

Title: Corporate Insolvency and Governance Act PIR No: DBT008(PIR)-23-INSS Original IA/RPC No: RPC-4467(2)-BEIS Lead department or agency: Insolvency Service (Exec Agency of DBT) Contact for enquiries: Hamish Hore; hamish.hore@insolvency.gov.uk	Post Implementation Review
	Date: 21/02/2023
	Type of regulation: Domestic
	Type of review: Statutory
	Date measure came into force: 26 th June 2020
	Recommendation: Amend
	RPC Opinion: Green

1. What were the policy objectives of the measure?

The Corporate Insolvency and Governance Act 2020 (CIGA) was introduced by the Government on 26th June 2020 with the overarching objective to provide companies with the flexibility to continue trading during COVID-19, as well as longer term benefits of saving viable companies after the pandemic. It did this with a mixture of temporary easements to insolvency law (which are out of scope of this review), coupled with a package of three permanent measures: Company Moratorium; Suspension of Termination (ipso facto) Clauses; and a Restructuring Plan. Each measure has its own objectives to help save companies which are in financial difficulty but fundamentally viable.

2. What evidence has informed the PIR?

The main body of evidence for this review comes from a process evaluation undertaken by the University of Wolverhampton. The process evaluation made use of semi-structured interviews with stakeholders, a survey of insolvency practitioners and two case studies. Other evidence for this review includes an in-house value-for-money evaluation, a data collection from Companies House filings, international comparisons, official statistics, and monitoring data from Companies House and HM Courts & Tribunals Service (HMCTS).

3. To what extent have the policy objectives been achieved?

The permanent CIGA measures have been broadly welcomed by stakeholders. The Restructuring Plan is seen as a success and appears to satisfy its policy objectives. Though early, the early signs are positive that the Suspension of Termination Clauses provisions are meeting their objectives. The evidence for the Company Moratorium is more ambiguous. While moratoriums have been used successfully, there are some areas of concern which have been identified. For the measures' impacts on employees, all three measures have, on the whole, given companies time to negotiate with their creditors and thus protect jobs. The measures have strengthened the insolvency and restructuring regimes by providing additional tools enabling companies to be rescued without first being required to enter insolvency proceedings.

I have read the PIR and I am satisfied that it represents a fair and proportionate assessment of the impact of the measure.

Signed by the responsible Minister: **Kevin Hollinrake MP**

Date: 03/05/2023

4. What were the original assumptions?

The Enactment stage Impact Assessment estimated that the three measures would have a combined net positive social impact of £1,535.5m and an estimated net positive annual impact on business of £178.4m over a 10-year appraisal. The main benefits were assumed to come from improved company survival, along with non-monetised benefits such as improved job preservation and retention of value in essential assets vital for continued trading. The main costs associated with the measures included familiarisation costs, additional insurance, legal costs, and cost associated with new processes, such as preparing eligibility reports and monitoring compliance. The costs and benefits set out in the Impact assessment have been revisited in this review as a value-for-money evaluation.

5. Were there any unintended consequences?

Evidence has found unintended consequences which can be classified as: serendipitous consequences; trade-offs; and classic unintended consequences, along with highlighting intended consequences (goals). One example is for the Company Moratorium where there is a perceived reputational risk of acting as a monitor in cases where a company rescue is not achieved. Areas of improvement have been identified for all three measures, though these should not detract from the overall benefit of the measures and that they have, on the whole, been well received by stakeholders. The measures have strengthened the insolvency regime, placing it in a stronger position than prior to the measures coming in force.

6. Has the evidence identified any opportunities for reducing the burden on business?

Areas for improvement have been identified for all three measures. For the Restructuring Plan this focused on areas to reduce the burden on business. This is particularly the case for SMEs whose response to the measure is more mixed in terms of its utility. However, whilst the burden could be reduced this should not mask that the measure was well received by stakeholders. The measure was intended to have more use in complex restructurings; but opening up the measure, to be more user friendly to SMEs, would strengthen the insolvency regime's alignment with latest best practice principles.

7. How does the UK approach compare with the implementation of similar measures internationally, including how EU member states implemented EU requirements that are comparable or now form part of retained EU law, or how other countries have implemented international agreements?

The insolvency framework in the UK is highly regarded internationally and is a key contributor to the UK being a great place to do business and invest. Whilst there is no one size fits all approach, the introduction of these three measures aligns with common features identified as best practice provided by the likes of the World Bank and UNCITRAL. This ensures the UK maintains its favourable reputation, as other countries also adopt similar measures, including those within the EU under the EU restructuring directive. However, to align with latest guidelines going forward, there could be benefit in adjusting features around the measures to lower barriers to SMEs.

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Background

- 1.1 The Corporate Insolvency and Governance Act 2020 (CIGA) came into force on 26th June 2020. CIGA was introduced by the Government with the overarching objective to provide companies with the flexibility to continue trading during COVID-19, as well as longer term benefits of saving viable companies. It did this with a mixture of temporary easements to insolvency law, coupled with a package of permanent measures to maximise the survival prospects of viable companies. Whilst the overarching objective was to save viable companies in the short and long term, a balance was needed to prevent non-viable companies avoiding a terminal insolvency, potentially leading to an increase in zombie companies¹. This balance has been referred to as type one (where a company that could be saved enters a terminal insolvency process) or type two errors (where a company that could not be saved avoids a terminal insolvency process)².
- 1.2 CIGA was the most significant change to the UK's corporate insolvency regime in 20 years³. Prior to CIGA, UK insolvency law had several tried and tested options for business rescue; but there were gaps when compared, for example, to best practice standards published by the World Bank⁴ and the 2019 EU Restructuring Directive⁵. Changes in insolvency regimes of several countries showed a general convergence in the principal features of restructuring and rescue frameworks of sophisticated market economies. The UNCITRAL Legislative Guide on Insolvency Law (2004:2021)⁶ sets out provisions which are now seen as core components of a modern insolvency regime. Those core requirements include a reorganisation plan, a stay of enforcement action and the treatment of executory contracts.
- 1.3 With these international developments in mind, the Government consulted on a range of reforms to the insolvency framework between 2016 and 2018⁷. Following widespread support from relevant professions and business groups⁸, the Government announced that it would implement the measures when a suitable legislative vehicle became available. The three permanent measures introduced by CIGA previously consulted upon are:
- Company Moratorium (moratorium)
 - Suspension of Termination (ipso facto) Clauses (SoTC)
 - Restructuring Plans (RPs)
- 1.4 As CIGA was primary legislation, there wasn't a requirement to make a statutory or non-statutory review commitment under the Small Business, Enterprise and Employment Act 2015⁹. However, during the passage of the bill, the Government made a commitment to review the three permanent measures no later than three years after they came into force (on 26th June 2020). A further commitment was made to conduct a review on the impact of the measures on employees. This post-implementation review (PIR) follows from that commitment.

¹ https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5601&context=sol_research

² <https://www.researchgate.net/publication/354443867> The law and economics of lockdown mitigation Bankruptcy errors in the United Kingdom

³ <https://www.gov.uk/government/news/major-changes-to-insolvency-law-come-into-force>

⁴ <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/518861467086038847/principles-for-effective-insolvency-and-creditor-and-debtor-regimes>

⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32019L1023>

⁶ https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law

⁷ <https://www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework>

⁸ <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-bill-2020-factsheets/overview-of-the-bill>

⁹ <https://www.legislation.gov.uk/ukpga/2015/26/part/2/crossheading/secondary-legislation-duty-to-review>

1.5 Going forward the measures will continue to be monitored, with numbers of moratoriums and RPs appearing in the Insolvency Service official statistics¹⁰. The Insolvency Service will continue to engage with the sector, both informally and, for example, through consultations; an aspect for which the Insolvency Service has been praised by industry¹¹.

1.6 In line with Better Regulation requirements¹² only the three permanent measures introduced by CIGA are in scope of this PIR, with the temporary amendments introduced by CIGA being out of scope. Whilst the three permanent measures come from different legislation (the moratorium and SoTC relate to Insolvency law, while the RP relates to company law) all three measures were covered by the same Act. They were also all covered by the same Impact Assessment (IA)¹³ during parliamentary passage.

Policy Objectives

Company Moratorium

1.7 The moratorium provides struggling companies a short period of protection, initially 20 business days, from creditor enforcement action, during which they can seek advice and agree plans for their rescue as a going concern. This protected period is designed to give companies a better chance of survival. The moratorium had four primary policy objectives:

1. To provide companies a period of protection so they can seek advice, negotiate with creditors, and agree plans for their rescue as going concerns.
2. To enable companies using the moratorium to benefit from greater opportunities for company survival.
3. To provide companies using the moratorium enough time during a “breathing space” to consider the best option for the company.
4. To ensure that all struggling companies that meet the eligibility criteria should be able to use the moratorium.

Suspension of Termination Clauses

1.8 SoTC generally prohibits the enforcement of “termination clauses” in contracts for the supply of goods and services that engage upon an insolvency event. This means suppliers must continue to fulfil their commitments under contract with the debtor company in the event of it entering a formal insolvency. This measure had three primary policy objectives:

1. To prevent companies in insolvency procedures from being held “hostage” by suppliers, either by withdrawing supply completely or by asking for additional “ransom” payments.
2. To provide a valuable tool to support company rescue and thereby provide better returns to creditors.
3. To mitigate the transference of risk onto suppliers, via a statutory “hardship provision” to protect suppliers that cannot (rather than will not) supply.

The Restructuring Plan

¹⁰ <https://www.gov.uk/government/collections/insolvency-service-official-statistics>

¹¹ <https://www.gov.uk/government/publications/confidence-in-the-regime/confidence-in-the-regime>

¹² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916918/better-regulation-guidance.pdf

¹³ <https://publications.parliament.uk/pa/bills/cbill/58-01/0146/SIGNED%20-%20IA%20Insolvency%20and%20Corporate%20Governance%20Enactment%20Stage.pdf>

1.9 The RP is a new restructuring procedure which may be proposed by a company in financial difficulties. Under it, creditors are divided into separate classes, by similarity of rights and interests, by the proposer. After class division is approved by the court, the respective classes of creditors (and shareholders, if relevant) vote on the proposed RP. The RP will bind all classes of creditors (and shareholders) if more than 75% of creditors, by value, in each class vote in favour. If, however, not all classes vote in favour, a process known as “cross-class cram down” can be sanctioned by the court, notwithstanding the votes of the dissenting class(es). This can only take place if at least one “in the money” class of creditors has voted in favour and the court is satisfied that no member of a dissenting class is worse off than they would be in the relevant alternative (likely to be an insolvency procedure such as administration or liquidation). The RP had four primary policy objectives:

1. To address the scenario where a secured creditor can block a company rescue, despite the proposals being well supported.
2. To enable courts to sanction restructuring plans where it is fair and equitable to do so.
3. To enable companies with viable businesses that are struggling to meet debt obligations, to restructure with limited disruption to their operations.
4. To provide an alternative measure to a scheme of arrangement in cases where the agreement of all classes of creditors is unlikely (as schemes do not provide any mechanism for “cram down” between classes).

1.10 Logic models setting out how the three permanent measures were expected to achieve their objectives can be seen below.

Measure	Context	Inputs	Outputs	Outcomes	Impacts
Company Moratorium	Problem: Action taken by creditors can cause viable companies to fail unnecessarily because they do not have any time to look at rescue options before enforcement proceedings ensue. The policy aim is to give struggling companies a short (though extendable) period of protection during which they can seek advice, negotiate with creditors and agree plans to enable the company to be rescued as a going concern. This will give companies a better chance of survival	Primary legislation will be enacted to create a Company Moratorium	Delivery of a Company Moratorium for 20 business days (or longer with an extension)	Companies use the Company Moratorium. This will protect companies, thereby facilitating advice, negotiation and appropriate plans for rescue.	Enhanced preservation as a going concern of distressed companies to be completed at a lower cost and faster time. Increased job preservation meaning a reduction in social costs. Improved returns to unsecured creditors helping the business community invest more.

Suspension of Termination Clauses	Problem and policy objective: During insolvency the debtor company can be held hostage by key suppliers that ask for ransom payments or terminate supply. The policy will prohibit such clauses and ransom payments. In doing so this will create a valuable tool to help companies restructure and provide better returns.	The measure will use primary legislation to change the law to prohibit termination clauses.	Termination clauses that engage on insolvency and ransom payments will be prohibited in insolvency. This will remove a hindrance to business rescue.	The prohibition of termination clauses and ransom payments will support ongoing company rescue and enable more to benefit from rescue. Suppliers now unable to rely on termination clauses which may incur additional costs.	Fairer distribution of available funds to body of creditors. Enhanced business preservation and restructuring. Increased job preservation, reduction in social costs. Improved returns to secured creditors resulting in greater business lending and lower risk premiums being charged on loans. Improved returns to unsecured creditors helping the business community invest more.
Restructuring Plan	Currently a relatively junior secured creditor can block a company rescue in a scheme of arrangement or CVA, despite the proposals being supported by other classes of creditors. To address this a new restructuring procedure will be created which will enable the court sanctioned binding of creditors into a plan where members of a dissenting class of creditors would receive no less than they would in the next best scenario.	Primary legislation will be enacted to create a new restructuring plan.	The measure will create a new restructuring plan. To initiate the plan must be proposed by a company in financial difficulties or its creditors. Many of these plans will replace existing schemes of arrangement .	Improved return from facilitating business restructuring. This will effectively address the situation where a junior secured creditor blocks a company rescue.	This will facilitate company rescue and boost returns to creditors and support job preservation. Increased job preservation, reduction in social costs. Improved returns to unsecured creditors helping the business community invest more. Improved returns to secured creditors resulting in greater business lending.

What evidence has informed this PIR

2.1 The regulatory policy committee (RPC) highlights the importance of early preparation for PIRs and gathering data as early as possible¹⁴. This PIR recognises this advice and has attempted to implement best practice principles. Despite the speed with which CIGA was introduced to combat the COVID-19 pandemic, a broad evaluation plan was set up in the impact assessment (IA)¹⁵. This

¹⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790031/RPC_case_histories_post-implementation_reviews_March_2019.pdf

¹⁵<https://publications.parliament.uk/pa/bills/cbill/58-01/0146/SIGNED%20-%20IA%20Insolvency%20and%20Corporate%20Governance%20Enactment%20Stage.pdf>

included setting up monitoring for the number of company moratoriums and RPs, which are included in the Insolvency Service official statistics publications¹⁶.

- 2.2 Following the initial thinking laid out in the IA, the evaluation plan was developed further following bill passage. This included considering what would be proportionate, developing research questions, and identifying what data (both primary and secondary) would be needed to answer the research questions. This early preparation ensured appropriate budget requirements were included in that summer's spending review¹⁷.
- 2.3 Considering what is proportionate for an evaluation is important to ensure value for money for the taxpayer, as highlighted by both the RPC¹⁸ and magenta book guidelines¹⁹. Based on these guidelines, it was clear that CIGA surpassed the threshold for a high level of evidence. This means it should look to include evidence such as:
- Bespoke monitoring and evaluation data collection
 - The experiences of stakeholders and how the measure achieves its effects
 - Quantification, monetisation and re-estimation of the actual costs and benefits of the measure
 - Commissioned work
- 2.4 As highlighted in the original IA²⁰, estimating a suitable counterfactual would be challenging. Following further contemplation around experimental, quasi-experimental and theory-based methods (as highlighted in the magenta book²¹), the Insolvency Service decided that an impact evaluation would not be feasible. This is in line with magenta book guidance which outlines considerations around feasible designs²². In this case, the level of precision and quantitative rigour would be limited, given the level of resources available. The measures introduced by CIGA are already established internationally as best practice measures²³. Therefore, a process evaluation, focusing on how the measures are working and if they are working as expected was deemed suitable to help inform future policy making. This approach also enabled the research to be flexible in adapting to ongoing uncertainties from the pandemic, which could impact the research. The RPC highlights that very few PIRs provide a comparison of the actual costs and benefits against the estimated impacts²⁴. Hence, it was decided that a value-for-money (VfM) evaluation, alongside the process evaluation, would also be suitable.
- 2.5 A variety of evidence sources have informed the PIR. The major sources are highlighted below.

Process Evaluation

¹⁶ <https://www.gov.uk/government/collections/company-insolvency-statistics-releases>

¹⁷ <https://www.gov.uk/government/topical-events/spending-review-2020>

¹⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800603/Final_proportionality_.pdf

¹⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879444/Magenta_Book_supplementary_guide_Guidance_for_Conducting_Regulatory_Post_Implementation_Reviews.pdf

²⁰ <https://publications.parliament.uk/pa/bills/cbill/58-01/0146/SIGNED%20-%20IA%20Insolvency%20and%20Corporate%20Governance%20Enactment%20Stage.pdf>

²¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879418/Magenta_Book_Annex_A_Analytical_methods_for_use_within_an_evaluation.pdf

²² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879437/Magenta_Book_supplementary_guide_Handling_Complexity_in_policy_evaluation.pdf

²³ <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/518861467086038847/principles-for-effective-insolvency-and-creditor-and-debtor-regimes>

²⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790031/RPC_case_histories_post-implementation_reviews_March_2019.pdf

- 2.6 The primary evidence base for this PIR is via a process evaluation. The Government commissioned the University of Wolverhampton in September 2021 (following fair and open competition), to provide an evidence base of how the permanent measures have been used and received by various stakeholders. As noted in the magenta book, using commissioned research brings independence to the evidence, and thus provides further credibility and trust in the findings²⁵. The process evaluation collected primary research utilising a mixed methods approach. The magenta book highlights that bringing together a combination of both qualitative and quantitative evidence is often the best approach to help address some of each method's respective limitations²⁶. The process evaluation was split into two phases, both of which have a published report, where further details of the research can be found²⁷.
- 2.7 Given CIGA surpasses the threshold for a high-level requirement of evidence, it was recognised that a robust and rigorous evidence base was required. The Insolvency Service worked with the University of Wolverhampton to ensure the research aligned with government best practice guidelines in the magenta book²⁸, and reflected the framework provided on quality in qualitative evaluation²⁹.
- 2.8 The first report was published on 21st June 2022³⁰. This phase involved qualitative research to make the most of serendipitous findings whilst the CIGA measures continued to unfold. The aim of qualitative research is to provide an in-depth understanding of a phenomenon rather than to establish prevalence, causality or generalisable findings. Therefore, a sampling approach was needed to gather a wide variety of valid perspectives. Purposive sampling was used to conduct 33 semi-structured interviews across insolvency practitioners (IPs), legal professionals and trade associations. A sub-strand of purposive sampling is expert sampling, whereby participants are recruited due to a high degree of knowledge about the study area³¹. Interviewees were therefore asked to participate based on their characteristics of having knowledge and/or experience of the CIGA measures. However, some participants were recruited outside of these criteria, to capture a variety of views, such as from those who may have avoided using the measures for certain reasons.
- 2.9 The second phase³² of research conducted further semi-structured interviews, along with a survey of IPs and two case studies.
- 2.10 A further 22 interviews were completed, in addition to the 33 completed in the first phase. These interviews again used purposive sampling with IPs, legal professionals, and trade associations, as well as government creditors.
- 2.11 Utilising the findings from the first phase, a quantitative survey was developed and distributed to IPs. The Insolvency Service was able to share a sample frame with the University of

²⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879438/HMT_Magenta_Book.pdf

²⁶https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879444/Magenta_Book_supplementary_guide_Guidance_for_Conducting_Regulatory_Post_Implementation_Reviews.pdf

²⁷ <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-evaluation-reports>

²⁸https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879438/HMT_Magenta_Book.pdf

²⁹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/190986/Magenta_Book_quality_in_qualitative_evaluation_QQE_.pdf

³⁰ <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-interim-report-march-2022>

³¹ <https://www.statisticshowto.com/expert-sampling/>

³² <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-evaluation-reports/corporate-insolvency-and-governance-act-2020-final-evaluation-report-november-2022>

Wolverhampton in line with the Insolvency Service personal information charter³³. This provided a sample frame of 1,517 IPs who had agreed for their details to be publicly available on gov.uk³⁴. The survey was distributed to all IPs in the sample frame and a total of 91 useable responses to the survey were received. As noted in the report, steps were taken to try and boost the response rate³⁵; however the final number of responses does increase the uncertainty associated with the results and should be factored into interpretation³⁶. To ensure the survey was rigorous and robust, best practice guidelines were followed, such as the use of item-specific questions^{37,38} (rather than ‘agree-disagree’ type questions) and piloting the survey to ensure the questions were working as intended.

- 2.12 In addition to the interviews and survey, the second phase also provided two case studies, one on the use of an RP by a SME and the other covering the use of a moratorium prior to the company entering a subsequent procedure. The case studies were selected based on critical instance and followed guidance highlighted by the magenta book on producing case studies³⁹.

VfM evaluation

- 2.13 To align with recommendations by RPC⁴⁰, an internal VfM evaluation has been completed by the Insolvency Service to estimate what the costs and benefits of the measures have been compared to those estimated in the IA. This evaluation used cost-benefit analysis⁴¹ on the CIGA measures and much the same methodology as that used in the original IA in terms of expected costs and benefits. However, new evidence (from the sources mentioned in this section) was used to estimate what the costs and benefits have been and, if appropriate, why they differed to those estimated in the original IA. For a fair comparison, the VfM evaluation provides estimates based on a three-year appraisal and converts to 2019 prices, as is the case with the gov.uk IA calculator⁴².

Companies House data collection

- 2.14 The Government commissioned MCC Economics Ltd in June 2022 to conduct a data collection from Companies House filings on administrations and creditors’ voluntary liquidations (CVLs). This data source was used to inform the internal VfM evaluation included in this review and

³³ <https://www.gov.uk/government/organisations/insolvency-service/about/personal-information-charter>

³⁴ <https://www.gov.uk/find-an-insolvency-practitioner>

³⁵ <https://www.sciencedirect.com/science/article/abs/pii/S0747563209001708#:~:text=Factors%20affecting%20response%20rates%20in%20survey%20development%20There,of%20web%20questionnaires.%202.1.%20Content%20of%20web%20questionnaires>

³⁶ <https://www.surveymonkey.co.uk/mp/what-is-the-difference-between-a-response-rate-and-a-completion-rate/#:~:text=What%20a%20low%20response%20rate%20means%20Higher%20level,of%20error%20and%20the%20reliability%20of%20your%20results.>

³⁷ <https://the-sra.org.uk/Common/Uploaded%20files/Social%20Research%20Practice%20Journal/social-research-practice-journal-issue-01-winter-2015.pdf>

³⁸ <https://www.imperial.ac.uk/education-research/evaluation/tools-and-resources-for-evaluation/questionnaires/best-practice-in-questionnaire-design/>

³⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879418/Magenta_Book_Annex_A_Analytical_methods_for_use_within_an_evaluation.pdf

⁴⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790031/RPC_case_histories_post-implementation_reviews_March_2019.pdf

⁴¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879438/HMT_Magenta_Book.pdf

⁴² <https://www.gov.uk/government/publications/impact-assessment-calculator--3>

reflects a similar exercise conducted in 2020 which informed the evidence in the IA⁴³. This evidence base provides an assumption for the VfM evaluation in terms of what outcomes might have been in the absence of CIGA measures. However, as noted in this review, providing a robust counterfactual is challenging. It must be noted that the pandemic (among other issues) has had a clear confounding impact on corporate insolvency in the UK. Therefore, this data collection is not a pure counterfactual⁴⁴, but provides an assumption.

