stewardship of UK companies by their investors, including the active monitoring of risk? Could existing investor initiatives to hold companies to account be strengthened (e.g. through developing the role of the Investor Forum)? Could better arrangements be made to ensure that lessons are learned from large company failings and controversies?**

**Comment here:**

Investors, particularly institutional investors, can be company-friendly and are able to outvote activists. Full disclosure of corporate governance and policy should be required.

**13 Do you consider reforms are required to the legal, governance and technical framework within which companies determine dividend payments? If so what reforms should be considered? How should they be targeted so as not to discourage investment?**

**Comment here.:**

Some reform would be helpful to prevent inappropriate levels of dividend and the introduction of a 'cap' might be considered. Where excessive dividends are a contributory factor in the insolvency, redress should be available.

**14 There are perceptions that some directors may not be fully aware of their duties with regard to commissioning and using professional advice. Do you agree, and if so, how could these be addressed?**

**Comment here.:**

We agree that directors can be unaware of many of their duties and responsibility. This results from the ease with which anyone can act as a company director without any expertise or appropriate knowledge. A basic online course ensuring people were aware of their legal responsibilities could be hugely beneficial to the individual and to all stakeholders.

**15 Should Government consider options to protect payments to SMEs in a supply chain in the event of the insolvency of a large customer? Please detail suggestions you would like to see considered.**

**Comment here:**

We believe the use of Project Bank Accounts should be increased, and the abolition of retentions should be a focus of government. The Construction Leadership Council resolved that they should be abolished by 2025 and this should be the absolute deadline with acceleration if at all possible.

Too many small businesses do not undertake even basic credit management practice, and education is an imperative. Tools like the Managing Cashflow Guides written for BEIS by the CICM have been downloaded almost 600,000 times but need to be far more widely publicised and promoted. See <https://www.cicm.com/resources/cashflow-guides/>

**16 Should Government consider removing or increasing the current £600,000 cap on the proportion of funds that can be ring-fenced and paid over to unsecured creditors (the “prescribed part”) or enabling a higher cap in larger insolvencies? What would be the impact of increasing the prescribed part?**

**Comment Here:**

We would prefer a sliding scale to an increased cap. The impact would be limited since, in most cases, there is little in the way of funds after preferential creditors and IP fees have been paid, but it would help to some extent.

**17 Is the current corporate governance framework in the UK, particularly in relation to companies approaching insolvency, providing the right combination of high standards and low burdens? Apart from the issues raised specifically in this consultation document, can you suggest any other areas where improvements might be considered?**

**Comment here:**

We believe that it provides an appropriate balance for the most part. Greater scrutiny of auditor reporting is required. A 'health warning' on information from Companies

House would be helpful; there is no validation, yet inexperienced suppliers can believe the numbers even when they are effectively fictitious.

In general, our members believe that many of the measures are currently available in legislation in one way or another, and this seems to be a knee-jerk reaction to recent events such as BHS, Carillion and vociferous comments from Parliamentary Select Committee members.

There are a number of consultations currently on related matters and it would be helpful if these could be consolidated. We also understand there has as yet been no government response to the 2016 consultation on insolvency process changes. Publication of a response would be timely and inform thinking.