ALLEN & OVERY

Corporate Insolvency and Governance Act 2020

A lifeline for struggling businesses in the United Kingdom – the most significant insolvency reforms for a generation

The Corporate Insolvency and Governance Act 2020 (the **Act**) entered into force on 26 June 2020. The Act represents the most significant reforms to the insolvency framework in the United Kingdom since, at least, the widespread introduction of administration under the Enterprise Act in 2003. The Act was brought into law very quickly to bring abount changes seen as necessary to support struggling businesses as they deal with the economic fallout from Covid-19. It should be noted, however, that many of the changes are permanent rather than temporary in nature and they will transform the way creditors and others interact with businesses in financial difficulty. The legislation is long and complex. As such, this and our related bulletins do not constitute full and detailed analysis of the legislation but are an attempt to answer some of the immediate questions that clients are likely to have.

The legislation focuses on some permanent reforms in three key areas: a moratorium, a ban on the operation of termination provisions (or so called *ipso facto* clauses) and the introduction of a new pre-insolvency rescue and reorganisation procedure (the **Plan**). There are also some temporary measures such as the relaxation of the wrongful trading regime and the suspension of statutory demands and winding-up petitions where financial difficulties are attributable to the Covid-19 pandemic. Below we give a high-level summary of the various measures. We have also prepared a more detailed Q&A analysis for each of the measures which can be accessed by clicking "Read more ▸" in the relevant section.

Moratorium

The provisions will provide businesses with a statutory breathing space from creditors within which to formulate a rescue plan. With certain key exceptions, the company will not have to pay debts falling due prior to the moratorium but will have to pay debts falling due during the moratorium.
The moratorium will be similar to that which is available in an administration. For as long as the moratorium applies, it will prevent the enforcement of security, the commencement of insolvency proceedings or other legal proceedings against the company and forfeiture of a lease. The moratorium will last for an initial period of 20 business days with an ability to extend for a further period of 20 business days without consent and with the possibility of further extensions of up to one year or more.

Read more ▸

Ban on ipso facto clauses

These measures will prevent suppliers of goods and services from terminating, varying or exercising any right under a contract due to its counterparty entering into an insolvency or restructuring procedure. Often if a company needs a continued supply of a particular good or service then the supplier will hold the company to ransom and will threaten to terminate unless their pre-insolvency arrears are paid and the terms of continued supply are made more favourable. This is detrimental to corporate rescue. As such, the supplier will be forced to continue to supply the debtor on the same terms and will not be guaranteed payment of arrears. There are significant carve-outs (including by entity type and contract type) to the operation of these provisions.

Read more ▸

Restructuring Plan

This new reorganisation measure will be similar to a scheme of arrangement, which many companies already use to successfully restructure their debts. As with a scheme, creditors will be divided into classes based on the similarity of their rights prior to and as a result of the plan. Each affected creditor will have the opportunity to vote on the plan and, provided that one "in the money" class of creditors approves the plan and the plan delivers a better outcome than the next best alternative option (ie liquidation or administration), the plan will become binding on creditors in all classes if sanctioned by the court.The court's role is to consider whether the classes have been properly formulated, whether each creditor receives more than they would under the next best alternative and whether the plan is fair and equitable.

Read more ▸

Suspension of wrongful trading

The Act temporarily amends the wrongful trading regime such that the court, in assessing whether a director should make a contribution to the assets of the company under the wrongful trading provisions, is to assume that the director is not responsible for any worsening of the financial position of the company or its creditors between 1 March 2020 and 30 September 2020.

Read more ▸

Statutory demands and winding-up petitions

The legislation plans to temporarily remove the threat of statutory demands and winding-up proceedings where unpaid debt is due to Covid-19. Statutory demands will be void if issued against a company between 1 March 2020 and 30 September 2020 (the **relevant period**). Winding-up petitions presented during the relevant period that claim that a company is unable to pay its debts will be reviewed by the court to determine the cause of non-payment. If the company cannot pay its debts because of Covid-19, no winding-up order will be made.

Read more ▸

General Meetings of a company's shareholders

The legislation provides temporary flexibilities relating to how and when members' meetings may be held. The provisions will override any more restrictive requirements in legislation or in a company's constitution and facilitate the ability of companies to get their meetings held in a manner consistent with preventing the spread of Covid-19.

Read more ▸

Company Filing Requirements

The legislation will grant a temporary extension of the period within which a public company has to file its annual accounts and reports at Companies House, and give powers to the Secretary of State to temporarily grant further extensions to certain filing deadlines as are required.

Timing of the measures

The provisions of the Act will take effect from 26 June 2020.

Exclusions

Read more ▸

Key messages

- Some temporary provisions to help companies struggling with Covid-19 (such as the restrictions on presenting winding-up petitions) together with some more permanent and fundamental changes to UK insolvency law.
- The new moratorium proceeding won't be suitable for all companies due to the need to pay amounts falling due in the moratorium and all financial indebtedness but in circumstances where the lenders are supportive (or a contractual waiver/standstill has been agreed with financial creditors), it could give a breathing space while a CVA or other restructuring is considered.
- The ipso facto provisions (restricting the operation of contractual termination and variation triggered by the commencement of insolvency proceedings) is a very significant change to UK insolvency law. Like marmite, you will either love or loathe these provisions. There are however extensive exclusions from both these provisions and the provisions for a payment holiday in a moratorium to protect the financial markets (eg loan agreements, derivatives and capital market arrangements). Whether these provisions are sufficient to capture all relevant financial services remains to be seen.
- The ability to cram-down one or more classes of creditors or shareholders in the restructuring plan is a welcome addition to the scheme of arrangement. The courts will need to make some difficult judgment calls regarding what is fair under the new legislation.

Moratorium

1. What is it?	Companies will be able to apply for a moratorium, which will prevent creditors taking certain action against the company for a specified period. This will give companies breathing space within which they can explore options for the rescue or restructuring of the company.
2. How does a company enter into a moratorium?	Where a company is an English company that is not subject to a winding-up petition, the directors of the company can obtain a moratorium by filing relevant documents with the court. Where an overseas company (or an English company that is subject to a winding-up petition) wishes to obtain a moratorium, it must make an application to the court. The court will only grant a moratorium where it is satisfied that the moratorium would achieve a better result for the company's creditors as a whole than the winding-up of the company without first being subject to a moratorium. For a short period (until 30 September 2020), an English company that is subject to a winding-up petition may still obtain a moratorium by the filing of documents and without needing to apply to court. It is worth noting that a court order is not required if an administration application has been made or a notice of intention to appoint an administrator has been issued. In such circumstances, the companies will be able to obtain a moratorium by filing relevant documents with the court.
3. What is the effect of the moratorium on the ability to commence insolvency proceedings?	The moratorium would prevent: (a) the presentation of a winding-up petition and the making of a winding-up order by the court (except for petitions made by directors or certain public interest petitions); (b) the passing of a resolution for the voluntary winding-up of the company unless recommended by the directors; (c) the making of a winding-up order, except on petition by the directors; and (d) the appointment of an administrator, the appointment of an administrative receiver, or the application for an administration order (except if made by the directors).
4. What is the effect of the moratorium on enforcement rights and legal proceedings?	The moratorium would prevent: (a) forfeiture of a lease by peaceable re-entry of business premises by a landlord; (b) the enforcement of security over the company's property except where security constitutes a collateral security charge or financial collateral or security has been granted during the moratorium with the monitor's consent; (c) the repossession of goods under a hire-purchase agreement; (d) the commencement or continuation of legal process against the company and its property (with limited exceptions); and (e) the crystallisation of a floating charge or any imposition of a restriction on disposal of a floating charge asset. This substantially mirrors the moratorium currently available in an administration of a company, except in relation to the crystallisation of floating charges.The court may give permission to creditors to take certain steps above, provided an application for permission may not be made for the purpose of enforcing a pre-moratorium debt for which the company has a payment holiday.