2.15 A total of 1,938 administrations and 23,434 CVLs were provided as a sample frame, covering the period from 1st July 2020 to 31st March 2022, i.e. after CIGA came into force. MCC Economics worked through this sample frame to randomly select a total of 262 administrations and 400 CVLs, having checked that the case had been completed. Various variables were collected from the filings, such as debts owed and payments to creditors.

Monitoring data

2.16 As planned in the IA⁴⁵, the Insolvency Service collaborated with Companies House to provide monitoring data that would help the review. Companies House was able to provide data between 26th June 2020 and 29th July 2022 for:

- The number of companies that used an extension to a moratorium at least once
- Outcomes following moratoriums by company
- The number of RPs and how many of these cases previously used a moratorium
- The number of schemes of arrangement (SoA) and how many of these cases previously used a moratorium

2.17 The Insolvency Service collaborated with HMCTS to determine whether any data were available for appeals against RPs or for challenges against a moratorium.

Insolvency Service Official Statistics

2.18 The review uses official statistics produced by the Insolvency Service on company insolvencies⁴⁶.

To what extent is the existing regulation working?

To what extent have the policy objectives been achieved?

General comments

3.1 According to the process evaluation, the permanent CIGA measures have been broadly welcomed by stakeholders and been seen as a positive addition to the UK's rescue framework.

⁴³ <https://publications.parliament.uk/pa/bills/cbill/58-01/0146/SIGNED%20-%20IA%20Insolvency%20and%20Corporate%20Governance%20Enactment%20Stage.pdf>

⁴⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/190984/Magenta_Book_quality_in_policy_impact_evaluation_QPIE.pdf

⁴⁵ <https://publications.parliament.uk/pa/bills/cbill/58-01/0146/SIGNED%20-%20IA%20Insolvency%20and%20Corporate%20Governance%20Enactment%20Stage.pdf>

⁴⁶ <https://www.gov.uk/government/collections/company-insolvency-statistics-releases>

- 3.2 Insolvency Service official statistics report on the number of RPs and moratoriums. As of 30th September 2022, there had been 40 moratoriums and 12 RPs since the introduction of CIGA on 26th June 2020. Even though the IA estimated impacts based on a “steady” state, the use of the measures is considerably lower than expected. There are several possible reasons for this, which are considered below.
- 3.3 Firstly, the Government provided extensive support during the COVID-19 pandemic for businesses. This included temporary restrictions on the use of statutory demands and most winding-up petitions, as well as enhanced financial support to companies by way of a range of Government backed loans, tax breaks and the Coronavirus Job Retention Scheme (Furlough Scheme)^{47,48}. This support is noted as an important external factor that has suppressed the full use of the measures. This is corroborated by official statistics, shown in Figure 1, which show company insolvencies declined during the onset of Covid-19. This was despite the initial expectation that company insolvencies would sharply rise during the pandemic⁴⁹. Total company insolvencies began to increase again during 2021, surpassing pre-pandemic cases in 2021Q4 and have continued to rise since. However, the rise is driven by creditors' voluntary liquidations (CVLs), and not procedures such as administration or company voluntary arrangements (CVAs), which remain below pre-pandemic levels. Furthermore, monitoring data from Companies House shows there had been 96 SoAs from the 26th June 2020 to 29th July 2022. This is a reduction from an average of 220 per year between 2016-19, with numbers increasing over the same period⁵⁰. These three procedures can facilitate restructuring, as with the RP, and could be used in conjunction with the moratorium. This could indicate that the market which will make most use of the CIGA measures has not yet returned to pre-pandemic levels and has largely been suppressed.

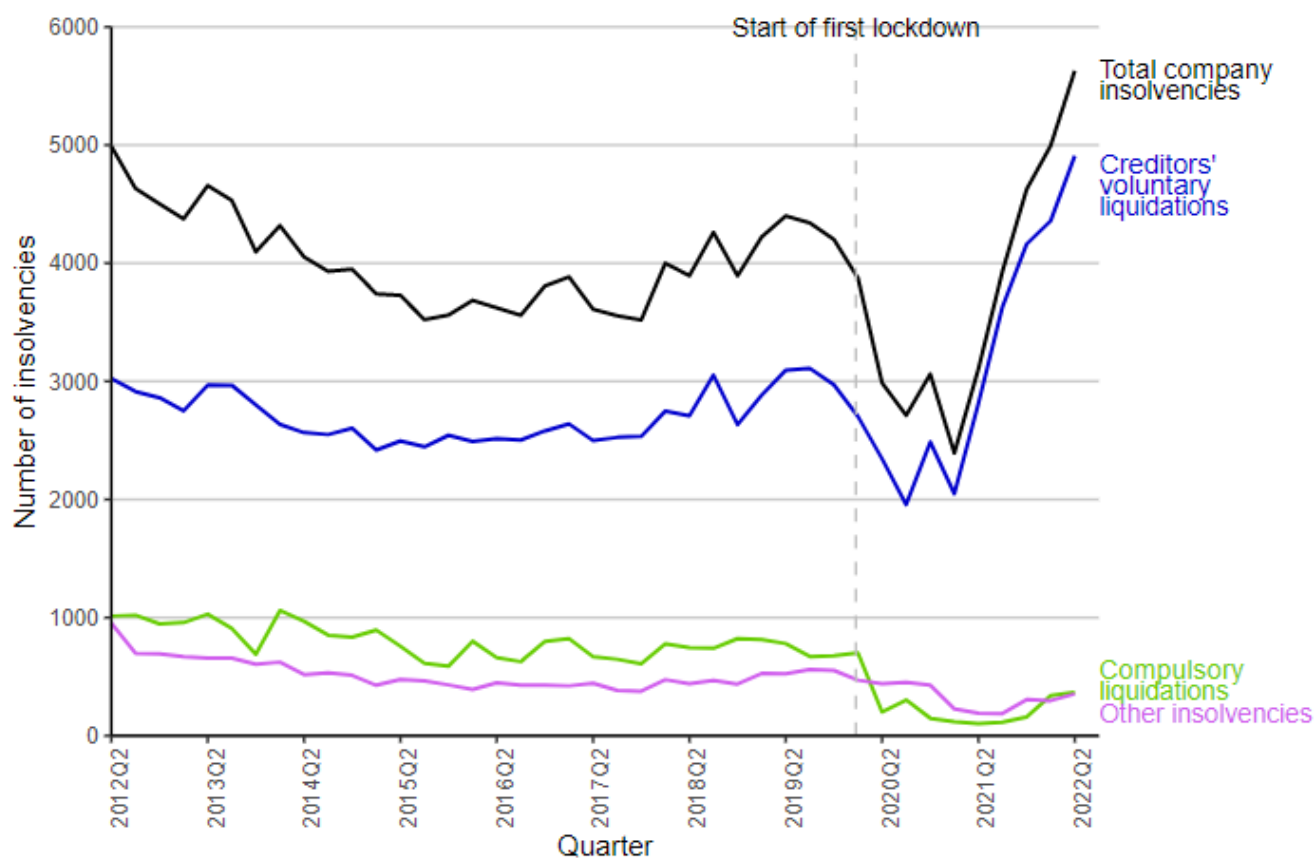
⁴⁷ <https://www.gov.uk/government/collections/financial-support-for-businesses-during-coronavirus-covid-19>

⁴⁸ <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

⁴⁹ From Hibernation to Revitalization: Analysis of Insolvency COVID-19 Response Measures and their Wind-Down (2022); A report prepared by The World Bank Group, INSOL International, and IAIR

⁵⁰ To note, between 2016-19 there were 173, 196, 232 and 281 SoA. This is different to numbers of SoA reported in the CIGA IA, which was an error.

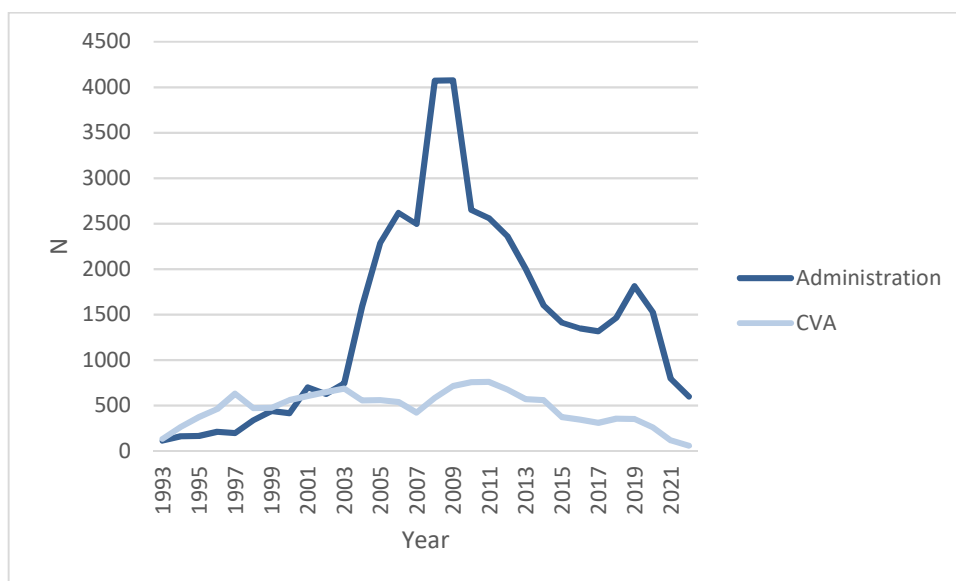
Figure 1: Registered company insolvencies, England and Wales, Q2 2012 to Q2 2022, seasonally adjusted



- 3.4 A second reason is that it can take time for industry to adopt new measures. The magenta book highlights two relevant concepts here; adaptation and tipping points⁵¹. Adaptation is where people within the system are capable of learning and changing how the system behaves in response to interventions. This could apply to the CIGA measures; as more companies use the measures, more case law is established and best practiced is shared, leading to greater take up. Introduction of other insolvency measures may have followed a similar trend. Historical data on both administrations and CVAs shows that they did not show immediate take up, but did so over a number of years.

⁵¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879437/Magenta_Book_supplementary_guide_Handling_Complexity_in_policy_evaluation.pdf

Figure 2: Long-run series of numbers of administrations and CVAs, England and Wales, 1993 to 2021



Notes:

- Bulk insolvencies have been counted as 1 to show their underlying state:
 - [For admins] Q4 2006 included 844 separate, limited companies created and managed by "Safe Solutions Accountancy Limited" for which Grant Thornton was appointed administrator.
 - [For admins] Q4 2008 included 729 separate managed service companies. The administrations were approved in September 2008, but the statistics are counted based on the date registered at Companies House (which fell in October 2008, i.e. Q4).
 - [For CVAs] Q2 2012 included 156 companies in the Southern Cross Healthcare Group that had CVAs approved.
- Administration was altered significantly by the Enterprise Act 2002. The corporate insolvency provisions of the Enterprise Act 2002 came into force on 15 September, 2003.

- 3.5 The second key concept is tipping points, where an event can cause a system to go through rapid change into a different state. It occurs in situations where change has initially been quite slow, but suddenly increases in pace. This could apply to the use of the RP by small and medium sized companies (SMEs). As the case study on Houst shows, a SME has utilised the RP successfully and it has been suggested there could be an increase in the use of the RP by SMEs^{52,53}.
- 3.6 The third reason is that, even after considering the points above, the estimates in the IA on use of the RP and moratorium were too high. This could be due to a combination of certain barriers/issues preventing uptake of the measures (explored further in this review), alongside the initial estimates simply being too high. The implications of the uncertainty around future case numbers are explored further via scenario analysis in the “what are the likely costs and benefits going forward” section of this review.

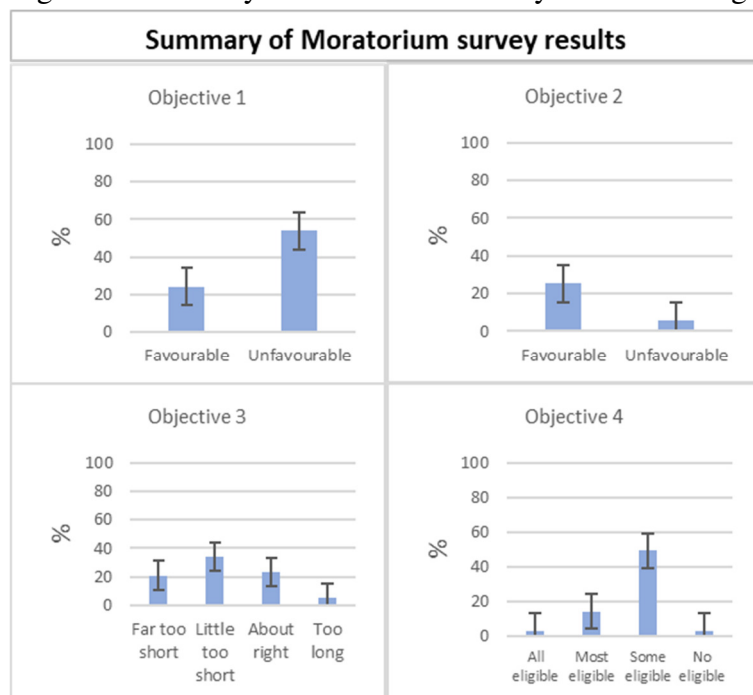
Company Moratorium

- 3.7 In terms of meeting the policy objectives, the evidence for the moratorium is more ambiguous than for the other measures. Whilst it has been shown to be working well in some instances, areas of concern have been raised.

⁵² https://www.addleshawgoddard.com/en/insights/insights-briefings/2022/restructuring/the-mid-market-restructuring-plan-v-hmrc/?utm_campaign=BD%20-%20News%20%2F%20Insights%20%2F%20Articles%20-%202022&utm_content=216273325&utm_medium=social&utm_source=linkedin&hss_channel=lcp-10232786

⁵³ https://southsquare.com/wp-content/uploads/2022/09/SSQ_Digest_September_2022_Final-2.pdf

Figure 3: Summary of Moratorium survey results relating to the policy objectives



Notes:

- Survey results have been summarised, with neutral or “don’t know” responses removed, and so may not sum to 100%. Full survey results can be seen in the published process evaluation reports.
- Error bars indicate the maximum margin of error associated with the results, which is +/-10pp

- 3.8 The first objective of the moratorium was to provide companies a period of protection so they can seek advice, negotiate with creditors, and agree plans for their rescue as going concerns. Current evidence would suggest that, of all objectives relating to any of the three measures, this is the least successful. Responses to the survey show 54% of IPs consider the moratorium as not effective against this objective, compared to 24% who do. The negative responses may be driven, in part, by the absence of a stay on actions by financial creditors. There is a general perception that the moratorium is more likely to be used by SMEs, many of whom have a single main financial creditor, often their bank. Therefore, as the moratorium will not usually prevent financial service providers from enforcing their rights against the company, it is not seen as an effective rescue tool in such cases. Based on the data, it cannot be concluded that this objective has been met.
- 3.9 Whilst we cannot conclude from the data that the objective has been met, it would also appear to be inappropriate to conclude the measure is not useful. It is clear from interview data that IPs who have worked with companies to use the moratorium have used it successfully, and there are IPs who see the moratorium as a positive tool for company rescue. For example, interviews highlighted cases where aggressive creditors were temporarily held off by use of the moratorium, as intended by the policy objective. The Bespoke Managed Space Borough Limited case study⁵⁴ shows how IPs were able to work with a company to use the moratorium for protection from creditors, whilst working towards the approval of a CVA. Therefore, the moratorium may well be effective against this objective in certain circumstances and does appear to be a useful measure. Going forward, considerations can be made around the interview responses to see if there is scope to widen the circumstances in which the measure could be useful, to help it achieve the policy objective. Possible refinements are addressed at the end of this review.

⁵⁴ <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-evaluation-reports/corporate-insolvency-and-governance-act-2020-final-evaluation-report-november-2022>

- 3.10 The second objective was to enable companies using the moratorium to benefit from greater opportunities for company survival. Survey responses show that respondents are mostly indifferent, with 57% perceiving that the moratorium will make company survival neither more nor less likely. However, more were favourable (25%) than unfavourable (5%). Furthermore, interview data shows that IPs who have used the moratorium have used it successfully as a tool for company rescue. Data on outcomes following the moratorium from Companies House can also shed light on this objective. At the time of obtaining data there had been 39 moratoriums. Of these, over half had led to the recovery of the company as a going concern and over a quarter resulted in the company going into a CVA. These are very high proportions of positive outcomes, especially when compared to outcomes following administrations highlighted in the IA⁵⁵. Based on a data collection exercise on a random sample of administrations starting in 2016, less than 2% were saved as a going concern or entered a CVA⁵⁶. Overall, it would appear the objective has at least been partly met, although there is a largely indifferent perception from IPs, which could be driven by those yet to use the measure.
- 3.11 The third objective was to provide companies using the moratorium enough time during a “breathing space” to consider the best option for the company. When factoring in the maximum margin of error associated with the survey results, the responses here are too ambiguous to draw firm conclusions. Just over a third (34%) thought it was a little too short, with 21% thinking it was about right and 23% thinking it was far too short. Companies House data again provide further insight. Having already established that outcomes following a moratorium are, on the whole, positive, only a third of the same 39 cases required an extension. Interviews highlight that those who have used the moratorium have found that it is easily extended when needed to do so, to suit the individual circumstances of a particular case. During consultation, a length of three months was proposed for the moratorium; however, most respondents thought that it should be shorter than three months. The most common length suggested was 21 days⁵⁷. Overall, there appears to be no clear consensus about the length of the moratorium. Furthermore, increasing the length of the moratorium could increase the risk of type two errors⁵⁸. By considering multiple sources of data, the conclusion from the process evaluation is that the current length of time, a reasonably short moratorium with the built-in flexibility of being easily extended, does work. However, it is possible that more detailed guidance on how the initial period may be extended would help develop a consensus in future. This policy objective has been met in cases where the measure has been used but there is a general view from IPs that the period is too short.
- 3.12 The fourth and final objective was to ensure that all struggling companies that meet the eligibility criteria should be able to use the moratorium. Survey responses show a sizable minority (29%) did not know if all companies in financial distress that meet the eligibility criteria were able to use the moratorium, which may indicate a certain lack of understanding and knowledge of the eligibility criteria. Virtually all the other answers suggested either some (49%) or most (14%) eligible companies would be able to use the moratorium. However, only 3% suggested all eligible companies would be able to use it. Whilst this does suggest that most IPs see the moratorium as available to eligible companies, it does fall short of the policy objective to be available to all. The

⁵⁵ <https://publications.parliament.uk/pa/bills/cbill/58-01/0146/SIGNED%20-%20IA%20Insolvency%20and%20Corporate%20Governance%20Enactment%20Stage.pdf>

⁵⁶ <https://publications.parliament.uk/pa/bills/cbill/58-01/0146/SIGNED%20-%20IA%20Insolvency%20and%20Corporate%20Governance%20Enactment%20Stage.pdf>

⁵⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736207/ICG_-_Government_response_doc_-_24_Aug_clean_version_with_Minister_s_photo_and_signature_AC_final.pdf

⁵⁸ https://www.researchgate.net/publication/354443867_The_law_and_economics_of_lockdown_mitigation_Bankruptcy_errors_in_the_United_Kingdom

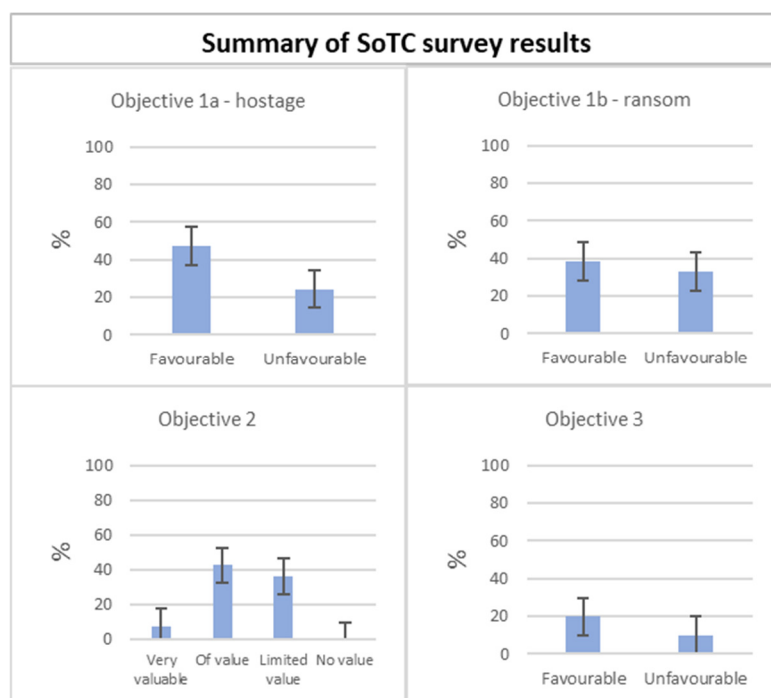
process evaluation suggests that there are factors in specific circumstances where the terms of the moratorium do not help the company. As mentioned, the moratorium’s payment holiday not applying to debts owed under “financial contracts” is one of the issues, mentioned by interviewees, of the moratorium not being of use to some distressed companies.

3.13 The process evaluation highlighted the concern that a company which owes a capital market debt of at least £10m is not eligible for a moratorium. This was followed up in the second phase of research, with survey responses being inconclusive. Here, 26% of IPs thought the exclusion should remain in place, 36% thought it should be removed and 37% did not know. The interview responses in the second phase of research continued to highlight this. Interviewees felt it was a matter which might be amended to open the moratorium for use by companies in the mid-market (as well as large companies).

Suspension of Termination Clauses

3.14 Overall, it is too early to tell if the SoTC has met its objectives, but the early signs are promising.

Figure 4: Summary of SoTC survey results relating to the policy objectives



Notes:

- Survey results have been summarised, with neutral or “don’t know” responses removed, and so may not sum to 100%. Full survey results can be seen in the published process evaluation reports.

