# CORPORATE DEBT UPDATE

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ADDLESHAW GODDARD

# INTRODUCTION

Welcome to the Winter edition of the Addleshaw Goddard Corporate Debt Update

Since our last edition the uncertainty created by Brexit has continued and further challenges have been presented by the upcoming general election, all contributing to a climate in which many corporates have taken the conscious decision not to transact at all, especially given many are also in a position of having completed refinancing deals last year. For those that have entered into transactions the uncertainty created by Brexit and the election have led to protracted transaction timelines and additional scrutiny on investment decisions and rationale. Credit sanctions also suggest additional diligence and sensitivities before transacting. However, there are sectors that continue to attract interest, with a range of funders and products available to support on the right terms.

Leading this edition is an extended article examining the UK Government's Green Finance Strategy. We examine in detail and provide commentary on the objectives of the strategy, what it might mean for UK business and the finance industry and what the next steps might be for all those impacted by it. This article follows on from, and links to, previous articles we have included in this publication focusing on the growth and evolution of 'green' and 'sustainable' financing. The prominence of this subject matter in market publications, industry seminars and the general news illustrate that 'green' and 'sustainable' are ever more likely to play a key role in financing.

We also take a closer look at a seemingly quiet change announced by the UK Government to the order of payments to creditors upon a business insolvency, i.e. that of moving HMRC ahead of certain categories of secured lenders. Where we are in the financial cycle means that the relevance of this change for the corporate debt market could be even greater than it might otherwise have been and members of Addleshaw Goddard have been actively involved in voicing concerns about this change through their involvement with industry associations such as R3 – the Association of Business Recovery Professionals, the UK's leading trade body for the insolvency profession. In this article we explain the proposed changes, examine their potential impact and reflect on some of the mitigants that lenders and borrowers may wish to consider employing at the point the proposals come into effect.

Finally, we consider the impact, on both funders and borrowers, of the extension of the Pension Regulator's powers and the introduction of new criminal offences under the measures set out in the Pension Schemes Bill that was published in October 2019.

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# THE UK GOVERNMENT GREEN FINANCE STRATEGY

In previous editions of this publication we have reviewed the growth of green financing and the evolution of sustainable financing in the loan market. 'Green' and 'sustainable' continue to be buzz words in an ever widening group within the world of business and finance and, on the 2 July 2019, the Government published its Green Finance Strategy (**GFS**), subtitled "Transforming Finance for a Greener Future". The GFS aims to ensure that climate and environmental factors are fully integrated into mainstream financial decision making across all sectors and asset classes. The GFS is the Government's response to a Report by the Green Finance Taskforce, published in March 2018, which set out recommendations as to how the Government and the private sector can work together to integrate green finance into the UK's financial services industry.

In this extended article we examine the contents of the GFS and what it might mean for business and finance in the UK.

## WHAT GFS MEANS FOR UK BUSINESS AND THE FINANCE INDUSTRY?

In a nutshell:

- businesses will need to put a 'price' on climate adaptation and start reporting on what they are doing to address it;
- the Green Finance Institute (**GFI**), established in July 2019, should help the public and private sectors to share ideas and come up with innovative new green finance products; and
- the UK wants to be seen as 'the' place to come for green finance: the country that can help other countries set up their own green finance products.

## WHAT ARE THE GFS OBJECTIVES?

The GFS has two objectives:

- to align private sector financial flows with clean, environmentally sustainable and resilient growth, supported by Government action, and
- to strengthen the competitiveness of the UK financial services sector.

To achieve these objectives, the Government has set out its plans in three 'strategic pillars':

- **Greening Finance**: integrating climate and environmental risks into mainstream financial decision making;
- **Financing Green**: mobilising and accelerating flows of private finance to support key clean growth and environmental sectors; and
- **Capturing the Opportunity**: ensuring that the UK continues to capture the commercial opportunities arising from the global and domestic shifts to clean growth (i.e. from the first two pillars).

## GREENING FINANCE

The publication of the GFS has the potential to mark a pivotal point in the evolution of the UK 'green' finance market, in terms of how funders make their decisions to invest and develop new financial products, in each case to capitalise on the opportunities that the 'green' objectives the Government has set industry, business and financial institutions will give rise to.

