

POTENTIAL IMPACTS OF WRONGFUL TRADING LAW SUSPENSION ON SECTION H DEFAULT APPROACH

MEETING NAME	BSC Panel
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Purpose of paper	For Information
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Classification	Public
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Summary	This paper sets out considerations and legal advice, requested by a Panel Member, with respect to potential impacts of Government's temporary suspension of wrongful trading law in light of the COVID-19 pandemic.
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1. Background

- 1.1 The Government has announced a three month suspension of wrongful trading effective from 1 March 2020, to be brought into effect by legislation. It is going to be part of a package of wider insolvency measures that is expected (as part of the Government's Covid-19 response) to introduce a US style Chapter 11 type arrangement (the American version of administration, but rather more focused on the outcome being a rescue of the entity than as a prelude to liquidation).
- 1.2 Wrongful trading is where a company continues to trade even though the directors of that company knew, or ought reasonably to have known, that there was no reasonable prospect that the company would avoid insolvency. This can lead to personal liability for those directors. It is not as severe as fraudulent trading.
- 1.3 A Panel Member has asked ELEXON and the BSC Panel to consider whether changes need to be made to the treatment of Section H Default to comply with the spirit (or indeed the letter) of HMG's temporary coronavirus-related changes to wrongful trading laws. Specifically, the Panel Member suggested consideration of the following points:
 - What actually are the changes to wrongful trading laws?
 - Does Panel even need to consider responding likewise?
 - How does Panel determine whether a defaulting Retailer is suffering coronavirus related difficulties with cash-flow?
 - How can Panel avoid the risk of increasing the burden of mutualised costs (as a result of delaying the inevitable and suffering larger defaults)?
 - What if any changes in other Codes treatment of defaults?
 - What discretion does Panel have?
 - Would another resolution be needed?
 - How would Panel determine the viability of the defaulting business?
 - Would Panel require some threshold tests to be passed for any such grace to be allowed? (e.g. directors attendance, commitments in writing, customer service record, BSC performance record)
 - Would any action present a risk to Panel member indemnities or ELEXON?
- 1.4 This paper sets out ELEXON's legal view of potential impacts of the suspension of wrongful trading on the Section H resolutions.

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2. Panel discretion in the event of Default

- 2.1 Under the BSC, the Panel has discretion as to whether, and the extent to which, it applies any of the Section H resolutions: H3.2.1 allows the Panel to apply its powers “at such time as it sees fit and having regard to all the circumstances of the Default”.
- 2.2 The Panel would need to be mindful of its objectives in Section B, in particular, the duty to ensure that the Code is given effect fully and promptly and in accordance with its terms.
- 2.3 ELEXON’s legal view is that the express wording in H3.2.1 clearly allows discretion to be more lenient, particularly in the current circumstances, notwithstanding the wider duties.

3. Discretion in the lead up to Default

- 3.1 Where there is less discretion provided by the Code, is on taking steps to stop Parties being in default in the first place (as opposed to taking remedial action once a Party is in default).
- 3.2 The insolvency related defaults in 3.1.1(g) arise as a matter of fact – as soon as these events occur then a Party is in default, but it is still open to the Panel to determine what, if any, steps to take (as per the above).
- 3.3 The same is also true for credit related Section H defaults.
- 3.4 Payment defaults only arise when ELEXON has served a payment default notice on the Party and the amounts remain unpaid. In theory, therefore, a Party would not be in default under H3.1.1(a), (a)(A) or (b) unless ELEXON served a notice. However, whilst ELEXON is not under an explicit duty to serve a notice:
 - (a) ELEXON is under the same duty as the Panel to give the Code effect fully and promptly; and
 - (b) the Code does not provide any obvious discretion to refrain from serving a notice

ELEXON’s legal view is therefore that for ELEXON to refrain from serving payment default notices would be a breach of the Code.

4. Impacts on Panel indemnity

- 4.1 Indemnities will cover Panel members for liabilities that arise as a result of actions taken that the Panel member “in good faith believes to be the proper exercise and discharge of the powers, duties, functions and discretions of that office in accordance with the Code”.
- 4.2 ELEXON’s legal view is that exercising some leniency in the application of the Section H resolutions under the current circumstances would seem to be a proper exercise of Panel member discretion and therefore would be covered by the indemnity.
- 4.3 It is ELEXON’s legal view that the discretion ought to be exercised on a case-by-case basis.

5. Conclusions

- 5.1 It is ELEXON’s view that suspension of wrongful trading won’t have an impact on the Section H default triggers.
- 5.2 Currently, the Code allows the Panel to apply resolutions fully, wholly, partially and for as long/short as the BSC Panel determines appropriate. We believe that this gives the Panel sufficient discretion to comply with HMG’s temporary coronavirus-related changes to wrongful trading laws.
- 5.3 ELEXON will continue to monitor the legislation as, depending on the exact changes, there is the potential for impact on Section H e.g. potential restrictions on what steps the Panel can take, or maybe a need to update the triggers referenced in H3.1.1(g).

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6. Recommendations

6.1 We invite you to:

- a) **NOTE** the information and legal advice within this paper.

For more information, please contact:

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