Business and Regulatory Impact Assessment

Title of Proposal

The Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019

Purpose and intended effect

- **Background**

The EU Insolvency Regulation (EU 2015/848) (the "EUIR") deals with the rules for cross-border insolvency procedures for businesses and individuals with operations/assets in more than one member state.

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. The EUIR makes other provisions to facilitate the operation of cross-border insolvency proceedings including for co-operation between courts and insolvency practitioners.

On exiting the EU without a deal the cross-border insolvency cooperation and automatic recognition of proceedings under the EUIR would no longer be available and this could impact on securing and recovering overseas assets, potentially reducing sums available to creditors. The Scottish Government and the Insolvency Service agreed that it would be necessary to draft legislation to cover the potential for no deal being reached on exit and in particular to address the deficiencies in domestic legislation due to the references to and application of the EUIR.

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 EUIR in UK law following EU exit.

The UK Government (Insolvency Service) laid a draft statutory instrument (the Insolvency (Amendment) (EU Exit) Regulations 2018) ("the UK Regulations") in the Westminster Parliament on 19 November 2018.

The UK 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of the EUIR, which forms the majority, relies on reciprocity between member States, and so those provisions are repealed.

The purpose of the UK Regulations is to ensure that the version of the EUIR that the UK retains following its withdrawal from the EU, and provisions in UK domestic legislation that facilitate its implementation, continue to function effectively from EU exit.

The UK Regulations modify the EUIR as it applies across the UK from EU Exit. The UK Regulations also address related deficiencies arising in domestic legislation 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).

- **Objective**

The Regulations address deficiencies arising in the devolved areas of company receivership (the effect of floating charges), bankruptcy and protected trust deeds. The purpose of the Regulations is to ensure that devolved Scottish insolvency legislation relating to jurisdiction, cooperation, and the recognition and of cross border insolvency proceedings functions appropriately after the UK's exit from the EU and also to 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, following the changes to be introduced by the UK Regulations). 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.

- **Rationale for Government intervention**

The Scottish Government recognises the responsibility it has to take action where it can to help the people of Scotland by ensuring that statutory debt mechanisms and associated legislation are fit for purpose, support the people of Scotland and strengthen Scotland's economy. Consequently, the rationale for Government intervention is centred on the need to address the deficiencies in domestic legislation in the event that the UK exits the EU without a deal. This is important to ensure that domestic legislation is clear and addresses issues of uncertainty over matters including jurisdiction in opening insolvency proceedings.

The Regulations contribute to the Scottish Government Economic Strategy to make Scotland a more successful country with opportunities for all to flourish, through increasing sustainable economic growth, aligned by the delivery of the national outcomes.

If agreed, the Regulations will also contribute towards the Scottish Government's purpose, specifically the four objectives described below:

Business – A culture of entrepreneurship, leadership, creativity and international ambition.

Inequalities – We have tackled the significant inequalities in Scottish society.

Employment opportunities – Realising our full economic potential with more and better employment opportunities for our people.

Communities – We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others.

Consultation

- **Within Government**

There has been close consultation and coordination with the UK Government and Scottish Government colleagues coordinating activity and the preparations for EU Exit. The approach being taken to deal with the reserved/devolved aspects of insolvency through the UK Regulations has been presented to and agreed by the Scottish Parliament in accordance with the protocol. Officials provided evidence to the Economy, Energy and Fair Work Committee on 2 October 2018.

- **Public Consultation**

It has not been possible to conduct a full public consultation on the changes being made by this instrument. There has been limited informal discussion with legal representatives working in the insolvency sector, in particular to confirm that the provisions proposed in relation to the appointment of a receiver by the holder of a floating charge (section 51 of the Insolvency Act 1986) achieve the intended purpose in the event of a no deal EU Exit.

- **Business**

It has not been possible to consult formally with business on the changes being made by this instrument.

Options

Option 1 – Do Nothing

At the present time the EUIR provide for automatic recognition of insolvency procedures across the EU Member States. In the event that the UK exits the EU with no deal, domestic legislation will continue to recognise EU insolvency proceedings and the appointment of insolvency practitioners but there will be no guarantee that UK proceedings will be recognised in other Member States. Without any action being taken through legislation there would be continued automatic recognition of EU proceedings in the UK, without reciprocal

recognition elsewhere. This means that EU Insolvency Practitioners would not face the same complexity and cost that would be required by UK Insolvency Practitioners and this would place the UK insolvency sector at a disadvantage. The UK Regulations address the issue of jurisdiction for opening insolvency proceedings and deficiencies in insolvency legislation relative to reserved aspects of insolvency and the mixed competency area of winding up. The UK Regulations do not address the deficiencies in fully devolved aspects of insolvency. This will result in discrepancies between reserved and devolved insolvency practices and procedures.