In order to incorporate 'green' into decision making across the UK financial services industry the GFS places emphasis on:

- clear, uniform objectives that bring about a shared industry understanding through, amongst other initiatives, setting out its expectations for all listed companies and large asset owners and developing a set of Sustainable Finance Standards, together with the British Standards Institution, for industry participants to work towards;
- clarifying roles and responsibilities of agencies like the Financial Conduct Authority and Prudential Regulation Authority in carrying out their duties in respect of encouraging, promoting and supervising climate-related financial issues;
- fostering a culture of transparency by setting out clear disclosure requirements and supporting quality disclosure through the publication of data and guidance; and
- overall, building a robust and consistent green finance market framework.

The ultimate aim of these combined objectives is to make the financial risks and opportunities of 'green' factors an essential and 'normal' element of good business strategy.

## FINANCING GREEN

The UK has committed to ambitious climate change targets. The UK Climate Change Act 2008 was recently amended by the Climate Change Act 2008 (2050 Target Amendment) Order 2019 to introduce the Government's new target for the UK to reach net zero greenhouse gas emissions by 2050. There is also the Clean Growth Strategy, the 25 Year Environment Plan and the National Adaptation Programme. All these will require significant investment in resilient low carbon infrastructure and services – a huge opportunity for UK business and financial institutions.

To mobilise green investment, both domestically and internationally, the government's approach has four main elements:

- **Establish robust, long-term policy frameworks**

Investors need long-term certainty, so they know they will get a return on their investment. The legally binding targets in the Climate Change Act 2008 (now made even tighter by the recent amendment order), with ongoing monitoring through five-yearly 'carbon budgets' mean the UK has to keep reducing emissions, so will continue to need investment in low-carbon infrastructure.

A key theme of the Green Finance Taskforce was the importance of driving supply and demand for green lending products. The GFS outlines a number of supportive policies for doing exactly this, including several around business energy use, for example, the Industrial Energy Transformation Fund to support businesses with high energy use to transition to low carbon and be more energy efficient; Climate Change Agreements to provide tax discounts from the Climate Change Levy to incentivise energy efficiency across industrial sectors; and the Industrial Heat Recovery Support programme designed to encourage and support investment in heat recovery technologies.

- **Improve access to finance for green investment**

There is a need for additional government support to overcome investment hurdles in certain sectors and the government has already set up or is in the process of setting up various public funds to leverage private capital investment in clean energy and natural capital growth e.g. a clean growth venture capital fund to be launched with a contribution from the Department for Business, Energy and Industrial Strategy for investment in UK companies seeking to commercialise promising technologies hopes to raise matched (or greater) funding from the private sector.

The GFS also seeks to unlock new revenue streams for green projects, rewarding them for the environmental benefits they deliver. These include introducing mandatory biodiversity net gain for developments (i.e. the requirement that developers ensure habitats for wildlife are enhanced and left in a measurably better state than they were pre-development), carbon offsetting and the strengthening of links between public and private sector initiatives.

- **Address market barriers and build capability**

The GFS sets out the action that the government is already taking in this area, rather than announcing anything new. It mentions the ongoing Infrastructure Finance Review and the National Infrastructure Commission's study on the current and future resilience of UK infrastructure and how climate considerations need to be integrated into this. It also sets out how the government is supporting local green finance projects and sharing best practice.

- **Develop innovative approaches and new ways of working**

A key theme of the GFS is public-private sector collaboration. The GFI is to lead on this.

## CAPTURING THE OPPORTUNITY

Putting all of this framework in place to encourage a green thought process and develop green objectives and standards when providing and utilising financial services will inevitably lead to the growth of the green finance market, so the final limb of the Government's strategy is how to capture the opportunity that growth generates.