- Error bars indicate the maximum margin of error associated with the results, which is +/-10pp

3.15 The first objective of the SoTC measure was to prevent companies in insolvency procedures from being held “hostage” by suppliers either by withdrawing supply completely or by asking for additional “ransom” payments. Survey responses suggest that the measure is generally seen as working reasonably well at ensuring continued supply, with 47% giving a favourable response, compared to 24% unfavourable. However, it seems that the provision is less successful at preventing “ransom” payments with favourable responses being 38% compared to 34% unfavourable. Both questions also have a sizable minority of “don’t know” responses. As the process evaluation notes, due to other Government interventions during the pandemic which were

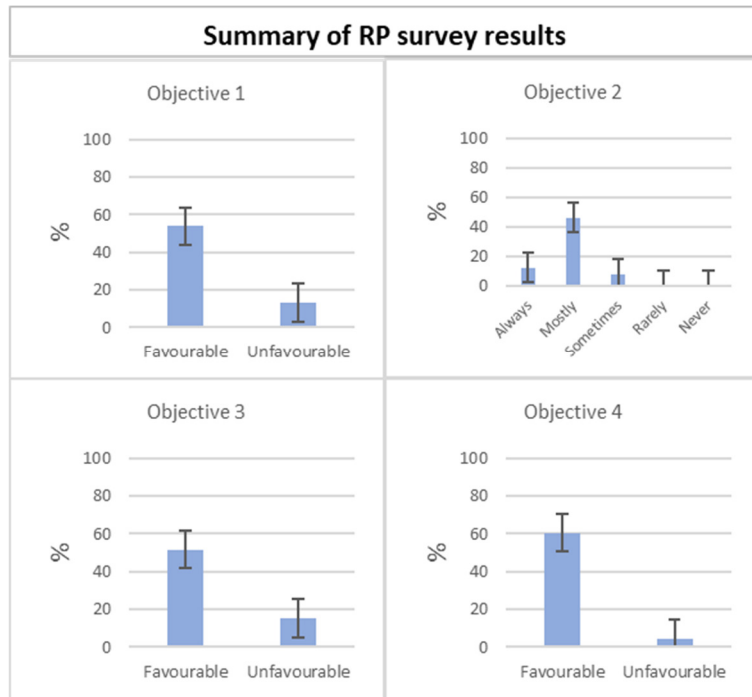
designed to allow many companies to avoid entering a formal insolvency procedure, there is limited data as to the practical operation of this measure. This may well contribute to the uncertainty around the survey responses. Overall, it is too early to tell if this objective has been met. Early signs are more positive for the first part of the objective, while results are more ambiguous for the second part. It will be important to continue to engage with industry around this measure as there is currently a sizable minority of respondents who are more doubtful.

- 3.16 The second objective was to provide a valuable tool to support company rescue and thereby provide better returns to creditors. The survey responses here provide a clear positive narrative, with 87% of IPs indicating that the measure was at least of some value. No IPs indicated that the measure was of no value. The process evaluation also identified two main positive effects from the interviews. Firstly, although previously IPs would negotiate with suppliers when the need arose, the measure has made communication with suppliers a Day One matter. This creates certainty on supply issues early in the process. Secondly, IPs no longer need to engage in any negotiations later in the process as the matter has been settled early on. The certainty that the measure brings to relations with suppliers is likely to lead to savings in time and in fees. The evidence suggests that the policy objective has been met.
- 3.17 The third and final objective was to mitigate the transference of risk onto suppliers, via a statutory 'hardship provision' to protect suppliers that cannot (rather than will not) supply. It is notable that when CIGA was introduced, this measure carried an exemption from the provision for small suppliers (which came to an end on 30th June 2021), which would impact on the use and need for the hardship provision since implementation. The survey responses again indicate that it is too early to assess whether the objective has been met which is corroborated by interview responses. In the survey 52% of IPs indicated they did not know if the hardship provision was effective. However, a higher proportion of IPs provided a favourable (20%) compared to an unfavourable (10%) response. As with the first objective, it therefore is too early to tell if the objective has been met. As the current evidence is ambiguous, continued engagement with industry will be vital. This is particularly important (as noted in the international comparisons section of this review) because there is cause for some concern around the hardship provision, in that it is largely undefined. However, there is precedent in other countries which suggests that the risk will iron out over time. A further concern is that as use of the measure develops over time, suppliers are given sufficient guidance about the hardship provisions. Although unlikely to be a concern where a supplier is relatively sophisticated, IPs might find it beneficial to receive guidance as to how to exercise the measure when dealing with less sophisticated suppliers. This guidance could be particularly beneficial as a higher proportion of IPs indicated that they thought suppliers were unaware (38%) compared to aware (34%) of the measure. Even after factoring in uncertainty associated with the survey, it would appear there is a need to ensure suppliers are made aware of protections available to them under the measure.

Restructuring Plan

- 3.18 Of the three measures, the RP appears to be the strongest in meeting its policy objectives. The RP is seen as a success by stakeholders and appears to satisfy all four of its policy objectives, at least in part.

Figure 5: Summary of RP survey results relating to the policy objectives



Notes:

- Survey results have been summarised, with neutral or “don’t know” responses removed, and so may not sum to 100%. Full survey results can be seen in the published process evaluation reports.
- Error bars indicate the maximum margin of error associated with the results, which is +/-10pp

- 3.19 The first objective of the RP was to address the scenario where a secured creditor can block a company rescue, despite the proposals being well supported. The survey responses here are positive, with 54% of IPs providing a favourable response, compared to 13% providing an unfavourable response. This is consistent with the findings from interviews where the general opinion of interviewees was that the RP has met the policy objectives of the measure. Specifically, the cross-class cram down provision is generally seen as an effective addition to the UK’s rescue toolkit. The successful cram down in the Houst case study is a clear example of the use of the measure by a SME company. Opinions were also expressed that the UK needed the cross-class cram down provision to stay competitive as an international restructuring hub. Therefore, this objective seems to have been met.
- 3.20 The second objective was to enable courts to sanction RPs where it is fair and equitable to do so. Again, the survey results provide a positive picture, with 58% of IPs providing a positive answer, but no negative responses. There were risks highlighted in the interim process evaluation report, with some wondering if there was adequate protection for dissenting creditors. Possible issues included the cost to challenge a RP or the view that some RPs may be seen as a foregone conclusion, which the court has little choice but to approve. There also seemed to be some concern as to the potential unfairness in the operation of the relevant comparator test, in that it could be seen as inadequate to protect the interests of dissenting creditors. However, in the second phase of interviews, there was more of a theme that the judicial oversight and sanction requirement for a RP offers some reassurance and protection to stakeholders. Judges are alert to ensuring that the court is satisfied that the interests of dissenting creditors are protected even where the dissenting creditor has not engaged with the court process. In the Houst case study, the judicial commitment to ensure justice and to try to keep costs down went as far as requesting further evidence from the company even after the hearing had ended. In addition, survey responses indicated that IPs with a view generally think dissenting creditors receive adequate

information at the right time, enabling them to challenge a RP effectively. Of all respondents, 38% gave a favourable response compared to just 8% giving an unfavourable response. Evidence from industry suggested that 50-75% of RPs have had some form of opposition⁵⁹. Overall, this objective seems to have been partially met, although it is important to remain alert to potential concerns from industry.

- 3.21 The third objective was to enable companies with viable businesses that are struggling to meet debt obligations, to restructure with limited disruption to their operations. Survey responses are again encouraging, with 52% of IPs providing a favourable response compared to 15% providing an unfavourable response. As was common in several of the survey questions, a sizeable proportion (33%) answered “don’t know”, likely reflecting the views of those who have not yet engaged with the measures. It is fair to conclude from current evidence that this objective has been met.
- 3.22 The final objective was to provide an alternative measure to a SoA in cases where the agreement of all classes of creditors is unlikely (as SoAs do not provide any mechanism for “cram down” between classes). Survey responses are again positive, with 60% of IPs providing a favourable response, compared to just 4% providing an unfavourable response. The process evaluation notes that a particular strength of this measure was the possibility to rely on the case law from SoAs. The ability of the courts to draw on the existing body of case law (including in respect of issues relating to class composition, third party releases and the relevant comparator) added a level of certainty to the RP. The *Houst* case study is a good example of meeting the policy objective. If that case had been proposed under a SoA (or a CVA) it would not have been approved. As highlighted in the IA, while both the RP and SoA are in the restructuring space, it is expected that they will coexist and be useful alternative measures. This has been supported by a report by PwC⁶⁰ which highlights that there is likely to be room for both the SoA and the RP going forward, and this is considered further in the international comparisons section of this review. Monitoring data can be used to check this assumption going forward. As mentioned, there were 96 SoA between the implementation of CIGA and late July 2022. Over the same period there were 12 RPs. This review concludes that this objective has been met.

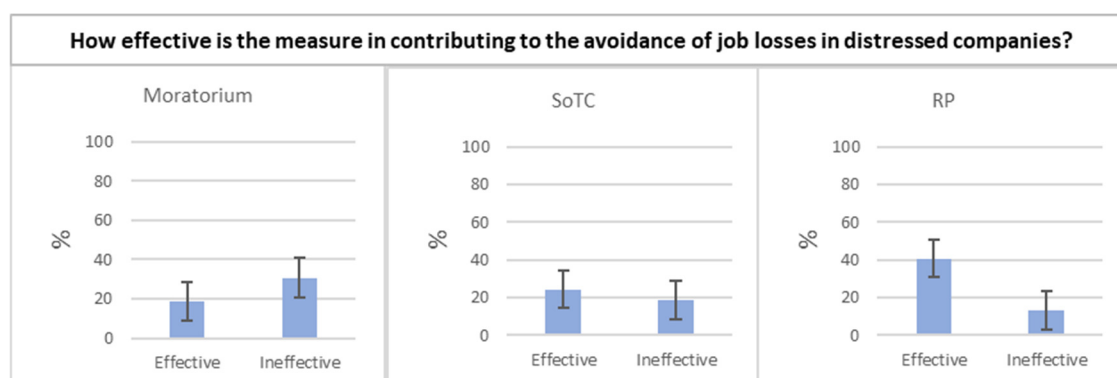
Impact on employees

- 3.23 In line with the parliamentary commitment to review the impact of the measures on employees, the process evaluation specifically collected primary and secondary data on this aspect. While they may not be effective in every circumstance, on the whole, the evidence does suggest the CIGA measures are assisting the rescue of companies as going concerns. Even if companies are rescued there can be job losses, but the job losses should be less than the alternative of the company being wound up. Therefore, the CIGA measures are seen as contributing to job retention in those companies.

⁵⁹ https://tma-uk.org/uploads/site-files/TMA_presentation_22.3.22-SML.pdf

⁶⁰ <https://www.pwc.co.uk/services/business-restructuring/insights/restructuring-plans-what-difference-year-makes.html>

Figure 6: Summary of survey results relating to measures impact on employees



Notes:

- Survey results have been summarised, with neutral or “don’t know” responses removed, and so may not sum to 100%. Full survey results can be seen in the published process evaluation reports.

- Error bars indicate the maximum margin of error associated with the results, which is +/-10pp

- 3.24 For the RP, interview data found that the RP has been effective to save companies, and, in the process, employment has been safeguarded. This was supported by the survey responses, with 41% indicating they thought the RP was effective in contributing to the avoidance of job losses in financially distressed companies. This is compared to 13% giving an unfavourable response. The Houst case study shows an example of up to 300 jobs being protected by use of the measure. As the company continued as a going concern, employee entitlements were unaffected. However, due to the need for confidentiality in the planning of the rescue of the company, the employees were not engaged in the RP process.
- 3.25 For the moratorium, interviews found that it has been used effectively to save companies and, in the process, employment has been safeguarded. This is supported by the positive outcomes following moratoriums data from Companies House (although caution does need to be taken in the absence of a clear counterfactual, a comparable procedure pre-CIGA, administration, had less favourable outcomes). The emphasis on rescuing companies as a going concern is likely to have a positive impact on jobs being saved. The moratorium is therefore clearly capable of having a genuine impact on saving companies and jobs. However, the survey evidence on whether the moratorium is effective in helping avoid job losses is less favourable. Of IP respondents, 19% of respondents gave a favourable response, compared to 31% less favourable. A sizable number of respondents indicated a lack of knowledge and uncertainty regarding the possible avoidance of job losses through use of the moratorium. The discrepancy in data sources could be due to survey respondents reflecting some of the barriers around using the moratorium (mentioned elsewhere in this review). The interviews show that those IPs who have used the moratorium have seen the avoidance of job losses. An example of this is the Bespoke Managed Space Borough Limited case study. This case study highlights that, although the company only had four employees (directors) whose jobs were safeguarded by use of the moratorium procedure, there is evidence of more jobs within the group of companies being saved by its use. The process evaluation noted that because the directors were the only employees of the company, it can be inferred that employees did engage in the process. Overall, while some in the industry appear to hold a less favourable view, for those who have used the moratorium it appears to be successful in avoiding job losses.

However, reducing barriers to using the moratorium may improve its effectiveness in contributing to the avoidance of job losses in financially distressed companies.

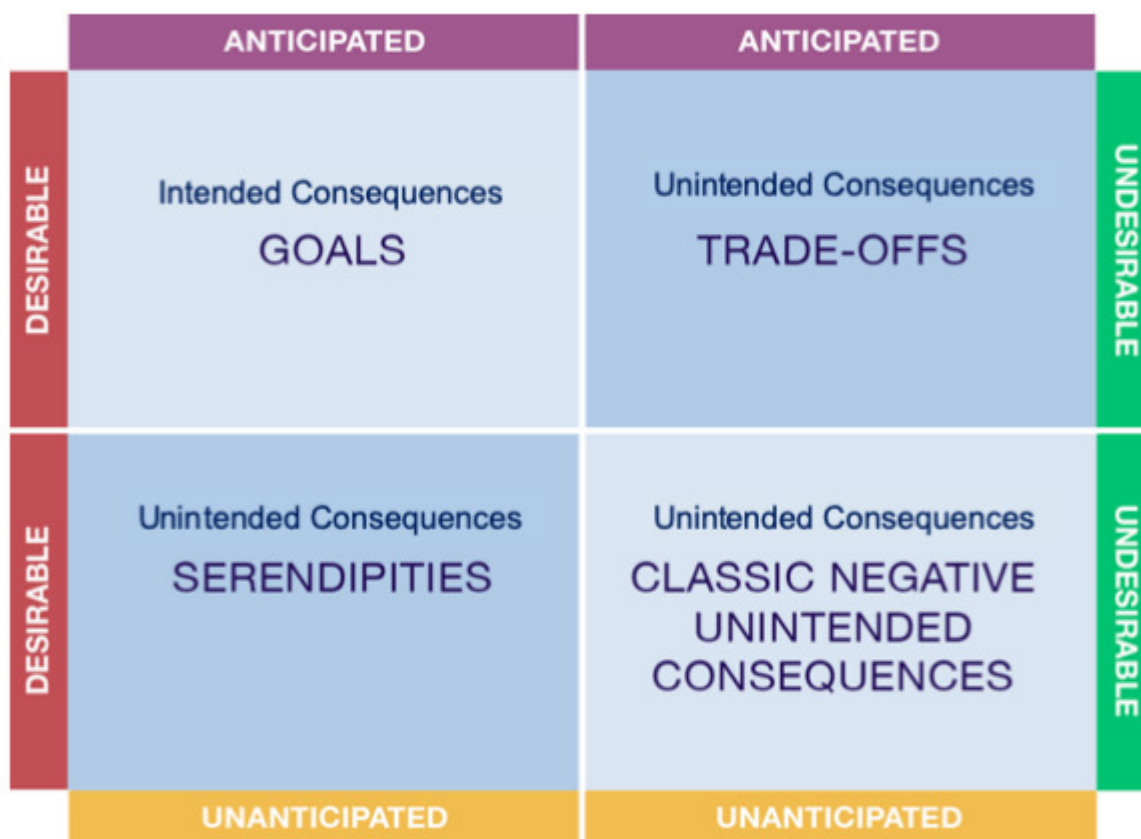
- 3.26 For the SoTC, as with the policy objectives, it appears too early to assess whether the measure has been used to protect jobs directly. However, the interviews found that the general view was that it is a useful tool for office holders to use when continued supply is crucial to a rescue plan. The survey responses are again ambiguous, with 24% giving a favourable response compared to 19% unfavourable. The process evaluation concluded that there remains limited knowledge of the practical application of the measure. Despite some respondents identifying issues around knowledge of the measures and enforceability, many believe that it will contribute to more positive restructuring outcomes. Positive restructuring outcomes have the probable benefit of avoidance of job losses. From this reasoning, there is logical evidence that this measure will help contribute to avoiding job losses in financially distressed companies. Overall, the early signs suggest this measure can have a positive impact on avoiding job losses, however it is too early to tell.

Were there any unintended consequences?

- 4.1 The Government Communication Service provide guidelines⁶¹ around unintended consequences, including four types of consequences that can result from an intervention, as shown in Figure 7 below. This includes:
- Goals are the desirable and anticipated outcomes of a policy, the intended consequences
 - Trade-offs are anticipated negative outcomes, which are expected but not intended.
 - Serendipities are unanticipated but desirable consequences.
 - Classic negative unintended consequences are both unanticipated and undesirable

⁶¹ https://gcs.civilservice.gov.uk/wp-content/uploads/2021/07/GCS_IN_CASE_A_behavioural_approach_to_anticipating_unintended_consequences.pdf

Figure 7: Categorising consequences of campaigns or policies



4.2 This framework highlights that some unintended consequences can be positive, and it can be used to consider the findings around what has been working well and less well for the CIGA measures.

4.3 The framework will also help address the RPC guidelines, that when considering unintended consequences, it is important to consider the significance of these effects for meeting the policy objectives and the extent to which such effects were reasonably foreseeable at the time the policy was implemented⁶².

What has worked well

Company Moratorium

4.4 Interviews and the Bespoke Managed Space Borough Limited case study show that the moratorium has been used effectively to enable a company to enter a CVA, where a short stay on actions enabled the company to seek approval of the CVA. Companies House data is consistent with this finding, with just under a third of moratoriums then going into a CVA. This use supports the intentions of the policy objective, and the expectation that an accessible and user-friendly moratorium could prove beneficial to the outcomes and efficacy of CVAs⁶³.

⁶²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790031/RPC_case_histories_post-implementation_reviews_March_2019.pdf

⁶³<https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1381>

- 4.5 Another finding from interviews was that some moratorium cases ended due to the lack of co-operation from a company's directors or when a rescue attempt failed. Again, this is consistent with the intentions of the policy objectives. Companies are given the opportunity to consider a rescue plan, but where this cannot be achieved, the moratorium should then end. This gives an opportunity for the company to be rescued but also provides protection for creditors where the rescue is not possible. Not all cases will lead to a successful rescue of the company as a going concern, and this was not the policy intention. Creditors can be reassured that a moratorium is not allowed to continue longer than it should, while monitors have an effective and swift mechanism if directors do not provide the information the monitor needs to fulfil their role.
- 4.6 Examples have been given of IP regulatory bodies asking practitioners why, for example, they have put a company through a pre-pack administration rather than use the moratorium to effect a company rescue. This additional oversight of the IP's decision can be considered a serendipitous finding that professional bodies are raising awareness of the CIGA measures.

Suspension of Termination Clauses

- 4.7 As highlighted, it appears too early to assess the impact of SoTC on practice. No additional findings are provided for this section.

Restructuring Plan

- 4.8 The process evaluation concluded that, on balance, the RP received positive reviews from those with experience of the measure. Additional examples of the RP working well were made in comparison to existing measures in the restructuring space. For example, compared to a CVA, the increased involvement of the court is seen as positive and provides reassurance to stakeholders. This is compared to a CVA where the court only becomes involved if the CVA is challenged after its approval. Whilst in comparison to the SoA, the absence of the Scheme's numerosity requirement (the need for a majority in number of creditors as well as a 75% majority in value) to approve a RP is seen as a positive development. This is consistent with the intentions of the policy objective. The RP has added to the range of measures available to companies in the restructuring space, providing options depending on their specific circumstances.

What has worked less well

Company Moratorium

- 4.9 There were some classic unintended consequences identified by the process evaluation. Firstly, a possible strategic use of the moratorium to the detriment of creditors by directors was suggested. Theoretically an unsecured creditor, such as a director (whose debts are argued to fall within the definition of "financial services" for example, lending money to a company or guaranteeing its debts) could encourage the company to enter a moratorium. If the company subsequently enters administration or liquidation within 12 weeks of the moratorium terminating, the unsecured creditor will have priority equal to all other financial creditors, even those who are secured. While no instances of this occurring have been found, theoretically it could, and there does not appear to be anything to stop it.
- 4.10 Initial interviews highlighted a perceived reputational risk to the IP should the company not be successfully rescued following a moratorium. This was explored further in the survey. Only 10% of IPs indicated reputational risk was not a deterrent, with 85% responding that it was at least a slight deterrent, and over a third (36%) indicated it was a significant deterrent. This was supported by further interviews with IPs stating that reputational risk, the change in priority for their fees in

a subsequent insolvency, as well as potential criminal penalties for actions taken whilst acting as a monitor means the risks facing an IP acting as a monitor appear more significant than, for example, acting as an administrator. This leads to IPs recommending administration proceedings instead of the moratorium. This is clearly not part of the policy objective and is something which requires further consideration.

- 4.11 The next consideration was around alteration of priority of debts in a subsequent insolvency procedure, which can cause uncertainty and may lead to an IP not receiving their fee in any repeated subsequent insolvency procedure. This creates an issue in that a moratorium may not be advised unless rescue is extremely likely. The survey asked if the priority rules may deter recommendations to use a moratorium. Of all respondents, 65% indicated that it was likely to be a deterrent, compared to just 8% saying it was not. Interviews support this finding, in that IPs find the alteration of pre-moratorium creditor priority in a subsequent formal insolvency creates several problems. This leads some IPs to advise against the moratorium, instead suggesting administration, a more expensive procedure. As with reputational risk, deterring use of the moratorium is clearly not part of the policy objective. Some issues (such as the definition of “financial contracts”) could be addressed by providing further clarity and guidance. However, to encourage use of the moratorium, it could be considered whether pre-moratorium priority of debts should be retained to some extent in any post-moratorium procedure. This would provide a more predictable and level playing field.
- 4.12 In addition to the classic unintended consequences, some examples of trade-offs were highlighted. One of these was around the moratorium eligibility and qualifying criteria. These may prevent mid-market or large companies from obtaining a moratorium as the exclusions include a company which owes a capital market debt of at least £10m. After that, even if a company is eligible to make use of the moratorium, it would still have to satisfy certain qualifying criteria. The concern is that not many companies would be able to meet both the eligibility and qualifying criteria. The survey asked whether the £10 million or more exclusion should remain. Responses were mixed, 26% said they should remain, 36% said they should be removed and 37% didn't know. Whilst the impact of exclusion does not prevent meeting the policy objectives, it does appear to limit potential take up of the moratorium to current non-eligible struggling companies, particularly those in the mid-market and larger companies.
- 4.13 Some stakeholders noted that the insolvency regime is becoming more debtor friendly. Creditors already had several procedural and substantive barriers restricting their powers to enforce payment, and the moratorium adds another potential hurdle to them. Although this may be the case, it is a clear policy objective of the measure that companies should be provided with more options to allow for a rescue package to be considered. The whole purpose of a moratorium is to temporarily restrict creditor action so the struggling company can seek advice, negotiate with creditors, and agree plans for its rescue as a going concern.

