

INSOLVENCY (NORTHERN IRELAND) ORDER 2005

S.I. 2005 1455

EXPLANATORY MEMORANDUM

INTRODUCTION

1. The Insolvency (Northern Ireland) Order 2005 (“the Order”) was made on 7 June 2005.
2. This Explanatory Memorandum has been prepared by the Department of Enterprise, Trade and Investment (“the Department”) to assist the reader in understanding the Order. It does not form part of the Order.
3. The provisions of the Order correspond closely to the measures dealing with insolvency which are contained in the Enterprise Act 2002 (c.40), which received Royal Assent on 7 November 2002.

BACKGROUND AND POLICY OBJECTIVES

4. The background to the Order is that aspects of insolvency law require modernisation to provide a stimulus to entrepreneurship.
5. The existing bankruptcy period, usually three years, is too long and is preventing people who have failed in business but have learned through their mistakes from making a fresh start.
6. If responsible risk taking is to be encouraged bankruptcy must not be seen to stigmatise people.
7. The public has to be effectively protected against the small minority of bankrupts whose conduct is irresponsible, reckless or otherwise culpable.
8. In the case of companies, administrative receivership whereby a receiver is appointed to realise assets subject to security if a borrower defaults favours the creditor who holds the security. There needs to be incentive both for the interests of other creditors to be taken into account and for an attempt to be made, if possible, to rescue the company as a going concern.
9. The right of Crown creditors to preferential payment in an insolvency needs to be removed if ordinary unsecured creditors are to have a fair chance of receiving payment.
10. Finally, provision is needed to allow for reform of the Insolvency Service’s financial regime.

CONSULTATION

11. Policy consultation took place during 2003 and the draft Order was circulated in August 2004. Article 17(6) has been amended to define a pre-commencement bankrupt in terms of bankruptcy, rather than the presentation of a bankruptcy petition, having occurred before the coming into operation of paragraph (1) of that Article. Article 18 (bankrupt’s home: civil partnership) has been added following the passing of the Civil Partnership

Act 2004. Paragraph 8 of Schedule 5 has been amended to refer to interim bankruptcy restrictions orders.

MAIN ELEMENTS OF THE ORDER

12. The Order contains 31 Articles and 9 Schedules.

COMMENTARY ON PROVISIONS

Article 3 (Replacement of Part III of the 1989 Order) and Schedules 1 and 2

Schedule 1

Article 3(1) replaces Part III of the Insolvency (Northern Ireland) Order 1989 with a new *Schedule B1* as set out in Schedule 1 to this Order.

Paragraph 3 of Schedule B1 provides that an administrator can be appointed under an administration order made by the High Court, or by the holder of a floating charge or by the company or its directors.

Paragraph 4 sets out the purposes of administration. It places the administrator under a duty to try to rescue the company as a going concern unless this is not reasonably practicable or it would not bring about the best result for the company's creditors as a whole in which case he is required to try to achieve a better result for creditors than would be achieved in a winding up. He can only realise the company's property and make a distribution to secured or preferential creditors if doing so would not result in unnecessary harm to the interests of the unsecured creditors and the company is not viable and does not have a business that can be sold as a going concern.

Paragraphs 11 to 14 deal with the appointment of an administrator by the High Court.

Paragraph 13 enables the company or its directors or creditors (which could include floating charge holders) to apply to the High Court for an administration order.

Paragraphs 15 to 22 deal with the appointment of an administrator by the holder of a floating charge.

Paragraphs 23 to 35 deal with the appointment of an administrator by a company or its directors.

Paragraph 36 gives a floating charge holder the right to apply to the Court for an administration order without having to demonstrate that the company is or is likely to become unable to pay its debts and paragraph 38 gives him the right to apply to do so if a winding up order has been made. Paragraph 39 gives a liquidator the right to apply to the Court for administration.

Paragraphs 43 and 44 provide that once a company is in administration the moratorium, which is a feature of administration, takes effect. Under paragraph 43 a resolution cannot be passed or an order made for the winding up the company except in certain limited circumstances.

Paragraph 44 provides that no steps can be taken by creditors to enforce their rights except with the consent of the administrator or the permission of the Court.

Paragraph 50 provides that as soon as reasonably practicable, or, in any event, within 8 weeks of the administration commencing (subject to any extension granted by the Court or agreed to by the creditors), the administrator is required to make a statement setting out proposals for achieving the purpose of the administration.

Paragraphs 52 and 53 provide that each copy of the administrator's proposals sent to creditors must be accompanied by an invitation to an initial creditors's meeting, which must be held within ten weeks of the administration commencing.

Under paragraph 54 the creditors may at the initial meeting decide to accept or reject the administrator's proposals, or with his approval, amend them.

Paragraph 66 allows an administrator to make a distribution to secured or preferential creditors without the permission of the Court and to unsecured creditors with the permission of the Court.

Under paragraph 74 an administrator's statement of proposals may not include any proposal affecting the right of a secured creditor to enforce his security without his consent.

