POLICY NOTE

THE INSOLVENCY (EU EXIT) (SCOTLAND) (AMENDMENT) REGULATIONS 2019

SSI 2019/94

The above instrument was made in exercise of the powers conferred by paragraph 1(1) and (3) of Schedule 2 and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018. The instrument is subject to the affirmative procedure.

Purpose of the instrument. The purpose of the instrument is to ensure that devolved aspects of corporate and personal insolvency relating to jurisdiction, cooperation, and the recognition and enforcement of cross-border insolvency proceedings function appropriately after the UK's exit from the EU without a deal.

It will also protect the existing powers of floating charge holders with pre-September 2003 charges to appoint a receiver.

Policy Objectives

The Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 ("the Regulations) deal with two discrete policy areas relating to insolvency. They:

- protect the existing powers to appoint a receiver under section 51 of the Insolvency Act 1986 ("the Act"); and
- address deficiencies arising in relation to devolved aspects of cross-border insolvency legislation from the withdrawal of the United Kingdom from the European Union, specifically as regards the application of the EU Insolvency Regulation (EU 2015/848) (the "EUIR") in UK law following EU exit.

Explanation of the law being amended by the regulations

The Regulations will amend the following:

Primary legislation:

- Section 51 of the Act;
- The Bankruptcy and Diligence etc. (Scotland) Act 2007; and
- The Bankruptcy (Scotland) Act 2016.

Secondary legislation:

- The Bankruptcy Fees (Scotland) Regulations 2018;
- The Public Services Reform (Insolvency) (Scotland) Order 2016;
- The Bankruptcy (Scotland) Regulations 2016; and
- The Bankruptcy (Applications and Decisions) Scotland Regulations 2016

The Regulations aim to protect the existing powers to appoint a receiver contained in section 51 of the Act and to address deficiencies in devolved cross-border insolvency legislation arising from EU exit and the application of the EUIR post-exit.

Reasons for and effect of the proposed change or changes on retained EU law

The UK Government have laid a draft statutory instrument (the Insolvency (Amendment) (EU Exit) Regulations 2018) ("the UK Regulations") in the Westminster parliament. The UK Regulations make changes to the EUIR as it will apply in domestic law from exit day.

The EUIR 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 is located. Secondary proceedings may be brought in a state where the debtor has an establishment. The EUIR makes other provisions to facilitate the operation of cross-border insolvency proceedings including for co-operation between courts and insolvency practitioners.

The primary purpose of the UK Regulations is to retain the EUIR in UK law in a form that will operate effectively after EU exit. The Regulations maintain a modified version of the EUIR's jurisdictional tests for the opening of insolvency proceedings that will apply across the UK and will sit alongside the UK's domestic provisions on jurisdiction rules. The remainder of the EUIR, which forms the majority, relies on reciprocity between member States. In the absence of a reciprocal deal with the EU to replicate the current arrangements provided by the EUIR these provisions cannot operate properly, and so they are repealed.

The UK Regulations also amend deficiencies arising in domestic legislation from EU Exit and the modification of the EUIR. These amendments remove references to the EUIR where the relevant provisions no longer apply or update references to the revised jurisdiction test under the retained EUIR. The UK Regulations make amendments in the areas of insolvency legislation which are wholly reserved and the mixed competency area of winding up (the general legal effect being reserved and the process being devolved).

These Regulations amend deficiencies in the devolved areas of company receivership (the effect of floating charges), bankruptcy and protected trust deeds. The purpose of the Regulations is similarly to ensure that devolved Scottish insolvency legislation relating to jurisdiction, cooperation, and the recognition and enforcement of cross border insolvency proceedings functions appropriately after the UK's exit from the EU. The Regulations will also maintain a floating charge holder's power to appoint a receiver under the Act from exit day.

Specifically, the Regulations address deficiencies arising in devolved legislation by removing references to the EUIR where the relevant provisions no longer apply and updating references to the revised jurisdiction test provided by Article 1 of the EUIR (as it will apply in UK law from exit day). Most of the changes previously made to devolved insolvency legislation to facilitate the application of the EUIR will be revoked by the Regulations.

The Regulations contain provision saving the existing law where insolvency proceedings were opened before exit day.

Statements required by European Union (Withdrawal) Act 2018

Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate

The Minster for Business, Fair, Work and Skills has made the following statement: "In my view the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 do no more than is appropriate".

This is the case because the Scottish Government and the UK Government agree that it would not be appropriate to keep the current EUIR provisions without reciprocity and thus continue the current system unilaterally. As such, it is appropriate to remove almost all of the provisions of the EUIR in order to prevent affected Scottish insolvency proceedings being restricted or obstructed by an unreciprocated obligation to recognise other countries' insolvency orders and judgments. The Regulations do no more than is appropriate to address deficiencies in devolved insolvency legislation arising from this approach.

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

The Minster for Business, Fair, Work and Skills has made the following statement: "In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

The amendments made by the Regulations will ensure that domestic provisions relating to jurisdiction, cooperation, and the recognition and enforcement of cross-border insolvency proceedings in areas of devolved insolvency legislation function appropriately after the UK's exit from the EU. The amendments will also ensure that the existing powers of floating charge holders to appoint receivers will be retained after the EU exit.

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Minster for Business, Fair, Work and Skills has made the following statement: "In my view the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 do not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts".

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

The Minster for Business, Fair, Work and Skills has made the following statement: "In my view the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010".

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

The guidance principles on the environment and animal welfare do not apply to the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019.

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

This is not applicable to the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019.

An indication of how the regulations should be categorised in relation to the significance of the change proposed.

Low (i.e. instruments that are minor and technical, continuity of law with no policy change etc.)

Statement setting out the Scottish Ministers' reasons for their choice of procedure

The Scottish Ministers have chosen the affirmative procedure to apply to the Regulations. This reflects previous practice for SSIs in the area of cross-border insolvency which make changes to primary legislation (e.g. the Insolvency (Regulation (EU) 2015/848) (Miscellaneous Amendments) (Scotland) Regulations 2017).

Further information

Consultation

In order to avoid prejudicing the outcome of the exit negotiations with the EU, it has not been possible to conduct a public consultation on the changes made by this instrument.

We have, however, had informal discussions with external solicitors who have significant knowledge and experience in insolvency in relation to the impact of the changes on the power to appoint a receiver.

AiB has also engaged in discussion and exchanges with the Insolvency Service (the UK Government) regarding this instrument and its interaction with the UK Regulations.

Impact Assessments

Full impact assessments have not been prepared for this instrument because the regulations are required to assist a seamless EU Exit and the impact is thought to be minimal.

While leaving the EU without a deal will make it more difficult for insolvency practitioners to deal with cross-border insolvency matters, it is considered that in the devolved areas of receivership and personal insolvency the impacts will be minimal.

The numbers of receivership appointments are falling, as they require a floating charge holder with a pre-September 2003 floating charge to appoint a receiver. Receivership appointments with cross-border insolvency issues are fairly rare.

It is extremely rare for personal insolvency appointments to have cross-border insolvency matters.

Financial Effects

A partial Business and Regulatory Impact Assessment (BRIA) has been completed and is attached.

The impact of this policy on business is that insolvency practitioners dealing with cross-border insolvency may require to incur additional court costs to obtain court recognition. However, it is considered that as cross-border insolvency in receivership and personal insolvencies are rare, these costs will be minimal.

The Accountant in Bankruptcy on behalf of the Scottish Government

January 2019