Suspension of Termination Clauses

- 4.14 Although there was little practical experience of SoTC in practice, an issue raised was around guaranteed payment. There was concern that suppliers who continue to supply insolvent companies are not guaranteed payment for continued supply, especially where there was no office holder in place. This issue can be considered a trade-off for the policy, with the IA acknowledging that the protection from this measure on debtor companies would in turn shift the risk onto

suppliers⁶⁴ (both small and large companies, after temporary protections on small suppliers expired). The risk from this issue is less likely when the company is in administration as the continued supply will have the benefit of super priority. The position is less clear where there is no office holder controlling the company. In such debtor-in-possession proceedings such as RPs, CVAs and moratoriums, the supplier will need to negotiate payment terms to reduce the risk. Survey responses from IPs showed virtually no support for a personal guarantee in favour of suppliers (4%). This is not surprising as IPs, when office holders, would be the ones who would provide such guarantees. However, a mitigation is already present for this scenario, via the hardship provision. If non-payment is a genuine concern and if such non-payment would impact significantly on the supplier, the supplier should be able to claim hardship.

- 4.15 A couple of classic unintended consequences were highlighted in the process evaluation, the first relating to enforcement. Although it appears untested, there is a concern that enforcement of the measure may not be straightforward. Survey responses indicated that over half of IPs (51%) thought there was no effective enforcement or that it was not straightforward, with only 4% indicating there was suitable enforcement. Legal action by an insolvent company to ensure continued supply may be logistically difficult for several reasons and suppliers may decide to risk non-compliance. At present, the risk to a supplier who intentionally breaches its obligations under this measure remains unclear. If the consequences to a non-compliant supplier were clear, and significant, it is more likely that they would comply or apply to court under the hardship provision. Clearly the policy intention is to ensure suppliers comply with the measure and continued engagement with industry may well be necessary. However, it is worth highlighting that there is precedent that the system works despite this issue. While the provision has been difficult to enforce in Canada, the provision has been uncontroversial, with the measure seen as working well⁶⁵. This is covered in more detail in the international comparisons section of this review.
- 4.16 A second classic unintended consequence is around supplier awareness. Survey responses show a higher proportion of IPs (38%) thought suppliers were not aware of the measure compared to 33% who thought they were at least somewhat aware. This represents an unintended consequence as it could mean that suppliers do not comply with the measure as they are not aware of it, or they do not know what protections may be available to them under the hardship provision. This issue may begin to iron itself out over time, as whilst the measure is not currently well-known outside of sophisticated suppliers, that is likely to change as more companies enter rescue proceedings. It will be important to continue to engage with industry going forward, as with increased awareness there is also a risk that there are attempts by suppliers to manoeuvre around the measure to avoid continuing supply.

Restructuring Plan

- 4.17 Despite the measure being viewed favourably, a couple of issues were raised. The first relates to burdens on business, which can be split into two subsets; the cost to set up a RP and the cost to challenge a RP. The need for two court applications, two hearings and cost of counsel as well as required valuation evidence drives up the costs to set up a RP. The concern raised was that the costs are at the top end of the market and so would not be accessible to all sizes of companies. Estimates from stakeholders noted the costs at the top of the market would likely to be between £2m and £10m, whilst it would be between £1m and £2m in the mid-market. This was supported

⁶⁴ <https://publications.parliament.uk/pa/bills/cbill/58-01/0146/SIGNED%20-%20IA%20Insolvency%20and%20Corporate%20Governance%20Enactment%20Stage.pdf>

⁶⁵ <https://onlinelibrary.wiley.com/doi/10.1002/iir.1446>

by the survey evidence with 60% of respondents indicating the costs are too high for SMEs. However, the case study of Houst Ltd highlights the use of a RP by a SME, showing it is possible for a SME to use a RP. As mentioned previously, this may act as a tipping point to open the procedure up to other SMEs⁶⁶. The costs of challenging a RP have also been highlighted as significant, the concern being that only certain creditors would be able to avail themselves of the built-in protection offered by the RP. Again, the process evaluation provided estimates from stakeholders. One large case had costs around £1m to challenge, whilst in a mid-market company the costs of the challenger were £165,000. This issue was again confirmed by survey responses, with 75% indicating the costs are at least a slight deterrent to challenging, with just 2% indicating the costs are not at all a deterrent. Both issues can be considered as trade-offs of the policy, with RPs likely to be more useful in scenarios with complex capital structures and a diverse range of stakeholders. This in turn pushes up the costs involved, whilst alternative restructuring measures are still available to other companies. Nevertheless, it should be considered whether there are ways to reduce the burden on business.

- 4.18 A classic unintended consequence highlighted by creditors is information asymmetry. To enable creditors to make informed decisions, they need enough relevant information within reasonable time to consider the information against the proposals being made. There is a perceived problem with creditors not having adequate access to information in a timely manner, which can make it difficult for them to put forward an alternative to the RP. This issue may have overlaps with the costs of challenging a RP, because they would include accountancy and valuation services, as well as legal costs. The survey responses from IPs show a different opinion to that of creditors, with 38% believing dissenting creditors have the right information at the right time, compared to just 8% believing this happened rarely. Part of this difference may be because there is already a mitigation in place in the form of the practice statement⁶⁷. This provides guidance for the applicant in order to ensure that the application is given in a concise form and in sufficient time to enable the affected parties to consider what is proposed. The guidance to provide concise information may inadvertently be contributing to the information asymmetry. Whilst concise information can be desirable, a balance is needed between providing too much, and providing enough, information to place creditors in a better-informed position. When advising companies prior to the convening hearing, IPs could be provided guidance to ensure that more detailed and relevant information is given within a reasonable timeframe with the specific intent of recognising the company's duty to consider the interests of creditors. It might also encourage more trust in the process and even minimise instances of challenge. Therefore, it could be beneficial to offer professional guidance (such as by expanding the practice statement) to IPs taking on the role of advisor and then as plan administrator in a RP.

What are the estimated costs and benefits of the policy?

Approach to Value for Money Evaluation

- 5.1 The methodology follows that of the IA⁶⁸. Detail regarding why certain costs and benefits are present are in the IA. Where there are changes from the original methodology these are highlighted and discussed briefly.

⁶⁶ https://southsquare.com/wp-content/uploads/2022/09/SSQ_Digest_September_2022_Final-2.pdf

⁶⁷ <https://www.judiciary.uk/guidance-and-resources/practice-statement-companies-schemes-of-arrangement-under-part-26-and-part-26a-of-the-companies-act-2006/>

⁶⁸ <https://publications.parliament.uk/pa/bills/cbill/58-01/0146/SIGNED%20-%20IA%20Insolvency%20and%20Corporate%20Governance%20Enactment%20Stage.pdf>

- 5.2 In each section below the costs and benefits considered in the IA are revisited, providing first an update in relation to case numbers relating to the measure and, secondly, providing information on updated evidence relating to the costs and benefits where available. Finally, the estimated costs and benefits are compared to those in the IA.
- 5.3 The IA estimated the three measures would have a combined net social impact of £1,535.5m and an estimated annual impact on business of -£178.4m over a 10-year appraisal. The main benefits were assumed to come from improved company survival, along with non-monetised benefits such as improved job preservation. The main costs associated with the measures included familiarisation costs, additional insurance, legal costs, and costs associated with new processes.
- 5.4 Whilst the IA considered a 10-year timeframe for the economic appraisal of the measures, the VfM evaluation considers a 3-year timeframe since the introduction of CIGA on 26th June 2020. The IA costs and benefits have been adjusted to a 3-year appraisal to make them comparable to the VfM evaluation. Costs and benefits are presented in 2019 prices.

Familiarisation

Cost of Training Courses and Opportunity Cost of IP Attendance

- 5.5 The IA anticipated that 1,244 appointment-taking IPs would have to spend time familiarising themselves with the new permanent measures, based on 2019 figures⁶⁹. As of 1st January 2021, there were 1,288 appointment-taking IPs, an additional 44 compared to the IA. The assumption that IPs undertook training courses and that course costs were in the region of £180-£400 per IP is maintained. Applying this to the higher number of appointment-taking IPs (1,288) results in training course one-off costs of £232K-£515k with a **best estimate of £374k**. This is approximately £8k-18k higher than the IA due to the increase in the number of appointment-taking IPs.
- 5.6 Instead of attending training courses, IPs could have spent the time on other productive activities. This time therefore has an opportunity cost. The assumption that IPs would have spent approximately 3.5-7 hours attending training courses on the legislative changes is maintained. Similarly, the evidence for IP hourly remuneration remains unchanged at £406. Therefore, the actual one-off time opportunity cost for IPs is estimated to have been between £1.83m – £3.66m. This is £63k-125k more than anticipated in the IA due to the increase in the number of appointment-taking IPs. Taking the midpoint, the **best estimate is a one-off cost of £2.74m**.

Company Directors

- 5.7 Corporate managers and directors were also anticipated to spend time familiarising themselves with the changes. The IA used a figure of 2.4m for the number of directors that would be impacted. Since then, DBT analysts have provided The Insolvency Service with figures from the FAME database, which have been used in more recent impact assessments⁷⁰. These figures from the FAME database, along with data from Companies House statistics, have been used to estimate a director to company ratio of around 1.44⁷¹. RPC opinion on a more recent IA produced by The

⁶⁹ <https://www.gov.uk/government/publications/insolvency-practitioner-regulation-process-review-2019/annual-review-of-insolvency-practitioner-regulation-2019>

⁷⁰ [https://publications.parliament.uk/pa/bills/cbill/58-02/0011/Directors%20disqualification%20\(dissolved%20companies\)%20IA.pdf](https://publications.parliament.uk/pa/bills/cbill/58-02/0011/Directors%20disqualification%20(dissolved%20companies)%20IA.pdf)

⁷¹ [https://publications.parliament.uk/pa/bills/cbill/58-02/0011/Directors%20disqualification%20\(dissolved%20companies\)%20IA.pdf](https://publications.parliament.uk/pa/bills/cbill/58-02/0011/Directors%20disqualification%20(dissolved%20companies)%20IA.pdf)

Insolvency Service suggested that only directors of companies directly impacted by measures should be considered for familiarisation costs⁷². Therefore, the impact on company directors is updated to only consider the directors of companies in insolvency, restructuring and moratorium procedures and the directors of suppliers to be impacted.

- 5.8 Since the introduction of CIGA, according to Insolvency Service Official Statistics⁷³ and Companies House data, there was an annual average of 16,957 cases where directors would need to be aware of the changes. Suppliers of these companies are also included (maintaining the IA’s assumption of 10 suppliers per company) to arrive at an estimate of 186,000⁷⁴ companies impacted by the changes. Applying the 1.44 director to company ratio suggests that 268,000 directors would have spent time familiarising themselves with the legislation.

Table 1: Annual Case Numbers of Insolvency and Restructuring related Procedures in UK since the introduction of CIGA

Procedure	Average Annual Number of Cases Since the Introduction of CIGA
Administrations	1,126
Creditors’ Voluntary Liquidation	14,432
Compulsory Liquidations	1,163
Company Voluntary Arrangements	166
Moratoriums	18
Restructuring Plans	6
Schemes of Arrangement	46
TOTAL	16,957

- 5.9 There will be an element of double-counting with this estimate. For example, companies which enter into administration may then subsequently end up in a liquidation. Therefore, the average annual number of cases in Table 1 do not represent 16,957 separate companies. Furthermore, directors may be associated with more than 1 company that is insolvent or a supplier of insolvent companies. Also, over time, some directors may already be familiar with the measures. As such this represents an overestimate of the true ongoing familiarisation cost experienced by directors.
- 5.10 The IA used the Annual Survey of Hours and Earnings to estimate the average hourly rate of corporate managers and directors. Using the same survey data, but from the October 2022 release, the median hourly rate is adjusted for non-wage labour costs⁷⁵ and ONS GDP deflators⁷⁶ are applied to adjust values to 2019 prices. This produces an hourly labour cost of £26.17⁷⁷, £0.86 less per hour than in the IA.
- 5.11 The IA’s assumption that company directors would spend 1 to 4 hours learning about the changes is maintained. Applying the hourly labour cost to the 268,000 directors provides an estimated ongoing director familiarisation cost of £7.03m-£28.12m with a **best estimate of £17.57m**. This

⁷² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994002/RPC-BEIS-IS-5065_2_Directors_Disqualification_Dissolved_Companies_Bill_-_revised_2_IA_f_-_opinion.pdf

⁷³ <https://www.gov.uk/government/statistics/monthly-insolvency-statistics-september-2022>

⁷⁴ 16,957 companies + 169,570 suppliers

⁷⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/827926/RPC_short_guidance_note_-_Implementation_costs_August_2019.pdf

⁷⁶ <https://www.gov.uk/government/statistics/gdp-deflators-at-market-prices-and-money-gdp-september-2022-quarterly-national-accounts>

⁷⁷ The median hourly rate in the link below is £22.82 in 2021 prices. This should be adjusted for non-wage labour costs (i.e. multiply by 1.22) and brought into 2019 prices using ONS GDP deflators.

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/occupation2digitsocashetable2>

estimate marks a different approach to the IA which assumed a one-off director familiarisation cost of £162.27m.

Table 2: Comparison of Estimated Actual Familiarisation Costs to IA Assumptions

Impact	PIR			IA		
	Best Estimate £	Direct Impact on Business	Ongoing or One-off cost	Best Estimate £	Direct Impact on Business	Ongoing or One-off cost
IPs – Time Cost	£2.74m	Yes	One-off	£2.65m	Yes	One-off
IPs – Training Course Cost	£0.37m	Yes	One-off	£0.36m	Yes	One-off
Directors	£17.57m	Yes	Ongoing	£162.27m	Yes	One-off

Company Moratorium

Number of Moratoriums

5.12 According to Insolvency Service Official Statistics, as of 30th September 2022 40 moratoriums had been obtained⁷⁸. This provides an annual average of 18 moratoriums per year⁷⁹ since the introduction of CIGA. Undoubtedly the primary reason for the fall in both costs and benefits is the lower number of cases than anticipated in the IA. For ease of comparison, per case costs and benefits are provided where available.

Costs

5.13 The procedure to enter a moratorium was associated with the following costs, which are considered separately:

- Cost of preparing a report on eligibility, and legal materials to authorise the breathing space (considered separately in the IA)
- Cost of monitoring compliance with the moratorium
- Cost of creditor challenges during moratorium period

Preparation of eligibility report and legal materials

5.14 To obtain a moratorium, relevant documentation must be prepared and filed. The IA contained an estimate of £7k per case for preparing a report on eligibility for the moratorium and £10k per case for preparing and filing the relevant legal materials. This provides a total of £17k per case.

5.15 Updated evidence provided through the process evaluation suggests that the cost of producing the eligibility report and relevant legal materials was, on average, £13.7k per case⁸⁰. This is approximately £3.3k per case less than anticipated in the IA.

⁷⁸ <https://www.gov.uk/government/statistics/monthly-insolvency-statistics-september-2022/commentary-monthly-insolvency-statistics-september-2022>

⁷⁹ 40 moratoriums divided 27 months since introduction of CIGA 2020 multiplied by 12.

⁸⁰ See 4.3.2 of The Interim Report. £15,000 in 2022 prices is adjusted using ONS GDP deflators.

5.16 Applying the revised cost per case to the 18 cases per year results in an estimated **ongoing cost for preparing eligibility report and legal materials of £247k per year**. This is approximately £21.04m less than estimated in the IA, primarily due to the lower number of cases.

Cost of monitoring compliance with the terms of the moratorium

5.17 The process evaluation provided updated evidence on the daily cost of Monitors being in place during a moratorium. This cost was reported to be in the range of £1,000-£3,000 per day⁸¹. The IA assumed that moratoriums would last for 20 days and monitoring would cost approximately £6,400 per case.

5.18 According to Companies House data, of the 39 moratoriums that were obtained by 31st July 2022, a third were granted an extension. Therefore, two-thirds were completed within 20 working days. Of those moratoriums that did not have an extension, they are assumed to have been in place for the full 20 working days. Of those that received an extension, it is assumed that they were in place for a further 20 working days for 40 in total. On this basis, and taking a mid-point of £2,000 as a per day cost for monitoring compliance with the terms of the moratorium, it is estimated that the total cost per moratorium was approximately £48.8k⁸². Applying this updated per case cost to the 18 moratoriums per year results in a best estimate of the **ongoing annual cost of £878k to monitor compliance with the terms of the moratorium**.

5.19 To account for uncertainty, the lower and upper ends of the per day cost range can be applied after adjusting to 2019 prices. Applying these costs to the 18 cases provides a range of £439k – £1.3m.

5.20 The £878k figure is comparable to the estimate in the IA of £6.4m-£9.6m. The costs have been significantly lower primarily due to the lower number of cases. The per case cost of £48.8k is significantly higher than the £6.4k anticipated in the IA. This is in part due to number of moratoriums lasting longer than 20 days but primarily due to the higher than anticipated remuneration cost for IP services.

Cost of creditor challenges during moratorium period

5.21 At the time of writing, there has been at least one case in which a creditor has challenged a moratorium. The Corbin & King case⁸³ was brought by a Thailand based creditor ‘Minor Hotel Group’. According to Section 7.5 of HMT Green Book⁸⁴, the scope of costs and benefits are to be considered based on the impacts on UK society as a whole, which generally includes UK residents and not potential residents or visitors. Given there are no challenges to moratoriums from UK-based creditors the **estimated cost to creditors for challenging moratoriums is £0**.

Benefits

5.22 The introduction of the moratorium was expected to deliver the following benefits, which are considered separately:

- Monetised Benefits:
 - Benefits of enabling restructuring of distressed companies to be completed at a lower cost and in a faster time
 - Benefits to creditors from better outcomes
- Non-Monetised Benefits

⁸¹ See 4.3.2 of The Interim Report. £1,000 - £3,000 in 2022 prices.

⁸² $((67\% \times £2k \times 20 \text{ days}) + (33\% \times £2k \times 40 \text{ days})) \times (94.0414 [2019 \text{ GDP Deflator}] / 102.8493 [2022 \text{ GDP Deflator}])$

⁸³ [https://files.lbr.cloud/public/2022-02/corbinking%20\(Final\).pdf](https://files.lbr.cloud/public/2022-02/corbinking%20(Final).pdf)

⁸⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063330/Green_Book_2022.pdf

- Increased job preservation and reduction in social costs
- Improved returns to unsecured creditors helping the business community invest more

Benefits of enabling restructuring of distressed companies to be completed at a lower cost and in a faster time

- 5.23 The IA anticipated that there would be approximately 10-20 RPs following a moratorium per year from an expected annual caseload of 1,000-1,500 moratoriums. According to Companies House data of the 39 moratoriums that were obtained by 31st July 2022 none were followed immediately by a RP. It is not surprising, given there were only 18 moratoriums per year, that there have been no RPs following a moratorium. Therefore, no cost savings have materialised from restructuring, via a RP, at a lower cost due to the breathing space provided by the moratorium.
- 5.24 The process evaluation, however, did gather some updated expert opinion evidence on the expected benefit, which is pertinent to the future costs and benefits section of this PIR.
- 5.25 The IA set out that the costs of restructuring were expected to be in the region of £2m-£15m (2010 prices). The IA used responses to a previous consultation as a basis for the assumption that a moratorium would lead to cost savings on subsequent restructuring costs in the region of 10%-20% as it would enable office-holders greater time to develop appropriate restructuring proposals.
- 5.26 In conjunction with the findings of the interim report, in which interviewees reported restructuring costs to be in the region of £91.4k to £9.14m⁸⁵, responses to a survey carried out for the process evaluation suggest that cost savings following a moratorium were overestimated. The responses to Q13, available from the process evaluation, have been used to calculate a weighted average for the upper end and lower end range of anticipated cost savings.
- 5.27 The mechanism by which restructuring following a moratorium should cost more than if the moratorium had not taken place is not immediately apparent. However, the survey responses suggest that it could cost more. The upper end estimate of the potential cost savings is 13.63% and the lower end estimate is -1.82% (i.e. increased costs). Given the remaining uncertainty around the potential benefits and as there is a potential increase in cost, we apply the high and low estimated cost saving percentages to the upper end of the of restructuring costs range (£9.14m) to produce the widest possible range. This suggests that following a moratorium, a restructuring could cost in the region of £1.36m less to £182k more than if no moratorium was entered.

Benefits to Creditors from Better Outcomes

- 5.28 Implementation of the moratorium procedure was intended to be associated with greater levels of company rescue and better returns to creditors. This was expected to occur in two ways:
- Firms that in the counterfactual would use administration can use the moratorium to restructure, which would improve creditor outcomes
 - The use of administration to effect a CVA or other form of restructuring could be reduced
- 5.29 These two expected impacts cannot be separated based on the data available. However, based on Companies House data, of the 39 moratoriums obtained by 31st July 2022, 87.2%⁸⁶ resulted in either a subsequent CVA, recovery (after a CVA), or recovery of the company as a going concern. This represents 16 out of the 18 moratoriums per year. Whilst a true counterfactual is not

⁸⁵ See The Interim Report section 4.2.4.2 and adjusted using ONS GDP deflators from 2022 to 2019 prices.

⁸⁶ 11 went into a CVA, 22 experienced recovery of the company as a going concern, 1 experienced recovery of the company as a going concern after obtaining a CVA subsequently to their moratorium

available, it is assumed that these cases would have entered administration in the relevant alternative. Outcomes from administration data, used in the IA, estimated that 2% of companies then go into a CVA or saved as a going concern. Applying the 2% to the 18 moratoriums, provides an estimate that none of the 18 moratoriums would have achieved the same outcome in the relevant alternative.