5. Will companies be obliged to use the new statutory moratorium?	No, use of the statutory moratorium will be completely optional and companies will maintain the ability to agree contractual or informal standstill agreements if they prefer (and for the reasons given below, this might still be the best option for financial creditors) or to use such arrangements in conjunction with the statutory moratorium.
6. Which companies will be able to apply?	The moratorium will be available to all companies except Excluded Entities (a complete list of which appears **here**). In short, Excluded Entities include those entities that currently have a specialist insolvency regime, such as insurance companies, banks, investment banks, investment firms, recognised investment exchanges and securitisation companies. Overseas companies will also be eligible, provided there is a sufficient connection with the United Kingdom (a test which the English courts are familiar with applying in the context of schemes of arrangement and insolvency proceedings), which can usually be founded on the basis that the debt to be subject to the moratorium is governed by English law. That said, consideration should be given to whether such a moratorium would be effective in the relevant jurisdictions (ie the jurisdiction of incorporation and other jurisdictions where the business operates). The court will have discretion to make an order to commence a moratorium for overseas companies.
7. What are the entry requirements?	It is clear that the moratorium is intended to be used by companies that are in financial distress but is not intended to simply delay the inevitable insolvency of a company that has no realistic prospect of survival. Therefore the following requirements must be met: (i) the company must not have been in a moratorium, administration, company voluntary arrangement or subject to a winding-up order in the previous 12 months (although this requirement is inapplicable until 30 September 2020); (ii) the application must contain a statement by the directors that in their view, the company is, or is likely to become, unable to pay its debts; (iii) the application must contain a statement from the proposed monitor that the company is an "eligible company", that the monitor is qualified and they consent to act as monitor in relation to the moratorium; and (iv) the application must contain a statement from the proposed monitor that, in their view, it is likely that a moratorium for the company would result in the rescue of the company as a going concern (or, until 30 September 2020, that it would do so if it were not for any worsening of the financial position of the company due to Covid-19).
8. When does a moratorium come into effect?	Where the document filing route of commencement is pursued, the moratorium commences when the relevant documents are filed with the court. Where a court order is required, the moratorium commences when an order is made by the court.
9. How will I know if a company is subject to a moratorium?	Once the moratorium has commenced, the directors must notify the monitor as soon as reasonably practicable. After being notified, the monitor must send a notice to all known creditors, the Registrar at Companies House and, in circumstances where the company is or has been an employer in respect of occupational pension schemes, to the Pensions Regulator and possibly the Pension Protection Fund.
10. How long will the moratorium last?	The moratorium will be for an initial period of 20 business days (beginning with the business day after it comes into force) with the possibility of extension by a further 20 business days by filing certain documents with the court (at any time after the 15th business day of the initial period). This one-time extension can be done by the directors without the consent of the creditors. We expect that most companies wishing to extend the initial moratorium will rely on this relatively straightforward option to begin with and, provided there is sufficient monies to pay the required debts, many moratoria will last for at least 40 business days.

11. What are the other options for extending the moratorium and can they be used more than once?	In addition to the extension route mentioned immediately above, there are a number of other possibilities for extension. **With creditor consent** The directors may extend the initial period (more than once) for a maximum period of up to 12 months from its commencement by obtaining creditor consent. **With court consent** The directors may apply directly to court (more than once) for an order to extend the initial period. The court may make any order it deems appropriate taking into account the interests of the pre-moratorium creditors and whether the continuation of the moratorium will help rescue the company. **In connection with a CVA** Where the moratorium has been used prior to a proposal for a company voluntary arrangement, the moratorium is automatically extended until the proposal is implemented, accepted or rejected by creditors or withdrawn by the company. **In connection with a scheme or restructuring plan** Where the moratorium has been used prior to a scheme of arrangement or a restructuring plan, the moratorium may be extended over the duration of the restructuring plan at the court's discretion.
12. Which creditors need to consent to the extension of the moratorium?	A decision to consent to a revised end date for a moratorium is made if, of those voting: (a) a majority (in value) of the pre-moratorium creditors for which the company has a payment holiday who are secured creditors vote in favour of the proposed decision; and (b) a majority (in value) of the pre-moratorium creditors for which the company has a payment holiday who are unsecured creditors vote in favour of the proposed decision, in each case in relation to debts that have not been paid or otherwise discharged, and subject to the vote not having been pushed through by connected creditors. In other words, it is only those creditors who have not been paid who will need to consent; lenders and other creditors with excluded contracts will not be given any consent rights.
13. What is the maximum length of the moratorium?	The maximum length of a moratorium is 12 months from its commencement in the case of an extension made with creditor consent. However, it is possible for directors to apply to court for a longer period or to request a further extension after the 12 months are over.
14. Are there any continuing conditions for companies to meet?	Yes, at each extension: (i) the directors must confirm that all moratorium debts and pre-moratorium debts that are not subject to a payment holiday have been paid as and when they became due and payable; and (ii) the monitor must confirm that the moratorium is likely to result in the rescue of the company as a going concern.
15. What is a pre-moratorium debt?	A pre-moratorium debt is any debt or other liability of the company that has fallen due prior to the commencement of the moratorium or which becomes due during the moratorium but under an obligation incurred by the company prior to the commencement of the moratorium; this would include obligations under contracts entered into pre-moratorium but where payments fall due post moratorium.

16. What is a moratorium debt?

A moratorium debt is any debt or other liability that the company becomes subject to during the moratorium (other than by reason of an obligation entered into prior to the moratorium) or to which the company may become subject after the end of the moratorium because of an obligation incurred during the moratorium. An example might be a debt arising under a new contract entered into by the company during the moratorium period.

17. What is a pre-moratorium debt for which the company has a payment holiday?

Most pre-moratorium debts will be subject to a payment holiday. In other words, the company will not be obliged to pay those debts during the moratorium. The only exception to this is those pre-moratorium debts in so far as they consist of amounts payable in respect of:

(a) the monitor's remuneration or expenses;

(b) goods or services supplied during the moratorium (and which would otherwise be pre-moratorium debts because the supply contract was entered into pre-moratorium);

(c) rent in respect of a period during the moratorium (under leases entered into pre-moratorium);

(d) wages or salary arising under a contract of employment, regardless of when those wages or salary fall due;

(e) redundancy payments, regardless of when those payments fall due; or

(f) debts or other liabilities arising under a contract or other instrument involving financial services. These include (amongst others) financial contracts (loans, financial leases, guarantees or commitments, commodities contracts, securities contracts), securitisation transactions, derivatives and spot contracts, capital market investments, market contracts etc. For a complete list see **here**. Again, these debts must be paid whether or not they fall due pre or post the moratorium.

The company is expected to keep making payment on the pre-moratorium debts listed in paragraphs (a) to (f) for the duration of the moratorium so all payments due under loan agreements and other financial services contracts should continue to be paid. If they are not, the monitor is required to bring the moratorium to an end.

18. Will I continue to be paid during the moratorium?

The company must continue to pay for any goods and services that it receives during the moratorium period and for rent falling due during the moratorium. The company must also continue to pay for any pre-moratorium debt for which it does not have a payment holiday – this includes the monitor's remuneration and expenses, wages or salaries and redundancy payments and all payments falling due under a loan agreement or other financial contract, regardless of whether these fall due pre or post the moratorium.

The company will not be permitted to make any payment, or series of payments, to any creditor in respect of any pre-moratorium payment obligations for which it has a payment holiday that exceed, in aggregate, £5000 or 1% of the total owed to unsecured creditors when the moratorium began, unless the monitor consents to such payment or a court order is obtained.

19. What contractual rights can I exercise during the moratorium?

Entry into the moratorium triggers the ban on the operation of termination or variation clauses discussed under the ipso facto sections of this bulletin. As such, unless an exclusion applies, no supply contract can be terminated or varied on the grounds that the company has entered into the moratorium. But any other contractual rights arising for any other reason after commencement of the moratorium can be exercised unless expressly prohibited by the moratorium provisions (as with enforcement of security, forfeiture of a lease, re-possession of hire-purchase goods etc.). In accordance with the ipso facto provisions, reliance on any pre-moratorium breach is temporarily suspended.

