

POLICY NOTE

THE INSOLVENCY (AMENDMENT) (EU EXIT) (SCOTLAND) REGULATIONS 2020

SSI 2020/337

The above instrument was made in exercise of the powers conferred by paragraph 11G(1) of schedule 2 of the European Union (Withdrawal) Act 2018 (“EUWA 2018”).

The instrument is subject to the negative procedure.

Purpose of the instrument

To amend the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 (S.S.I. 2019/94) (“the principal Scottish Regulations”) which provide for 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.

The principal Scottish Regulations are stated to come into force on exit day, subject to saving provisions. Paragraph 1(1) of schedule 5 of the European Union (Withdrawal Agreement) Act 2020 (c.1) provides that references to subordinate legislation coming into force on exit day are to be read instead as references to coming into force on IP completion day.

The current instrument amends the saving provision in regulation 9 of the principal Scottish Regulations to give effect to Article 67(3)(c) of the Withdrawal Agreement. This provides that the EU Insolvency Regulation (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings) (“the EU Insolvency Regulation”) will continue to apply in respect of main proceedings (as defined in that EU Regulation) which are opened before IP completion day.

Policy Objectives

The purpose of the current instrument is to amend the principal Scottish Regulations to ensure that, at the end of the implementation period, devolved legislation on cross-border insolvencies provides a functioning legal framework that gives effect to the Withdrawal Agreement.

The principal Scottish Regulations included (at regulation 9) saving provision to ensure the EU Insolvency Regulation would continue to apply to cross-border insolvency proceedings that were opened before exit day.

The current instrument amends that saving provision in the principal Scottish Regulations, to provide instead that the EU Insolvency Regulation will continue to apply in respect of main proceedings (as defined in that EU Regulation) which are opened before IP completion day. In doing so it gives effect to Article 67(3)(c) of the Withdrawal Agreement.

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

Upon the UK's exit from the EU (and the end of the implementation period), cross-border insolvency proceedings commenced in the UK will no longer enjoy automatic recognition in EU member states. The EU Insolvency Regulation will continue to apply in the UK as retained EU law. However, because the EU Insolvency Regulation relies heavily on reciprocity between EU member states to operate effectively, it is not possible to continue the current system unilaterally.

The UK Government made the Insolvency (Amendment) (EU Exit) Regulations 2019 ("the principal UK Regulations") in January 2019 in anticipation of a no-deal exit, to address this failure of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The principal UK Regulations in large part dis-applied the EU Insolvency Regulation (as it would exist as retained EU law).

The principal UK Regulations made amendments to legislation governing cross-border insolvency in areas of reserved and (in relation to winding up) mixed competence.

The Scottish Government made the principal Scottish Regulations in March 2019 to address corresponding deficiencies in devolved legislation on cross-border insolvencies, including deficiencies arising as a result of the disapplication of the EU Insolvency Regulation.

Both the principal UK Regulations and the principal Scottish Regulations contained saving provisions to allow for the continued application of the EU Insolvency Regulation to insolvency proceedings which were opened before "exit day".

Subsequently, the Withdrawal Agreement was reached between the EU and the UK, which included provision at Article 67(c) that the EU Insolvency Regulation shall continue to apply to insolvency proceedings, provided the main proceedings were opened before the end of the transition period.

The UK Government laid the Insolvency (Amendment) (EU Exit) Regulations 2020 ("the UK amending Regulations") in the Westminster Parliament on 30 June 2020. That instrument was required to amend the saving provision in the principal UK Regulations, in order to give effect to Article 67(c) of the Withdrawal Agreement.

The current instrument makes corresponding amendments to the saving provision in regulation 9 of the principal Scottish Regulations, for the same purpose.

The principal Scottish Regulations and associated policy note are attached for information.

<https://www.legislation.gov.uk/ssi/2019/94/contents/made>
<https://www.legislation.gov.uk/ssi/2019/94/policy-note/contents>

Parliamentary Procedure

These Regulations are made under the powers conferred on the Scottish Ministers by Part 1B of schedule 2 of EUWA 2018. For such Regulations paragraph 8D(3) of schedule 7 EUWA provides that –

“(3) Regulations under Part 1B of Schedule 2 of the Scottish Ministers acting alone which amend, repeal or revoke—

(a) primary legislation, or

(b) retained direct principal EU legislation,

are subject to the affirmative procedure (see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010).

(4) Any other regulations under Part 1B of Schedule 2 of the Scottish Ministers acting alone are subject to the negative procedure (see section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010).”.

The amendments made by the current instrument broaden, rather than restrict, the scope of the saving provision in regulation 9 of the principal Scottish Regulations. Consequently the proceedings to which EU Insolvency Regulation will continue to apply will be expanded. The amendments made by the current instrument do not “amend, repeal or revoke” retained direct principal EU legislation. Paragraph 8D(3) of schedule 7 EUWA is not engaged by the provision made in this SSI, and the negative procedure therefore applies. This is consistent with the approach taken for the UK amending Regulations.

Guiding principles on the environment and animal welfare

Scottish Ministers have, in preparing the regulations, considered the guiding principles on the environment and animal welfare and these do not apply to The Insolvency (Amendment) (EU Exit) (Scotland) Regulations 2020.

Effect 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 (Amendment) (EU Exit) (Scotland) Regulations 2020.

Categorisation of instrument in relation to the significance of the change proposed

Low - minor and technical, continuity of law with no policy change.

Consultation

As there has been no change to policy from the principal Scottish Regulations, no public consultation has been carried out.

AiB has, however, engaged in discussions and exchanges with the Insolvency Service (the UK Government) regarding the instrument and its interaction with the principal and amending UK Regulations.

Impact Assessments

Full impact assessments have not been prepared for this instrument because the purpose of this instrument is to enable main proceedings opened prior to the IP completion date to continue to operate under the terms of the EU Insolvency Regulation. This returns the

position for main proceedings to that prior to the introduction of the principal Scottish Regulations. The impact on the devolved areas of receivership, bankruptcy and trust deeds is thought to 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 involve cross-border insolvency matters.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has not been completed.

The impact of this policy on business is that insolvency practitioners dealing with cross-border insolvency cases opened prior to the IP completion date will continue to operate under the terms of the EU Insolvency Regulation.

It is considered that as cross-border insolvency in receivership and personal insolvencies are rare, any costs will be minimal and the recognition of all proceedings opened before IP completion date may serve to reduce the cost of insolvency administration.

The Accountant in Bankruptcy on behalf of the Scottish Government

October 2020