- 5.30 The IA methodology only considered the differences in the returns to unsecured creditors under CVAs and administrations to estimate the benefit that this would provide. This was due to the evidence available from the OFT market study⁸⁷, which estimated the 6.75% improvement in returns to unsecured creditors. However, the benefit of moving from administration to a CVA or other restructuring procedure would be experienced, on average, by most if not all classes of creditors. As discussed further in the section below on RPs, evidence to date suggests that the returns to all creditors under RPs could be as high as 91%, compared to an average return to all creditors in administration from the MCC economics data collection of 10.53%.
- 5.31 Whilst there are grounds for challenging the application of this assumption to the returns for the wider body of creditors, the logic derives from the nature of the creditor hierarchy from which returns are assigned in insolvency procedures⁸⁸. Given that unsecured creditors are at the lower end of this waterfall, and in conjunction with the low returns experienced by creditor classes with higher status than unsecured creditors, it follows that on a residual basis, if unsecured creditors are better off by 6.75% in CVAs compared to administrations, that it is likely that other creditor classes must also have been made better off through actualised returns.
- 5.32 Due to this uncertainty, 3 scenarios are applied for the estimated improvement in returns to creditors:
- 6.75% improved returns to all creditor classes
 - 12.22%⁸⁹ improved returns to all creditor classes
 - 80.03%⁹⁰ improved returns to all creditor classes
- 5.33 The total average creditor claims in an administration in the MCC economics data collection was £11.1m. This differs from the IA's usage of average claims from unsecured creditors. Applying the 3 improved return scenarios to the 16 cases, better returns to all creditors are estimated to be between £11.9m - £141.7m. However, based on the MCC economics data, it is estimated that approximately 15% of this would be returned to non-business creditors such as HMRC. Therefore, the estimated improved return to business creditors ranges from £10.1m-£119.9m. Using the second scenario as our best estimate provides a best estimate of the **ongoing annual benefit in better returns to creditors of £18.3m**. This is not directly comparable with the estimate provided in the IA due to the IA's focus on unsecured creditors and hence the lower value of claims in administrations, which are solely from unsecured creditors in the IA. It is expected that the PIR value would be higher than the IA due to this more accurate scope of the impact.

⁸⁷ https://webarchive.nationalarchives.gov.uk/ukgwa/20140402142426/http://www.offt.gov.uk/shared_offt/reports/Insolvency/oft1245

⁸⁸ <https://www.legislation.gov.uk/ukpga/1986/45/contents>

⁸⁹ 6.75% (improved returns to unsecured creditors in a CVA compared to administration) + 16% (average return to all creditors from administrations in IA) - 10.53% (average return to all creditors from more recent administration MCC Economics data)

⁹⁰ 91% average returns to creditors in Restructuring Plans – 10.53% (see above)

Table 3: Comparison of Ongoing Costs and Benefits associated with Moratorium to IA assumptions

Impact	PIR		IA	
	Best Estimate £	Direct Impact on Business	Best Estimate £	Direct Impact on Business
Cost				
Cost or preparing an eligibility report and legal materials to authorise the breathing space	£0.2m	Yes	£21.3m	Yes
Cost of monitoring compliance with the moratorium	£0.9m	Yes	£8.0m	Yes
Cost of creditor challenges during moratorium period	£0.0m	Yes	£0.29m	Yes
Total Costs	£1.1m	Yes	£29.6m	Yes
Benefit				
Benefits of enabling restructuring of distressed companies to be completed at a lower cost and in a faster time	£0.0m	Yes	£25.3m	Yes
Benefits to creditors from better outcomes	£18.3m	Yes	£5m	Yes
Total Benefits	£18.3m	Yes	£30.3m	Yes

Suspension of Termination Clauses

Costs

5.34 The IA considered the following costs in relation to SoTC:

- Monetised Costs
 - Increased cost to suppliers from loss of termination clauses
 - Legal cost to suppliers from hardship claims

Increased cost to suppliers from loss of termination clauses

5.35 The process evaluation report suggests that trade credit insurance cover is likely to terminate at the point a company enters a formal insolvency process and that any supplier who has to continue to supply to the insolvent company subsequently will therefore not have the benefit of insurance cover⁹¹. Furthermore, it does not appear as though the insurance market has developed new products to provide coverage in these instances or that there is any consideration of developing such products in the near term. Therefore, the original assumption made in the IA that there would be an increased uptake of trade credit insurance policies does not seem to apply.

5.36 Whilst suppliers cannot require payment of pre-insolvency debts as a condition of continued supply, there appears nothing to stop them insisting upon full payment for the continued supply of

⁹¹ See section 4.4.2 of The Interim Report. <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-interim-report-march-2022/corporate-insolvency-and-governance-act-2020-interim-report-march-2022>

goods and services during the company's insolvency period. This mitigates the risk transferred onto supplier companies for their continued supply. It is therefore assumed that the cost of trade credit insurance due to the introduction of CIGA has been £0. This eliminates an anticipated £337.9m annual cost to suppliers from the IA.

Legal cost to suppliers from hardship claims

5.37 The process evaluation provides evidence that there has been no usage of the hardship provision:

“Partly due to the s15 CIGA temporary exemption for small suppliers from the measure (which came to an end on 30 June 2021) the hardship test has yet to be tested in the courts.”

5.38 As such, it is assumed there has been no associated legal cost to suppliers. This compares to the IA's estimate of a £3.3m per year.

Benefits

5.39 The IA considered the following benefits that were anticipated to materialise following the SoTC:

- Monetised benefits
 - Increased company rescue leading to improved returns
 - Continuing company rescue leading to improved returns
- Non-monetised benefits
 - Increased job preservation and reduction in social costs
 - Improved returns to unsecured creditors helping the business community invest more

5.40 The IA set out an expectation that the SoTC should lead to improved returns to creditors through two routes. It estimated that:

- 10% of compulsory liquidations and CVLs would be avoided, approximately 1,600 per year. These would become administrations instead;
- 10% of administrations and CVAs would no longer be expected to lapse into liquidation as a result of demand for ransom payments.

5.41 The resulting benefit to creditors can be estimated based on differences in the average return to all creditors from these procedures. The MCC economics data collection is used to provide an updated return to creditors from administrations and CVLs.

Increased company rescue leading to improved returns

5.42 The case numbers provided in Table 1 can be used as to estimate the number of liquidations that have been avoided due to the SoTC. Of the 15,595 CVLs and compulsory liquidations occurring annually since the introduction of CIGA, it is assumed that there would have been approximately 1% more liquidations, which are now administrations, had it not been for the SoTC. This compares with an assumed avoidance rate of 10% in the IA. The revised assumption is purposefully conservative due to evidence from the process evaluation that, whilst perceived as a useful addition, there has not yet been widespread engagement with SoTC. These 1% of cases provide an average 10.53% return to creditors through an administration, compared to 0.51% in CVLs⁹². There is therefore an improved return to creditors per case of 10.02 percentage points.

⁹² Returns for administrations and CVLs based on MCC Economics Data Collection

This is slightly lower than the IA’s assumption of an assumed 11 percentage point improved return to creditors.

5.43 Following the IA methodology, the average amount owed to creditors in administration, £11.1m, is used to estimate the benefit. The improved returns to all creditors is £172.9m per year⁹³. Some of this benefit is assumed to be a transfer from suppliers to debtor companies given the loss of ransom payments. The IA’s assumption that 50% of the value is a transfer is maintained. Adjusting for the proportion of debt owed to non-business creditors, such as HMRC, is 15% and so results in an **ongoing annual benefit to business creditors from increased company rescue of £73.2m**⁹⁴. This compares to the £499m estimate in the IA.

5.44 The primary reasons for the differences to the estimate in the IA are due to:

- The lower perceived number of liquidations avoided (1% compared to 10%)
- The higher level of outstanding debt on administration cases (£11.1m compared to £6.3m in the IA)
- The higher amount of debt being returned to non-business creditors (15% compared to 10%), which is potentially due to the change to preferential creditor status of some elements typically owed to HMRC (on 1st December 2020)⁹⁵.

Continuing company rescue leading to improved returns

5.45 For those companies that were likely to lapse into liquidation from a CVA or administration, the estimated avoidance rate is reduced from 10% in the IA to 1%. This revision is again made to reflect evidence that there has yet to be widespread engagement with the measure. Since the introduction of CIGA there has been an annual average of 1,292 CVAs and administrations. Applying the same methodology as above it is estimated that there was an improved return to creditors overall of £14.3m. Of this, approximately 50% is a transfer due to the loss of supplier ransom payments. Of the remaining value, 15% is attributable to non-business creditors. Therefore, the estimated actual benefit to business creditors is estimated to have been **£3.0m per year**. This compares to the IA estimated ongoing annual benefit of £35.1m.

Table 4: Comparison of Ongoing Costs and Benefits associated with SoTC to IA assumptions

Impact	PIR		IA	
	Best Estimate £	Direct Impact on Business	Best Estimate £	Direct Impact on Business
Cost				
Increased cost to suppliers from loss of termination clauses	£0.0m	Yes	£337.9m	Yes
Legal cost to suppliers from hardship claims	£0.0m	Yes	£3.3m	Yes
Total Costs	£0.0m	Yes	£341.2m	Yes
Benefit				
Increased company rescue leading to improved returns	£73.2m	Yes	£499m	Yes

⁹³ 15,595 x 1% x £11.06m x 10.02%

⁹⁴ £172.9m x 50% x (1-15%)

⁹⁵ <https://www.gov.uk/government/publications/hmrc-as-a-preferential-creditor/hmrc-as-a-preferential-creditor>

Continuing company rescue leading to improved returns	£3.0m	Yes	£35.1m	Yes
Total Benefits	£83.4m		£534.1m	

Restructuring Plans

Number of Restructuring Plans

- 5.46 As of 30th September 2022, 12 companies had a RP registered at Companies House⁹⁶. This equates to approximately 6 RPs annually since the introduction of CIGA.
- 5.47 Following the IA methodology, of the 6 annual RPs, it is assumed that 50% of these would have been SoAs in the counterfactual, with the other 50% representing growth in the restructuring market⁹⁷. This is corroborated by insolvency industry evidence on RP cases which suggests that half of RPs have required the cross-class cram down mechanism to be used in order to implement the plan, and so would not have been sanctioned as a SoA^{98 99}. The costs and benefits of RPs are therefore considered on the basis of 3 cases per year, which would otherwise have been SoAs, and 3 cases per year which would otherwise have likely gone through an administration. These latter cases represent a growth in the restructuring market.

Costs

- 5.48 The IA considered the following cost in relation to the introduction of RPs:
- Monetised costs
 - Cost of disputing the provision of a RP
- 5.49 Given the updated evidence on the cost of formalising a RP, an additional section which was not considered in the IA, is added.

Cost of disputing the provision of a restructuring plan

- 5.50 Data on the number of disputes regarding RPs was sourced from HMCTS. The Court of Appeal, Civil Division, have had no appeals from a High Court Judge in this type of matter. Whilst there appears to have been no appeals, the process evaluation reported that the costs involved in challenging the approval of a RP may be seen as “excessive”, which is likely to be a contributory factor to their low numbers. There has been, however, some opposition to RPs, whether by

⁹⁶ <https://www.gov.uk/government/statistics/monthly-insolvency-statistics-september-2022/commentary-monthly-insolvency-statistics-september-2022>

⁹⁷ In line with the IA, the growth in the restructuring market is not considered as a direct impact on business. What is included as a direct impact is the benefit from increased returns to creditors which arises from the removal of restrictions on companies preventing the use of RPs. The impact is immediate (i.e. a shift from replacing current procedures) and the impact is in the market being regulated (i.e. a ‘partial equilibrium effect’).

⁹⁸ <https://www.pwc.co.uk/services/business-restructuring/insights/restructuring-plans-what-difference-year-makes.html> - At time of publication, three Plans have required the court to sanction Plans where there has been a class (or classes) where the 75% approval threshold has not been met. At the time of publication, 6 RPs had been implemented.

⁹⁹ <https://www.mondaq.com/uk/insolvencybankruptcy/1273698/european-restructuring--insolvency--what-we-saw-in-2022-and-what-to-expect-in-2023#:~:text=The%20%22cross-class%20cram-down%22%20has%20remained%20an%20attractive%20feature,exclude%20out-of-the-money%20stakeholders%20from%20voting%20on%20the%20Plan.> – 2 out of 4 Plans sanctioned in 2022 saw the cross-class cram-down mechanism used.

correspondence or formally at court. Industry evidence suggests that 50%-75% of RPs face creditor opposition¹⁰⁰. The process evaluation estimates that challenges to RPs can cost in the region of £151k-£914k¹⁰¹.

- 5.51 Taking the upper end of this cost range and applying it to 50-75% of the 3 additional RPs per year since the introduction of CIGA provides an estimated ongoing annual cost to creditors of £1.37m - £2.05m.
- 5.52 For the RPs which are assumed to have replaced SoAs, the IA's original assumption is maintained, that they could challenge through a similar judicial process if they had been subject to a SoA, and that there is therefore no additional burden on these creditors.
- 5.53 The cost to creditors for disputing RPs in court is estimated to have been £1.37-£2.05m with a **best estimate of £1.71m**. This compares to the IA's best estimate of £20k. The primary reason for the difference in estimated costs is the cost per case from challenging RPs, which was around £4k in the IA.

Cost of additional restructuring plans (not included in IA)

- 5.54 The IA implicitly assumes that RPs should cost a similar amount to SoAs. Expert evidence from the process evaluation estimates that SoA cost around 1/3 less than a RP. However, overall costs are likely to be broadly the same, with the addition of further processes such as an administration or CVA.
- 5.55 Of the 6 annual RPs, it is assumed that 50% of these would have been SoAs in the counterfactual, with the other 50% representing growth in the restructuring market, based on industry evidence. It is estimated that 3 RPs are additional to current case numbers in the restructuring market.
- 5.56 The process evaluation suggests that the costs of RPs vary depending on the size of the debtor company and the complexity of the case. Guiding cost ranges are:
- £91k - £137k for an SME
 - £914k - £1.8m for a mid-market RP
 - £1.8m - £9.14m for top of the market RP
- 5.57 The 3 other RPs are assumed to be from growth in the restructuring market. These are associated with the full cost mentioned previously. Whilst there has been at least 1 RP by a SME debtor company (see Houst case study), the top of market costs are used as a best estimate as it is more representative of the current users. Therefore, **the 3 additional RPs have an associated set-up cost of £27.4m**. The process evaluation notes that as lawyers become more experienced in drafting RPs it is possible that the cost of doing so will fall in the future.

Benefits

- 5.58 The IA considered the following benefits in relation to the introduction of RPs:
- Monetised benefits
 - Improved returns to creditors from permitting RPs
 - Non-monetised benefits
 - Increased job preservation and reduction in social costs
 - Improved returns to unsecured creditors helping the business community invest more

¹⁰⁰ https://tma-uk.org/uploads/site-files/TMA_presentation_22.3.22-SML.pdf E.g. DeepOcean, gategroup, Virgin Active, Hurricane Energy, National Car Parks, Amicus Finance, Smile Telecoms, China Fishery Group

¹⁰¹ See 4.2.4.2 of The Interim Report. £165k - £1m challenger costs. Adjusted to 2019 prices using ONS GDP deflators

- Improved returns to secured creditors resulting in greater business lending

Improved returns to creditors from permitting restructuring plans

- 5.59 For the 6 annual RPs it is assumed that the relevant alternative for these cases is an administration procedure. Industry evidence suggests that legal filings assume the relevant alternative for RPs range from group liquidation to pre-pack sales¹⁰². The adoption of the assumption of administration as the relevant alternative is chosen to ensure a more conservative estimate of the improvement in returns to creditors.
- 5.60 According to reports by industry participants (PWC¹⁰³ and Kirkland & Ellis¹⁰⁴), in 9 of the first RPs, approximately £6.315bn worth of debt was affected by the restructuring. Of this £595m was written off, £520m was swapped for equity, and the remaining £5.2bn was amended and or extended. On a per case basis, it is assumed the overall retention of the asset value of debt, as either amended debt or equity, is considered as a return to creditors through the preservation of the asset value of the debt. This suggests that RPs have provided, on average, a 91% return. Under the relative alternative of an administration, a conservative estimate is used via a single case from the MCC economics data collection, which has the highest return with an outstanding debt of over £100m. This case had a return to creditors of 15%. This alternative results in a 76-percentage point improvement in returns to creditors through a RP compared to an administration.
- 5.61 The median amount of debt outstanding in RPs is approximately £430m. For the 3 additional RPs (representing growth in the restructuring market) this represents £324.9m improved returns to creditors per case compared to if they had been through administration. For the courts to sanction a RP at least 51% of the outstanding loans should be governed by English law¹⁰⁵. This does not necessarily entail that 51% of the value should be attributable to UK-based creditors, however, in the judgements relating to the sanctioning of RPs, such as for Smile Telecoms¹⁰⁶, there were significant amounts of debt owed to non-UK creditors. As mentioned previously, HMT Green Book methodology stipulates that solely UK society should be concerned when estimating costs and benefits. Given the origin status of these creditors is uncertain, a conservative range is used to estimate the benefit to UK creditors of £497.1m - £974.7m. Taking the lower end of this range provides a conservative best estimate of the **ongoing annual benefit to UK creditors from increased returns of £497.1m.**

¹⁰² <https://www.pwc.co.uk/services/business-restructuring/insights/restructuring-plans-what-difference-year-makes.html>

¹⁰³ <https://www.pwc.co.uk/services/business-restructuring/insights/restructuring-plans-what-difference-year-makes.html>

¹⁰⁴ https://tma-uk.org/uploads/site-files/TMA_presentation_22.3.22-SML.pdf

¹⁰⁵ <https://www.pinsentmasons.com/out-law/legal-updates/first-uk-restructuring-plan-approved-that-excludes-all-but-one-group-of-creditors>

¹⁰⁶ <https://www.latham.london/2021/09/the-smile-telecoms-restructuring-plan-a-closer-look/>

Table 5: Comparison of Ongoing Costs and Benefits associated with RPs to IA assumptions

Impact	PIR		IA	
	Best Estimate £	Direct Impact on Business	Best Estimate £	Direct Impact on Business
Cost				
Cost of disputing the provision of a restructuring plan	£1.71m	Yes	£0.02m	Yes
Cost of additional restructuring plans	£27.4m	Yes	N/A	N/A
Total Costs	£29.11m	N/A	£0.02m	N/A
Benefit				
Improved returns to creditors from permitting restructuring plans	£497.1m	Yes	£4.0m	Yes
Total Benefits	£497.1m	N/A	£4.0m	Yes

Non-monetised benefits

5.62 The IA anticipated there would be non-monetised benefits associated with the three measures, such as;

- Increased job preservation and reduction in social costs
- Improved returns to unsecured creditors, helping the business community invest more
- Improved returns to secured creditors, resulting in greater business lending and reduced risk premiums being charged on loans

5.63 These benefits remain non-monetised. However, their occurrence has been evidenced in the process evaluation as each of the CIGA measures is seen to be assisting the rescue of companies as going concerns, which in turn is seen as contributing to job retention in those companies.

Impacts on SMEs

5.64 The IA anticipated that there would be greater opportunities for company survival including for small companies i.e. those with fewer than 250 employees. Experimental statistics published by the Insolvency Service¹⁰⁷ suggest that 95% of insolvent companies in 2017 were companies with fewer than 250 employees.

5.65 Recently published guidance¹⁰⁸ suggests that departments should also consider disproportionate impacts on medium-sized businesses (i.e. businesses with between 50 and 499 employees) in addition to the requirements to assess impacts on small and micro businesses. Whilst the new guidance pertains primarily to the production of analysis for IAs, commentary is included on the impacts on SMEs. There is limited data available on the impacts associated with medium sized businesses with between 250 and 499 employees.

Familiarisation Costs

¹⁰⁷ <https://www.gov.uk/government/statistics/corporate-insolvencies-by-size-age-and-location-2015-to-2017>

¹⁰⁸ <https://www.gov.uk/government/publications/better-regulation-framework/medium-sized-business-regulatory-exemption-assessment-supplementary-guidance>

- 5.66 Directors of SMEs that are likely to enter insolvency will need to familiarise themselves with the options available to them. This includes some of the measures introduced in CIGA such as the moratorium and SoTC, which are also relevant for suppliers. SMEs are unlikely to make use of RPs due to the associated costs but have alternative restructuring procedures available to them such as CVAs¹⁰⁹. On a per case basis, therefore, SME directors are likely to have spent less time familiarising themselves with CIGA than directors of large and medium sized companies.
- 5.67 The directors of supplier companies affected by their purchaser's insolvency will also need to familiarise themselves with the legislation. No evidence has suggested that SME suppliers were disproportionately impacted by familiarisation costs associated with the legislation.
- 5.68 R3, the Association of Business Recovery Professionals is a trade body which represents IPs, has previously estimated that 46% of its members can be classified as small and micro businesses¹¹⁰. This suggests that the familiarisation costs for IPs through training courses fees and time spent attending and will fall predominantly on medium and large businesses. Smaller IP firms may incur higher training costs as a percentage of gross revenue compared to larger IP firms, however there is no requirement for small IP firms to take on this type of work and the associated costs.

Company Moratorium

- 5.69 It is concluded that moratoriums are used more frequently by smaller companies. This is due to evidence from the process evaluation that eligibility criteria, such as the £10m cap on capital market debt, are preventing larger companies using the moratorium.
- 5.70 In terms of the returns to business creditors, banks and financial institutions are the most prominent creditors in today's economy¹¹¹. The assumption is that these types of business are large and therefore most of the returned value to business creditors is attributable to these entities. This suggests that SMEs may not benefit from the improved returns as much as large businesses, however they are more likely to benefit from the breathing space created by moratoriums.

Suspension of Termination Clauses

- 5.71 The SoTC was associated with a transfer of risk onto supplier companies, however, as discussed in the IA, this was mitigated by the statutory hardship provision. Whilst this has not been tested in court to date, the measure is available for suppliers to use in instances which would put them into financial difficulty. SME suppliers were also exempt from the SoTC during the Covid-19 pandemic. This exemption was extended to provide further support and ceased on 30th June 2021.
- 5.72 As discussed above, the returns to business creditors are more likely to be experienced by large financial institutions.

Restructuring Plans

- 5.73 To date, RPs have primarily been used by medium and large companies. There has been a known instance of use by an SME (see Houst case study) where the company was not already in a formal insolvency procedure. The process evaluation highlights the costs involved with RPs is likely a significant deterrent to SMEs utilising this restructuring option. However, there is no requirement

¹⁰⁹ <https://www.pwc.co.uk/services/business-restructuring/insights/restructuring-plans-what-difference-year-makes.html>

¹¹⁰ https://www.legislation.gov.uk/ukia/2021/40/pdfs/ukia_20210040_en.pdf

¹¹¹ <https://www.accountsandlegal.co.uk/small-business-advice/debtors-and-creditors-explained>

for a SME to use this procedure and other restructuring options, such as CVAs, are available to them.

5.74 The assumption that returns to business creditors are primarily attributable to large businesses is maintained for the improved returns under RPs.