The establishment of the GFI is a key part of this thread of the strategy. It is jointly funded by the Government and the City of London and is mandated to:

- strengthen public and private sector collaboration on green finance through creating greater alignment between initiatives e.g. on innovation of green products, data and analytics;
- create commercial opportunities for UK finance providers by striving to coordinate public and private activities behind a shared strategy;
- strengthen the competitiveness of the UK financial services sector by driving innovation, up-skilling financial professionals and government officials equally, and

- ultimately promoting all of that globally through a unified UK green finance brand.

## CURRENT DEVELOPMENTS AND NEXT STEPS

At the moment HM Treasury is carrying out a review into the costs of decarbonisation and will be looking at green finance in this context. We are also still expecting the Energy White Paper to set out the government's energy policies for the next few years – this was due earlier this year but is still awaited.

The Impact Investing Institute was established in June 2019. Impact investment is investment with the intention to generate a positive, measurable impact on society and the environment alongside a financial return. It is working with the GFI to develop joint initiatives.

The Government has promised an interim progress review of the GFS by the end of 2020 and a formal progress review in 2022. This shows it is taking this seriously and it should not be just another thing that is kicked into the long grass.

There have been a number of recent high profile financings linked to sustainability targets. Addleshaw Goddard has been involved in advising corporate borrowers and lenders on both sustainable and green finance and banking partner, Richard Oman, who recently advised Co-op on its ground breaking £400m Sustainable Revolving Credit Facility, comments that: "*As the issue of how businesses can be more environmentally conscious becomes more important, the sustainability angle on corporate financing deals will inevitably become a key part of discussions between lenders and corporate borrowers".*

## COMMENT

The GFS is another step towards pushing green and sustainable financing to the top of the agenda of all participants in the UK finance market. It is a market that has been developing for some time, driven by the Government's environmental agenda since the signing of the 2015 Paris Climate Change Agreement and the general public's increasing consciousness of social and environmental issues. However, thus far, this awareness had filtered down into different areas of the UK finance market at different rates and has manifested itself in different ways, for example:

- voluntary market guidelines such as the International Capital Market Association Green Bond Principles (**GBPs**) and the Loan Market Association Green Loan Principles (**GLPs**) focus on the 'use of proceeds' concept i.e. a requirement that the proceeds will be invested into projects, activities or assets that have a specified environmental benefit;
- the development of commercial concepts and documentary mechanisms, which, instead of specifying that the loan must be utilised for a green purpose, provide a financial incentive for the borrower to engage in environmentally responsible or 'green' behaviour (e.g. the inclusion of 'green' covenants that set out certain sustainability criteria (perhaps around CO2 emissions, water usage, sourcing of sustainable raw materials or supplies, recycling, production of sustainable products and/or improvement in the borrower's overall ESG rating or achievement of a recognised ESG certification) that are tied to a reducing margin ratchet), which led to the LMA Sustainability Linked Loan Principles (**SLLPs**) that were just published in March 2019; and
- some banking institutions developing their own green objectives and standards for issuing loans e.g. attributing a green weighting factor to their financing deals, which provides for a positive adjustment (i.e. cheaper finance) for deals creating affirmative climate and environmental action ('dark green') on a scale down to a negative adjustment for deals with an adverse environmental impact ('brown').
- For more detailed analysis of the evolution of the UK green and sustainable financing market also see previous AG articles on this topic:

The Growth of Green Finance

The Evolving Scope of Sustainable Financing

Such voluntary measures and organic growth is all very positive but inevitably leads to variations, across the market generally and between individual financial institutions, in the decision making processes applied to determine the types of projects that qualify as 'green', the nature and quality of the solutions and products provided and in the appetite to engage in 'green' activity. This leads to barriers to the delivery of green financing on the wider scale envisaged by the Government.

The Government envisages in the GFS solutions to help overcome the problems those barriers create. For example:

- Defining 'green' and 'green-washing'

There is no formal universal standard applied to determine what qualifies as a green project. This can leave both funders and borrowers nervous about labelling a project or product as green for fear of the risk that it will be determined to be 'green-washing' (i.e. spinning the nature of a product to make it appear greener than it actually is in the drive to be seen to be green.) A green finance market framework with clear objectives and taxonomy has the potential to reduce such concerns and risks and move the market towards a standardisation that will ensure its integrity.

