Member State: United Kingdom

The UK has a flexible and effective restructuring and insolvency regime that is very much in keeping with the general themes of the EU Recommendation and is recognised across the world for its efficiency, emphasis on business rescue and high levels of returns to creditors.[1] Business recovery, and the restructuring frameworks that enable it, are very important to both national and global economies; that the European Commission is looking into these issues is therefore welcomed. We recently issued a call for evidence to invite our stakeholders' views on the Recommendation and the UK rescue and insolvency regime and we make reference to the responses we received throughout this questionnaire.

Rescue and insolvency however, cannot be viewed in isolation from other national laws that govern fundamental issues such as; security rights, contract law, company law, trusts, tax and employment. The UK's legislative framework is flexible and updated as needed in the light of experience and changing market conditions. Additionally, as our stakeholders have argued; 'the effectiveness of a legislative regime depends not only on the rules themselves, but also on the quality of the courts which enforce them, the ability of the practitioners who implement them, and the general prevailing commercial and business culture.'[2]

In the UK we have worked hard to develop knowledgeable and predictable courts, experienced and creative specialist professionals and a business culture, in part composed of a flexible lender community and specialist firms prepared to buy distressed businesses and inject new management, which supports a greater depth of restructuring and a concentration of expertise. These factors combined provide UK based corporate debtors with a range of options for restructuring; a flexible tool kit that ensures that, wherever possible, businesses are rescued at an early stage.

1. Availability of preventive restructuring procedures (Point 6(a), 7 and 8 of the Recommendation)

1.1. Is there a procedure in your Member State which enables the corporate debtor to restructure at an early stage, as soon as it is apparent that there is a likelihood of insolvency and thereby avoid insolvency? Since when has such a procedure been in application? Please list each procedure if there are more than one in your national law (where such a procedure is foreseen only as part of ordinary/formal insolvency proceedings, please specify this).

The procedures available in the UK include:

1) Schemes of Arrangement
2) Administration (including pre packaged administration)
3) Company Voluntary Arrangements
4) Consensual agreements

[1] World Bank '*Doing Business*' report places the UK in 13th position globally, 2015.
[2] Insolvency practitioner trade body R3 response to call for evidence, p2.

More information on each of these is provided below and responses to Questions 1.2, 1.3 and 1.4 are included as a subsection under each procedure.

i. Procedure no. 1: Schemes of Arrangement

A Scheme is a compromise or arrangement, under Part 26 of the Companies Act 2006, between a company and one or more classes of its creditors. A scheme becomes legally binding on all creditors (or the relevant class or classes) if the necessary majority of creditors vote in favour and the court approves it. A scheme is not an insolvency procedure and can be a useful restructuring tool for both solvent and insolvent entities; it can be accessed by corporate debtors at an early stage and can therefore be made use of to avoid insolvency.

Questions 1.2, 1.3 and 1.4

A meeting of Scheme creditors will be convened at the direction of the court. This is usually done on the application of the debtor, because in practice the debtor's support for the scheme is required for it to have any chance of success, although a creditor can apply for a convening hearing. The Scheme is approved if more than 50% in number, representing 75% in value, of creditors (or of each class of creditors) who attend and vote in person or by proxy pass the resolution. Once this majority has approved the proposition court sanction is required. The Scheme becomes effective on the registration of the court order with the Registrar of Companies.

ii. Procedure no. 2: Administration (including Pre Packaged Administrations)

Administration is an insolvency procedure, first introduced by the Insolvency Act 1986 and updated in 2002 by the Enterprise Act. Administration's primary statutory objective is to facilitate the rescue of the company as a going concern and therefore it gives corporate debtors the opportunity to restructure. A pre packaged administration is a type of administration in which this happens at a particularly early stage; the sale of the business as a going concern is negotiated prior to the company entering formal insolvency, with the transaction (often to a connected party, such as the former director of the old company) taking place immediately upon, or very shortly after formal insolvency.

Questions 1.2, 1.3 and 1.4.