Under paragraph 77 an administrator's appointment ceases to have effect one year after the date on which it takes effect. However this term may be extended by up to six months with the consent of creditors or, for as long as necessary, by the Court.

Paragraph 84 allows an administrator to end the administration and convert the proceedings into a voluntary winding-up if the total amount which each secured creditor is likely to receive has been paid or set aside for him.

Paragraph 85 provides that an administrator can take steps to dissolve the company where he thinks that there are no assets remaining from which to make a distribution to creditors.

Schedule 2

Article 3(3) inserts Schedule 2 which contains minor and consequential amendments arising out of the changes to administration.

Article 4: Special administration regimes

This Article saves and applies to air traffic control companies under the Transport Act 2000 and building societies as defined by the Building Societies Act 1986 the administration procedure under Part III of the Insolvency (NI) Order 1989 as presently applied and modified by the two enactments.

Article 5: Prohibition of appointment of administrative receiver

This Article inserts ten new Articles, 59A to 59J, at the end of Part IV of the Insolvency (NI) Order 1989. New Article 59A prohibits the holder of a qualifying floating charge as defined under paragraph 15 of Schedule B1 from appointing an administrative receiver except in the cases listed in Articles 59B to 59I. Certain terms used in new Articles 59B to 59I are defined in Schedule 1A to the Insolvency (NI) Order 1989.

Article 5(2) inserts Schedule 3 by which new Schedule 1A is inserted into the Insolvency (NI) Order 1989.

Article 6: Abolition of Crown Preference

Article 6 abolishes the Crown's right to claim debts from insolvent companies and bankrupt's estates ahead of floating-charge holders and unsecured creditors.

Article 7: Unsecured creditors

This Article inserts a new Article 150A (Share of assets for unsecured creditors) into the Insolvency (NI) Order 1989, to set aside a percentage share of the net property of a company in liquidation, administration, provisional liquidation or receivership to go to unsecured creditors.

Article 8: Liquidator's powers

Article 8 brings in a requirement for liquidators to obtain sanction (approval), usually of the creditors or the Court, before action under Article 177 (fraudulent trading), 178 (wrongful trading), 202 (transactions at an undervalue, and 203 (preferences).

Article 9: Application of insolvency law to company incorporated outside Northern Ireland

Article 9 will allow the Department to apply the rescue provisions of the Insolvency (NI) Order 1989 to companies incorporated outside Northern Ireland through detailed secondary legislation.

Article 10: Application of law about company arrangement or administration to non-company

This Article makes provision for company arrangement and administration provisions to be applied by order to apply to friendly societies and industrial and provident societies.

Article 11: Voluntary arrangements: minor amendments

Article 11 makes two minor amendments to Schedule A1 to the Insolvency (NI) Order 1989.

Article 12: Duration of and discharge from, bankruptcy

Article 12 replaces existing Article 253 of the Insolvency (NI) Order 1989 to provide for bankrupts to be automatically discharged within one year after the bankruptcy order was made. Article 12(3) gives effect to Schedule 4 which makes transitional provisions to deal with individuals, including solicitors, declared bankrupt and not discharged prior to commencement of Article 12 of the Order.

Paragraph 7 of Schedule 4 sets out transitional provisions relating to income payments orders in existence at the time of commencement.

Article 13, Schedule 5 and Schedule 6: Post-discharge restrictions

Article 13 inserts new Article 255A into the Insolvency (NI) Order 1989 which gives effect to Schedule 2A and provides for Schedule 2A to be inserted into the Insolvency (NI) Order 1989 by Schedule 5 to this Order and for the amendments set out in Schedule 6 to have effect.

New Schedule 2A will enable the High Court to make a bankruptcy restrictions order lasting for a minimum of two years and a maximum of fifteen years on the application of the Department or the Official Receiver acting on the direction of the Department.

Paragraphs 7-9 of new Schedule 2A make it possible for a bankrupt to agree to be bound by similar restrictions by giving a bankruptcy restrictions undertaking to the Department.

Schedule 6 extends those provisions of the Insolvency (NI) Order 1989 which place restrictions on bankrupts through making certain conduct an offence to cover individuals subject to bankruptcy restrictions orders and undertakings. Such conduct includes, acting as receiver or manager of a company's property on behalf of a debenture holder, obtaining credit above the prescribed limit without disclosing that you are subject to a bankruptcy restrictions order, trading in a name other than that under which you were made bankrupt, acting as an insolvency practitioner, and acting as a company director.

Article 14: Investigation by Official Receiver

Article 14 inserts new Article 262 into the Insolvency (NI) Order 1989 thereby providing that the Official Receiver is only required to investigate the conduct and affairs of a bankrupt where he thinks it necessary.

Article 15: Income Payments Order

Article 15 amends Article 283 of the Insolvency (NI) Order to provide for income payments orders to last for a period of up to three years from the date they were made.