- Lack of transparency

Transparency is also fundamental to ensuring the integrity of green finance products and a lack of it is a barrier to the development and wider availability of such products. That is why the Government's proposals in the GFS to enhance the production and access to data and analytics through more stringent disclosure requirements are a key policy to expanding the 'green' market. It should allow investors to make more informed decision and develop new products.

The wider market is listening to the 'green' message as the topic often takes the prime spot at industry conferences, like those run by the Loan Market Association, and it seems as a result of pressure from governments, consumers, investors and corporates, we are now on a trajectory towards integrating 'green' into business and financial strategies as the norm.

Climate change and sustainability are no longer factors that can be ignored, but will play a key role in financing from now on.

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# CROWN PREFERENCE – A QUIET CHANGE WITH A POTENTIALLY GREAT IMPACT

As part of the October 2018 budget, the Government announced a seemingly quiet change to the order of payments to creditors upon a business insolvency. That change was to move HM Revenue and Customs (**HMRC**) ahead of certain categories of secured lender.

Lenders and representative bodies of non-government creditors, and industry trade associations, are increasingly concerned about the effect such a change will have on both bank lending and security of payment for small businesses. However, despite continuing concerns and opposition following an initial consultation period, the current Government has confirmed its intent to move forwards with the proposals in April 2020 by publishing draft legislation that would implement the proposals.

## THE CURRENT POSITION

Payments to the creditors of an insolvent company are currently made in the following order:

1. Secured creditors with a fixed charge (after costs of realisation)
2. Insolvency practitioners' fees and expenses
3. Preferential creditors
4. Prescribed part creditors
5. Secured creditors with a floating charge
6. Non-preferential unsecured creditors
7. Shareholders

HMRC currently ranks in category 6 as an unsecured creditor, meaning that it is often left unpaid in the event of an insolvency.

## PROPOSALS

### A CHANGE TO THE RANKING

The proposal is that from 6 April 2020 certain unpaid taxes will move to category 3 in the list set out above, ranking them ahead of secured creditors with a floating charge.

The Government has billed the proposal as a means of ensuring that taxes paid in good faith by customers and employees are used to fund public services rather than distributed to other creditors. However, business credit secured by way of a floating charge is widely used to fund business growth in small and emerging businesses, particularly through the use of asset based lending facilities. That is particularly true of stock or 'inventory' lending, where forms of fixed charge security are not, in practice, available.

The proposed Crown preferential status will apply to tax "collected" by a company on behalf of another but not yet paid to HMRC - principally VAT, PAYE and employee National Insurance Contributions. This is similar to the position that HMRC held until the abolition of Crown Preference in 2003. A significant footnote though to the proposal is that it seeks to capture all historic tax debts too (with no cap on quantum or look back period), including amounts incurred prior to 6 April 2020, with no transitional period.

### AN INCREASE IN THE PRESCRIBED PART

The draft Finance Bill 2019-20 will also see the maximum sum ring-fenced for unsecured creditors (otherwise known as 'prescribed part' creditors that fall into category 4) increase from £600,000 to £800,000. The prescribed part was introduced in 2003 to ensure that unsecured creditors were not substantially disadvantaged by the increase in funds available to floating charge holders as a result of the abolition of Crown preference. The overall policy aim of these measures was to 'enhance the rescue culture' in the UK. This proposed increase in the prescribed part would have the effect of further reducing the sums available to a floating charge holder upon the insolvency of the borrower, leading to the concern that the impact of these measures could damage the so-called "rescue culture".

## IMPACT

The Government expects the proposed regime to have no material impact on lending whilst generating a HMRC revenue of up to £185,000,000 per year by 2023 as a direct result of the reintroduction of Crown preference. However, from the analysis set out above it is easy to see how lenders could view floating charge lending as substantially more risky and, for businesses with significant historic tax debts, potentially as risky as unsecured lending. For some businesses, such as those reliant on 'inventory lending', it could substantially reduce access to finance.

It seems clear, therefore, that the proposals are likely to have a particularly considerable impact on the asset based lending market (which is heavily reliant on the floating charge) and SMEs (who typically do not have many, if any, assets over which fixed security can be granted).