Administration can be accessed in a number of ways; by the company, directors or one or more secured or unsecured creditor(s) making an application to the court. Alternatively the company, its directors or a floating charge holder can appoint an administrator without a court hearing by filing papers at court, which are not subject to judicial scrutiny. The company must be unable, or likely to become unable to pay its debts (cash flow or balance sheet insolvency) or, in the case of an appointment by a floating charge holder, the charge must be enforceable on the date administration commences. A statement from the administrator (an insolvency practitioner) that achieving the objectives of administration is likely is also required.

iii. Procedure no. 3: Company Voluntary Arrangements (CVA)

Company Voluntary Arrangements are an insolvency procedure first introduced by the Insolvency Act 1986 and amended by the Insolvency Act 2000. CVAs can be used to rescue a company as a going concern and they allow companies to renegotiate payments due to all of their creditors, or other forms of financial restructuring. A CVA is supervised by an insolvency practitioner and is a very flexible tool that can be accessed at an early stage and through which a company can be restructured.

Questions 1.2, 1.3 and 1.4

The directors of a company or an administrator or liquidator can propose a CVA. The company does not have to be insolvent. The CVA will be approved if 75% of creditors present and voting at a meeting summoned to approve the proposal agree to it and provided that those voting against it do not include more than half in value of creditors unconnected with the company. CVAs do not require court involvement and debtors therefore take advantage of their swift and efficient nature.

iv. Procedure no. 4: Consensual Agreement to Financial Restructuring

Companies can also agree to informal arrangements with their creditors, in order to achieve early stage restructuring that result in the avoidance of insolvency. It was the view of PricewaterhouseCoopers (PWC), that; 'the majority of the restructurings undertaken on large corporates in the UK are done outside of a formal process, through consensual agreement following a negotiations process.'[3] Consensual agreements are underpinned by long established custom and practice, experienced professional advisors who facilitate restructuring through stakeholder management and flexible laws that allow debtors to take a variety of steps in the best interest of creditors. Consensual agreements are also effective due to the deterrent effects of penalties, such as those that impact upon directors if they do not treat creditors fairly, and the fact that should an agreement fail a formal insolvency procedure may need to be entered into which could result in lower returns to creditors. 'The law therefore works to guide directors to act responsibly when a company is in financial distress, without forcing it into a formal insolvency within a narrow time frame. Creative solutions can be used whilst a restructure is put in place (for example the use of trust accounts to protect creditors). This brings considerable benefits to the UK regime.'[4]

Questions 1.2, 1.3 and 1.4

As this process is informal it is flexible and can respond to contextual and situational needs as they arise, it does not require court involvement.

[3] PWC response to call for evidence, p6
[4] PWC response to call for evidence, p6

1.2. Who can access the procedure (e.g. the debtor and/or one or more of its creditors)?

See above

1.3. What are the conditions for access to such procedure?

See above

1.4. Is a court's decision on opening proceedings a condition for formally entering the procedure?

See above

2. Debtor in possession (Point 6(b) and 9)

2.1. In preventive restructuring procedures mentioned under Question 1 above, what type of transactions is the debtor allowed to conclude during the procedure?

In a stand-alone CVA, a Scheme or consensual arrangement the debtor maintains control over the day to day operations of its business. In a CVA an insolvency practitioner is appointed but their function is only to monitor the company and ensure it complies with its obligation under the terms of the CVA and also often to distribute funds to creditors.

In relation to a Scheme, it is common for there to be a supervisor when the Scheme is proposed by a company in administration/liquidation to assist with distributions to creditors, in which case the administrator/liquidator would be the supervisor. In other cases, a Scheme will not necessarily need a supervisor in order to be implemented.

It is only in an administration that an insolvency practitioner takes over the day to day running of the company and we feel, as do stakeholders, that ‘it is not clear that a debtor in possession model is essential to a rehabilitation objective’[5] and that the introduction of a company rescue expert provides a great deal of benefit.

2.2. Is an insolvency practitioner appointed by the court? If so, what are the powers of the insolvency practitioner?

If a CVA is commenced an insolvency practitioner, or other person authorised by the Secretary of State to act in such capacity, will always be appointed as a nominee and then supervisor of a CVA. In a CVA, the nominee/supervisor is appointed by the director, administrator or liquidator and agreed to by a majority of creditors by value.

An insolvency practitioner is not required to implement a Scheme, although a Scheme proposed by a company in administration/liquidation will be overseen by the administrator/liquidator.

In an administration, the administrator will be an insolvency practitioner nominated by the applicant (director, company, creditor or floating charge holder) and, if the administration is commenced by application to court, he will be approved by the court.

