

Response ID ANON-KGMK-XSAP-6

Submitted to **Consultation on Developing an Insolvency Regime for the Further Education and Sixth Form Sector**
Submitted on **2016-08-04 16:37:32**

Introduction

1 What is your name?

Name:

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2 What is your email address?

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3 What is your organisation?

Representative/ sector organisation

Name of organisation:

Sixth Form Colleges Association

4 Do you agree that only the Special Administration Regime (SAR) element of this regime should be applied only to Designated Institutions that are companies?

Yes

Please give reasons for your answer. :

Yes, for consistency. The concepts are not appropriate for unincorporated entities.

5 Which of the insolvency measures summarised in our proposals (company voluntary arrangement, ordinary administration, compulsory liquidation, creditor's voluntary liquidation) should be available in the event of college insolvency, as well as a Special Administration Regime? Please explain your answer(s).

Please explain your answer(s):

It is appropriate to extend the range of insolvency measures to colleges as this will offer greater flexibility and will enable creditors to deal with colleges with the same confidence with which they would deal with trading companies. However, given the complexity and sensitivity of college insolvency, the Special Administration regime is likely to be the one that is used most frequently. Of the current options in standard insolvency practice, the Company Voluntary Arrangement should also be an option for colleges as this would give a college in difficulty an opportunity to sort out its finances and enable it to focus on continuity of learning. The ability of students to complete their studies is a paramount concern.

6 Does the proposed special objective sufficiently reflect the needs of learners and creditors?

Yes

Please give reasons for your answer. :

The planned special objective does appropriately safeguard the needs of learners in the event of a college insolvency. The current absence of a resolution regime for colleges means that insolvency situations may be both confusing and costly with learners suffering.

While the special objective does not appear to prejudice the position of creditors, it will be important that the wider insolvency regime is framed in a manner which does not destabilise relationships between colleges and lenders. In the social housing sector a proposed SAR framework was modified due to a range of issues including the length of SARs and debt servicing during the SAR period.

It is important that colleges are seen as being robust business partners by other commercial bodies in the private sector and are not perceived as being a higher risk. Therefore, reference to creditors continuing to be treated fairly in the event of a SAR being implemented should be included in the special objectives.

7 Do you have any comments on our proposals for SAR initiation?

Comments on SAR initiation :

The initiation process for a SAR appears reasonable. As much as possible the regime should mirror standard administration processes. However, the SAR is only initiated when, or after, a college becomes insolvent and the actions needed to recover the situation may, by then, need to be severe. If a college, or the EFA, could invoke the SAR process earlier, as a result of some other 'trigger' event, then there is a better chance of a speedy recovery without the need for potentially drastic measures and less disruption to learners. The early trigger events could be, for example, a deficit in I&E Reserve (after FRS17), breach of bank loan covenants, more than 'n' consecutive years of deficit of income and expenditure, more than 'n' consecutive years of cash deficit (excluding capital expenditure and exceptionals) etc.

8 What issues, if any, would you envisage if transfer of provision or assets/liabilities were required?

What issues, if any, would you envisage if in the event of transfer of provision of assets/ liabilities were required? :

The consultation paper does not refer to the complications arising from the Exchequer Interest in land and buildings through capital grants. Many colleges own assets which were partly funded by government capital grants. The majority of Catholic and trust-based Sixth Form Colleges do not own their land and buildings but are granted access to them by the Diocese or their Trustees. The buildings have usually been improved or financed by capital grants with a depreciating exchequer interest. Any re-distribution of assets would be challenged by any profit being claimed by the Secretary of State or by the unsecured interest of a former owner (e.g. land given for educational purposes). Continuity of provision is another consideration where an educational site is closed and students have to travel to another provider and the costs of transport to parents are not picked up by local authorities. Difficulties in ascertaining ownership of assets where trusts are concerned is also another issue to consider. Transfer of assets may contravene bank loan covenants and crystallise a bank loan liability.

9 Do you have any views on our proposals in relation to directors' and governors' liabilities?

Do you have any views on our proposals in relation to directors' and governors' liabilities?:

The consultation paper notes that, as charity trustees, governors have a duty to act with reasonable care and skill. They must act responsibly, reasonably and honestly; they should put appropriate procedures and safeguards in place. The paper also notes that trustees can be held personally liable to their charity for any financial loss they cause or help to cause by their wrongful action although charity law protects trustees who have acted honestly and reasonably from personal liability.

The liabilities put in place by the Insolvency Act 1986 were intended to ensure that the requirement for directors to act diligently and without negligence or dishonesty is a statutory requirement to give credibility to the incorporated body regime.

The extension of governor liability may have serious effects on college governance as a whole. Existing and potential governors may be discouraged from taking on the already heavy responsibilities of the voluntary position of governor when informed that the role exposes them to unlimited civil liability and even imprisonment. It would be a particularly perverse outcome of the proposals if accountants, lawyers and other professionals were increasingly wary of joining college governing bodies. Liabilities should not affect their own businesses and current directorships.

10 Do you agree that, as a matter of general principle, the insolvency law applying to companies on the avoidance of transactions should apply to colleges?

Yes

Please explain your answer.:

The application of insolvency law to set aside earlier transactions appears reasonable to prevent any party being unfairly preferred. Avoidance of transactions is an important weapon for the administrator against the unscrupulous. But it should be available only in very special circumstances - such as insolvency.

11 Do you agree that only provisions of Part 3 of the Insolvency Act 1986 that deal with fixed charges, should apply to colleges?

Yes

Please explain your answer.:

Yes. Colleges should have the same requirements and obligations to creditors as other trading companies in the private sector.

12 Do you have any other comments on the proposals set out in the consultation document?

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The term "college in education administration" may be unhelpfully confused with the status of "administered college". It is also important that comprehensive guidance is made available to governors to understand the regime. When publishing the final process it would be useful to understand how likely it is that it will actually be used - perhaps by stating how many colleges DfE believe it would have applied to in the past.