Excluded Contracts (listed **here**) are not subject to the ipso facto provisions and as such, rights under loan agreements and other financial contracts can continue to be exercised, except in so far as prohibited by the moratorium provisions. As a result lenders under loan agreements can, for example, charge default interest, draw-stop an RCF and otherwise exercise their contractual rights.

20. What enforcement rights can I exercise during the moratorium?

As referred to above, even where there is no payment holiday in the moratorium (for example in relation to rent and supplies during the moratorium or payments under loan agreements), the creditor cannot seek to enforce its debt by presenting a winding-up petition, commencing legal proceedings or enforcing security (other than financial collateral). However, the remedy for such a creditor is that, if its debt is not paid, the monitor must bring to an end the moratorium. Self-help remedies (such as the exercise of set-off outside of court proceedings) are not prohibited.

21. Can the company dispose of secured property during the moratorium?

Yes, either in accordance with the terms of the security or with the permission of the court.

If the company disposes of any property subject to security with the permission of the court, the company must pay the secured creditors any net proceeds received and any additional money required to be added to the net proceeds to produce a total amount, which in the court's determination would have been realised on a sale of the property in the open market by a willing vendor.

22. How does the moratorium affect the rights under a floating charge?

A floating charge cannot be crystallised during a moratorium. To the extent the right to crystallise the floating charge expires during the moratorium, the chargee is permitted to give such notice as soon as practicable after the moratorium terminates.

Any provision in an instrument creating a floating charge that triggers crystallisation of the floating charge, imposes any restrictions on disposal of the company's property or provides for the appointment of a receiver on the commencement of a moratorium or anything done with a view to commencing the moratorium is void. Although this will happen automatically by operation of law, the parties to a security agreement may want to carve the moratorium out from the crystallisation provisions to ensure that the rest of the clause is preserved.

These restrictions do not apply to a floating charge that is: a collateral security; a market charge; a security financial collateral arrangement; or a system charge (each as defined in the Act).

23. What entities are excluded from the moratorium regime?

Any company that is or has been subject to an insolvency procedure or moratorium in the preceding 12 months.

Any insurance company, bank, electronic money institution, investment bank or investment firm, companies that are party to market contracts/market charges, participants in a designated system, payment institutions, operators of payment systems, recognised investment exchanges, securitisation companies, parties to capital market arrangement (involving debt of at least £10 million), public private partnership project companies and certain overseas companies are also excluded from the moratorium regime.

24. What happens to the directors of the company and is there any additional oversight?

The directors will remain in control of the company. For the duration of the moratorium a monitor will be in place, the role of the monitor is to protect creditor interests and to ensure continued compliance with the moratorium entry requirements and conditions. The monitor will be able to attend board meetings and request information from the directors. Any transactions that are not in the ordinary course of business for the company will need to be sanctioned by the monitor.

With respect to the directors and any other officer of the company, new offences relating to fraud during and in anticipation of a moratorium, false representation to obtain a moratorium and other offences relating to a moratorium have been introduced. A creditor or member of a company (and in certain circumstances the Board of the Pension Protection Fund, in place of the trustees or managers of a pension scheme) can challenge the actions of the directors on the ground that, during the moratorium, the company's affairs, business and property are being or have been managed by the directors in a way that unfairly harmed the interest of creditors or members or that any proposed action would cause such harm.

25. Who will perform the role of the monitor and will they incur any potential personal liability?

This role will be performed by a licensed insolvency practitioner – usually an accountant. The monitor is an officer of the court and must perform various duties while occupying this position. If the monitor fails to perform certain duties without reasonable excuse, he will commit an offence.

A creditor (including, in certain circumstances, the Board of the Pension Protection Fund in place of trustees or managers of pension schemes), director, member of the company or any other person affected by the moratorium can challenge the monitor's actions if it results in unfairly harming their interests. If successful, the court will make appropriate remedial orders but the monitor will not be liable to pay any compensation.

26. Is there any way to get around the moratorium?

Yes, the actions otherwise prohibited by the moratorium can be taken either with the consent of the monitor or the court. The monitor must consider, and the court is likely to consider, whether any such action will support the rescue of the company as a going concern.

The moratorium itself can also be challenged on the grounds that the eligibility criteria and qualifying conditions are not met or that the continuation of the moratorium would result in unfair harm to the applicant's interests.

28. When and how does the moratorium end?

The moratorium is intended to be a gateway or an initial step to a company completing a recovery. There are therefore a number of ways that it might come to an end, as follows:

(i) by agreement upon the company entering into a consensual restructuring with its creditors;

(ii) when a court order sanctioning a scheme of arrangement or restructuring plan comes into effect;

(iii) automatically upon entry into a voluntary winding-up, administration or interim moratorium prior to administration and liquidation or initial steps to initiate such proceedings;

(iv) automatically upon the expiry of the moratorium time limit; and

(v) by a court order.

The monitor will also be obliged to bring the moratorium to an end in certain circumstances including if the debtor ceases, or is likely to be unable, to pay amounts falling due during the moratorium, if the moratorium is no longer likely to result in a rescue of the company as a going concern or the directors are not cooperating with the monitor to provide information.

29. What happens after a moratorium ends?

The hope will be that the company will emerge from the moratorium having achieved a rescue as a going concern and business will carry on as usual.

However, if the company enters into a winding-up or administration process within 12 weeks following the end of the moratorium, there is an impact on the priority of creditors in such a winding-up or administration. Any debts that did not have the benefit of a payment holiday in the moratorium but which are unpaid (i.e. debts arising under a pre-moratorium agreement in respect of the monitor's remuneration or expenses; goods or services supplied during the moratorium, rent in respect of a period during the moratorium; wages or salary arising under a contract of employment, so far as relating to a period of employment before or during the moratorium; any liability to make a redundancy payment which fell due before or during the moratorium; and any debt that arises under a contract or other instrument involving financial services that fell due before or during the moratorium (unless the amount only fell due during the moratorium because of an acceleration or early termination of the relevant debt)) will have priority over all other debts (except fixed charges), ie they will come ahead of preferential creditors, the prescribed part and floating charge holders.

Ban on operation of termination clauses in supply contracts – so called 'Ipso Facto' clauses

1. What is proposed?	There will be a prohibition on the termination of any contract for the supply of goods and services to a company, or 'doing any other thing' in respect of that contract, by reason of the company entering into an 'insolvency procedure'. An 'insolvency procedure' includes where: (a) a moratorium comes into force for the company under the new moratorium procedure; (b) the company enters administration; (c) an administrative receiver of the company is appointed; (d) a company voluntary arrangement takes effect in relation to the company; (e) the company goes into liquidation or a provisional liquidator is appointed; or (f) a convening order is made by the court in respect of a restructuring plan. The prohibition on the termination or variation of any contract for the supply of goods and services does not apply to schemes of arrangement under Part 26 of the Companies Act 2006.
2. What does 'any other thing' mean?	The 'any other thing' language is extremely broad. It means that any other contractual rights triggered by or exercisable upon the commencement of an 'insolvency procedure' permanently cease to have effect except with company or office-holder consent, or a hardship order. This would affect provisions such as the ability to charge default interest, acceleration, or any other contractual consequence. To take some particularly concerning examples: 1. a guarantee included in the supplier contract: the supplier would be prevented from making a claim under the guarantee (as a provision in the supply contract) by reason of the principal debtor's insolvency; and 2. a group supply arrangement where other companies in the group are not subject to insolvency proceedings: it is not clear on the face of the Act whether a supplier could exercise contractual rights in relation to other (solvent) group companies.
3. Can I still terminate on non-insolvency grounds (eg for non-payment)?	Yes if the default occurs following the commencement of the insolvency procedure but see below where the default occurs prior to the commencement of such procedure.