An administrator has a statutory duty to act in the interests of all creditors and must not act so as to harm the interests of any creditor or group of creditors. Within this duty however an insolvency practitioner can be flexible and has a wide range of powers they can use for the realisation of assets and the rescue of a company. In an administration an insolvency practitioner also has the power to investigate a company’s affairs.[6]

[5] Peter Bloxham solicitor response to call for evidence, p.5.
[6] Schedule 1 and Sections 234-236 of the Insolvency Act 1986

3. Stay of individual enforcement actions (Points 10 to 14)

3.1. What types of enforcement actions can be stayed (e.g. of unsecured as well as secured and preferential creditors)?

Small companies, as defined by the Companies Act 2006, planning a CVA may propose a moratorium.[7] During the period the moratorium is in force the company is protected as follows:

- no winding-up petition may be presented;
- no meeting of the company may be called or requisitioned except with the consent of the nominee or the leave of the court;
- no resolution may be passed or order made for the winding up of the company;
- no administration application in relation to the company may be made;
- no administrator of the company may be appointed
- no administrative receiver of the company may be appointed;
- no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the company in respect of a failure by the company to comply with any term or condition of its tenancy of such premises, except with the leave of the court;
- no other steps may be taken to enforce any security over the company‘s property, or to repossess goods in the company‘s possession under any hire-purchase agreement (which includes any conditional sale, chattel leasing and retention of title agreement) except with the leave of the court;
- no other proceedings or execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the leave of the court;
- no floating charge on the property of the company may crystallise; and
- section 233 is extended to cover the moratorium so that "utility" suppliers cannot hold the company to ransom during this period

Certain small companies involved in insurance, banking and other financial market or project finance activities and companies with a liability of £10 million or more under an agreement that forms part of a capital market arrangement are excluded. A company is also ineligible where it is already in administration, liquidation (including provisional liquidation) or administrative receivership as these procedures provide their own protection from the actions of creditors. In addition, the option of a moratorium is not available where a company

[7] A small company is defined as one that does not have a turnover of more than £6.5million, a balance sheet total not more than £3.26 million and not more than 50 employees

currently has a CVA in effect or has already had a moratorium in the previous 12 months and the proposed CVA did not come into effect or ended prematurely.

In an administration, an interim moratorium is automatically triggered when a notice of intention to appoint an administrator is filed and a permanent moratorium occurs once administration is entered into. An interim moratorium has the general effect of freezing the rights of creditors to institute insolvency proceedings and other legal processes but does not destroy them; a creditor may apply to the court for permission to enforce these rights. Once a company is placed into administration no creditor can act to recover assets, or take certain other actions, without the administrator's agreement or the court's permission.

In 2009 we issued a consultation document that invited stakeholder views as to whether the small companies' moratorium ought to be extended to medium and large companies.[8] As a result of the responses we received it was decided that moratoriums should not be extended, although this is a conversation we continue to have with our stakeholders. R3, the trade body for insolvency practitioners, conducted a survey in 2009 that found the existing moratorium procedures are not much used and that '62% said that they thought this would also apply in the case of medium and large companies.' The reasons given for the limited use of the moratorium procedure included; risk to the nominee, directors not deeming it necessary, costs and potentially negative publicity.[9]

Companies often make use of the moratorium protection afforded by administration whilst the terms of a CVA are negotiated or whilst a Scheme is being put in place.

In addition to this, a statutory instrument was recently laid that ensures that debtors cannot be held to ransom by their essential suppliers. This continuity of supply instrument means that key suppliers of utilities, information technology and other services will not be able to terminate their contracts with a debtor company just because that company is insolvent; this will give businesses a better chance of being rescued.

There is no moratorium in the Scheme procedure; however, companies may get the benefit of a stay by implementing a Scheme within an administration.

3.2. Is the stay automatic or granted by a court on the appreciation of the merits of the application? Please provide details, e.g. automatic upon registration in a particular register, or the conditions placed on the granting of the stay etc.

In a CVA, where the directors of a company wish to obtain a moratorium they must submit to the nominee a document setting out the terms of the proposed CVA and a statement of the company's affairs. (The content of these documents is almost exactly the same as in the case of a CVA without a moratorium). The directors are also required to supply any other information the nominee needs to enable him to assess the viability of the proposal.

The nominee will in return submit to the directors a statement of his opinion as to whether the proposed CVA has a reasonable prospect of being approved and implemented; whether the company has sufficient funds to carry on its business during the proposed moratorium;

[8] Encouraging Company Rescue – A Consultation, The Insolvency Service, June 2009
[9] R3 response to call for evidence, p4.

and whether meetings of the company and its creditors should be called to consider the proposed CVA.

