
EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations address failures of the law to operate effectively and other deficiencies in devolved legislation on cross-border insolvencies arising from the withdrawal of the United Kingdom from the European Union. They include changes consequential on amendments made to the EU Regulation on insolvency proceedings ((EU) 2015/848) (“the EU Regulation”) by the Insolvency (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/146) (“the UK Regulations”).

The EU Regulation determines in which member State main insolvency proceedings may be opened and provides for decisions opening proceedings to be recognised in other member States. Main proceedings may only be opened in the state where the centre of the debtor’s main interests (“COMI”) is located. Secondary proceedings may be brought in a state where the debtor has an establishment. The EU Regulation makes other provisions to facilitate the operation of cross-border insolvency proceedings including for co-operation between courts and insolvency practitioners.

The UK Regulations address deficiencies that will arise from the absence of mutual application of the EU Regulation between the UK and the EU member States from exit day. They amend the EU Regulation (as it forms part of domestic law on and after exit day) by repealing the majority of its provisions, which are based on mutual application between member States, and removing the existing restrictions on opening insolvency proceedings where COMI is in a member State. They also make other changes to domestic insolvency law, including to reserved and devolved aspects of Scots insolvency law.

The UK Regulations retain the jurisdictional test based on COMI as an additional ground for jurisdiction to open insolvency proceedings. This applies from exit day in addition to any grounds to open such proceedings which apply in the laws of any part of the UK.

These Regulations address legislative deficiencies arising in the devolved areas of receivership, the effect of floating charges on winding up, bankruptcy and protected trust deeds.

Regulation 2 amends section 51 of the Insolvency Act 1986, which sets out that it is competent for the holder of a floating charge to appoint a receiver over the property of a company where either the Court of Session has jurisdiction to wind up the company, or a court of a member State other than the UK has jurisdiction under the EU Regulation to open insolvency proceedings in respect of the company. The amendments make clear the reference to the EU Regulation is to the EU Regulation as it has effect in the law of the EU (rather than as it is retained in domestic law from exit day), and remove a reference to the UK as an EU member State.

Regulations 3 and 4 make amendments to the Bankruptcy and Diligence etc. (Scotland) Act 2007 and the Bankruptcy (Scotland) Act 2016 (“the 2016 Act”) which are consequential on the amendments to the EU Regulation made by the UK Regulations. The amendments to sections 11 and 12 of the 2016 Act reflect that, under the UK Regulations, the retained jurisdictional test based on COMI will apply where the debtor’s COMI is in a member State of the EU other than Denmark, since Denmark is not a party to the EU Regulation.

Regulations 5 to 8 make amendments to secondary legislation which are consequential on the amendments to the EU Regulation made by the UK Regulations.

Regulation 9 provides that the amendments made by regulations 2 to 8 do not apply to proceedings opened before exit day.

A partial business and regulatory impact assessment was prepared in respect of the Regulations, copies of which can be obtained from the Accountant in Bankruptcy, 1 Pennyburn Road, Kilwinning.