These concerns have been put to the Government by representative bodies and industry associations who are focusing on the impact on the lending market of implementing the proposals and the incompatibility of this policy with the approach of governments of other jurisdictions to the same issue. Members of AG have been actively involved at the forefront of voicing those concerns, through our industry positions with associations, such as R3 – the Association of Business Recovery Professionals, the UK's leading trade body for the insolvency profession.

Early indications are that those lenders who are prepared to take on the risk of HMRC recovering the lion's share of distributions in an insolvency are likely to reconsider their approach to lending, including measures such as:

- reductions in levels of available finance;
- withdrawal in whole or in part of availability in particular sectors;
- pricing of their facilities; and
- greater pre-lending and ongoing monitoring, with the costs of those procedures being passed to borrowers.

Lenders are also likely to express greater concern around tax warranties and covenant tests when negotiating finance documents, with a greater emphasis on compliance with tax requirements prior to the date of the facility.

Commentators have also voiced concerns that realisations that would otherwise be available to unsecured creditors on an equal basis, in particular the suppliers to an insolvent company, will now be wholly allocated to the payment of unpaid tax. A similar argument has also been put forward in respect of pension funds, who will see the assets available for distribution to them reduced by these changes. Again, this is likely to lead to a request for increased certainty and security from these entities, reducing the liquid assets of and credit available to smaller companies.

## MITIGANTS

The primary mitigant for lenders will be to avoid over-exposure to floating charge lending, by reducing the levels of available finance to their borrowers under this type of secured facility (whether by reducing the overall levels of this type of finance and/or requiring tax reserves be held by a borrower and an equivalent amount deducted from the amount made available under that borrower's facility), coupled with a secondary focus on taking, or supplementing their floating charge security, with fixed charge security or assignments where possible and appropriate.

The mitigant of supplementing floating charge security poses a particular problem for lenders and businesses in Scotland, or where the main asset base is in Scotland or subject to Scots law, as fixed charge security is limited to real estate under Scots law. This factor means that this measure could have a disproportionately greater impact on access to finance in Scotland than the rest of the UK economy given it is an economy that is dominated by an SME business culture. We understand that industry bodies such as R3, with which AG members are involved, are in discussion with Scottish Government agencies to consider reforms to Scottish security law, which might provide some mitigation for Scottish lenders and businesses.

Both lenders and suppliers will therefore need to ensure that they have an increased awareness of a potential borrower's or customer's actual or potential liability to HMRC to better gauge the risk of lending and make decisions on what additional protections they may require.

Industry bodies currently lobbying the Government on these changes are focusing on the following in a bid to provide increased certainty around the proposals:

- a limit on the amount for which HMRC will be a preferred creditor;
- a limit on the period for which HMRC can look back to recover historic amounts;
- restricting the application to floating charges created after 6 April 2020 only; and

- measures to improve HMRC's engagement in insolvency proceedings.

R3 reported to its members in the Summer of 2019, that so far the only concession apparently made is that tax penalties should not be included in the tax debts which will enjoy Crown preference.

## CONCLUSION

In conclusion, the reinstatement of HMRC's preferential status and simultaneous increase in the prescribed part will render floating charge lending a less attractive product for lenders, have a potentially negative impact on the position of other stakeholders in the insolvency waterfall (e.g. suppliers and pension funds) and could generally have far reaching consequences for businesses in uncertain times.

Given the current Government's progression with the proposals they seem likely to proceed and all those parties with an interest in the results should ensure that they are aware of the proposed changes and the potential impact of the same on their business.

Those looking for quality, and imaginative ways to prepare for these impact of these changes, should speak with their contacts at AG who stand ready to help.

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# THE PENSION SCHEMES BILL: WHAT DOES THIS MEAN FOR FUNDERS AND BORROWERS?

