



# UK Corporate Insolvency and Governance Act 2020

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The Corporate Insolvency and Governance Act 2020 (the Act) makes the most significant changes to UK insolvency law in a generation. It had a rapid passage through the UK parliamentary process, making its way from first publication on 20 May 2020 to Royal assent on 25 June 2020 in just over five weeks. This article provides a brief overview of the key measures introduced by the Act (both permanent and temporary), the various extensions to the temporary measures and summarises the amendments made to the Act during its progress through parliament. It also provides links to our further, more in-depth, analysis.

## Overview of the Act

The Act introduces three permanent measures:

1. a new free standing moratorium;
2. a restructuring plan process (largely modelled on schemes of arrangement but with the addition of a cross-class cram-down); and
3. restrictions on termination of contracts for the supply of goods and services.

It also includes temporary measures in response to the COVID-19 pandemic, which are:

1. restrictions on using winding-up processes;
2. temporary changes to wrongful trading rules; and
3. relaxation of meetings and filing requirements to give companies greater flexibility.

The restrictions on using winding-up processes were initially put in place until 30 September 2020. These restrictions have been extended a number of times, most recently to 30 September 2021.

The temporary measures relating to wrongful trading were initially not extended and ended on the 30 September 2020. A second suspension on wrongful trading liabilities began on 26 November 2020 and ended on 30 June 2021.

## Moratorium

A free standing moratorium for distressed but viable companies introduced by the Act can be used to support a rescue of a company as a going concern (as opposed to the rescue of only the company's business). The aim is to afford companies some breathing space from creditor action to pursue a turnaround plan without adding significant costs. It is focused on the recovery of the company rather than the realisation of assets so is a marked shift to a debtor-focused process.

The initial period for the moratorium will be 20 business days but this is capable of being extended or terminated early. An initial 20 business day extension is available without consent, so many moratoria may last 40 business days. Further extensions are available with the consent of creditors or the permission of the court. During the moratorium period:

1. the day to day running of the business of the debtor company remains with the directors but under the supervision of a monitor (an insolvency practitioner) and with the monitor's consent required before the directors can undertake certain transactions;
2. creditors and lenders will not be able to take enforcement action against the debtor company (including enforcement of security); and
3. landlords cannot exercise rights of forfeiture.

However, the debtor company must continue to pay certain of its debts during the moratorium. These include amounts due for new supplies made during the moratorium, rent in respect of a period during the moratorium, wages and salary, and amounts due under financial contracts, including loan agreements. These amounts must continue to be paid or the moratorium will have to end. As amounts due to lenders are among those which must be paid lenders have a large measure of control over the moratorium.

Certain debts, largely those incurred during the moratorium, will be given priority status in an insolvency process which follows within 12 weeks of the end of the moratorium. There were concerns that accelerated financial debts could be given this super priority status, but amendments in the House of Lords have sought to deal with that issue.

Our in-depth analysis of the moratorium.

## Restructuring plan

The new restructuring plan process is a court supervised restructuring process, largely modelled on schemes of arrangement but with the addition of a cross-class cram-down. The restructuring plan can be used with or without the protection of the new moratorium.

A company which "has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern" may make an application to use the restructuring plan process. As long as there is some form of compromise or arrangement and the purpose of it is to deal with the company's financial difficulties then the plan is virtually a blank canvas.

Dissenting creditors, including secured lenders, landlords and suppliers together with members of the company can each be bound by a plan if (i) at least one class of creditors who would receive a payment, or have a genuine economic interest in the company, vote in favour; (ii) the dissenting creditors would not be any worse off under the plan than they would have been in the event of whatever the court considers would be most likely to occur in relation to the company should the plan be rejected; and (iii) the court is prepared to sanction the scheme.

Valuation will be key in the new process both in assessing the comparison for creditors being crammed down as part of a plan and also when assessing which creditors are out of the money and can be excluded from the voting process.

Our in-depth analysis of the restructuring plan process.

## Restrictions on termination of contracts for the supply of goods and services

The third permanent change is a new restriction on suppliers of goods or services from terminating a contract or supply, or doing any other thing, because the customer has entered a relevant restructuring or insolvency process. Suppliers will also be banned from insisting on payment of sums falling due prior to the insolvency as a condition of continued supply. There were temporary exclusions for specified small suppliers which ended on 30 June 2021. There are permanent exclusions for certain financial institutions. Financial contracts are excluded which means that lenders will continue to be able to terminate, and exercise other rights, upon a borrower's insolvency.

Our in-depth analysis of these new restrictions.

## Winding up petitions and statutory demands

From 27 April 2020 to 30 September 2021, a creditor cannot present a winding-up petition, unless it has reasonable grounds to believe that either coronavirus has not had a financial effect on the debtor company, or that the company was unable to pay its debts regardless of the financial effect of coronavirus.

Similarly, there is a ban on statutory demands served between 1 March 2020 and 30 September 2021 being used for presenting a winding-up petition on or after 27 April 2020.

The Act modifies existing insolvency legislation so that a petition presented in the relevant period will not prevent disposals of the debtor company's property (which, for the purposes of the Act, are voided from the date of the winding-up order, rather than the date of the petition as is the usual position, unless the court orders otherwise).

Our in-depth analysis of these temporary restrictions.

## Wrongful trading

For most companies, the Act includes a temporary suspension of wrongful trading rules, removing one potential threat of personal liability on directors trading through the coronavirus pandemic. The Act provides that when considering the contribution that a director is required to make to company assets, the court is to assume the director is not responsible for any worsening of the financial position of a company or its creditors during the period 1 March 2020 to 30 September 2020 and during the period from 26 November 2020 to 30 June 2021.