To obtain a moratorium the directors must file the following at court:

- a document setting out the terms of the proposed CVA,
- a statement of the company's affairs,
- a statement that the company is eligible for a moratorium,
- the statement from the nominee as to the matters set out above in this paragraph, and
- the nominee's consent to act.

The moratorium comes into force when the above documents (for which there are prescribed forms) are filed at court.

In an administration, an application to court for an administration order automatically triggers an interim moratorium unless an administrative receiver has been appointed. Once a company enters administration a permanent moratorium applies.

3.4. Is the opening of insolvency proceedings also suspended for the duration of the stay?

See question 3.1.

3.5. What is the duration of the stay? When prolongations are possible, please specify under what conditions. Where there is a maximum period for the stay, please specify the maximum stay period.

In a small company CVA, the moratorium ends when a 28 day period has elapsed or when the meetings of the company and its creditors is first held, or is scheduled to be held, whichever is first. This is true unless at the meeting it is resolved that the meeting be adjourned or that the moratorium be further extended. If it is decided that the moratorium should be extended, it can be extended for up to two months from date that the meeting of company and creditors is first held. The moratorium will also come to an end if the nominee withdraws his consent to act, the court orders it to end following a challenge of the nominee's or directors' actions, or the meetings decide it should end.

In an administration the interim moratorium remains in place until:

- the application for the appointment of an administrator is granted or dismissed; or
- the appointment of the administrator takes effect after notice to appoint has been served; or
- the period of five business days expires after the filing of a notice of intention without an administrator being appointed.

Once administration is entered into there is a permanent moratorium that lasts for the duration of the administration which is normally one year, although it can be extended.

3.6. Is there a possibility for the stay to be lifted before its expiry and if so, under what conditions?

See question 3.5.

4. Restructuring plans (Points 15 to 26)

4.1. Are there specific rules on the contents of the restructuring plans? Are the elements listed in Point 15(a)-(e) required also in your law?

Firstly it is important to note that not all restructuring plans require court confirmation under UK law, for example CVAs and consensual arrangements. Instead, the contents requirements for a restructuring plan are often contained in legislation (CVAs) or are set out in case law (CVAs and Schemes). Whilst this means that the UK regime differs in terms of the specifics set out in points 15-26 it means that it exceeds the Recommendation's overarching objective of keeping court involvement to a minimum as set out in Points 7 and 8.

A CVA proposal must contain a short explanation of why a CVA is desirable, and give reasons why the company's creditors may be expected to concur with the CVA. It must also include other prescribed matters such as: full details of the company's assets and liabilities and how they are to be dealt with within the CVA; the expected duration of the CVA; and how the supervisor's remuneration will be paid.[10] Where the proposer of the CVA is the administrator or liquidator, the proposal should, in addition to these matters, contain details of the preferential creditors and any other matters that the insolvency practitioner considers appropriate.[11]

Although there is no regulatory requirement to disclose terms of new finance a stakeholder detailed how it was common practice to do so in CVAs; 'if this [new finance] was likely to be a material factor affecting creditors' voting decisions the terms ought to be disclosed' and also that whilst 'assessing the viability of a plan is a subjective matter…the UK regime does require IPs to comment on the plan and whether it is reasonable to expect creditors to concur.' [12]

In a Scheme, creditors are summoned to a meeting with the company and must be provided in advance of the meeting either with an explanatory statement accompanying the Scheme document or details of how they can access such a statement and the Scheme document. The explanatory statement must explain the effect of the compromise or arrangement, and in particular, state;

- Any material interests of the directors of the company (whether as directors or as members or as creditors of the company or otherwise), and .
- The effect on those interests of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons.

In an administration an insolvency practitioner must put a statement of his proposals to creditors for their approval within 8 weeks of his appointment. Amongst other things, it must include how it is envisaged that the purpose of administration will be achieved, the likelihood of achieving one of the statutory aims of administration, such as rescuing the business as a

[10] Rule 1.3 Insolvency Rules 1986
[11] Rule 1.10 Insolvency Rules 1986
[12] Response of James Cowper Kreston to call for evidence, p25

going concern, and how it is proposed that the administration will end.[13] Where an insolvency practitioner undertakes a pre pack sale they are required to disclose additional information under the Statement of Insolvency Practice 16 (SIP16).[14]