## WHAT DOES THE PENSION SCHEMES BILL PROPOSE?

The Pension Schemes Bill 2019-20 (**Bill**), published in October 2019, amongst other new measures, provides for major extensions to the powers of the Pensions Regulator (**Regulator**). In particular, the new powers include the creation of new criminal offences, which are very broad in scope and could potentially capture a wide range of people (including investors, banks and other financial institutions). Although the Bill 'fell', due to the dissolution of Parliament to allow for the general election, we understand that its measures enjoy cross-party support and it appears likely that the measures will be re-introduced in the next Parliament.

## WHAT NEW OFFENCES AND FINANCIAL PENALTIES DOES THE BILL INTRODUCE?

The Bill provides for the creation of new criminal offences, including:

- Avoiding an employer debt

This offence would be committed where a person acts or engages in a course of conduct that:

  - prevents the recovery of the whole of any part of an employer debt to the pension scheme under legislation (known as a "section 75 debt"); or
  - prevents such a debt becoming due or compromises/reduces such a debt,

where the person intended the act to have such effect and does not have a reasonable excuse for the act.

This offence will be punishable by an unlimited fine and/or seven years' imprisonment. A failure to act can also amount to an offence.

- Action that risks accrued benefits

This offence would be committed where a person acts or engages in a course of action that detrimentally affects, in a material way, the likelihood of benefits, accrued under a defined benefit scheme, being received, where the person knew or ought to have known that the act or course of action would have such effect and does not have a reasonable excuse for the act.

This offence will be punishable by an unlimited fine and/or seven years' imprisonment. A failure to act can also amount to an offence.

In addition to the criminal sanctions, the Bill gives the Regulator new powers to impose a civil penalty of up to £1 million in respect of acts or omissions constituting the above offences if “it was not reasonable for the person to act or fail to act in the way that the person did”. However, the Regulator cannot issue such a civil financial penalty in respect of an act/omission if a person has already been convicted of a criminal offence in respect of that same act or omission, or if criminal proceedings have been instituted but not concluded in respect of that act or omission. Furthermore, the Bill also broadens the circumstances in which the Regulator may exercise its "moral hazard" powers to require scheme employers or persons associated with them to provide additional scheme funding.

## WHAT IS THE POTENTIAL IMPACT FOR FUNDERS AND BORROWERS?

The criminal and civil sanctions referred to above are drafted extremely broadly and can apply to "any person" (other than an insolvency practitioner). The term "any person" potentially includes investors, banks and other financial institutions who finance a company or group of companies with a defined benefit scheme; and possibly persons within those banks and financial institutions who individually fall foul of the standards of conduct expected by the Regulator. This will increase the risks for investors and funders participating in transactions that involve the restructuring or refinancing of a company or group of companies with a defined benefit scheme.

The threshold of acting without "reasonable excuse" is also significantly lower than that which had previously been indicated by the UK Government when proposing new criminal offences, and it is uncertain what will amount to a "reasonable excuse". For example, would it be considered reasonable for a borrower company to secure additional debt ranking above a defined benefit scheme in order to rescue its struggling business? For practical purposes, it will be the Regulator who will determine what amounts to a "reasonable excuse" in the first instance, however, this will be a matter for the courts to ultimately rule on.

Consequently, it is foreseeable that the new powers could limit the ability of borrower companies with defined benefit schemes to secure financing, especially in circumstances where such companies are in financial difficulty and/or where the defined benefit scheme has a material deficit.

## WHAT HAPPENS NEXT?

The wording of the Bill does not indicate an intention to introduce the new offences with retrospective effect, however, the Regulator will have the power to impose sanctions in respect of a "course of action" and, therefore, it is reasonable to envisage that it may be possible that transactions happening now could in future come under scrutiny from the Regulator, on the basis that the Regulator regards them as relevant to a course of action that has had an impact on a pension scheme. Therefore, it would be prudent for investors and funders to consider the proposed new powers in the context of current and future corporate transactions, restructurings and re-financings where such transactions may be detrimental to a defined benefit scheme.

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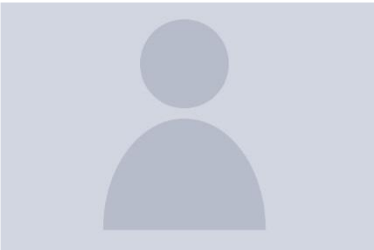

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