Benefits – There are no perceived benefits in adopting this option.

Cost – The cost implications here are considered to be minimal. There are very few insolvency proceedings under personal insolvency legislation or those involving the appointment of a receiver by a floating charge holder that involve cross-border activity and recognition. As highlighted, if no action is taken, there may be some Scottish Insolvency Practitioners who may face increased costs and complexity in having proceedings recognised in Member State Courts where there are cross-border issues – these costs would not necessarily apply to overseas Insolvency Practitioners as the unamended legislation would allow for recognition of EU member State proceedings in Scottish Courts. This option would also create inconsistency in insolvency legislation across the UK. The UK SI would deal with the deficiencies created for fully reserved areas of insolvency and company winding-up which spans reserved and devolved competence, but the deficiencies would still exist in relation to the fully devolved aspects of insolvency. This would add to the complexity of the legislation which may have some resource implications for Insolvency Practitioners and other parties.

Sectors and Groups affected – Individuals and organisations, insolvency practitioners, creditors and the broader Scottish economy.

Option 2 – The Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019

The second option is to address the deficiencies in legislation.

Benefits – This also addresses any potential disadvantage and increased costs that UK-based insolvency Practioners would face in not having any guarantee that UK proceedings would be recognised in other states, while their counterparts elsewhere in the EU would have proceedings recognised by the UK Courts. It would also create greater consistency in legislation with all EU exit related deficiencies addressed in both a UK Statutory Instrument and Scottish Statutory Instrument.

Sectors and groups affected - Individuals and organisations, insolvency practitioners, creditors and the broader Scottish economy.

Costs – As highlighted, the costs involved here are likely to be minimal as the instances of insolvency proceedings covered by this instrument that involve cross-border activity are extremely low.

Sectors and Groups affected – Individuals and organisations, insolvency

practitioners, creditors and the broader Scottish economy.

Scottish Firms Impact Test

The changes being made are unlikely to have an impact for Scottish firms.

Competition Assessment

Having considered the Competition and Markets Authority competition filter questions – i.e. does the proposal limit suppliers either directly or indirectly and reduce ability and/or incentives to compete? We can confirm that these changes will apply equally to all who engage with the Scottish insolvency system. There should be no competitive advantage to any particular individual or group as a consequence of the introduction of these Regulations.

Test run of business forms

There will be no impact on business forms.

Legal Aid Impact Test

The Scottish Legal Aid Board have confirmed that they do not foresee any impact on the legal aid fund as a result of the provisions in the Regulations.

Enforcement, sanctions and monitoring

The Scottish Government will carefully monitor how the Regulations impact in practice by carrying out reviews and seeking feedback from stakeholders and address these where required.

Implementation and delivery plan

The Regulations will come into force on exit day.

Post-implementation review

To evaluate the impact of the new legislation the Scottish Government has stated that AiB will carry out a continuous monitoring of these provisions after they come into force.

Summary and recommendation

After due consideration it is recommended that Option 2 is implemented for the reasons given in the table below.

- **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative

1	1. No requirement to change the legislation.	1. Insolvency Practitioners based in the UK may be liable for costs involved in securing recognition of insolvency proceedings in EU member State Courts – these equivalent costs would not be incurred by EU-based Insolvency Practitioners. 2. Insolvency legislation operating across the UK would be inconsistent and unnecessarily complex. The deficiencies that would be created in devolved areas of personal insolvency and company receivership would not be addressed. The UK statutory instrument would address these deficiencies for fully reserved areas and company winding-up that spans reserved and devolved competence
2	1. Insolvency legislation would be amended to deal with the deficiencies created by a no-deal EU exit and UK-based insolvency practitioners would not incur higher costs than EU counterparts in having proceedings recognised by the courts. 2. There would be a consistent approach taken to addressing EU exit legislative deficiencies for both reserved and devolved aspects of corporate insolvency – this has advantages of reduced complexity.	1. There would be no additional costs

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed: Jamie Hepburn

Date: 09/01/2019

Minister's name: Jamie Hepburn
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