Wider Impacts

5.75 The IA assumed that there would be impacts on the Justice System due to the increased caseloads of various insolvency procedures under consideration. This included an anticipated annual:

- 50-100 RP sanctions;
- 1,000-1,500 moratorium authorisations,
- 30-50 moratoriums with winding-up petitions outstanding against the debtor;
- 10-20 moratorium applications from overseas companies;
- 20-30 moratorium extensions;
- 10-15 challenges to monitor actions;
- <10 supplier hardship claims in relation to the SoTC.

5.76 As there have been fewer cases than originally anticipated in the IA the impact on the justice system is lower than anticipated in the IA.

Impact on Public Sector and Voluntary Organisations

5.77 Alongside the better returns to business creditors described in the costs and benefits section above, better returns will also accrue to non-business creditors such as HMRC¹¹². Table 6 sets out the annual value that has accrued to all creditors and disaggregates by the business and non-business impacts. As discussed in the IA, the returns accruing to public sector bodies is affected by their position in the order of priority in insolvency. Upon the passing of the Finance Act 2020, some debts owed to HMRC were re-categorised according to this hierarchy¹¹³. This could explain why average returns to HMRC from administrations were higher than they were prior to the introduction of CIGA.

Table 6: Returns to Non-Business Creditors

Measure	Impact	Improved returns to creditors	Improved returns to business creditors	Improved returns to non-business creditors
Company Moratorium	Benefits to creditors from better outcomes	£21.6m	£18.3m*	£3.3m*
SoTC	Increased company rescue leading to improved returns	£172.9m	£146.4m*	£26.5m*
SoTC	Continuing company rescue leading to improved returns	£14.3m	£12.1m*	£2.2m*

¹¹² The IA excluded the wider impact on HMRC from the summary figure of Total NPSV, which was an error.

¹¹³ <https://www.gov.uk/government/publications/hmrc-as-a-preferential-creditor/hmrc-as-a-preferential-creditor>

* For the purposes of the cost-benefit analysis in the IA and the PIR, the loss of ransom payments to suppliers is netted off as an impact on business to account for transfers.

- 5.78 Charitable organisations that have adopted a corporate structure (Charitable Incorporated Organisations) in England and Wales continue to be able to benefit from the measures introduced through CIGA, with no identified disproportionate impacts on these entities.
- 5.79 The summary outputs from the IA and the PIR are presented in Table 7 on a 3-year appraisal period basis.

Table 7: Summary Outputs of IA compared to PIR

Assessment	Total Net Present Value	Business Net Present Value	Net Direct Cost to Business per Year
IA: Estimated Costs and Benefits	£596m	£410m	-£142m
PIR: Estimated Costs and Benefits	£1,623m	£1,574m	-£543m

- 5.80 The outputs from this VfM evaluation suggest that the CIGA permanent measures are having a greater net positive benefit than anticipated. Whilst the benefits associated with moratoriums and SoTC are lower than anticipated, the benefits from RPs have been much higher than anticipated. Some of the large anticipated costs in the IA such as for trade credit insurance, which are no longer considered valid, has also contributed to the improved assessment.

Has the evidence identified any opportunities for reducing the burden on business?

- 6.1 The process evaluation identified areas that could be improved in relation to the three measures, which follow on from issues identified in the unintended consequences section of this review. Based on the evidence thus far, it may be fair to conclude that the RP has had a more mixed response by the SME market¹¹⁴ in terms of its utility, whilst issues have been identified with the moratorium which prevent the measure being seen as suitable for SMEs. There has been an increasing recognition that addressing the needs of SMEs in insolvency is vital for economic growth¹¹⁵. SMEs often struggle to navigate an ordinary insolvency process, and typically lack the resources to cover the costs and fees of the proceedings.

Moratorium

- 6.2 Interviews with IPs who had acted as monitors found none was of the view that the burden on them as monitors was too onerous.
- 6.3 Several areas of potential improvement have already been identified and discussed in this report in the policy objectives and unintended consequences section;

¹¹⁴ <https://www.stevens-bolton.com/site/insights/articles/ciga-report-march-22-assessing-the-impact-of-the-insolvency-prov>

¹¹⁵ <https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf>

- consider amending eligibility criteria to allow large, mid-market and larger SME companies to use the procedure
- consider amending the creditor priority in a subsequent insolvency procedure
- consider clarifying the definition of ‘financial services’
- consider including financial contracts within the payment holiday, which may address some of the issues for SMEs

- 6.4 Another area of consideration was the role of the monitor, namely whether it should continue to be restricted to just IPs and if the role is clear. Evidence from interviews shows a divergence of opinion on whether the monitor role should remain exclusive to IPs, or if it could be opened to others such as accredited turnaround professionals. Opening the role up to others may lead to reduced costs and be more consistent with company rescue. However, some secured creditors were against this, partly as they are accustomed to having a say in which IP is appointed to a company, which may limit hostile appointments. The survey evidence suggested most IPs (80%) feel the role should be kept to just IPs. Given the self-interest nature of the question, this result is not surprising. However, as noted earlier in this review, reputational risk to IPs is a serious issue which deters many from considering a moratorium. If other professionals were permitted to act as monitors, this may not be such an issue. This might be particularly true for turnaround professionals who may see the moratorium more as a rescue procedure than an insolvency procedure and therefore approach it with less reputational concern. This in itself has its own potential hurdles because turnaround specialists may have a conflict of interest in a role as monitor. If they are being paid to rescue the company, this has potential to conflict with their acting as monitor where they need to consider objectively whether rescue remains likely.
- 6.5 A related point is whether the role of the monitor is clear. Interviews found some uncertainty about the monitor role. The role for the IP differs from that which is traditionally understood by creditors (e.g. administrator or CVA supervisor). The uncertainty relates to the monitor’s level of engagement with the operation of the business and possible rescue plan. This was provided as a possible reason why the measure has not been as widely used. It was suggested that more guidance might help address this issue.

Suspension of Termination Clauses

- 6.6 As noted in the unintended consequences section, there were suggestions for continued supply to be guaranteed by an office holder. The process evaluation concluded that it would be very difficult to ensure an effective personal guarantee in cases where there is no office holder. It would seem reasonable to leave the measure as it is which leaves the supplier with some flexibility in how it negotiates assured payment for future supplies. There is also some overlap with the moratorium over priority rules. An option could be to just retain super priority for suppliers impacted by SoTC, to ensure adequate protections are in place.

Restructuring Plan

- 6.7 Many of the suggestions for improvements for the RP related to how the burden on business could be reduced. Whilst numerous suggestions were made, the process evaluation notes that the measure was well received by stakeholders.
- 6.8 One suggestion was that less complex cases might be made more accessible in two ways. Firstly, allow the RP to be sanctioned at a single hearing. Secondly, the hearing could be held before an Insolvency and Companies Court judge, rather than a High Court judge. This may open the

measure up more to SMEs, be more efficient and ultimately save on costs. The IP survey found most respondents agreed that there might be appropriate circumstances where one hearing would suffice (67%), with a minority (10%) saying it would not work well. However, a potential drawback to this suggestion is the Government intention to have RPs broadly follow the process of approving a SoA. This allows courts to draw upon existing law, which has been found to be a particular strength of the measure. Reducing the number of hearings might undermine the intentions of the Government and lead to uncertainty. A possible alternative in the process evaluation is to retain the two-step process of the RP, consistent with that of SoA, but to allow for step 1 to be dealt with out of court and on paper only in the case of SMEs. This would allow companies to save on cost but retain the benefit of case law. Where more information is needed at step 1 the ability to request more information can be built in. Such a change would help align the measure with latest guidelines on designing insolvency regimes for SMEs^{116,117}. The UK regime partly aligns with these principles already. For example, a simpler (and more cost effective) restructuring alternative to a RP for a SME could be a CVA¹¹⁸. However, the Houst case study showcases the RP can be used by an SME for reorganization and preserving employment. Nevertheless, opening the RP further to SMEs through a simplified procedure, would strengthen the alignment with best practice, particularly aligning with “Reduced formalities”¹¹⁹. This would be consistent with the objective, set out by UNCITRAL, of establishing a cost-effective simplified insolvency regime by reducing formalities for procedural steps.

- 6.9 Another suggestion to reduce the burden on business was to create a standardised form or template for RPs, which would make the measure more accessible. The R3 standardised form for SME CVAs was mentioned by interviewees as being well received and made a significant difference to the practical use of the CVA procedure. A RP precedent for SMEs could look to SME CVA precedents rather than the documentation for a typical RP which is likely to be overly complex for the purposes of a SME.
- 6.10 It was suggested that multiple debtor entities should be allowed to be party to the same RP. This would simplify the procedure to allow RPs in group structures without requiring separate applications. This could have benefits of savings on time and costs, including court time.
- 6.11 It was suggested upside sharing could incentivise creditors to lend their support to a RP. This would require creditors to receive some of the company’s future profit should the rescue be successful. Currently, it was felt that creditors may “lose out to ensure the survival of the company” and creditors are expected to engage with the process without much incentive. The process evaluation notes that this suggestion could incentivise creditors and would also address the equitability of the RP when considering the relevant alternative.
- 6.12 A final suggestion was about recognition of the RP overseas. Currently the courts have to consider whether a RP will have effect in relevant overseas jurisdictions. This could be omitted so that the RP would expressly include extra territorial effect, as is the case in other major restructuring jurisdictions. Providing the measures with extra territorial effect would reduce costs as well as create certainty. It would also be more in line with what is regarded as best practice, where an

¹¹⁶ <https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf>

¹¹⁷ https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/part_5_en.pdf

¹¹⁸ <https://www.pwc.co.uk/services/business-restructuring/insights/restructuring-plans-what-difference-year-makes.html>

¹¹⁹ https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/part_5_en.pdf

effective insolvency system should facilitate the smooth conduct and resolution of cross-border insolvencies¹²⁰.

International Comparisons

Having a world leading regime

- 7.1 The UK is recognised as being a world class place in which to do business, invest and innovate. Key to this are its corporate governance and insolvency framework. The insolvency framework in the UK is highly regarded internationally and the UK has long been a destination for corporate rescue and restructuring¹²¹. This enables the insolvency and business rescue regime to be a key contributor to the UK being a great place to do business and invest.
- 7.2 Whilst the report has now been discontinued¹²², the last World Bank's Doing Business rankings in 2020 illustrated the UK's leading reputation¹²³. The UK was ranked 14th in the world for "Resolving Insolvency"¹²⁴. The World Bank is formulating a new approach to assessing the business and investment climate in economies worldwide, as part of the Business Enabling Environment¹²⁵ Project, which could be important for comparing the UK's future international performance. The strength of the UK regime has also been highlighted by the OECD¹²⁶ where the UK ranked 1st out of 36 countries based on quantitative indicators of insolvency regimes. Strengths highlighted by the OECD included that personal costs associated with entrepreneurial failure and barriers to restructuring are low in the UK. Further evidence of the strength of the UK regime comes from research by IFF on behalf of The Insolvency Service, which found that UK IPs (who could make international comparisons) compared the UK's system very favourably with the rest of the world¹²⁷.
- 7.3 The World Bank Principles of Effective Insolvency and Creditor/Debtor Rights Systems¹²⁸ takes account of international best practice in insolvency systems, and notes that jurisdictions that have an insolvency framework that focuses on rescue or restructuring of distressed, yet viable, businesses usually provide better returns to creditors. Best practice is also highlighted in other texts such as the UNCITRAL Legislative Guide on Insolvency Law¹²⁹ which gives recommendations on key objectives and principles that should be reflected in a State's insolvency

¹²⁰[https://www.bing.com/ck/a?!&&p=bf91500311191ee1JmItdHM9MTY2Nzk1MjAwMCZpZ3VpZD0yNDIIYzQxOC11OGM3LTZjYmYtMzIiZ1kNGU5ZTk0MzZkMzImaW5zaWQ9NTE3OA&ptn=3&hsh=3&fclid=249ec418-e8c7-6cbf-39ef-](https://www.bing.com/ck/a?!&&p=bf91500311191ee1JmItdHM9MTY2Nzk1MjAwMCZpZ3VpZD0yNDIIYzQxOC11OGM3LTZjYmYtMzIiZ1kNGU5ZTk0MzZkMzImaW5zaWQ9NTE3OA&ptn=3&hsh=3&fclid=249ec418-e8c7-6cbf-39ef-d4e9e9436d32&psq=The+European+Bank+for+Reconstruction+and+Development++Core+Principles+of+an+effective+Insolvency+System&u=a1aHR0cHM6Ly93d3cuZWJyZC5jb20vbGVnYWwtcmVmb3JtL2VicmQtaW5zb2x2ZW5jeS1jb3JLLXByaW5jaXBsZXMuGmRm&ntb=1)

[d4e9e9436d32&psq=The+European+Bank+for+Reconstruction+and+Development++Core+Principles+of+an+effective+Insolvency+System&u=a1aHR0cHM6Ly93d3cuZWJyZC5jb20vbGVnYWwtcmVmb3JtL2VicmQtaW5zb2x2ZW5jeS1jb3JLLXByaW5jaXBsZXMuGmRm&ntb=1](https://www.bing.com/ck/a?!&&p=bf91500311191ee1JmItdHM9MTY2Nzk1MjAwMCZpZ3VpZD0yNDIIYzQxOC11OGM3LTZjYmYtMzIiZ1kNGU5ZTk0MzZkMzImaW5zaWQ9NTE3OA&ptn=3&hsh=3&fclid=249ec418-e8c7-6cbf-39ef-d4e9e9436d32&psq=The+European+Bank+for+Reconstruction+and+Development++Core+Principles+of+an+effective+Insolvency+System&u=a1aHR0cHM6Ly93d3cuZWJyZC5jb20vbGVnYWwtcmVmb3JtL2VicmQtaW5zb2x2ZW5jeS1jb3JLLXByaW5jaXBsZXMuGmRm&ntb=1)

¹²¹ [https://www.researchgate.net/profile/Dr-Jennifer-](https://www.researchgate.net/profile/Dr-Jennifer-Gant/publication/359579592_The_EU_Preventive_Restructuring_Framework_in_Extra_Time/links/62443c1d5e2f8c7a034a42f2/The-EU-Preventive-Restructuring-Framework-in-Extra-Time.pdf)

[Gant/publication/359579592_The_EU_Preventive_Restructuring_Framework_in_Extra_Time/links/62443c1d5e2f8c7a034a42f2/The-EU-Preventive-Restructuring-Framework-in-Extra-Time.pdf](https://www.researchgate.net/profile/Dr-Jennifer-Gant/publication/359579592_The_EU_Preventive_Restructuring_Framework_in_Extra_Time/links/62443c1d5e2f8c7a034a42f2/The-EU-Preventive-Restructuring-Framework-in-Extra-Time.pdf)

¹²² <https://www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report>

¹²³ <https://archive.doingbusiness.org/en/reports/global-reports/doing-business-2020>

¹²⁴ <https://www.worldbank.org/en/programs/business-enabling-environment/doing-business-legacy>

¹²⁵ <https://www.worldbank.org/en/programs/business-enabling-environment>

¹²⁶ [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP\(2018\)52&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2018)52&docLanguage=En)

¹²⁷ <https://www.gov.uk/government/publications/confidence-in-the-regime>

¹²⁸ <https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf>

¹²⁹ https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law#:~:text=The%20Legislative%20Guide%20provides%20a%20comprehensive%20statement%20of,should%20be%20reflected%20in%20a%20State%27s%20insolvency%20laws.

laws. The three permanent measures introduced by CIGA were developed with these best practice documents in mind and tailored to ensure the right fit for companies in the UK.

7.4 Latest best practice has seen a shift to focus on SMEs. Prior to the COVID-19 pandemic, some countries around the world, such as the United States and Myanmar, adopted special insolvency frameworks for SMEs. Since the pandemic many other jurisdictions, including Australia, Colombia, India and Singapore, have adopted permanent or temporary frameworks for SMEs. Latest guidance is expected to encourage more countries to adopt these regimes characterized by providing a quick, simple and affordable solution to SMEs in insolvency¹³⁰. The World Bank revised its principles in 2021, focused on helping policymakers improve insolvency systems that support micro, small and medium enterprises (principles C18-20)¹³¹. This latest guidance attempts to address the specific challenge of making insolvency systems more accessible to SMEs. It is noted that whilst country approaches may vary, there are still common objectives effective insolvency systems for SMEs should aim to achieve. These include, but are not limited to;

- lower the barriers to access and encourage early use of out-of-court restructuring procedures, hybrid procedures and in-court simplified insolvency proceedings.
- design and implement a streamlined regime that reduces the complexity and costs of ordinary insolvency proceedings, rehabilitate and/or reorganize viable insolvent or financially distressed SMEs, and to effectively liquidate nonviable ones.
- maintain basic safeguards for protecting the rights of creditors, debtors and all parties involved in or affected by SMEs insolvency proceedings.

7.5 Alongside latest updates from the World Bank, UNCITRAL have also published legislative recommendations on insolvency of SMEs¹³². These include key objectives of a simplified regime, which complement the practice highlighted by the World Bank. Examples include;

- Putting in place expeditious, simple, flexible and low-cost insolvency proceedings.
- Making simplified insolvency proceedings available and easily accessible to SMEs.
- Promoting the SMEs fresh start by enabling expedient liquidation of non-viable SMEs and reorganization of viable SMEs through simplified insolvency proceedings.
- Where reorganization is feasible, preserving employment and investment.

7.6 The US Chapter 11 is held in high regard internationally and has influenced many of the recent developments worldwide¹³³. The new measures introduced via CIGA adopt some of the provisions that exist in US Chapter 11, such as restructuring tools, including a powerful moratorium, the restriction of termination clauses, and a cross-class cramdown mechanism¹³⁴.

7.7 Without making these enhancements to the UK insolvency and business rescue regime, the international reputation of the UK as a global restructuring hub would come under pressure and would be in danger of losing ground against other developed regimes. For example, the EU

¹³⁰ https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5601&context=sol_research

¹³¹ <https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf>

¹³² https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/part_5_en.pdf

¹³³ <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-interim-report-march-2022/corporate-insolvency-and-governance-act-2020-interim-report-march-2022>

¹³⁴ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940512

introduced a new restructuring directive¹³⁵ on 20th June 2019, with an ethos similar to the UK measures. Both are seen to be ambitious and signal a promising future of restructuring in Europe¹³⁶. The directive's essential provisions were intended to be implemented by member States no later than 17th July 2021. However, in July 2021 only a few member States had implemented the measures¹³⁷ (such as The Netherlands and Germany), with a majority of EU members asking for an extension of the initial deadline. Progress has been made by member States since that date, for example the directive was implemented into French law on 1st October 2021¹³⁸ and into the Irish examinership regime on 29th July 2022¹³⁹. While rollout has been slower than expected, it was vital the UK introduced its own measures because member States are introducing mechanisms that that could compete with the UK's pre-existing measures. Going forward, a key challenge for the UK to remain a leading restructuring hub in Europe is the competitive disadvantage to the EU procedures due to the uncertainty of recognition or enforcement overseas¹⁴⁰.

- 7.8 Whilst the focus on providing restructuring opportunities does align with current best practice, there are challenges. Whilst it is desirable to improve the attractiveness of a restructuring framework, it is vital insolvency systems remain protective of the interests of creditors¹⁴¹. Otherwise, unintended consequences can occur, as creditors may respond to reforms via higher risk premiums¹⁴², which in turn can harm economic growth. To mitigate this, protection to creditors should not only include the adoption of certain safeguards, but also ensuring sure non-viable companies do not use reorganisation procedures opportunistically. The UK has been explicitly noted as an example of striking the tricky balance between the interests of creditors and debtors¹⁴³.
- 7.9 A report by The World Bank Group, INSOL International, and IAIR¹⁴⁴, whilst focused on Covid-19 response measures, noted the importance of longer-term measures to prepare insolvency systems for the pandemic's aftermath. It noted that longer-term reforms will be needed to ensure that a full array of in-court and out-of-court tools are available to ease firm distress and encourage market efficiency. The action taken by the government to bring in the three new permanent measures ensured the UK is well prepared to have an insolvency regime fit to deal with the pandemic's aftermath.

Moratorium

¹³⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1023>

¹³⁶ https://www.researchgate.net/profile/Dr-Jennifer-Gant/publication/359579592_The_EU_Preventive_Restructuring_Framework_in_Extra_Time/links/62443c1d5e2f8c7a034a42f2/The-EU-Preventive-Restructuring-Framework-in-Extra-Time.pdf

¹³⁷ <https://d1198w4twoqz7i.cloudfront.net/wp-content/uploads/2021/07/20160258/Global-Restructuring-Review-The-EU-Restructuring-Directive.pdf>

¹³⁸ <https://www.bakermckenzie.com/-/media/files/insight/publications/2022/05/european-restructuring-schemes.pdf>

¹³⁹ <https://byrnewallace.com/news-and-recent-work/publications/changes-to-the-irish-examinership-regime-transposition-of-eu-preventive-restructuring-directive.html#:~:text=Changes%20have%20been%20introduced%20to%20the%20current%20Irish,%E2%80%9C%20Directive%20%E2%80%9D%29%20that%20relate%20to%20corporate%20insolvency.>

¹⁴⁰ https://www.researchgate.net/profile/Dr-Jennifer-Gant/publication/359579592_The_EU_Preventive_Restructuring_Framework_in_Extra_Time/links/62443c1d5e2f8c7a034a42f2/The-EU-Preventive-Restructuring-Framework-in-Extra-Time.pdf

¹⁴¹ https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5601&context=sol_research

¹⁴² https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3768436

¹⁴³ https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5423&context=sol_research

¹⁴⁴ https://insol.azureedge.net/cmsstorage/insol/media/document-library/special%20reports/wb_guide-to-insolvency_2022_digital_11052022.pdf?utm_campaign=1137527_CDR%20project%203&utm_medium=email&utm_source=INSOL%20International&dm_i=4WAM,ODPZ,38Y9EA,2ZBOI,1?utm_source=LinkedIn&utm_medium=Post&utm_campaign=HibernationBook_24May

- 7.10 The ability to use a moratorium aligns with best practice guidance set out by the World Bank¹⁴⁵. Guidance around a moratorium is set out in principle C5. For example, it notes “A stay of actions by secured creditors also should be imposed” in liquidation and reorganisation proceedings to enable higher recovery of assets. While it “should be of limited, specified duration”, with exceptions being limited and clearly defined.
- 7.11 The importance of out-of-court workouts¹⁴⁶ (OCW) to effective insolvency and corporate restructuring regimes has been highlighted by the financial stability board (FSB)¹⁴⁷, as well as being a future insolvency trend following the pandemic¹⁴⁸. FSB note that effective insolvency and corporate restructuring regimes will be necessary to help combat the economic impact of COVID-19. However, the FSB highlight that OCW frameworks serve different purposes and that there is no one-size-fits-all approach.
- 7.12 Whilst there are different types of OCW, the moratorium and RP fall under the overall OCW umbrella, as well as complementing pre-existing OCW procedures in the UK. Whilst most FSB jurisdictions has a variety of OCW in place, few match the UK in terms of breadth across types of OCW frameworks¹⁴⁹. It has also been highlighted how the UK’s measures may be utilised together to improve outcomes, such as using a moratorium prior to a CVA¹⁵⁰ as was the case in the Bespoke Managed Space Borough Limited case study.
- 7.13 One issue with OCW noted by FSB is that data about their use is scarce¹⁵¹. This is to be expected in informal debt restructurings, however as hybrid restructuring procedures rely on limited judicial intervention, they could be included in insolvency statistics. The UK has done just that. Since the introduction of CIGA, the number of moratoriums and RPs have been reported in the Insolvency Service’s official statistics release¹⁵².
- 7.14 The use of a moratorium to improve the attractiveness of reorganisation procedures was one of the motivations behind its introduction in Singapore in 2017¹⁵³. A moratorium on debt enforcement is also highlighted by FSB as one of the features considered most helpful by authorities to support swift and cost-efficient restructurings¹⁵⁴. This links to IMF guidelines where time and cost are fundamental indicators to an efficient insolvency system¹⁵⁵. The UK moratorium is explicitly pulled out by FSB as an example of a moratorium on creditor actions, along with Singapore and the EU restructuring directive (to then be adopted by member states)¹⁵⁶. As already noted, there is no one-size fits all approach for OCW, and the moratorium in Singapore and the EU restructuring directive differ to that in the UK. For example, in Singapore the moratorium is linked just to the scheme of arrangement procedure, while the EU moratorium is granted for an initial four months, up to a maximum of 12 months.