Article 16: Income Payments Agreement

Article 16 inserts new Article 283A into the Insolvency (NI) Order 1989 to provide for the making of legally binding agreements between bankrupts and the Official Receiver or trustee to be known as income payments agreements. Under such agreements the bankrupt or a third party would be required to make specified payments to the trustee or the Official Receiver for a specified period.

Article 17: Bankrupt's Home

Paragraph (1) of Article 17 inserts new Article 256A into the Insolvency (NI) Order 1989 thereby providing that where a bankrupt's estate includes an interest in a bankrupt's or their spouse's or former spouse's sole or principal residence the interest reverts to the bankrupt unless within three years from the date of bankruptcy the trustee takes one of five specified actions, including realising the interest.

Paragraph (3) of Article 17 inserts new Article 286A into the Insolvency (NI) Order 1989 to provide for the dismissal of applications for orders for sale, possession or a charging order in respect of a bankrupt's residence where the value of the bankrupt's interest is below a level prescribed in secondary legislation.

Article 18: Bankrupt's Home: civil partnership

Article 18 makes amendments to the Insolvency (NI) Order 1989 to take account of the passing of the Civil Partnership Act 2004 (c. 33).

Article 19: Powers of trustee in bankruptcy

Article 19 brings in a requirement for trustees to obtain sanction (approval), usually of the creditors or the High Court, before taking action under Article 312 (transactions at an undervalue), 313 (preferences), or 367 (transactions defrauding creditors) of the Insolvency (Northern Ireland) Order 1989.

Article 20: Repeal of certain bankruptcy offences

Article 20 repeals Article 332 of the Insolvency (NI) Order 1989 which made failure to keep proper accounting records an offence, and Article 333 which made gambling and rash and hazardous speculation an offence.

Article 21: Individual Voluntary Arrangements

Article 21 inserts Schedule 7 which makes provision about individual voluntary arrangements. Paragraph 2 of Schedule 7 inserts new Articles 237A to 237G into the Insolvency (N I) Order 1989 thereby creating a new fast-track scheme for post-bankruptcy individual voluntary arrangements for the repayment of debts where the Official Receiver is the proposed nominee. Paragraph 3 of Schedule 7 inserts a new Article 348B into the Insolvency (N I) Order 1989 to enable the Official Receiver to act as nominee or supervisor in post-bankruptcy individual voluntary arrangements.

Article 22: Disqualification for office: the Assembly

This Article substitutes a new Article 370 in the Insolvency (NI) Order 1989 which makes provision for the Assembly's presiding officer to be notified if a bankruptcy restrictions order or interim order is made against or a bankruptcy restrictions undertaking accepted from an Assembly member.

New Article 370 does not include provision dealing with disqualification for Assembly membership. This is because it is intended that section 426A of the Insolvency Act 1986 as inserted by section 266(3) of the Enterprise Act 2002 should be amended so that the making of a bankruptcy restrictions order by the Northern Ireland High Court would disqualify a person from membership of the House of Commons. Under section 36(4) of the Northern Ireland Act 1998 a person is disqualified for membership of the Assembly if he is disqualified for membership of the House of Commons otherwise than under the House of Commons Disqualification Act 1975

Article 23: Disqualification for office: district councils

Article 23 replaces the automatic restriction on bankrupts serving as members of district councils with one disqualifying those subject to a bankruptcy restrictions order.

Article 24: Disqualification for office: general

Article 24 gives Northern Ireland departments power to amend or repeal restrictions on bankrupts.

Article 25: Minor and consequential amendments relating to individual insolvency

Article 25 gives effect to Schedule 8 which makes minor and consequential amendments relating to individual insolvency.

Article 26: Fees

Paragraph (1) of Article 26 inserts a new Article 361A into the Insolvency (NI) Order 1989 thereby enabling the Department to charge fees for the recognition of bodies for the purpose of licensing insolvency practitioners (IPs), for the licensing of IPs by the Department itself and for the operation of the Insolvency Account.

Article 27: Insolvency Account: interest

Article 27 amends Schedules 5 and 6 to the Insolvency (NI) Order 1989 so that company and individual insolvency rules may enable the Department to set the rate of interest payable on monies in the Insolvency Account.

Article 28: Insolvency Account: adjustment of balances

Article 28 inserts a new Article 358A into the Insolvency (NI) Order 1989 which allows for adjusting payments to be made between the Insolvency Account and the Consolidated Fund.

Article 29: Transitional or transitory provision and savings

Article 29 allows the Department to make transitional or transitory provisions and savings by order.

Article 30: Power to make consequential amendments etc

Article 30 allows the Department to make supplementary, incidental or consequential provisions by order.

Article 31: Repeals

Article 31 gives effect to Schedule 9 which lists repeals.

COMMENCEMENT

13. The introductory provisions (Articles 1 and 2) are to come into operation on the expiration of 7 days from the day on which the Order is made. The other provisions will be brought into operation on a day to be appointed by a commencement order.