

Executive Note

The Debt Arrangement Scheme (Scotland) Amendment (No. 2) Regulations 2007 SSI/2007/187

The above instrument is made in exercise of the powers conferred by sections 2(3), 4(5), 5(4), 6(1), 7 and 62(2) of the Debt Arrangement and Attachment (Scotland) Act 2002 (“the 2002 Act”). It is subject to negative resolution procedure.

Policy Objectives

This instrument amends the Debt Arrangement Scheme (Scotland) Regulations 2004¹, which came into force on 20 November 2004.

Purpose of the Debt Arrangement Scheme

The purpose of the Debt Arrangement Scheme (“DAS”) is to provide a facility for the orderly repayment of multiple debts. It complements the time to pay arrangements for single debts created by the Debtors (Scotland) Act 1987.

The policy objectives of the DAS are to:

- enable people to resolve serious debt problems in a dignified way;
- reduce the need for creditors to take legal action to recover their debts;
- extend the benefit of money advice to those people who have a particular need for it;
- improve the quality of money advice, by training and accrediting money advisers; and
- minimise the impact of bad debt on both debtors and creditors.

The DAS allows people who are unable to pay their debts in full as they fall due, but who have a reasonable level of surplus income after meeting their basic needs (food, accommodation, utilities, council tax etc.), to pay those debts over a longer period.

They can apply for approval of a DAS debt payment programme. A programme will be approved by the Accountant in Bankruptcy (on behalf of the Scottish Ministers) if all the creditors agree or the programme is otherwise fair and reasonable. The creditors are unable to bankrupt the debtor or use diligence (seize and sell assets) against them while a programme is approved.

If the programme is approved then the debtor no longer needs to make individual payments to each creditor. Instead, a single payment is made to an approved payments distributor who divides that payment up amongst the several creditors in a fair way. The costs of this are met by charging the creditors an administration fee of up to 10% of the payment. The creditors gain through reduced administrative and legal costs, and increased certainty of payment.

The DAS is powerful tool capable of helping many people. It helps people to manage their way out of serious debt problems, which makes it a lot easier for them to re-start when their debts are dealt with. The debtor in a DAS is protected from the risk of losing their home, in contrast to bankruptcy or a trust deed where ownership of all land and buildings passes to the trustee for the creditors.

¹ S.S.I. 2004/468, amended by S.S.I. 2004/470.

However, not every person with debt problems either needs to use DAS or is suitable for it. DAS is one of range of debt tools, both formal and informal. For that reason all persons wishing to use DAS must take advice from an approved money adviser. They can choose the best way forward in the light of that advice.

The adviser will look at a person's whole circumstances and (for example) help them to maximise their income. In some cases the person may be able to agree an informal payment arrangement. In others, it will be clear that the debt problem is so severe that the person should either go bankrupt or grant a trust deed for their creditors. In those cases where the DAS is suitable the adviser can apply for approval of a programme.

Need for reform

Take up of the DAS by both money advisers and debtors has been lower than expected. At this date, there are 90 approved advisers and 202 debt programmes. Coverage is not uniform across Scotland, with some parts of the country seeing significantly greater use of the Scheme than other comparable areas.

The Executive therefore conducted a review of DAS during 2006, and listened to the views of stakeholders and of the Parliament as expressed during the passage of the Bankruptcy and Diligence etc. (Scotland) Act 2007 ("the 2007 Act").

Successful management of a debt through completion of a DAS programme is a considerable achievement. There is a general concern that DAS offers too small a reward for the efforts made by the debtor, and a particular concern about the effect of interest and charges continuing to accrue during the period of a debt payment programme.

For example, the debtor in a programme is given more time to pay and may not therefore be making the full payment due under a contract. The creditor may then be entitled to apply charges, including penalty interest and administration fees. The payments agreed at the start of the programme will not take account of these additional charges, with the result that the debtor may complete a programme and still have debts to pay.

Purpose of the reforms in the above instrument

The 2002 Act has been amended by sections 211 and 212 of the 2007 Act in response to the concerns discussed above. These sections provides that Scottish Ministers may by regulations make provision for debt relief in debt payment programmes and further amendments to the 2002 Act.

Subject to Parliamentary approval, the Debt Arrangement Scheme (Scotland) Amendment Regulations 2007 (S.S.I. 2007/Draft) will deal with the effect of interest and charges continuing to accrue during a programme. They do so by providing that interest and debt charges (fees, penalties or other charges) are suspended on approval of a debt payment programme, and cancelled on completion of a programme. This has the effect that a debtor entering into a debt payment programme knows that they will be clear of their debts when the programme is completed.