4. Can I terminate on the basis of a default that occurred prior to the insolvency procedure?	If the supplier had a right to terminate the contract or supply before the company became subject to an insolvency procedure but did not exercise that right, the supplier may not terminate for that reason during the insolvency period. Therefore, if a supplier does not exercise its rights in relation to a pre-insolvency default, it will temporarily lose that right once the insolvency procedure has commenced. The drafting is very broad and would suspend a counterparty exercising any contractual right to terminate that arose pre-insolvency proceeding including, for example, a right to terminate for fraud or wilful default. In that situation, a counterparty would require company or office-holder consent, or a hardship order from the court before it could terminate the contract.
5. How can I terminate my supply contract?	Where the prohibitions on termination or variation are in effect, the supplier may only terminate the contract if: (a) the relevant office-holder (ie the administrator, administrative receiver, liquidator or provisional liquidator) consents to the termination; (b) the company consents to the termination; or (c) the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for the termination of the contract.
6. Should I continue to supply? What if it is clear the company no longer requires the supply?	Where the supplier cannot terminate, the Act seems to oblige it to carry on supplying to the company even before the insolvency office-holder has confirmed whether it wants the supply. We suspect that, in practice, the supplier would speak to the office-holder/ company to make sure that the supplies are wanted (and will be paid as an expense ie as a priority claim in the insolvency process).
7. Are there any exceptions to the obligation to continue to supply?	Yes. If a supplier considers that the obligation to continue to supply is causing the supplier hardship then they will be able to apply to court for permission for the termination of the contract. There will also be a temporary exemption for small company suppliers where their counterparty became subject to an insolvency procedure before 30 September 2020, with this date being subject to possible extension. A company is a small company supplier if it meets at least two of the following tests: (i) turnover not more than £10.2 million; (ii) balance sheet total not more than £5.1 million; and (iii) no more than 50 employees. There are also exceptions for financial services entities and contracts – see further below.
8. What does 'hardship' mean?	The Act does not include a definition of 'hardship'. Without further guidance, the court will need to develop principles to determine what factors to apply when determining whether the continuation of supply is causing the supplier hardship.
9. Will I get paid for continued supplies? What protection will I have?	The debtor ought to make payments for the continued supply that it is receiving and where the relevant insolvency procedure is administration, liquidation, provisional liquidation or administrative receivership, the office-holder should ensure that these amounts are paid as expenses of the procedure (ie ranking ahead of pre-insolvency unsecured and floating charge claims). However, if the company ceases to pay for goods during the insolvency procedure, this would usually give rise to a termination right, which could be exercised by the supplier; it is therefore in the interests of the debtor company to continue paying for the supplies that it requires.
10. Will I get paid for pre-insolvency debts?	A supplier is prohibited from making it a condition of any future supply of goods and services that any pre-insolvency outstanding charges are paid. This seems to be the case regardless of whether there is an ongoing supply contract or a series of contracts for "spot" deliveries. So although the company may choose to pay the supplier, there is no obligation to do so. Furthermore, as detailed above, where the company enters into an insolvency procedure, prior termination rights are temporarily suspended.

11. Does it apply to all types of entities?	No. Certain entities are excluded from these provisions and will not be subject to them where they themselves are in distress or where they are a supplier to a business in distress. These 'Excluded Entities' are listed **here**. The list is a long one and includes deposit-taking and investment banks and insurance companies, so any contracts with these types of entity would be excluded. For other types of entity that do not fall within these definitions (including, for example, SPVs or hedge funds), the question will be whether there is an exclusion for the particular contract (see below).
12. Does it apply to all types of contracts?	No, it only applies to contracts for the supply of goods and services. Financial contracts (as detailed **here** are excluded from these provisions and can continue to be terminated or varied on the grounds of insolvency. Again, the list is extensive and includes loan agreements, financial leasing, swap agreements and derivatives and capital market arrangements. There is also a carve-out for any set-off or netting arrangement. This means that lenders will be permitted to draw-stop facilities, accelerate loans, charge default interest, exercise contractual set-off rights and otherwise exercise their contractual rights associated with an event of default under the facility. Although intercreditor agreements are not included, it is hard to see how these are contracts for the supply of goods or services.

Restructuring plan

1. What is proposed?

The Act introduces a new restructuring tool (as a new Part 26A to the Companies Act 2006), similar in form to a scheme of arrangement, where a company can propose a restructuring plan to its creditors or members. Although the legislation refers to a plan in relation to creditor OR members (as does the corresponding scheme of arrangement legislation), this must be taken to mean that a single plan can be proposed in relation to creditor AND members.

Creditors and members will be divided into classes based on the similarity or otherwise of their rights prior to the restructuring plan and following implementation of the plan. The court must approve the class formation and the convening of restructuring plan meetings. Each class will then vote on whether they accept the plan and provided that sufficient creditors/members approve the plan and the court considers it a proper exercise of its discretion to sanction the plan, then the plan will be binding on all creditors and members regardless of whether they, individually or as a class, approved the plan.

2. Can all companies propose a restructuring plan?

Under the terms of the Act, all companies will be eligible to apply for a restructuring plan, provided that the conditions below are met. However, there is power for the Secretary of State to make regulations which would exclude authorised persons (as defined under the Financial Services and Markets Act 2000 – broadly those providing financial services), or a sub-section of authorised persons, from the scope of the restructuring plan where the plan would involve a compromise of creditors who are themselves authorised persons. The restructuring plan can also be used by a number of non-corporate entities such as limited liability partnerships.

As with the moratorium provisions and schemes of arrangement, the restructuring plan will be available not just to companies incorporated in the United Kingdom but to any company with a sufficient connection to the United Kingdom. We understand that the restructuring plan will not be listed in the Annex to the European Insolvency Regulation (Regulation (EU) 2015/848) and thus it will be in the same position as schemes of arrangement in that it will not benefit from automatic recognition across the European Union. Sufficient connection can usually be founded on the basis that the debt being compromised is governed by English law. As with schemes, we expect that a restructuring plan will be capable of having international effect and could be recognised in other jurisdictions on the basis of private international law where the creditors have submitted to the English courts and under Chapter 15 of the US Bankruptcy Code. Whether it will be recognised as an insolvency proceeding for other jurisdictions that have implemented the UNCITRAL Model Law on Cross-border Insolvency Proceedings will depend on how those jurisdictions have implemented the Model Law but, on the basis of the first condition referred to below, we would hope that this will be the case.

3. Are there any conditions?

There are two conditions a company must meet in order to use a restructuring plan.

1. The company must have encountered or be likely to encounter financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern. This is different to a scheme of arrangement, which can be proposed by a company in financial distress or a completely solvent company.
2. A compromise or arrangement must be proposed between the company and its creditor or members (or any class of either) and the purpose of such compromise or arrangement must be to eliminate, reduce, prevent or mitigate the effect of any of the financial difficulties the company is facing.

4. What steps are involved in a restructuring plan?

1. Application to the court for leave to convene the class meetings to consider the restructuring plan.
2. Court hearing to consider classes and summon the meetings of creditors/members.
3. Notice summoning the meetings and an explanatory statement of the plan to be sent, or otherwise advertised, to creditors and members.
4. Creditor/member meetings occur and vote is conducted.
5. Provided requisite majorities are reached, there will be a second court hearing to sanction the compromise or arrangement.
6. Provided the court sanctions the compromise or arrangement, the plan will become binding on all creditors and members in accordance with its terms once the court order has been delivered to the registrar of companies (in the case of a company incorporated in the United Kingdom) or published in the Gazette (in the case of an overseas company).

5. Can anyone apart from the company propose a restructuring plan?

The Act allows for a plan to be proposed by the company or by any creditor or member. A plan can also be proposed by a liquidator or administrator of a company. However, given the requirement to produce and share with creditors/members an explanatory statement of the plan and its proposed impact on creditors/members, it is unlikely that anyone apart from the company (or its administrator or liquidator) or potentially the shareholders, could put forward a restructuring plan. The same is true of a scheme of arrangement, where creditors and shareholders have a right to propose a scheme of arrangement but it is not seen in practice.

6. What does the explanatory statement need to contain?

The explanatory statement must explain the effect of the compromise or arrangement. This requirement is the same as for a scheme of arrangement and usually leads to the production of a lengthy document. There are additional specific requirements in relation to disclosing the interests of directors and trustees under debentures.