While this should mean that directors will not be required to make a contribution, it is not entirely clear whether any circumstances remain in which the court could order contributions for wrongful trading. Comments made in the House of Lords debates indicate that the government's intention is that there should not be any such circumstances. The fraudulent trading and director disqualification regimes and general directors' duties continue to apply. Directors should continue to act responsibly and reasonably to protect value and minimise loss.

Our in-depth analysis of the temporary suspension of wrongful trading rules.

## Filing of accounts and meetings

Extensions to deadlines for filing accounts, and to other Companies House filing deadlines, are included both in the Act and in secondary legislation made under it. As a result of the restrictions imposed by the government due to the COVID-19 pandemic, the Act includes a number of provisions to make it easier for both public and private companies to hold meetings.

However, the automatic extensions permitted under the Act ceased for filings made after 5 April 2021, and the usual deadlines apply once more. Those with an interest in mortgage charges created up to and including 4 April 2021 will continue to receive an automatic extension of 10 additional days to file charge particulars. Mortgage charges created after 4 April 2021 will not receive an automatic extension, and the charge will need to be filed by those with an interest in it within the usual 21 day period.

## Amendments to the legislation made during its passage through parliament

At all stages, only government amendments were accepted, though many others were proposed. The following table summarises the more significant amendments made to the first draft of the bill (published on 20 May 2020) before it received Royal assent and became law:

Process/Measure	Amendment
Moratorium	The legislation was originally drafted such that financial creditors were able to accelerate their debts during the moratorium and obtain super priority for such debts in a subsequent administration or liquidation of the company, or protection from compromise for such debts in a CVA, scheme or restructuring plan, in each case occurring within 12 weeks of the end of the moratorium.

	<p>Amendments were made before the Act became law to tighten the description of (and thereby restrict) the debts which will obtain super priority or protection in a subsequent process. That description expressly excludes amounts under financial contracts, which became due in the period from the date of the monitor's statement that a rescue would be likely (so slightly before the moratorium comes into force) to the end of the moratorium, because of an acceleration or early termination clause or right. This means that while accelerated debts will not obtain super priority they are still pre-moratorium debts without a payment holiday and therefore would need to be paid during the moratorium. Financial creditors therefore still have the power to bring an early end to the moratorium by accelerating their debts.</p> <p>Further amendments included: Exclusions from restrictions on floating charge crystallisation for collateral security, market charges, financial collateral arrangements, and system charges; and amendments to the definitions of certain types of financial contracts in the moratorium exclusions to refer to the relevant agreement rather than only the transaction type.</p>
Restructuring plan	<p>The removal of the protections initially included for creditors with aircraft related interests so that they can be compromised by a scheme or restructuring plan. This allows the distressed airline industry to make use of those processes and in fact the first use of the restructuring plan process was by an airline, Virgin Atlantic Airways Limited.</p> <p>The introduction of new powers for the Financial Conduct Authority, Prudential Regulation Authority and the Bank of England to enforce the rights they are given to receive notice and provide consent when a regulated person (or in the case of BoE, infrastructure company) is intending to use the restructuring plan process.</p>
Restructuring plan and moratorium	<p>Providing for the Pensions Regulator and Pension Protection Fund (PPF) to receive notices and documents in relation to a moratorium or restructuring plan of a relevant employer and for regulations to be made to allow the PPF to exercise certain creditor rights held by the scheme trustees or managers in a moratorium or restructuring plan.</p> <p>The PPF is also given standing to challenge the monitor's or director's conduct during a moratorium where the trustees or managers of the scheme are creditors and would have standing to make such a challenge.</p>
Termination of contracts for the supply of goods and services	<p>An exclusion of Cape Town Convention interests (related to aircraft equipment) from the new restrictions on termination of contracts or supplies of goods and services, to allow this specialist market to operate without these restrictions.</p> <p>Amendments to the definitions of certain exclusions from the restrictions to refer to the relevant agreements rather than only the relevant transaction type.</p>
Wrongful trading suspension, restrictions on winding-up processes, exclusion for small suppliers from restrictions on termination of supplies, and	<p>Setting the original expiry date of the temporary measures to 30 September 2020. With the exception of certain of the temporary relaxations to the moratorium, these measures have all now been further extended. The wrongful trading suspension was initially not extended and ended on 30 September 2020, however a second suspension on wrongful trading applied for the period</p>

temporary relaxations to allow greater access to the moratorium

between 26 November 2020 and 30 June 2021.

Other more minor technical amendments, and various changes to the regulation making powers given in the Act, were also made during the parliamentary process.

Debate on the legislation in the House of Lords extended to points which have been discussed in the industry for some time but were not included in the Bill for example insolvency practitioner regulation; the need for corporate governance reform; protection for small business from late payment; and criticism of the proposed elevation of certain tax debts to preferential status from December 2020. Only one such matter, the review of pre-pack transactions to connected parties, has been addressed in the Act through the revival of a power to make regulations to prohibit or restrict such transactions, which was given in 2015, but recently lapsed (in May 2020). The Administration (Restrictions on Disposal etc. to Connected Persons Regulations 2021 came into force on 30 April 2021. These regulations impose conditions on disposals to connected persons within the first eight weeks of an administration, meaning that in certain circumstances an administrator will not be able to execute a pre-pack.

## Our verdict

The Act provides very useful additions to the restructuring tool kit and welcome relief for distressed businesses. However, given the speed with which the Act has been passed, and the complexity of the legislation, there are undoubtedly areas of ambiguity and potential challenge. It will be exciting to be part of the community developing market practice and testing the new provisions in negotiations and in the courts.

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