Therefore, as regards the detailed contents of restructuring plans, it is our belief and the belief of our stakeholders that the UK already complies with the Commission's recommendations[15]. R3 summarised it as: 'The information required to be provided in Scheme documentation, CVA proposals and administrators' proposals easily satisfies, or even exceeds, the recommended requirements.' [16]

4.2. Are creditors treated in separate classes for the purposes of voting on a restructuring plan? Are creditors in the same class treated in the same way? Please describe the criteria according to which creditors are grouped

Although voting is not done by classes in CVAs, secured and unsecured creditors are treated slightly differently in that secured creditors are not bound by the CVA unless they have expressly agreed to the arrangement. Secured creditors vote according to the value of their debts but are only admitted to the extent that their claim exceeds the value of the security. In order for the plan to be agreed 75% of creditors by value present at the meeting summoned to approve the proposals need to agree the restructuring deal and those voting against it must not include more than half in value of the creditors unconnected with the company.[17]

In a Scheme, all classes affected have to be in favour of a restructuring plan before it can be implemented, although each class approves on a majority in number, 75% in value of those present, basis. If this majority is achieved the scheme then binds the remainder of the class, including those who may have received no notice of the Scheme. Creditors within a class will be treated in the same manner. What constitutes a class was set out in case law by Bowen LJ in *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 537, paragraph 583, where he said that a the class 'must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'.

Creditors are not divided into classes for the purpose of voting on administrators' proposals. As with a CVA, secured creditors will not be bound to the extent of their security and may therefore only vote on the unsecured balance of their debts. There are also rules for valuing unliquidated debts and hire-purchase/leasing arrangements.[18] The administrators' proposals will be adopted if approved by a majority in value of creditors present and voting, provided

[13] Para 49 Schedule B1 Insolvency Act 1986 and Rule 2.33 Insolvency Rules 1986
[14] https://www.r3.org.uk/media/documents/technical_library/SIPS/SIP_16_-_Version_2_(effective_from_1_November_2013).pdf
[15] The stakeholders include: James Cowper Kreston, R3, Grant Thornton, Clifford Chance, Institute of Chartered Accountants Scotland, Chartered Accountants Ireland, EY, Berg and Institute of Chartered Accountants of England and Wales.
[16] R3 response to call for evidence, p5.
[17] Rule 1.19 Insolvency Rules 1986
[18] Rules 2.38-42 Insolvency Rules 1986

that those voting against it do not include more than half in value of the creditors unconnected with the company.[19]

4.3. Please provide a description of the voting process, including the majority required for the adoption of the restructuring plan and whether voting by distance means is possible.

In a CVA the approval or modification of a proposal at a creditors' meeting requires a majority of three-quarters or more in value of the creditors present in person or by proxy and voting on the resolution, provided that those voting against it do not include more than half in value of the creditors unconnected with the company.

In a Scheme, if a majority in number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.

In an administration, the administrators' proposals will be adopted if approved by a majority in value of creditors present and voting, provided that those voting against it do not include more than half in value of the creditors unconnected with the company.[20]

In all instances voting by proxy is accepted and recent legislative changes in the Deregulation Act 2015 will encourage voting via distance technologies such as online surveying and voting by default.

4.4. Is the involvement of only those creditors affected by the plan, whether they have secured or unsecured claims, possible under the procedure?

Schemes can be made binding on certain classes whilst leaving other classes unaffected. The recommendation appears to go further than this however, suggesting the ability to 'cram down' an entire class of creditors. This is not something the UK regime currently provides for, and whilst we have discussed such a measure with stakeholders they remain divided on the merits of such an approach. It is felt that such a measure would necessitate increased court involvement, create unnecessary layers and procedures and thus slow down the restructuring process and increase its cost.[21]

Other stakeholders have pointed out the need for additional research for example into how the value-break is determined, how abuses of the process can be minimised, and the impact on competitiveness in the free market economy, in particular in relation to any impact this might have on access to finance and the cost of that finance.[22] The risk that if whole class 'cram down' takes place may trigger higher interest rates premiums or tighter and more onerous terms and more guarantees being passed onto other products to compensate

[19] Rule 2.43 Insolvency Rules 1986
[20] Rule 2.43 Insolvency Rules 1986
[21] Chartered Institute of Credit Management response to the call for evidence, p10.
[22] R3 response to the call for evidence, p6.

creating potential problems elsewhere. It also mirrors what is already heavily criticised and complaint about from the pre-packs.'[23]