7. Do all creditors vote on the plan?

No, every creditor or member of the company whose rights are affected by the compromise or arrangement must be permitted to participate in the meeting and vote on the plan but there is no need to include creditors or members whose rights are not affected. Furthermore, a court may exclude even a creditor or member whose rights are affected where it is satisfied that none of the members of that class has a genuine economic interest in the company.

There is a further exclusion of creditors in respect of:

(a) moratorium debts (ie debts incurred during the new moratorium period under arrangements entered into post moratorium); and

(b) priority pre-moratorium debts (ie debts arising under a pre-moratorium agreement in respect of the monitor's remuneration or expenses; goods or services supplied during the moratorium, rent in respect of a period during the moratorium; wages or salary arising under a contract of employment, so far as relating to a period of employment before or during the moratorium; any liability to make a redundancy payment which fell due before or during the moratorium); and any debt that arises under a contract or other instrument involving financial services that fell due before or during the moratorium (unless the amount only fell due during the moratorium because of an acceleration or early termination of the relevant debt)),

where the plan (or a company voluntary arrangement or scheme of arrangement) is proposed within the 12 week period following the end of the moratorium – in practice this means that a restructuring plan cannot be used until after the expiry of that 12 week period or that the restructuring plan would need to be put together within the moratorium.

8. How many creditors need to approve the plan before it can be implemented?	**Consensual plans** For a consensual plan (ie one where each class votes in favour) to be capable of being sanctioned by the court, 75% in value of creditors or members present and voting (in person or by proxy) in each class must agree the compromise or arrangement. This is similar to the threshold in a scheme of arrangement but, unlike with a scheme of arrangement, there is no numerosity requirement that there must be at least 50% by number of creditors voting in favour. **Cram-down plans** If not all classes have approved the plan as required for a consensual plan, the court may still sanction a plan, provided that: (a) the court is satisfied that none of the dissenting classes are any worse off under the plan than they would be in the event of the "relevant alternative" (referred to below); and (b) the plan has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting (in person or by proxy) who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative.
9. Could a super senior lender be "crammed-up" by more junior lenders?	Yes, provided that the conditions for sanctioning a cram-down plan (as set out above) have been met, it is open to the court to sanction a plan that is approved by a senior secured class of lenders but rejected by a super senior secured class. The protection for the super senior class is that they must receive at least what they would receive in the relevant alternative and the court will consider whether the plan is fair.
10. What is the relevant alternative?	The relevant alternative is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned by the court. This may be liquidation of the company and a fire sale of its assets – which usually leads to a low return for creditors and could see large numbers of creditors disenfranchised for having no genuine economic interest. Or it could be a sale of the assets of the company on a going concern basis, which would generally lead to a greater number of creditors retaining an economic interest. This requirement, as with schemes of arrangement, is likely to lead to differences of opinion between the various creditor groups but perhaps even more fiercely under a plan where there is the possibility of cramming down other classes of creditors.
11. What is the role of the court at the initial court hearing?	At the initial court hearing, the court will need to decide whether to convene the plan meetings. In making this determination, the court is likely to consider the following matters: 1. whether the qualifying conditions are met; 2. whether the court has jurisdiction in relation to the proposed plan; 3. whether the classes have been properly constituted; and 4. whether any creditor/member should be excluded from the plan on the basis that it has no genuine economic interest.

12. What is the role of the court at the second court hearing?	At the second court hearing, the court needs to determine whether to exercise its discretion to approve the plan.The court is not bound to sanction the plan just because the relevant voting thresholds have been met. The court is likely to consider the following matters: 1. whether the votes in favour of the plan were fairly representative of the class as a whole; 2. whether the plan is likely to be effective in the relevant jurisdictions; 3. whether the plan is fair; and 4. in a cram-down scheme: ensuring that the dissenting classes are not worse off than in the relevant alternative and that the plan has been approved by a class who would receive a payment or have a genuine economic interest in the company in the event of the relevant alternative.
13. How much scrutiny will the court impose?	As with a scheme of arrangement, and particularly because of the ability to effect a cross-class cram-down, we expect that the court will very closely scrutinise a restructuring plan, especially where the cram-down mechanism is employed. In connection with schemes of arrangement, the court (while having a wide discretion to refuse to sanction a scheme of arrangement) has usually taken comfort from the fact that creditors are usually the best judge of their own commercial interests and that since each class has approved the scheme of arrangement there is a good reason for saying that the scheme of arrangement is fair. As a result, the court has largely been concerned with whether the votes of each class are fairly representative of the class as a whole or whether a particular creditor has some ancillary interest which has led them to vote (and carry the vote for the class) in a way that is adverse to the interests of the class as a whole. The court will not be able to rely on this in any restructuring plan where the cross-class cram-down is being utilised and the court is therefore likely to conduct greater scrutiny in these circumstances and, for the protection of creditors, this is to be welcomed.
14. What role will valuations play in a restructuring plan?	Valuations are likely to be key and even more hotly contested that in a scheme of arrangement given the need to identify those creditors who do or do not have a genuine economic interest in the company and in considering whether creditors are receiving at least what they would receive in the relevant alternative.
15. Can the restructuring plan be used in conjunction with the moratorium?	Yes, the moratorium can be used either prior to or simultaneously with a restructuring plan (although see above re the inability to compromise certain debts if the plan is proposed within 12 weeks of the end of the moratorium). Where an application is made for a restructuring plan or a scheme of arrangement at a time when the moratorium is in force, the court can make an order extending the moratorium to any date as it decides in its discretion.

16. What will protect creditors'/members' rights from being unfairly prejudiced by larger or more senior creditors?

Ultimately there are two main protections for creditors.

1. Where, as a class, they do not approve the plan, they must receive at least what they would have received in the relevant alternative. This might give the impression of greater protection than it deserves – this is quite a low threshold for the supporting creditors or the company to demonstrate, particularly if they are able to persuade the court that the relevant alternative is liquidation.
2. The greater protection is offered by the court's discretion as to whether to sanction a plan. The courts have demonstrated, in connection with schemes of arrangement, that they are not there to simply "rubber stamp" the process and that their role is to conduct proper scrutiny and we can certainly expect no less from them in relation to a restructuring plan where the cross-class cram-down makes the protection of creditors' rights even more imperative.

17. Would the 'absolute priority rule' have offered more protection?

When the government originally consulted on the introduction of the restructuring plan, they indicated that they intended to incorporate a form of the absolute priority rule. The absolute priority rule is the concept that a dissenting class of creditors, who do not as a class approve the plan, would have to be satisfied in full before a more junior class could receive any distribution under the plan. The government proposed to give the court a discretion to approve a plan even where it deviated from the absolute priority rule where deviation was necessary to achieve the aims of the restructuring and was just and equitable in the circumstances (sometimes referred to as the 'relative priority rule'). Having removed any references to a priority rule (absolute or relative), there is greater risk of more senior lenders being dragged along in a restructuring they do not agree with in circumstances where they are not necessarily required to be kept whole.

18. Can the court's decision to approve a plan be appealed?

Yes, the court's decision can be appealed. Our experience with schemes of arrangement is that it is extremely rare for a scheme to be appealed, largely because the court involvement throughout the process and the ability for opposing creditors to appear at the court hearings means that issues are considered and dealt with at an earlier stage. However, it remains to be seen whether the inclusion of the cross-class cram-down leads to a greater number of appeals given the greater role of discretion in the court's determination.

19. If a plan fails, what rights do I have against the company?

Where a plan has been approved but has ultimately failed to prevent the company from going into an insolvency proceeding, the rights of a creditor or member against the company will be those rights that were provided for under the plan rather than the original rights.

20. Why is this potentially better than a company voluntary arrangement?

At present, a large number of company voluntary arrangements fail (up to 60%) and they are also unable to compromise the rights of a secured creditor to enforce their security – as such often a company voluntary arrangement will need to be coupled with bilateral agreements with secured creditors in order to achieve a wholesale restructuring of a business. This gives secured creditors a certain hold-out value. Moreover, a company voluntary arrangement cannot impact the shareholding of the company – being limited to compromising rights of creditors. This is not the case with the restructuring plan.

