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Are the New Restructuring Plans suitable for SMEs?

Like Schemes of Arrangement ('Schemes'), Restructuring Plans ('Plans') are a 'debtor in possession' process – there is no insolvency practitioner required to be appointed to administer, supervise or monitor, albeit specialist restructuring advisors will be closely involved in its preparation and implementation.

They are subject to Court oversight and sanction which divides affected members and/or creditors into appropriate classes, depending on how their rights are to be affected and is subject to creditor approval with voting thresholds of 75% by value in each class (Schemes have an additional requirement of 75% in number, which does not apply to the Plan) and if sanctioned, binds both unsecured and secured creditors (unlike a [Company Voluntary Arrangement](#) ('CVA')) where secured creditors rights cannot be affected.

One of the drawbacks of Schemes is the ability for certain creditors to hold out and disrupt a proposal that would otherwise save a company. Plans import a key feature of US Chapter 11 bankruptcies: a 'cross-class cram down'. The Court has the discretion to impose Plans on dissenting classes if it considers it fair, and if satisfied that none of the members of the dissenting class would be any worse off than they would be if the Plans were not sanctioned (comparing it with what is likely to happen to the company otherwise) and the Plans have been approved by at least one class that would have a genuine economic interest if the Plans were not sanctioned. The cross-class cram down enables debt-for-equity swaps to be imposed without shareholder consent, which Schemes cannot achieve, and the potential for empowering junior creditors.

Between 26 June 2020 and 30 September 2021 (15 months), only 9 companies had Plans registered at Companies House. Our view is that Plans are a useful procedure for bigger companies. None of those 9 companies who have undertaken Plans in the UK are SMEs. The legal and professional costs of Plans are prohibitive for many smaller companies. SMEs tend not to have complex debt structures although they might have sometimes. CVAs, Administrations and Liquidations will continue to be the procedures of choice for the corporate recovery of SMEs for the foreseeable future unless professional costs can be reduced and procedures become more streamlined and standardised.

Bounce Back Loans 'BBL' – Abuses reportable to the Insolvency Service (IS) by Office Holders

These are: Failure to disclose a BBL in the statement of affairs; minimal creditors, e.g., a BBL and bank overdraft, and/or HMRC; funds not being used for the benefit of the business; where there was no intention after receipt of the BBL to carry on trading or make attempt to repay; businesses not trading in the UK or resident for UK tax; businesses not trading as of 1 March 2020; company dormant, i.e., filing dormant accounts for 2019 and/or 2020; sole traders falsely declaring start date of trading; businesses overstating turnover by more than 25%, or a loan of more than 25% of turnover; multiple applications to different lenders for a BBL (N.B.: Companies could apply for other Covid support loans such as a CBILS but must use those funds in part to repay the BBL in full); knowledge of insolvency prior to application; applications close to, or after, insolvency event, including post-petition or post-liquidation; sole traders who were bankrupt, in an IVA or DRO at date of application.

HMRC – Guidance on joint and several liability notices for repeated insolvency and non-payment cases

The Finance Act 2020 introduced 'joint and several liability of company directors' which will make directors personally liable for tax debts in situations where they are suspected of abusing the insolvency framework in order to avoid paying taxes. Where there are repeated insolvency and non-payment cases, an HMRC officer may give a Joint Liability Notice to an individual if it appears to the officer that a number of **conditions** have all been met. **The conditions are as follows:**

Condition A is that there are at least two companies ("the old companies") in the case of each of which— (a) the individual had a "relevant" connection with the company at any time during the period of five years ending with the day on which the notice is given ("the five-year period"), (b) the company became subject to an insolvency procedure during the five-year period, and (c) at the time when the company became subject to that procedure it had unpaid tax liabilities or outstanding tax returns.

Condition B is that another company ("the new company") is or has been carrying on a trade or activity that is the same as, or is similar to, a trade or activity previously carried on by— (a) each of the old companies (if there are two of them), or (b) any two of the old companies (if there are more than two).

Condition C is that the individual has had a relevant connection with the new company at any time during the five-year period.

Condition D is that at the time when the notice is given— (a) at least one of the old companies referred to has a tax liability, and the total amount of the tax liabilities of those companies(i) is more than £10,000, and (ii) is more than 50% of the total amount of those companies' liabilities to their unsecured creditors

The effect of HMRC giving a Joint and Several Liability Notice

The individual is jointly and severally liable with the new company (and with any other individual who is given a notice) for both of the following: (1) any unpaid tax liability of the new company which is unpaid on the day the joint and several liability notice is given (2) any tax liability of the new company that arises during the period of 5 years beginning with the date the joint and several liability notice is given and while the notice continues to have effect. Also, if there is still any unpaid liability of one or both of the relevant old companies, the individual is also jointly and severally liable with that company (and with any other individual who is given such a notice) for that liability.

Insolvency Service Statistics Case numbers (E&W)	2020			2021		
	Q1	Q2	Q3	Q1	Q2	Q3
Corporate						
Compulsory Liqs.	876	202	302	115	102	104
Creditors' Voluntary Liqs.	3,782	2,281	1,915	2,085	2,861	3,591
Administrations	578	354	400	203	157	333
Company Voluntary Arrangmnt	87	47	110	37	25	20
Receiverships	1	1	1	-	1	-
Personal						
Bankruptcies	6,072	2,441	5,225	2,801	2,306	1,870
Debt Relief Orders	9,229	4,820	4,490	4,163	4,374	5,735
IVAs	19,458	25,281	13,914	19,158	21,726	20,559

Commentary on the statistics

Insolvency numbers are still being affected by unprecedented levels of government funding and Covid restrictions. Creditors Voluntary Liquidations and IVAs are approaching pre-Pandemic levels but other procedures are considerably below previous levels. The statistics do not disclose Restructuring Plans and Moratoriums introduced in June 2020. There have been only 9 Restructuring Plans and 14 Moratoriums to 30 September 2021. The Restructuring Plans have been large high-profile companies.

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