The City of London Law Society noted; 'Questions such as whether (and if so, in what circumstances) the claims of secured creditors, employees or pension funds should be crammed down, or shareholders should be deprived of their equity, go to the very heart of the legal, social, political and economic policy considerations underpinning a Member State's insolvency regime.' They felt therefore that 'such matters should be left to national laws to address, not least because any attempt at standardisation would require comprehensive amendments to each Member State's restructuring and insolvency laws, extending into the law governing security and quasi-security techniques (and also, potentially into their company and tax legislation) which would be difficult and costly to implement.'[24]

4.5. What are the conditions for the validation of a restructuring plan by a court (or equivalent body)? Are the elements listed in Point 22(a)-(d) among those conditions? Can courts reject restructuring plans if these are not viable?

As is mentioned in answer to question 4.1, not all restructuring plans under UK law require court confirmation; CVAs for example. This process exceeds the Recommendation's specifications as it achieves Points 22(a)-(d) without requiring court approval. This is achieved through several means. First, a CVA nominee who is not an administrator/liquidator must file a report to court on the CVA proposal, including whether they believe a proposal to be acceptable to the majority of creditors[25] and a majority of creditors are unlikely to agree a proposal that does not serve their legitimate interests. Secondly, all creditors must be notified of the CVA proposal and the meeting to approve it.[26] Thirdly, a dissenting creditor may apply to court within 28 days of the post-meeting report (or within 28 days of becoming aware of the CVA, if later) to challenge the CVA on grounds that it unfairly prejudices the interests of a creditor or that there has been some material irregularity in relation to the meeting.[27] One of the factors that the court may consider when deciding whether a CVA unfairly prejudices a creditor's interests is what that creditor would have received on a liquidation of the debtor company.[28]

A court must convene the creditors' meeting(s) to approve a Scheme. Creditors must be given advance notice of the key terms of the Scheme and this convening hearing in a "creditors' issues letter" so that they have the opportunity to attend and make representations at the hearing.[29] At the convening hearing the court will check that the proposed creditor notification provisions and the information to be provided to creditors are adequate before agreeing to convene the creditors' meeting(s). The court will also consider whether the classes of creditors have been properly convened at this stage.

[23] BE RESCUED (BUSINESS) CONSULTING Limited (Previously Firefox Associates UK LLP) response to the call for evidence, p10.
[24] City of London Law Society response to the call for evidence, p11.
[25] s2(2) Insolvency Act 1986. An administrator/liquidator is bound by existing duties to act in the best interests of creditors as a whole.
[26] S3 Insolvency Act 1986
[27] S6 Insolvency Act 1986
[28] E.g. *Re Portsmouth City Football Club Ltd (in administration)* [2010] EWHC 2013 (Ch)
[29] Practice statement (Companies: Schemes of Arrangement) [2002] 3 All ER 96

Schemes are confirmed by the court on the basis that they have been approved by the relevant majority of creditors (see answer to Question 4.3.).At the sanction hearing after the creditors' meeting(s), the court will consider whether the scheme is one which an intelligent and honest member of the relevant class might reasonably approve before sanctioning the Scheme.[30]This gives a creditor the opportunity to challenge the scheme at the sanction hearing for any perceived unfairness in the scheme. Financial information to enable creditors to compare their position under the proposed scheme with a liquidation outcome should have been provided in the explanatory statement[31] and one of the factors which may be raised in a challenge for unfairness is the comparison with what a creditor would have received on a liquidation.

In an administration, the administrator is required to prepare proposals for how he will conduct the administration and he must have regard to his duty to act in the interests of creditors as a whole. The administrators' proposals must be sent to every creditor of the company of whose claim and address the administrator is aware[32] and the administrator is bound by various rules on the summoning of creditors' meetings regarding method of notification, notice periods etc. in respect of the creditors' meeting to approve those proposals.[33] The proposals must state how the purpose of administration will be achieved, and this may include rescuing the company or otherwise delivering a better return to creditors than on a liquidation.[34] A court is not required to approve the administrators' proposals. However, a creditor may apply to court to challenge an administrators' conduct on the basis of misfeasance or that the administrator has unfairly harmed his interests.

For new financing, there are no specific requirements about its relationship with existing creditors. However, there is nothing to prevent creditors from challenging the terms of any new finance with the court if they think that that the new finance prejudices/harms their interests.

4.6. Are dissenting creditors allowed to raise objections to the restructuring plan adopted by a majority of affected creditors before a court?