21. Why is this potentially better than a scheme of arrangement?	A scheme can compromise the rights of secured creditors, but in a scheme creditors need to be divided into classes and each class must approve the scheme by the requisite majority – this can give junior classes of creditors a hold out value. Although a scheme can change the shareholding of an entity, in a private company where there is a single corporate shareholder – they would constitute a class of one and so have a complete hold out value in a scheme where each class needs to approve the compromise. To address this, a scheme can be coupled with a pre-packaged administration sale of the business to a lender owned newco but it is a two stage process. The restructuring plan allows you to compromise the rights of secured creditors, allows you to cram down across classes and allows you to change the shareholding so that you can leave the corporate structure otherwise intact. One downside to the restructuring plan is that is cannot be used in the case of a company which is not in financial difficulty, as such, solvent companies will still need to pursue a scheme in order to affect a compromise or reorganisation.

Wrongful trading

1. What is proposed?	Contrary to the previous announcements made by the government, the Act does not 'suspend' or 'switch-off' the existing wrongful trading provisions under section 214 and 246ZB of the Insolvency Act 1986. Instead, for the purposes of those existing (and still applicable!) provisions, the Act directs the courts to assume that a director is not responsible for any worsening of the financial position of the company or its creditors that occurs during the relevant period (ie from 1 March 2020 to 30 September 2020). The Act reduces, but does not remove, the threat of personal liability arising from wrongful trading for directors who continue to trade a company through the Covid-19 pandemic not knowing whether the company will be able to avoid insolvency in the future.
2. Can you remind me of how the existing wrongful trading provisions apply?	Under the existing (and still applicable) regime, directors can be found liable for wrongful trading where: (a) a company has gone into insolvent liquidation or administration; (b) the director, at some time before the commencement of the insolvent liquidation or administration, knew or ought to have concluded that there was no reasonable prospect that the company would avoid insolvent liquidation or administration; and (c) the director cannot make out the statutory defence that they took every step they ought to have taken to minimise the potential loss to creditors. If a director is found liable, the court (on application from a liquidator/administrator) may declare that a director must contribute to the company's assets (a compensatory rather than a penal measure). The test is strict: where a director is aware (or ought to have concluded) that an insolvent liquidation or administration cannot reasonably be expected to be avoided, that director has a duty to do everything possible to minimise the potential losses of the company's creditors.
3. Can a director still be liable for wrongful trading during the 'relevant period'?	Yes. Under the Act, provided that the existing tests are met, a director could still be liable for wrongful trading during the relevant period. The court has a wide discretion to require a director to contribute to the assets of the company in respect of any losses caused to the company during the period of wrongful trading. However, the Act significantly curtails this discretion and directs the court to assume that a director was not responsible for any worsening of the financial position of the creditors or the company that occurs during the relevant period. This significantly reduces (although does not eliminate) the likelihood that the court would make a contribution order against a director and, even if one was made, significantly reduces the likely quantum of that order.

4. What does 'worsening of the financial position of the creditors or the company' mean?	'Worsening of the financial position' is not defined and, unlike in other parts of the Act, is not limited to a worsening as a consequence of, or for reasons relating to, Covid-19. In recent cases, the courts have considered the proper approach to take when considering the quantum of a contribution order against directors liable for wrongful trading. Generally, the courts have calculated the increase in the net deficiency of the company during the period of wrongful trading. It may be that the courts apply a similar approach when calculating the worsening of the financial position of the company. The reference to creditors is likely to mean the general body of creditors as a whole, as opposed to individual creditors, although this will be a point for the courts to determine.
5. Do directors still have to consider whether to file for insolvency during the relevant period?	Yes. The existing wrongful trading provisions are designed to make directors liable for debts and liabilities of the company of which they are officers if, when they should have realised that the company's position is untenable, they continued to trade and worsened creditors' losses instead of doing everything possible to minimise the potential losses to creditors. Where a director concludes or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation/ administration, liability may arise if a director does not take every step with a view to minimising the potential loss to the company's creditors. If a director does take every such step, that director should not be liable. What steps a director should take will depend on the circumstances but, in some cases, will mean immediately ceasing to trade and placing the company into an insolvency proceeding. In other situations, however, minimising losses to creditors may involve continuing to trade while exploring other options. Given the difficulty for directors in judging whether there is a reasonable prospect of avoiding an insolvent liquidation or administration due to the unpredictability of the Covid-19 situation, the Act does not give directors the breathing space they may have been expecting. A director will still have to make difficult decisions as to whether or not to put an otherwise viable business into an insolvent liquidation or administration to avoid the ongoing threat of potential personal liability (albeit at a reduced quantum).
6. Does the revised wrongful trading regime apply to directors of all companies?	No. The revised regime will not apply to directors of '**Excluded Entities**' or parties of capital market arrangements or puplic-private partnership project companies. Therefore, directors of these entities will not be protected by the relaxation of the wrongful trading regime.
7. Will the measures be extended?	The Secretary of State has the power to change the duration of the temporary provisions by regulation made by statutory instrument. The power extends to reducing the duration of the 'relevant period' for the purposes above or to extending the 'relevant period' by up to six months in each case, if considered reasonable in order to mitigate an effect of Covid-19.
8. What about other legal duties and liabilities of directors?	A brief summary of some of the principal potential avenues for liability of directors is set out below. These provisions are not affected by the Act. Further information on can also be found in our factsheet which is available **here**.

9. Directors' duties	The Act does not impact the requirement that directors must act in accordance with the duties that they owe to the company under the Companies Act 2006. These duties include a duty on directors to: (a) act within their powers; (b) promote the success of the company; (c) exercise independent judgment; (d) exercise reasonable care, skill and diligence; and avoid situations in which their interests can or do conflict, or may possibly conflict, with those of the company.
10. Fraudulent trading	The Act does not impact the existing law relating to fraudulent trading either as a criminal offence or as a civil offence under sections 213 and 246ZA of the Insolvency Act 1986. A director will be liable for fraudulent trading if the business of the company is carried on with the intent to defraud creditors or for any fraudulent purpose and they participated in this with knowledge that there was an intention to defraud. Directors will fall foul of this provision where they incur new liabilities knowing that there is no prospect that the company will be able to repay those liabilities when they fall due or shortly thereafter, even if they believe that the company would be able to repay them at some point further in the future.
11. Disqualification	The Act does not impact the possibility of disqualification as a director, or the making of a compensation order, under the Company Directors Disqualification Act 1986 (**CDDA**). Directors are at risk of disqualification where the relevant company has become insolvent and where the court considers that the particular director's conduct as a director is such that the person is unfit to be concerned in the management of a company – the court will consider the full range of a director's conduct, including whether they have breached their duties as directors and whether they have been found guilty of fraudulent or wrongful trading. Furthermore, the CDDA also allows the court, where the director has 'caused loss' to one or more creditors, to make a compensation order requiring the director to contribute to the assets of the company or to make a payment for the benefit of a particular creditor or creditors. However, it is hoped that, in the current circumstances, the court would take a more lenient approach in relation to such compensation orders.

Statutory demands and winding-up petitions

1. What is proposed?	The Act temporarily removes the threat of statutory demands and winding-up proceedings where Covid-19 has had a worsening financial effect on the relevant company. Companies will not be protected from the making of a winding-up order where the financial difficulties of the company would have arisen even without the effects of Covid-19.
2. What is proposed for statutory demands?	The Act provides that statutory demands will be void if served on a company during the relevant period.
3. What is the relevant period?	The relevant period is defined as the period between 1 March 2020 and 30 September 2020.
4. What is proposed for presenting winding-up petitions?	The Act reduces the circumstances in which winding-up petitions can be presented by creditors. During the relevant period, a creditor may not present a winding-up petition in respect of an unpaid statutory demand or unsatisfied judgment debt unless that creditor has reasonable grounds for believing that: (i) Covid-19 has not had a financial effect on the company; or (ii) the grounds for presenting the winding-up petition would have arisen (ie the company would not have paid the amount due in respect of the statutory demand or unsatisfied judgment debt) even if Covid-19 had not had a financial effect on the company. During the relevant period, a creditor may not present a winding-up petition in respect of a company that is insolvent (either on a cash-flow or balance sheet basis) unless that creditor has reasonable grounds for believing that: (i) Covid-19 has not had a financial effect on the company; or (ii) the company would have been insolvent (either on a cash-flow or balance sheet basis) even if Covid-19 had not had a financial effect on the company.