Suspension of Termination Clauses

¹⁴⁵ <https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf>

¹⁴⁶ Represent the alternative to full, formal insolvency proceedings

¹⁴⁷ <https://www.fsb.org/2022/05/thematic-review-on-out-of-court-corporate-debt-workouts/>

¹⁴⁸ https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5601&context=sol_research

¹⁴⁹ Box 1 <https://www.fsb.org/2022/05/thematic-review-on-out-of-court-corporate-debt-workouts/>

¹⁵⁰ <https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1381>

¹⁵¹ <https://www.fsb.org/2022/05/thematic-review-on-out-of-court-corporate-debt-workouts/>

¹⁵² <https://www.gov.uk/government/collections/company-insolvency-statistics-releases>

¹⁵³ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940512

¹⁵⁴ <https://www.fsb.org/2022/05/thematic-review-on-out-of-court-corporate-debt-workouts/>

¹⁵⁵ <https://www.imf.org/en/Publications/WP/Issues/2019/02/04/The-Use-of-Data-in-Assessing-and-Designing-Insolvency-Systems-46549>

¹⁵⁶ Box 2 <https://www.fsb.org/2022/05/thematic-review-on-out-of-court-corporate-debt-workouts/>

- 7.15 The World Bank principles¹⁵⁷ cover treatment of contractual obligations under section C10. The principles state that “Contract provisions that provide for termination of a contract upon either an application for commencement or the commencement of insolvency proceedings should be unenforceable subject to special exceptions.” UNCITRAL also provide recommendations¹⁵⁸ on automatic termination and acceleration clauses¹⁵⁹. Here it is stated that insolvency law should specify that any contract clause that automatically terminates or accelerates a contract upon application to commence insolvency proceedings should be unenforceable. The law should also be clear in specifying which contracts should be exempt from this, such as financial contracts. Therefore, the introduction of SoTC within CIGA align with international best practice guidelines.
- 7.16 Singapore SoTC came into effect in its regime at the end of July 2020¹⁶⁰. Tan & Han (2021) state the provisions are a welcome addition to the toolkit of measures available to companies looking to restructure their debts in Singapore¹⁶¹. The report states that this is particularly important following the economic impact of COVID-19, with the measures likely to play an important part in the anticipated waves of corporate insolvencies. The authors go on to say the measures will go some way to ensuring Singapore is a world leading regime for international debt restructuring. Having similar measures in place ensures the UK will maintain its reputation as a world leading regime.
- 7.17 Canada introduced SoTC into its regime in 2009. Sarra et al (2021) note that jurisdictions which have recently introduced such clauses, like the UK, can learn from Canada who have had such clauses in place for longer¹⁶². While the prohibition has been unenforceable in Canada, the measure has been uncontroversial. There are no empirical studies, however the Canadian federal government confirms that there have been no reported cases contesting the provisions, and that parties generally have adjusted their commercial contracts to recognise them¹⁶³. Overall, the legislation is working well, and there have been no calls for reform by insolvency professionals or civil society groups.
- 7.18 Sarra et al (2021) also considers the changes made in the UK, as well as in the EU restructuring directive and Germany more specifically¹⁶⁴. In the UK, whilst the provisions mirror those used elsewhere, Sarra et al state that there are some causes for concern. These include the speed with which the legislation was introduced, meaning the provisions may not have been scrutinised as much as would usually occur. Furthermore, some key terms, for example those around the hardship provision, are largely left undefined. However, the authors do point out that these issues may iron themselves out as stakeholders get used to the provisions over time, as has been the case in Canada. The speed with which the legislation was introduced was a necessary response to the COVID-19 pandemic. To help ease concerns at the speed of the introduction of the legislation the government committed to conducting this review of the measures within three years. Evidence suggests it is too early to fully understand the measure’s reception, but the early signs are positive. It will be important to continue to engage with the sector going forward.

¹⁵⁷ <https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf>

¹⁵⁸ https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf

¹⁵⁹ Recommendations 70 & 71

¹⁶⁰ <https://journalonline.academypublishing.org.sg/Journals/SAL-Practitioner/Insolvency-and-Restructuring/ctl/eFirstSALPDFJournalView/mid/596/ArticleId/1613/Citation/JournalsOnlinePDF>

¹⁶¹ <https://journalonline.academypublishing.org.sg/Journals/SAL-Practitioner/Insolvency-and-Restructuring/ctl/eFirstSALPDFJournalView/mid/596/ArticleId/1613/Citation/JournalsOnlinePDF>

¹⁶² <https://onlinelibrary.wiley.com/doi/10.1002/iir.1446>

¹⁶³ <https://onlinelibrary.wiley.com/doi/10.1002/iir.1446>

¹⁶⁴ <https://onlinelibrary.wiley.com/doi/10.1002/iir.1446>

- 7.19 The EU restructuring directive leaves freedom as to implementation of the measure to member States, meaning its scope could vary across member States¹⁶⁵. This has been noted around the EU restructuring directive as a whole. Whilst it has been described as a “game changer” the big issue going forward is how the directive will be transposed and implemented across different countries, which could invariably lead to differences in application¹⁶⁶. There is a risk of member states choosing options that reduce the intended benefit from harmonisation¹⁶⁷. The scope of the EU SoTC
- 7.20 is narrower than that of the UK and Canada, with the provision only applying to preventive debt restructuring mechanism and not liquidations more widely. Within Germany, it is noted that the SoTC provisions introduced there were very limited, and there is uncertainty as to what will fall within scope of the ban. However, like the UK, more certainty may develop over time.
- 7.21 Sarra et al (2021) concludes that a careful balance needs to be struck between promoting company survival and on introducing unpredictability and extra cost onto suppliers. This balance can be addressed through careful design, meaning SoTC can help the policy objective of encouraging the restructuring or rehabilitation of financially distressed companies which still have a viable business¹⁶⁸. Concerns about SoTC can be addressed by legislators, such as considering the circumstances in which the constraints will operate, the nature of those constraints and the types of contracts that will be affected, as well as considering carve outs for certain types of creditors.
- 7.22 Separately INSOL International published a review on SoTC¹⁶⁹, reviewing the legislation in eight different jurisdictions: the United States, Canada, UK, Singapore, Australia, India, the Netherlands, and for member States under the EU restructuring directive. Specifically on the UK, the review notes the legislative intent behind the provisions goes beyond corporate rescue and rehabilitation to companies in liquidation proceedings. This can be contrasted with the approach taken in other countries, such as Singapore, where only companies participating in restructuring proceedings can avail themselves of the protection against the enforcement of the provisions. The review is also explicit that there has not been much judicial guidance as yet on the scope of the SoTC provisions.
- 7.23 Similar to Sarra et al (2021), the INSOL review highlights that while the SoTC provision differs across jurisdictions, there are certain common themes and features. These include: (a) the types of contracts subject to the restrictions; (b) the types of contracts excluded or exempted from the restrictions; and (c) an affected counterparty’s recourse to seek exemption or relief from the restrictions (and what the counterparty must demonstrate). For example
- Certain jurisdictions confine their SoTC to “essential contracts”, as was the case in the UK prior to CIGA.

¹⁶⁵ <https://onlinelibrary.wiley.com/doi/10.1002/iir.1446>

¹⁶⁶ https://globalrestructuringreview.com/article/insol-international-london-developing-rescue-finance-market?utm_source=Cayman-registered%2Bliquor%2Bgroup%2Bwound%2Bup%2Bin%2BHong%2BKong%2Bfollowing%2BGlobal%2BBrands%2Bdecision&utm_medium=email&utm_campaign=GRR%2BAlerts

¹⁶⁷ https://www.researchgate.net/profile/Dr-Jennifer-Gant/publication/359579592_The_EU_Preventive_Restructuring_Framework_in_Extra_Time/links/62443c1d5e2f8c7a034a42f2/The-EU-Preventive-Restructuring-Framework-in-Extra-Time.pdf

¹⁶⁸ <https://onlinelibrary.wiley.com/doi/10.1002/iir.1446>

¹⁶⁹ INSOL International: A Comparative Review of Legislative Restrictions on the Enforcement of Ipso Facto Clauses: August 2022

- A common exclusion appears to be “eligible financial contracts” (or other similar formulation), where SoTC may be well established and regarded as industry norms. However, beyond that, there is considerable variation in the classes of excluded contracts.
- Recognising that SoTC fundamentally interfere with pre-existing contractual rights, most jurisdictions with SoTC provide some form of protection for an affected counterparty.

Restructuring Plan

- 7.24 Section C14 of the World Bank Principles¹⁷⁰ includes guidelines on reorganisation proceedings including how to “provide a structure that encourages fair negotiation of a commercial plan and for approval of the plan by an appropriate majority of creditors”. The guidelines state that “the effect of approval of the plan by a majority vote should bind all creditors, including dissenting minorities.” Therefore introducing the RP through CIGA followed the guidance from the World Bank to introduce a statutory, multi-class restructuring procedure, including a cross class cram-down mechanism to aid company rescue. UNCITRAL also provide recommendations¹⁷¹ on a reorganisation plan in recommendations 139-159. UNCITRAL notes that the purpose of reorganisation “is to maximize the possible eventual return to creditors, providing a better result than if the debtor were to be liquidated and to preserve viable businesses as a means of preserving jobs for employees and trade for suppliers.”
- 7.25 As discussed under the moratorium, the FSB has highlighted the importance of OCW¹⁷², particularly to help combat the economic impact of COVID-19. The RP falls under the umbrella of OCW. The FSB report notes that one of the main characteristics of hybrid procedures (such as the RP) is the cram-down procedure. However, the exact nature of the cram-down can vary by jurisdiction, for example some jurisdictions allow cram-down solely within the same creditor class (Brazil, Italy), whilst others allow cross-class cram-downs (Argentina, EU, Germany, UK).
- 7.26 The FSB¹⁷³ highlights the plethora of measures available in the UK, whilst other research has highlighted that the measures are distinct enough to still be valid, rather than creating “choice overload”¹⁷⁴. For example, RSM UK’s report¹⁷⁵ notes that the CVA offers a flexible and cost-effective solution that bridges the gap between informal negotiations and formal insolvency procedures such as administration / liquidation. As costs of a RP are significantly higher than those of the average CVA it is often restricted to complex, very large company restructurings. PwC¹⁷⁶ note that whilst use of the RP is starting to increase, there is likely to be room for both SoA and RP going forward. This is because of the similar preparation required for both tools. PwC have found the final decision of which procedure to use can often be delayed until it is clear whether the additional provisions under the RP are required.
- 7.27 The recommendations in the FSB report¹⁷⁷ note that jurisdictions should evaluate their OCW frameworks and should consider whether there are significant barriers to the use of their OCWs by

¹⁷⁰ <https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf>

¹⁷¹ https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf

¹⁷² <https://www.fsb.org/2022/05/thematic-review-on-out-of-court-corporate-debt-workouts/>

¹⁷³ <https://www.fsb.org/2022/05/thematic-review-on-out-of-court-corporate-debt-workouts/>

¹⁷⁴ <https://thedecisionlab.com/biases/choice-overload-bias>

¹⁷⁵ <https://www.gov.uk/government/publications/company-voluntary-arrangement-cva-research-report-for-the-insolvency-service/company-voluntary-arrangement-research-report-for-the-insolvency-service>

¹⁷⁶ <https://www.pwc.co.uk/services/business-restructuring/insights/restructuring-plans-what-difference-year-makes.html>

¹⁷⁷ <https://www.fsb.org/2022/05/thematic-review-on-out-of-court-corporate-debt-workouts/>

SMEs. The UK is aligning with the first recommendation by conducting this review, on the back of commissioning the process evaluation into how the CIGA measures are working¹⁷⁸. The process evaluation noted that RPs are seen as too costly and time-consuming for use in the SME market¹⁷⁹. This is not an uncommon issue for SMEs, with the FSB report highlighting that certain OCW procedures can be too sophisticated¹⁸⁰, because formal in-court insolvency procedures are potentially only accessible to large and medium enterprises with the resources to bear the costs of formal restructuring. Costs and complexity are a deterrent to the use of RPs by SMEs to the point where the value added by the debt restructuring process does not necessarily outweigh the cost. Whilst the RP may be inaccessible to some SMEs, it was used by an SME for the first time in June 2022 which may be seen as a precedent for its use in the middle market¹⁸¹. Furthermore, as there is a plethora of options available in the UK, there are other procedures available that can be used by SMEs. For example PwC, like RSM, note that potential costs of the RP may mean the CVA remains the process of choice for small to mid-size companies¹⁸².

- 7.28 The attractiveness of the RP has been highlighted by Gurrea-Martinez¹⁸³. One of the primary challenges for improving restructuring frameworks for debtors is making sure that the insolvency system remains protective of the interests of the creditors. If reform makes creditors worse off, they could respond by increasing the cost of debt, which could lead to more harm than good. Gurrea-Martinez created a novel index, comparing leading financial regimes; the USA, UK, Singapore and Hong Kong. The index measured the attractiveness of reorganisation procedures from the perspective of debtors, secured creditors and general unsecured creditors. This new index shows how the UK significantly enhanced its restructuring framework while remaining an attractive jurisdiction for lenders. It is argued that a regime can be both pro-debtor and pro-creditor, with the CIGA reforms providing debtors with a more attractive restructuring framework while remaining attractive to creditors.
- 7.29 The same article by Gurrea-Martinez¹⁸⁴, whilst noting the strength of the RP in the UK, claims it may not be as attractive to companies as the system in Singapore. This is for two main reasons. Firstly it does not provide debtors with the comprehensive system of rescue financing existing in Singapore and the United States. Second, the moratorium enjoyed by debtors is more limited. However, the article does point out the context within the particular market and institutional environment should be considered. For example, the UK has well developed financial systems meaning some viable but insolvent firms might not have trouble having access to new finance. If so, the adoption of rescue financing provisions might not be strictly needed.
- 7.30 The issue of debtor in possession (DIP) in restructuring (covering more than just the RP) has been highlighted elsewhere by Gurrea-Martinez¹⁸⁵. Here, 30 jurisdictions are compared in their DIP financing framework. The UK is classified in the paper as having no or weak DIP financing regimes, with strong or semi-strong regimes including; USA, Singapore, Columbia, The Philippines, India, Dominican Republic and Brazil. If viable but insolvent firms cannot obtain new

¹⁷⁸ <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-interim-report-march-2022>

¹⁷⁹ <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-interim-report-march-2022/corporate-insolvency-and-governance-act-2020-interim-report-march-2022>

¹⁸⁰ <https://www.fsb.org/2022/05/thematic-review-on-out-of-court-corporate-debt-workouts/>

¹⁸¹ <https://www1.reorg.com/new-coverage-houst-p26a-restructuring-plan/>

¹⁸² <https://www.pwc.co.uk/services/business-restructuring/insights/restructuring-plans-what-difference-year-makes.html>

¹⁸³ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940512

¹⁸⁴ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940512

¹⁸⁵ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4067966

financing this can lower benefits for debtors, creditors and society as a whole. The paper therefore recommends that countries should adopt policies to make sure that these firms have access to finance. However, within this recommendation it is noted that the design of DIP financing provisions should differ across jurisdictions. As previously commented on, the UK has well developed financial systems meaning the adoption of additional rescue financing provisions might not be strictly needed. This has been highlighted by PwC in relation to the RP who note that despite initial criticism for the lack of any specific mechanism to enable rescue financing, over the first 12 months of the RP up to £1.1bn of new money was injected alongside RP proposals¹⁸⁶.

7.31 The process evaluation considered international comparisons. Interviewees referred to regimes in The Netherlands, Germany, USA and Singapore in their responses. The RP requires that at least 75% of votes by value of debt in one class votes in favour, and that the plan be considered by the court at both a convening and a sanctioning hearing. The process evaluation report notes that popular pre-insolvency proceedings in The Netherlands, the Wet homologatie onderhands akkoord (WFOA), were lauded for providing a cross-class cramdown at a consent threshold of two-thirds (instead of three-quarters), without a numerosity requirement, whilst having only one hearing, the sanctioning hearing (instead of both a convening and a sanctioning hearing). The German Insolvenzplan was mentioned for providing a debtor-in-possession style restructuring procedure whilst requiring a simple majority as a consent threshold (instead of three-quarters). In the USA Classes of creditors approve a Chapter 11 reorganization plan by a two-thirds majority in value and more than one-half in number of class members. In Singapore a 75% in value majority is needed for the Scheme to be approved in addition to a majority in number in favour. The IP survey found there was some support for a reduction to two-thirds in value (33% of respondents). However, the most frequent response was that the consent threshold for RPs at three-quarters in value should be retained (39%).

7.32 On the back of these comparisons, the process evaluation notes:

- Limiting the role of the court in restructuring procedures could reduce admin burdens;
- There is support for retaining the 75% voting threshold in RPs;
- Providing for restructuring measures with extra territorial effect will reduce cost and create more certainty.

Is government intervention still required?

Are the objectives of the measure still valid / relevant?

8.1 The objectives of the three measures are still relevant. The measures were brought in to help companies combat the challenges brought about by the Covid-19 pandemic, but also to help viable companies survive in the longer term by offering more options and support for company rescue, in particular tools that could be used before the point of insolvency. Following consultation, the

¹⁸⁶ <https://www.pwc.co.uk/services/business-restructuring/insights/restructuring-plans-what-difference-year-makes.html>

government committed to implement the measures back in August 2018¹⁸⁷. The Covid-19 pandemic increased the urgency for the need of the measures, but they had already been established as being a desired addition to strengthen the UK insolvency regime.

- 8.2 The UK aims to continue to be recognised as being a world class place in which to do business. In order to achieve this, the UK's insolvency regime must be kept at the forefront of global standards and practices. An effective and well-regulated insolvency regime supports the economy by ensuring that viable businesses can be rescued, preserving jobs and productivity for the long term. A well-functioning insolvency regime also creates a positive environment for lending and investing.
- 8.3 As shown in the international comparisons section, all three measures are best practice elements of world leading insolvency regimes and help ensure the UK maintains its positive reputation around its insolvency framework.
- 8.4 The initial rationale for intervention still applies. Corporate insolvency creates strong incentives for those affected, to engage in zero sum game¹⁸⁸ behaviour. The measures help address this zero sum game by improving coordination problems and reducing transaction costs. The VfM evaluation estimates the measures have a positive NPSV, so are shown to be Kaldor-Hicks efficient¹⁸⁹.
- 8.5 The measures have been shown to help viable companies to survive and so will be an important aspect of the insolvency regime going forward. Whilst they will be useful in a steady state economy, they will also be vital to help viable companies deal with economic shocks. This is likely to be the case in the short term as companies deal with the impacts from the pandemic, rising energy prices and high inflation.
- 8.6 The Office for Budget Responsibility (OBR) has highlighted the difficult environment that currently exists for the UK economy, such as high inflation, the squeeze on real incomes and Russia's invasion of Ukraine¹⁹⁰. The OBR highlights that these pressures could tip the economy into a recession lasting just over a year. Historically recessions have been associated with higher insolvencies, for example in the recession following the global financial crisis. This recession saw insolvencies rise by 40% after two quarters then saw levels drop off, but it was around two years before levels returned to what they were prior to the shock.
- 8.7 Data from the ONS¹⁹¹ highlights businesses' primary concerns are high inflation and rising energy prices. ONS have also drawn a link between high energy prices and insolvencies.¹⁹² ONS notes the three industries recording the highest number of business insolvencies in the first half of 2022 are construction, wholesale and retail trade, and accommodation and food service activities. It also notes how these three industries, and insolvencies relating to them, may have been impacted by higher energy prices.

¹⁸⁷ [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG - Government response doc - 24 Aug clean version with Minister s photo and signature AC.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version_with_Minister_s_photo_and_signature_AC.pdf)

¹⁸⁸ A situation in which one person or group can win something only by causing another person or group to lose it

¹⁸⁹ <https://www.economicshelp.org/blog/glossary/kaldor-hicks/#:~:text=Definition%20of%20Kaldor%E2%80%93Hicks%20efficiency%20Pareto%20efficiency%20occurs%20where,losers%20to%20be%20compensated%20from%20the%20net%20gain.>

¹⁹⁰ https://obr.uk/docs/dlm_uploads/CCS0822661240-002_SECURE_OBR_EFO_November_2022_WEB_ACCESSIBLE.pdf

¹⁹¹ <https://www.ons.gov.uk/economy/economicoutputandproductivity/output/datasets/businessinsightsandimpactontheconomy>

¹⁹² <https://www.ons.gov.uk/businessindustryandtrade/changestobusiness/bankruptcyinsolvency/articles/risingbusinessinsolvenciesandhighenergyprices/2022-10-07>

What would happen if you removed the measure?