See question 4.5.

[30] *Re Dorman Long & Co Ltd* (1934) 1 Ch 365
[31] *Re Heron International NV* [1994] 1 BCLC 667
[32] Para 49(5) Schedule B1 Insolvency Act 1986
[33] Rule 2.35 Insolvency Rules 1986
[34] Para 3(1) Schedule B1 Insolvency Act 1986

5. Encouraging new finance (Points 27 to 29)

5.1. Is new money necessary for implementing a restructuring plan allowed and encouraged in national law, e.g. debt-to-equity swaps, sales as a going concern?

Points 27 and 28 of the Recommendation make reference to the problems faced by providers of new finance (criminal liability and finance being declared void, voidable or unenforceable as an act detrimental to the general body of creditors) in some member states. We suggest, and stakeholders agree, that these concerns do not apply in the UK context.[35]

In addition to this existing support we are already talking with stakeholders and 'considering further whether any additional steps could, or should, be taken to facilitate the creation of competitive DIP finance and exit finance markets in the United Kingdom, particularly as encouraging additional sources of essential ongoing funding for businesses which are being restructured'.[36]

5.2. Are new investments protected for example from claw-back or avoidance actions? Please explain

The UK regime largely exempts new financing from avoidance actions - particularly where new money is provided; except for the possible challenge to a floating charge holder where this does not simply secure new money.

Although there is no legislative provision that assures super priority to new financing this is in practice achieved in administration as new funding is repayable as an expense of the administration and is therefore paid first. This is supported by the charge on floating charge assets provided by paragraph 99 of Schedule B1 to the Insolvency Act 1986, as an administrator also has power to grant security over the company's assets.

Super priority status for new funding is in practice achieved, in other restructuring processes, through the terms and conditions agreed in contractual arrangements and through consensual negotiation. In a CVA, the terms of the proposal must provide how the business is to be financed during the course of the arrangement and what security, if any, is to be provided. The rights of an existing secured creditor cannot be compromised without their consent.

The reason why there is currently no legislative provision for forcing super priority status for new funding is due to the existence of a floating charge, there are frequently no free assets. For super priority to be effective therefore, it would have to overreach any floating charge. This would be a fundamental change to the UK insolvency regime and could have an effect on the cost of debt financing.

[35] City of London Law Society Response to call for evidence, p.5.
[36] City of London Law Society Response to call for evidence, p.5

6. Second chance (Points 30 to 33)

6.1. Do natural persons who find themselves in financial hardship have access in your Member State to:

a) procedures which enable them, to make repayments of their debts on the basis of a repayment plan, with or without the possibility of a debt reduction, and

b) procedures which liquidate the debtors' assets in order to satisfy creditors?

Please specify which categories of natural persons can benefit from such procedures (e.g. sole traders, craftsmen, professionals, consumers).

The UK also has a flexible and effective personal insolvency regime that meets the Commission's objective of providing a second chance to entrepreneurs, as well as to consumers and other types of debtor. The processes outlined below are available to all categories of natural person, subject to the limits outlined in reference to Question 6.2.

The following procedures are available in England, Wales and Northern Ireland (with the exception of Debt Management Plans, which are also available in Scotland[37]):

1) Debt Management Plans
2) Individual Voluntary Arrangements
3) Bankruptcy
4) Debt Relief Orders

More information on each of these is provided below and the answers to question 6.2 are provided as a subsection to each.

i. Procedure 1: Debt Management Plans (DMPs)

Under the UK regime a natural person can make use of Debt Management Plans, whereby an agreement is reached between a person and their creditors to pay all of their debts. Regular payments are then made to a licensed debt management company who will distribute these payments to creditors.

Question 6.2.

DMPs can only be used to pay unsecured debts.

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[37] The Scottish personal insolvency regime consists of the following:

1. Debt Arrangement Scheme - a debt payment programme which protects debtors from further action by their creditors.
2. Protected trust deed – an agreement with a Trustee to pay back part of what the debtor owes, and debts are written off upon completion. The deed is binding on creditors, who can take no further action if creditor complies.
3. Sequestration – involves the taking possession and sale of an insolvent debtor's estate for the benefit of creditors.

ii. Procedure 2: Individual Voluntary Arrangements (IVAs)

An IVA is an agreement between an individual and their creditors to pay all or part of their debts. A person makes regular payments to an insolvency practitioner, who distributes this money to creditors.