5. When do the restrictions apply?	The restrictions on presenting a winding-up petition apply retrospectively and the Act makes it clear that for winding-up petitions that are presented on or after 27 April 2020 but before the Act comes into force, the court (as opposed to the presenting creditor) will apply the tests set out above. If the court finds that the tests are not satisfied, it may make such order as it thinks appropriate to restore the position to what it would have been if the winding-up petition had not been presented. The Act also provides that any winding-up orders made on or after 27 April 2020 but before the Act comes into force will be void if the order would not have been made had the court applied the tests under the Act which are set out below. We note that in this intervening period the courts excercised their discretion to dismiss winding-up petitions in anticipation of the Act coming into effect.
6. What is proposed for winding-up orders?	If a winding-up petition is presented by a creditor during the relevant period that claims that a company is unable to pay its debts, the court will consider whether Covid-19 had a financial effect on the company before the presentation of the petition. The court may only wind up the company if: (a) for a petition presented in respect of an unpaid statutory demand or unsatisfied judgment debt, the ground for presenting the winding-up petition would have arisen (ie the company would not have paid the amount due in respect of the statutory demand or unsatisfied judgment debt) even if Covid-19 had not had a financial effect on the company; or (b) for a petition presented in respect of a company that is insolvent (either on a cash-flow or balance sheet basis), the company would have been insolvent (either on a cash-flow or balance sheet basis) even if Covid-19 had not had a financial effect on the company.
7. Can a statutory demand still be served on a company?	Yes. The Act does not prevent a statutory demand being served on a company. However, any statutory demand so served on a company during the relevant period will be void and no petition for the winding-up of a company may be presented after 27 April 2020 in respect of such a statutory demand.
8. Will a statutory demand be void even in respect of a company not in financial difficulty or a company that is in financial difficulty for reasons other than Covid-19?	Yes. All statutory demands served on a company during the relevant period will be void. There is no carve-out for statutory demands served on companies that are not in financial difficulty or are in financial difficulty for reasons other than Covid-19.
9. Can a company apply to have a statutory demand set aside?	Unlike for individual debtors, there is no procedure for a company to apply to set aside a statutory demand served on it. The remedy for a company that wishes to avoid a creditor issuing winding-up proceedings on the basis of a statutory demand would be to apply to restrain the presentation of a winding-up petition. However, any statutory demand served on a company during the relevant period will be void and no petition for the winding-up of a company may be presented after 27 April 2020 in respect of such a statutory demand.

10. What does 'Covid-19 has a financial effect' on a company mean?	The Act states that Covid-19 has a 'financial effect' on a company if (and only if) the company's financial position worsens in consequence of, or for reasons relating to, Covid-19. However, this language does not take into account certain practical realities of the business world's reaction to Covid-19. For example, certain companies might have taken the decision to mothball parts of their business during the Covid-19 pandemic. Those companies may in fact improve their financial position for short term trading but still not be able to make certain debt payments. It is unclear whether the language of the statute would be wide enough to cover these situations, although our expectation is that the courts would give a broad interpretation to the term 'financial position' and assess each case on its particular merits and facts.
11. Practically, how can a court determine whether Covid-19 has had a 'financial effect' on a company?	Whether Covid-19 has had a 'financial effect' on a company will be a question of fact. However, the temporary emergency measures are intended to protect UK businesses from aggressive debt recovery actions. Given that the Covid-19 pandemic has had far-reaching consequences for a wide range of UK businesses, our expectation is that the courts would take a broad interpretation of the term 'financial position' and assess each case on its particular merits and facts. If the court determines that Covid-19 has had a 'financial effect' on a company, it must still go on to consider whether the company would have been insolvent (either on a cash-flow or balance sheet basis) or unable to pay its debts even if Covid-19 had not had a financial effect on the company. If the court finds that the impact of Covid-19 worsened the outcome for the company, but did not change that outcome then it may still make an order for the winding-up of the company.
12. How long will it take the court to make a determination?	Given the pressures on the courts in the Covid-19-affected environment, it is not clear how long the court will take to determine whether to make the winding-up order. The court will be required to make factual determinations which could require evidence or submissions to be made, which could extend the process. Borrowers and lenders should check their finance documents (including the insolvency proceedings event of default) to see whether the presentation of a winding-up petition will cause an event of default and whether a grace period applies within which a winding-up petition may be discharged, stayed or dismissed before an event of default is triggered. Normally these grace periods are for short periods of time such as 15 or 30 days. It is not certain that the court will be able to make a determination within that period of time, particularly if a winding-up petition is contested.
13. Are transactions entered into after a winding-up petition is presented void?	Under section 127 of the Insolvency Act 1986 certain transactions, including any disposition of the company's property and any transfer of shares made after the commencement of a winding-up, are void. Where a creditor makes a winding-up petition during the relevant period and the court makes an order for a winding-up of the company, the Act shifts the point in time at which a winding-up will be deemed to commence for the purposes of section 127 from the time of the presentation of the winding-up petition to the making of the winding-up order. Therefore, transactions that are entered into after the presentation of a winding-up petition during the 'relevant period' but prior to the making of the winding-up order will not be void.

14. What happens if an order for a winding-up of a company has already been made but should not have been made under the Act?	The Act provides that any winding-up order made on or after 27 April 2020 but before the Act comes into force will be void if the order would not have been made had the court applied the tests under the Act. Following the making of a winding-up order that is subsequently to be regarded as void, an official receiver, liquidator or provisional liquidator may have taken certain actions in the normal course of the winding-up of the company. The Act provides an exculpation of criminal or civil liability for anything done by those persons pursuant to the (subsequently void) order. The Act also enables the court to give such directions to the official receiver, liquidator or provisional liquidator as it thinks fit for the purpose of restoring the company, to which the (subsequently void) order relates, to the position that company was in immediately before the winding-up petition was presented. It is not clear how this would operate in practice, particularly, for example, if key assets have been sold, important employees have left the business or the company's operations have been irreversibly shut-down.
15. Do the emergency measures in relation to statutory demands and winding-up petitions apply to all companies?	Yes. The temporary emergency measures in relation to statutory demands and winding-up petitions apply to all companies – there are no exceptions for 'Excluded Entities'.
16. Will the measures be extended?	The Secretary of State has the power to change the duration of the temporary provisions by regulation made by statutory instrument. The power extends to reducing the duration of the 'relevant period' for the purposes above or to extending the 'relevant period' by up to six months in each case, if considered reasonable to mitigate effects of Covid-19.

Company meetings

1. What types of flexibility will the legislation provide in relation to company meetings?	The flexibilities relate both to how company meetings may be held, and the deadlines before which they must be held.
2. How can member meetings be held under the new provisions?	Meetings may be held on a "closed" basis – a meeting need not be held at any particular place; quorum requirements can be met without any participants being together at the same place; and a member does not have a right to attend a meeting in person, participate in a meeting other than by voting, or vote by particular means (so, for example, appointing the chair of a meeting as proxy to vote would satisfy the right to vote). In addition, meetings may be held and votes may be cast, "by electronic or any other means". So, a meeting may be held on an entirely virtual basis. These flexibilities apply irrespective of anything to the contrary in statute or a company's constitution.
3. When will it be possible to hold a meeting in the ways permitted by these provisions?	The provisions will apply (partly retrospectively) to general meetings held between 26 March and 30 September. This period can be shortened, or extended for up to 3 months at a time (up to 5 April 2021 at the latest).
4. What are the implications of these flexibilities for shareholder engagement with company meetings?	The provisions in the Act facilitate the ability of companies to get their meetings held in a manner consistent with preventing the spread of Covid-19. The ability of companies to hold meetings on a "closed" basis may raise concerns in relation to shareholder engagement. However, Q&A documents published jointly by BEIS and the FRC recognise the importance of continuing to engage with members in relation to meetings held during the current circumstances, and we expect best practice guidance on the topic to be published.
5. What extensions are offered in relation to company AGMs?	AGMs due to be held between 26 March and 30 September should be held by 30 September. This means that listed companies with 31 March year ends are not currently granted an extension. Regulations may be made to increase this extension (but may not extend the period for holding an AGM by more than eight months).