- 9.1 As highlighted, the objectives of the measures are still valid. While the initial threat and urgency of the Covid-19 pandemic has passed the problem is still relevant. New threats to business survival have emerged and there was a need to modernise the insolvency regime to keep pace with international best practice.
- 9.2 Based on the evidence in this review, whilst some beneficial refinements could be made, the measures have been well received by stakeholders and have been a valuable addition to the UK insolvency framework. Removing them would therefore be a backwards step and put the UK insolvency regime in a worse position than it is currently. It would go against international best practice and the UK would lose pace with other leading regimes, including with EU member states.
- 9.3 Losing the measures would mean some viable companies would have fewer options available to them for survival, and therefore put them at risk of being wound up. This in turns means some jobs, which could have otherwise been saved, would be lost. As highlighted by the VfM evaluation, the measures have an overall positive net present social value, and net business impact. These benefits would be lost if the measures were removed.
- 9.4 Removing the measures would likely worsen relationships with key stakeholders, who overall have welcomed the additions and were supportive of the proposals during consultation¹⁹³.
- 9.5 The original IA considered non-legislative alternative to the measures when they were introduced. As noted at the time, these alternatives would not achieve the policy objective to the same extent as the legislative measures. This still applies. Undoing these additions would also increase confusion, uncertainty and administrative burdens for businesses who would have to readapt to the previous status-quo.

Is the existing form of government regulation still the most appropriate approach?

What are the likely costs and benefits going forward?

- 10.1 This section assumes that there are no changes to the existing legislation or non-legislative intervention. Any legislative changes in the future would be covered by their own IA where appropriate.
- 10.2 The assessment of future costs and benefits are presented on the basis of three scenarios:
 - **Scenario 1:** Assumes the same caseloads going forward as those that have occurred since the introduction of CIGA. It maintains the assumptions used to estimate the costs and benefits in the sections outlined above. Any difference from the method to estimate the costs and benefits to date is explained below.
 - **Scenario 2:** Assumes an increase in caseloads as industry participants become more familiar with the measures and procedures available to them, which is also associated with lower costs per case.

¹⁹³[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736207/ICG - Government response doc - 24 Aug clean version with Minister s photo and signature AC final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736207/ICG_-_Government_response_doc_-_24_Aug_clean_version_with_Minister_s_photo_and_signature_AC_final.pdf)

- **Scenario 3:** Identical to Scenario 2 but with lower levels of debt associated with RP cases. This reflects the debt profile of large companies that have been through administration since the introduction of CIGA who may adopt RPs in the future.

10.3 The results are presented on a 10-year appraisal basis and the outputs in terms of Net Present Social Value, Business Net Present Value, and Net Direct Cost to Business per year are provided alongside those of the IA for comparison. Costs and benefits are presented in 2019 prices.

10.4 These future impacts are highly uncertain. The resulting future costs and benefits are particularly sensitive due to being based on a relatively small population of high value RPs. Changes to the constituency of this RP population could result in large variations of costs and benefits going forwards.

Scenario 1

10.5 Scenario 1 assumes the estimated costs and benefits for years 1-3 and assumes that these continue for years 4-10. The only additional cost considered is that challenges to moratoriums are brought by UK based creditors.

10.6 To account for potential creditor challenges a rate of 2.5% (1 in 40) is applied to the 18 moratoriums to estimate the number of cases with creditors formally opposing the moratorium or actions of the monitor. This is to acknowledge that there was a challenge in the first 3 years, albeit from a creditor based outside of the UK. This results in increased creditor costs compared to the estimated costs and benefits to date (i.e. in the first 3 years of the appraisal) which were zero. The ongoing cost from year 4 onwards is £9k annually.

Scenario 2

10.7 Scenario 2 also assumes the estimated costs and benefits for years 1-3. There are some slight changes to the assumptions in years 4-10. The annual number of SoAs increase by a factor of 4 to 184. This is due to the estimated suppression of annual case numbers¹⁹⁴ compared to the pre-coronavirus pandemic average.

10.8 Director familiarisation costs are ongoing with a value of £17.76m annually. This is higher than the actual annual costs to date due to assumed higher number of companies obtaining moratoriums and RPs and SoAs. This increases the number of directors needing to familiarise themselves with the legislation, both for those companies and their suppliers.

10.9 The annual number of RPs increases from 6 to 15. The growth in the additional number of RPs is lower than that of SoAs as whilst there is an element of replacement of SoAs by RPs, which would be associated with similar levels of growth, the growth in the restructuring market element is assumed to be a slower process which will gather pace as more cases are sanctioned and confidence in the procedure grows through the adaptation of market participants. Therefore, the average growth rate for RPs is estimated to be lower than that of SoAs and 5 of the 15 RPs are additional.

10.10 The annual number of moratoriums increases to 50; higher than the actual 18 per year to date. The number of moratoriums is expected to increase as comparable procedures, such as administration, currently appear suppressed compared with pre-pandemic levels (see Figure 1). In the first three quarters of 2022, numbers of administrations were about 65% of those in the corresponding

¹⁹⁴ 46 cases per year (based on 96 cases in 25 months to date). Pre-pandemic average was approximately 200 per year.

quarters of 2019¹⁹⁵. It is also expected that numbers of moratoriums will increase as market participants become more familiar with the process. It appears unlikely that the IA's assumed caseload of 1,000-1,500 moratoriums per year will materialise in a do-nothing scenario.

- 10.11 The cost of monitoring the moratorium is expected to reduce by 10%. This is based on evidence from the process evaluation that the costs of monitors are expected to reduce as they become more familiar with the moratorium process. Creditor challenges to moratoriums from UK based creditors are assumed to arise at the same rate as in Scenario 1 i.e., 2.5%. In terms of benefits, of the 50 annual moratoriums it is assumed that at least 1 will result in restructuring on a lower cost basis than had the company not been through a moratorium. This is based on IP expectations that there would be, on average, costs savings associated with this route, so they would be likely to recommend it to client companies. However, due to the assumed 10% cost reduction of RPs (discussed below), the potential benefit associated with the cost saving by first going through a moratorium procedure is also reduced by 10%.
- 10.12 For the SoTC, the IA's assumption that 10% of liquidations will be avoided is reinstated, compared to the 1% used in the PIR VfM evaluation. The expectation is that as insolvencies increase post Covid, the effects of the SoTC will be felt more widely. There could be a greater proportion of cases entering into insolvency procedures other than liquidation, due to the continued supply of goods and services and the implicit protection from the demand for ransom payments. The cost to suppliers wishing to apply for exemption under the hardship provision is maintained.
- 10.13 The average cost of additional RPs, from growth in the restructuring market is assumed to fall by approximately 10%. This is due to the expectation that as the case law establishes principles which can be applied by all companies, a RP will be associated with less intensive valuation requirements and should result in lower costs¹⁹⁶.
- 10.14 The debt per case in RPs is assumed to fall as cases involving very large levels of debt become clearer outliers. The lower quartile of total debt from the first 9 RPs, approximately £180m, is used as an estimate¹⁹⁷. The benefits associated with RPs are attributable to the additional 5-7.5 cases, with the other RPs replacing SoAs, which we assume produce similar returns to creditors. The assumption that 51-100% of the estimated benefit accrues to UK creditors is maintained.

Scenario 3

- 10.15 Scenario 3 assumes the same changes made under Scenario 2, however the debt per case in RPs is assumed to fall to represent a change in the population profile of companies making use of RPs in the future whilst maintaining the assumed caseload of 15 per annum as in Scenario 2. This change assumes a larger constituency of companies which had used administration since the introduction of CIGA and hold lower levels of debt. An estimate of £82m debt per company is based on the MCC economics data for large companies who had been through administration.

Outputs of Scenario Analysis

Table 8: Scenario Analysis Outputs

Scenario	Total Net Present Social Value	Business Net Present Value	Net Direct Cost to Business per Year

¹⁹⁵ <https://www.gov.uk/government/statistics/company-insolvency-statistics-july-to-september-2022>

¹⁹⁶ https://southsquare.com/wp-content/uploads/2022/09/SSQ_Digest_September_2022_Final-2.pdf

¹⁹⁷ <https://www.pwc.co.uk/services/business-restructuring/insights/restructuring-plans-what-difference-year-makes.html>

Scenario 1	£4,825.0m	£4,677.6m	-£543.4m
Scenario 2	£8,575.5m	£7,685.0m	-£892.8m
Scenario 3	£7,497.6m	£6,607.2	-£767.6m

- 10.16 The results from the scenario analysis show that the measures would be expected to deliver continued positive net present social value and provide a net direct benefit to businesses in either scenario.
- 10.17 Due to the contribution of RPs to improvements in returns to creditors, the future costs and benefits in Scenarios 1 and 2 are higher than anticipated in the IA. However, this improvement in returns is based on an assumed return in the relevant alternative of administration for these cases of 15%. Whilst the relevant alternative of administration is justified, and the highest possible rate of return in administration from sample data has been applied, there could be an overestimate of the improvement of returns to creditors from these specific cases if the return would have been higher than normal through the alternative procedure.
- 10.18 Break-even analysis can demonstrate the amount of returns that RPs would need to provide to UK creditors on an annual basis to have a positive NPSV. These are based on the expected cost per case and the annual case numbers under each scenario:

Table 9: Break-even for Restructuring Plans

Scenario	Cost per RP case	Number of Additional RP Cases Annually	Returns to UK creditors required for breakeven
Scenario 1	£10m	3	£30m
Scenario 2 & 3	£9m	5	£45m

- 10.19 It is important to recognise that these are not claimed benefits and the results are particularly sensitive to the number of RPs and the estimated improvement in rate of return to creditors described above. This is due to the high value of median debt compromised or amended in RPs, £430m. The value of median debt compromised or amended in RPs going forward could be very volatile, due to the small population of cases to date. For instance, if the lowest compromised debt on RP cases (from those considered in PWC's report which represent large businesses), of approximately £150m, was taken as opposed to the lower quartile of £180m in Scenario 2, this would have reduced total NPSV by approximately £330m.

Table 10: Lower value of returns to creditors through RPs - sensitivity on Scenario 2

Scenario	Total Net Present Social Value (NPSV)	Business Net Present Value	Net Direct Cost to Business per Year
Scenario 2	£8,245.5m	£7,355.1m	-£-854.5m

- 10.20 There is significant uncertainty with regard to the future volumes of insolvency procedures more generally. The OBR have forecast a recession lasting just over a year in the UK economy¹⁹⁸. During the global financial crisis, company insolvencies rose by as much as 40%¹⁹⁹. Whilst the characteristics of that economic recession may be markedly different from the state of today's economy, it is important to acknowledge that underlying macroeconomic factors can influence the overall prevalence of insolvencies and therefore the costs and benefits associated with the CIGA measures.
- 10.21 That said, the assessment is that each of the three permanent measures introduced by CIGA are associated with positive NPSV, and are likely to continue to be so going forwards.

How likely are unintended effects in the future?

- 11.1 This review has highlighted unintended consequences associated with the measures. These include goals, serendipitous consequences, trade-offs and classic unintended consequences. Nevertheless, the process evaluation highlights the measures have been broadly well received from stakeholders. Therefore, the unintended consequences should not detract from the overall benefit the measures have brought. This is further supported by the VfM evaluation which found the measures have had a positive NPSV. No unintended consequences have been discovered which suggest the measures have put the insolvency regime into a worse position than prior to their introduction. Evidence suggests the measures have strengthened the insolvency regime and should remain in place going forward, although potential refinements have been identified.
- 11.2 Whether the unintended impacts will continue moving forward will vary depending on the impact and any government action. Examples are presented below, considering the possible government actions of do nothing, non-legislative intervention, and legislative intervention.
- 11.3 In the case of do-nothing, certain impacts will continue going forward. For example, the moratorium eligibility and qualifying criteria would continue to exclude certain companies from being able to use the measure. However, for the concern that enforcement of SoTC may not be straightforward, this issue could simply iron out over time. As noted elsewhere in this review, there is precedent for this issue, and that the market may simply adapt to the measure as government intended over time. Therefore, it is possible that certain unintended consequences will erode over time, as the market adapts to the measure.
- 11.4 Whilst it is possible for stakeholders to adapt to the measures over time, non-legislative intervention (such as guidance) from the government can address scenarios where do-nothing would maintain the status quo. An example here is the role of the IP as an advisor in a RP. This issue may benefit from some professional guidance to help address information asymmetry. Another advantage of non-legislative intervention is that it can help to either speed up adaptation from stakeholders or mitigate the risk in a do-nothing scenario where stakeholders may adapt to the measures in a way other than government intended. An example here is around current ambiguity for the definition of "financial contracts" in relation to the moratorium. While the market could adapt to this over time, guidance could achieve the same outcome more efficiently. Furthermore, it may prevent the market from adapting to the definition in a way the government did not intend, which may (for instance), lead to recommendations to administration, when a moratorium might be more suitable.

¹⁹⁸ https://obr.uk/docs/dlm_uploads/CCS0822661240-002_SECURE_OBR_EFO_November_2022_WEB_ACCESSIBLE.pdf

¹⁹⁹ <https://www.gov.uk/government/collections/company-insolvency-statistics-releases>

- 11.5 A final form of government intervention would be legislative change. This would be suitable in circumstances where either do nothing or non-legislative intervention would maintain the status quo. One such example would be the current barrier due to certain moratorium eligibility and qualifying criteria. To remove that trade off going forward, it may be necessary to consult, with a view towards legislative change.

How effective is the implementation / enforcement mechanism for the policy?

- 12.1 The process evaluation found there was a broadly positive reaction to the measures. No alternative procedures were identified by interviewees which would have been preferable to the introduction of the CIGA measures, and they were seen as the right measures to introduce at the time. The process evaluation sample included a wide mix of stakeholders, including IPs, trade associations, legal professionals and government agencies. The warm reception to the measures is also corroborated by other evidence, for example IPs expressing positive attitudes towards the RP and the framework moving in the direction of company restructuring²⁰⁰.
- 12.2 While uptake of the measures has been lower than expected, the process evaluation notes this is partly due to a general reluctance of many to try new procedures. The comparison was made to the general reluctance of practitioners (IPs and lawyers) to make use of the CVA and administration procedure when these procedures were introduced in 1986 (see Figure 2).
- 12.3 When considering how stakeholders have received measures, better regulation guidance²⁰¹ highlights the Hampton principles²⁰². These states that “regulations should be written so that they are easily understood, easily implemented, and easily enforced, and all interested parties should be consulted when they are being drafted.”
- 12.4 Survey responses from IPs found that a third (33%) found the CIGA measures difficult to understand, compared to 23% who found them easy to understand. One aspect noted in interviews was that many IPs did not understand the term ‘ipso facto’ when used in describing the SoTC. Furthermore, it was stated that the new measures were not easy to understand without the assistance of expensive legal advisors. Some companies, particularly SMEs, may not be able to afford such assistance. The evidence suggests there are issues regarding the complexity of the measures. However, it could be argued that the lack of understanding may also in part be due to a lack of training or continuous professional development by certain IPs. The need for training was an assumed cost in the IA for the measures.
- 12.5 In relation to the phrase ‘ipso facto’ the use of this is not inclusive terminology. It should be noted that the legislation does not refer to the SoTC provisions as “ipso facto clauses” but rather as “Protection of supplies of goods and services”.
- 12.6 Survey responses suggest government guidance on the measures has been helpful for some, but is mixed. In relation to this 38% of respondents found the government guidance helpful compared to 27% who found it unhelpful. Some interviews did highlight that government guidance was helpful, but contained mostly general information. It was felt by some that more specific guidance on the measures was needed. By their nature, the measures do have a degree of complexity, and guidance would itself need to be detailed to reflect that. If aspects were made simpler to understand, it is likely that guidance would be more easily grasped. This review has highlighted

²⁰⁰ <https://www.gov.uk/government/publications/confidence-in-the-regime/confidence-in-the-regime>

²⁰¹ <https://www.gov.uk/government/publications/business-regulation-producing-post-implementation-reviews/producing-post-implementation-reviews-principles-of-best-practice>

²⁰² <https://publications.parliament.uk/pa/cm201213/cmselect/cmspeak/1069/106911.htm>

areas of the measures where improvement around complexity/uncertainty could be made, such as around the meaning of ‘financial services’ for the moratorium.

- 12.7 In terms of enforcement, the process evaluation found there was no suggestion from anyone that there was any malpractice or non-compliance issues with the measures. However, it did highlight two possible risks. The first is the concern that the enforcement of SoTC may not be straightforward. The impact of this is that legal action by an insolvent company to ensure continued supply may be logistically difficult for several reasons and suppliers may decide to risk non-compliance. The second is around the moratorium and how a possible strategic use of the moratorium to the detriment of creditors by directors was suggested. For both issues they are currently risks, as no evidence has been uncovered to suggest they have materialised. Nonetheless, there appears to be nothing at present to stop them from materialising.
- 12.8 As noted in the IA, the measures were consulted on between 2016 and 2018 prior to their introduction²⁰³. Research has highlighted that IPs have generally been positive about the levels of consultation the Insolvency Service has shown towards stakeholders²⁰⁴. This has been noted as one of the factors that makes the insolvency regime innovative, as it is listening to IPs across the country. However, a potential skew exists where smaller IPs, whilst positive about consultation in general, noted that they thought larger IPs and associations are potentially overrepresented in these consultations. The process evaluation also sought feedback on the consultation which led to the CIGA measures. It was described as allowing relevant stakeholders to voice their concerns and to engage with the proposed reforms. However, the opinion was expressed that the consultation process did not cover how the measures might operate in practice, especially the RP.
- 12.9 Overall, the measures have been well received by stakeholders. However, there is room for improvement in relation to the Hampton principles, mostly around helping industry to adapt to some of the complexity around the measures. The measures are working well, although a couple of risks around enforcement do exist. Consultation with stakeholders appears to be a strength for the current regime, although there are steps which can be taken to improve this further, notably around targeting further inclusion of smaller IPs.

What refinements could be made?

- 13.1 In 2021, the Insolvency Service launched its 5-year strategy²⁰⁵, with the aim to strengthen our system regulation and improve the insolvency framework; “We aim to deliver a stronger insolvency regime that works as effectively as possible for all its stakeholders and to work with government to deliver a robust regulatory regime. We will keep the insolvency regime under review throughout, pursuing opportunities to improve outcomes and increase efficiency.” This post-implementation review helps to meet that goal, highlighting that whilst the measures have broadly worked, there is the potential to make changes to improve outcomes and make them work more efficiently.

²⁰³ [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG - Government response doc - 24 Aug clean version with Minister s photo and signature AC.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version_with_Minister_s_photo_and_signature_AC.pdf)

²⁰⁴ <https://www.gov.uk/government/publications/confidence-in-the-regime/confidence-in-the-regime>

²⁰⁵ <https://www.gov.uk/government/publications/the-insolvency-service-strategy-2021-to-2026/the-insolvency-service-strategy-2021-to-2026>

- 13.2 In line with guidance from RPC²⁰⁶ and the Magenta book²⁰⁷ the appropriate option going forward will be to **Amend** the measures. This is because the policy has been generally well received by stakeholders and seen as a good addition. The measures do align with best practice and strengthen the insolvency framework, so there is still a need for the measures going forward. However, amendments could be made to help achieve further benefits and to reduce the burden on business.
- 13.3 The following table outlines possible refinements which could address some of the issues identified by respondents in the evaluation report. It has been highlighted that the measures were well received, and are still needed, so it is important to note that although there is evidence that these changes could lead to more use of the new processes and greater efficiency, they are raised here as areas of which further consideration would be constructive. In particular where it is indicated that further action may be beneficial, this does not constitute a commitment to make any of the changes, several of which would require consultation and changes to primary legislation (which may be achievable through statutory instrument), and all of which would be subject to Parliamentary consideration.

Table 11: Possible refinements going forward

Measure	Issue	Action	Brief justification for action
Moratorium	Alteration of priority of debts, leading to uncertainty as to whether office-holder debts would be paid in subsequent insolvency	Consultation. Any change would require amendment of primary legislation.	There is evidence of an unwillingness to recommend an option which would lead to a risk that a subsequent office-holder's fees will not be paid.
Moratorium	Definition of financial services, including a risk of exploitation of definitions in Schedule ZA2.	Consultation. Any change would require amendment of primary legislation.	To ensure that it is clear which liabilities are within the definition.
Moratorium	Eligibility criteria	Consultation. Any change would require amendment of primary legislation.	The current eligibility criteria exist to mitigate any risk to financial stability, including appetite for lending. Any change would require full assessment of the wider impacts on lending.
Moratorium	Reputational risk to IPs	Guidance	A new process is by its nature likely to involve a familiarisation period.

²⁰⁶ <https://www.gov.uk/government/publications/rpc-case-histories-post-implementation-reviews-march-2019>

²⁰⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879444/Magenta_Book_supplementary_guide_Guidance_for_Conducting_Regulatory_Post_Implementation_Reviews.pdf

			Many company voluntary arrangements do not continue for their full term, but no evidence has been found to suggest that there is a reputational risk to nominees and supervisors as a result.
Moratorium	Clarity over role of the monitor	Guidance	Evidence suggested more guidance might help take up of the measure
Moratorium	Current length of the moratorium	Guidance	Guidance on how the initial period can be extended. Evidence suggests that it is easily extended where needed.
SoTC	Guaranteed payment	Do nothing	The hardship provisions provide a safety net for suppliers. Continued engagement with the sector will be important.
SoTC	Preventing “ransom” payments	Do nothing	Too early to intervene, but continued engagement with the sector will be important.
SoTC	Enforcement of the measure	Do nothing	Too early to intervene and may resolve itself over time. Continued engagement with the sector will be important.
SoTC	Lack of supplier awareness of measure	Do nothing	May solve itself as more companies enter rescue proceedings. Continued engagement with the sector will be important.
SoTC	Dealing with less sophisticated suppliers	Guidance	It may be beneficial for IPs to receive guidance as to how to exercise the measure when dealing with

			less sophisticated suppliers.
RP	Costs associated with setting up and challenging a RP	Consultation. Any change would require amendment of primary legislation.	It was anticipated that RPs would be more suitable for companies with certain characteristics than others, and the need for two court hearings would not lend itself to this being a cheap process. Exploration of whether the financial burden could be eased may be beneficial.
RP	Information asymmetry	Guidance	Evidence has suggested that professional guidance may help improve trust and transparency with the process.
RP	Standardised RP form	Do nothing	It has been suggested that SMEs may benefit from the guidance developed around that which already exists on SME CVA, rather than documentation for a typical RP which is likely to be overly complex for their purposes.
RP	Multiple debtor entities	Consultation. Any change would require amendment of primary legislation.	Such a change would introduce a lead company concept with jurisdiction extending to affiliated companies. This would go against the established principles of "one entity, one procedure".
RP	Mandatory upside sharing	Consultation. Any change would require amendment of primary legislation.	This could incentivise creditors to lend their support to a RP by providing for creditors to receive a share of future profit should

			the rescue be successful
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