These Regulations are intended to support the Debt Arrangement Scheme (Scotland) Amendment Regulations 2007 as part of the first stage of these reforms, to provide for a freeze on enforcement to give the debtor a chance to put a debt payment programme in place,

and simplify DAS in order to make it easier to use and to understand by introducing the following measures:

- Remove the duty of fee charging advisers to advise debtors of free alternative advice,
- Introduce a new regulation 31A to restrict the power of a creditor to enforce diligence for up to 6 weeks where a debtor has intimated an application to the DAS Administrator,
- Introduce a provision to prevent a debtor intimating an application to the DAS Administrator more than once in any year – this is to prevent abuse of the rights provided by the new regulation 31A,
- Introduce a new regulation 36A to restrict the power of a creditor to enforce new forms of diligence after an application has been approved, and
- Allow variation of a programme if the debt was wrongly assessed by mistake, oversight or some other reasonable cause – this will allow a creditor to apply for a variation if the debt included in an approved programme has been accidentally miscalculated, consequential on debts becoming frozen on approval.

These Regulations also introduce the following changes which are intended to improve the administration of the scheme:

- Increase the period for which a Money Adviser is approved from 2 to 3 years,
- Increase the review period for a Debt Payment Programme from 6 months to 1 year,
- Provide that a programme is approved on the same day that it is entered on the Register,
- No longer require the Money Adviser to take responsibility for the revocation of a failing programme – this responsibility will be undertaken by the DAS Administrator
- Allow the DAS Administrator to revoke a Debt Payment Programme where the debtor has not made payments to the Payment Distributor for six months,
- Remove restrictions on access to the DAS Register,
- Allow a debtor to withdraw a pending application,
- Remove the requirement to refer an application to the Sheriff if a specified proportion of creditors refuse to consent or are not deemed to have consented – in all cases where there is less than full consent the DAS Administrator will apply the fair and reasonable test to the application. This will be subject to a right of appeal to the Sheriff,
- Remove a creditor's right of objection – this is currently in addition to the right to refuse to consent – but allow the DAS Administrator to consider information provided by a creditor in respect of the equity in the debtor's property, and
- Specify circumstances in which a Money Adviser can submit an electronic form on behalf of a debtor.

There are consequential changes to the forms used in the Debt Arrangement Scheme as well as a result of the overarching changes.

The Regulations contain a saving provision which provides, with one exception, that the changes will not apply to any application where the form requesting the consent of creditors is posted before the 30 June 2007. The exception is that a debtor in an existing programme can apply for a variation of that programme in order to take advantage of the new provisions for interest freezing.

It is intended to review the effect of these reforms in the course of 2008, and to consider whether any further debt relief is appropriate after that review.

It is intended that all the changes made by this instrument, by making the DAS more effective, will encourage more money advisers to become approved for the purpose of the Scheme. This will in turn mean that more of the people who need the protection that the DAS offers will be able to take advantage of it.

Consultation

There has been no formal consultation on the reforms in this instrument. There has, however, been extensive engagement with the key stakeholders, including Money Advice Scotland, Citizens Advice Scotland, and the Institute of Chartered Accountants of Scotland. This has included meetings, seminars, surveys and conferences.

The Scottish Executive has also set up a programme board to help oversee implementation of the 2007 Act. The key stakeholders are represented on that board, and have agreed that the changes made by the above instrument are needed.

Financial Effect

The Scottish Executive is funding local money advice provision to the extent of £5 million a year, including a training and certification programme for the approval of money advisers.

DAS costs are not 'ring fenced' within that funding, although Executive has said in guidance that it expects each local authority to have at least one approved money adviser at an estimated cost of £1.28 million a year. Approved advisers do not however work on DAS alone.

The additional costs that necessarily follow from this instrument are limited to the further administrative and IT costs of the DAS Administrator, which are estimated at £50,000.

The cancellation of interest and charges will have an effect on creditors, both business and public. For example, £300 of debt would be cancelled in a three year programme in respect of debt of £1000 on which interest at 10% a year is due.

This may however be a notional rather than an actual cost. It is important to understand that any person entering a DAS does so because they need protection from their creditors. In the absence of a DAS (say, because of the lack of incentive to use the Scheme) that person will be unable to pay their debts as they fall due and may well need to go bankrupt or grant a trust deed.

The average level of payments to creditors in a sequestration or trust deed is low compared to any form of DAS, current or anticipated. Applying debt relief will in many cases, by making DAS more attractive, lead to higher payments to individual creditors than would otherwise be the case.

It is not, however, possible to quantify this effect at this time. A Regulatory Impact Assessment has not therefore been prepared.