Exclusions

1. What is an 'Excluded entity' for the purposes of ipso facto and moratorium provisions?

(a) Insurers;

(b) Deposit-taking banks and banking group companies under the Banking Act 2009;

(c) Investment banks and investment firms;

(d) Electronic money institutions;

(e) Payment institutions;

(f) Operators of payment systems and infrastructure providers / companies;

(g) Recognised investment exchanges, recognised clearing houses or recognised CSDs;

(h) Securitisation companies; and

(i) Any overseas entities whose functions correspond with the above list of entities.

In addition, a company which has permission under Part 4A of FSMA to carry on a regulated activity, and which is not subject to a requirement to refrain from holding money for clients, will also be specifically excluded from being eligible for the company moratorium with temporary modifications and from the wrongful trading suspension.

The new provisions relating to the company moratorium, termination clauses and wrongful trading suspension will also not apply to building societies, friendly societies and credit unions.

Additional entities which are excluded from being eligible for the company moratorium

(a) Companies that are party to market contracts or subject to market charges;

(b) Participants in designated systems;

(c) Parties to a capital market arrangement where the debt incurred or expected to be incurred was at least £10 million and involved the issue of a capital market investment; and

(d) A project company of a project which is a public-private partnership project which includes step-in rights.

2. What is an 'Excluded contract'?

(a) Financial contracts, meaning:

(i) a contract for the provision of financial services consisting of (i) lending (including the factoring and financing of commercial transactions), (ii) financial leasing, or (iii) providing guarantees or commitments;

(ii) a securities contract, including (i) a contract for the purchase, sale or loan of a security group or index of securities; (ii) an option on a security or group or index of securities; (iii) a repurchase or reverse repurchase transaction on any such security, group or index;

(iii) a commodities[1] contract, including (i) a contract for the purchase, sale or loan of a commodity or group or index of commodities for future delivery; (ii) an option on a commodity or group or index of commodities; (iii) a repurchase or reverse repurchase transaction on any such commodity, group or index;

(iv) a futures or forwards contract, including a contract (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date;

(v) a swap agreement, including (i) a swap or option relating to interest rates, spot or other foreign exchange agreements, currency, an equity index or equity, a debt index or debt, commodity indexes or commodities, weather, emissions or inflation; (ii) a total return, credit spread or credit swap; (iii) any agreement or transaction that is similar to an agreement referred to in sub-paragraph (i) or (ii) which is the subject of recurrent dealing in the swaps or derivatives markets;

(vi) an inter-bank borrowing agreement where the term of the borrowing is three months or less;

(vii) a master agreement for any of the contracts or agreements referred to above.

(b) Securities financing transactions, within the meaning given by Article 3(11) of Regulation (EU) 2015/2365 on the transparency of securities financing transactions (but for the purposes of that Article, references to "commodities" in that Regulation are to be taken as including the units and allowances referred to above) and related master agreements.

(c) Derivatives, within the meaning given by Article 2(5) of Regulation (EU) No. 648/2012, and any related master agreement.

(d) Spot contracts, within the meaning given by Article 7(2) or 10(2) of Commission Delegated Regulation of 25.4.2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, and any related master agreement.

(e) Capital market investments, meaning that the investment is within article 77 or 77A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) (debt instruments) and is rated listed or traded or designed to be rated listed or traded, or consists of a bond or commercial paper issued to one or more of: an investment professional (as defined in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (S.I. 2005/1529) (the **Order**); a person who, when the agreement was entered into, was a certified high net worth individual in relation to a communication within article 48(2) of the Order or who falls under article 49(2) of the Order; a person who, when the agreement was entered into, was a certified sophisticated investor in relation to a communication under article 50(1) of the Order; or a person in a State other than the United Kingdom who under the law of that State is not prohibited from investing in bonds or commercial paper.

[1] Commodities has a defined meaning for these purposes.

Additional excluded contracts for the payment of pre-moratorium debts	(a) Contracts to accept and process card-based payment transactions, within the meaning given by Regulation (EU) 2015/751 of the European Parliament and of the Council of 29th April 2015 on interchange fees for card-based payment transactions, specifically from the company moratorium. (b) Market contracts within the meaning of Part 7 of the Companies Act 1989 (see section155 of that Act). (c) Qualifying collateral arrangements and qualifying property transfers within the meaning of Part 7 of the Companies Act 1989 (see section 155A of that Act). (d) Default arrangements and transfer orders, within the meaning of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (S.I. 1999/2979) (see regulation 2 of those Regulations). Contracts secured by certain charges or arrangements where any obligation under the contract is - (a) secured by a market charge within the meaning of Part 7 of the Companies Act 1989 (see section 173 of that Act), (b) secured by a system-charge within the meaning of the Financial Markets and Insolvency Regulations 1996 (S.I. 1996/1469) (see regulation 2 of those Regulations), or (c) secured or otherwise covered by a financial collateral arrangement within the meaning of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226) (see regulation 3 of those Regulations).
3. What are 'financial protections'?	The legislation provides that the protections provided by the following arrangements and legislation are unaffected by the new moratorium and ipso facto provisions: (a) Set-off and netting arrangements (within the meanings given by section 48(1)(c) and (d) of the Banking Act 2009). These arrangements are excluded from the effect of the termination clauses provisions. The company moratorium will not affect the operation of set-off or netting. (b) Part 7 of the Companies Act 1989 (financial markets and insolvency). (c) The Financial Markets and Insolvency Regulations 1996 (S.I. 1996/1469). (d) The Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (S.I. 1999/2979). (e) The Financial Collateral Arrangements (No.2) Regulations 2003 (S.I. 2003/3226).

Key contacts

Katrina Buckley
Partner
Tel +44 20 3088 2704
katrina.buckley@allenovery.com

David Campbell
Partner
Tel +44 20 3088 4768
david.campbell@allenovery.com

Tim Crocker
Partner
Tel +44 20 3088 3208
tim.crocker@allenovery.com

Joel Ferguson
Partner
Tel +44 20 3088 2414
joel.ferguson@allenovery.com

Ian Field
Partner
Tel +44 20 3088 2671
ian.field@allenovery.com

Earl Griffith
Partner
Tel +44 20 3088 2635
earl.griffith@allenovery.com

Nick Lister
Partner
Tel +44 20 3088 2469
nick.lister@allenovery.com

Jennifer Marshall
Partner
Tel +44 20 3088 4743
jennifer.marshall@allenovery.com

Melissa Samuel
Partner
Tel +44 20 3088 4361
melissa.samuel@allenovery.com

Hannah Valintine
Partner
Tel +44 20 3088 2238
hannah.valintine@allenovery.com

Tim Watson
Partner – London
Tel +44 20 3088 3984
tim.watson@allenovery.com

Randal Weeks
Partner
Tel +44 20 3088 2661
randal.weeks@allenovery.com

Lucy Aconley
Counsel
Tel +44 20 3088 4442
lucy.aconley@allenovery.com

Nick Charlwood
Counsel
Tel +44 20 3088 4106
nicholas.charlwood@allenovery.com

Nicola Ferguson
Senior PSL
Tel +44 20 3088 4073
nicola.ferguson@allenovery.com

Mallika Abidi
Senior Associate
Tel +44 20 3088 2514
mallika.abidi@allenovery.com

Matthew Kimber
Senior Associate
Tel +44 20 3088 1475
matthew.kimber@allenovery.com

UK
CS2005_CDD-59861_ADD-90607