Question 6.2.

Much like CVAs, IVAs also have to be agreed by 75%, by value, of an individual's creditors present at the meeting called to agree the IVA.

iii. Procedure 3: Bankruptcy

A person can make themselves, or be made, bankrupt. In this process the assets and property of a person is vested in the trustee in bankruptcy, who can realise these in order to make payments to creditors. The debtor's creditors are generally bound to accept the rateable payments made by the trustee in bankruptcy in settlement of the bankruptcy debts owed to them and cannot take action against the debtor to recover the remaining debts.

Question 6.2.

There is no minimum level of debt required in order to declare your self bankrupt, subject to the granting of a Bankruptcy Order by the court. A court may refuse to make the order if an individual has assets that would cover their debt, which they have refused to sell. The creditor petition limit, which is the amount of debt needed for a creditor to petition the court to make an individual bankrupt, was recently increased to £5,000.

iv. Procedure 4: Debt Relief Orders (DROs)

DROs provide debt relief to those excluded from existing procedures – those with low levels of debt but with no ability to pay off those debts due to low income and asset levels, and without the means to enter bankruptcy. They also support the financial rehabilitation of debtors as its low cost provides debtors with an incentive to address their debt issues earlier. By having strict entry conditions DROs also maintain the right of creditors to collect against their debts where debtors are able to pay.

Question 6.2.

Debt Relief Orders are granted by Official Receivers and are accessible by persons who have a debt of less than £20,000, assets (excluding a reasonable vehicle) of less than £1,000 and surplus income of less than £50 a month.

6.2. Please explain under what conditions debtors can access each of the procedures mentioned in 6.1 above.

See above

6.3. After what period of time can natural persons obtain a discharge of their debt under the procedures described above and when do those periods start to run?

The length of DMPs and IVAs vary according to the terms agreed with creditors. Under normal circumstances a bankrupt person, or a person subject to a DRO, will be discharged after 12 months.

6.4. Are there exceptions foreseen in national law from the principle of full discharge after a relatively short period of time (e.g. 3 years)? Which of these exceptions are justified by the policy objectives foreseen in Point 32 of the Recommendation and which are justified by other objectives? Please specify.

Where a bankrupt's conduct prior to, or during, their bankruptcy is deemed to have been dishonest or blameworthy in some other way the Official Receiver can apply to court for a bankruptcy restriction order (BRO). A BRO may last between two and fifteen years and an individual subject to a BRO will face borrowing restrictions and may be prevented from acting as a company director. The same outcome can be achieved without recourse to the court if a bankrupt gives a Bankruptcy Restriction Undertaking (BRU) to the Secretary of State.

This exception is justified by the objectives foreseen in Point 32 as the purpose of a BRO or BRU is to discourage entrepreneurs who have acted dishonestly or in bad faith, either before or after the bankruptcy proceedings were opened, including those who do not adhere to a repayment plans or otherwise take actions that further harm creditors.

In terms of the objective foreseen in Point 32 subsection (c) the UK regime meets this objective as amongst those assets exempt from the bankruptcy estate are certain assets associated with livelihood, such as; books, tools, a reasonable vehicle and other items of equipment which an individual may need to use personally in their employment, business or vocation.

6.5. Which types of debt cannot be discharged in your national law?

Debts under the Proceeds of Crime Act and other criminal liabilities such as those arising from fraud, as well as fines and maintenance payments cannot be discharged.

7. Data (Point 35)

7.1. Please provide available data for the past 5 years (when available) on:

a) the number of preventive restructuring proceedings initiated:

b) the size of debtors involved:

c) the outcome of the proceedings:

d) the length of proceedings:

e) the number of ordinary/formal insolvency proceedings and their outcome:

Insolvency procedures used in restructuring:

Year	Administrations	CVAs
2010	2835	765
2011	2808	767
2012	2532	839
2013	2365	577
2014	1790	563

England and Wales

The information we collect is not stored in such a way as to be able to establish the size of the debtor or the outcome or length of proceedings.

The Insolvency Service does hold information on Schemes of Arrangement as these are restructuring procedures available to all companies, and not just those facing insolvency.

8. Consumer insolvency

8.1. Please describe which of the principles of the Recommendation also apply to consumer over-indebtedness and/or consumer insolvency in your Member State.

The processes outlined in answer to question 6.1. are also available to consumer who are over-indebted/insolvent, therefore they too are afforded a ‘second chance’.

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