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Gordon Lindhurst MSP, Convener, Economy, Energy and Fair Work Committee
Graham Simpson MSP, Convener, Delegated Powers and Land Reform Committee
Scottish Parliament
Edinburgh
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20th September 2018

Dear Conveners,

THE INSOLVENCY (AMENDMENT) (EU EXIT) REGULATIONS 2018
EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, Mike Russell wrote to the Conveners of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September setting out the Scottish Government's views on EU withdrawal. That letter also said that we must respond to the UK Government's preparations for a No-Deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

I attach a notification which sets out the details of the SI which the UK Government propose to make and the reasons why I am content that Scottish devolved matters are to be included in this SI.

The policy rationale for the proposed approach is to remove areas of doubt and confusion in relation to company winding up insolvency process in Scotland, which span reserved and devolved competence. In preparing for a No-deal scenario, it provides the most effective means of dealing with these cross-competence elements of insolvency legislation. Insolvency stakeholders have consistently indicated support for amending legislation in this area, insofar as possible, within in a single instrument. The alternative approach in drawing

out the devolved aspects of the cross-competence aspects of insolvency with an SSI would create significant complexity.

A separate significant exercise is to modernise the corporate insolvency rules for Scotland is currently ongoing. Scottish Government officials are working closely with their counterparts in the UK on this exercise. A Scotland Act Order was obtained for the mutual transfer of competence, enabling the cross-competency area of winding up to be included in an SSI to be laid in the Scottish Parliament with any future revisions being possible through instruments laid in either the Scottish or UK Parliaments, subject to the agreement of each administration. This collaborative approach has been welcomed by industry stakeholders.

Please note that the date on which the UK Government proposes to lay these regulations is 24 October 2018. I realise that with the October recess starting on 6 October I am asking for approval within a shorter timescale than the 28 days outlined in our protocol.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you.

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NOTIFICATION TO THE SCOTTISH PARLIAMENT

The Insolvency (Amendment etc.) (EU Exit) Regulations 2018 ("the Regulations")

Brief explanation of law that the proposals amend

The Regulations would amend EU Regulation 2015/848 ("the EU Regulation") as it applies in domestic law after Exit Day.

The EU Regulation deals with cross-border cooperation and coordination of insolvency proceedings for businesses and individuals with operations/assets in more than one member state, and provides a framework for determining where applications for insolvency proceedings can be made; the applicable law; and the interaction between insolvency proceedings in different member states.

The Regulations would also correct various deficiencies across UK insolvency legislation where such legislation reflects the provisions of the EU Regulation which are repealed or amended by the Regulations.

Summary of the proposals and how these correct deficiencies

Once the UK is no longer a member state of the EU, insolvency proceedings commenced in the UK will no longer have automatic recognition in EU member states under the EU Regulation, and it will not be possible for the UK to continue the current cross-border system on its own.

The EU Regulation, as it is retained in UK law after Exit Day, will therefore not operate effectively and requires to be amended to reflect the fact that the UK will no longer be a member state of the EU.

The proposal is for the major part of the EU Regulation to be removed from UK law. The UK would maintain a modified version of the EU Regulation's rules for opening insolvency proceedings, that would sit alongside the UK's own domestic rules. The proposed amendments would allow UK courts to continue to open insolvency proceedings where an EU individual or company has an establishment in the UK. The other provisions in the EU Regulation would be repealed.

The provisions of the EU Regulation are reflected in various other pieces of insolvency legislation and which will result in deficiencies . The Regulations would also amend these deficiencies.

AiB and The Insolvency Service (UK Government) have carried out an extensive review of the various pieces of insolvency legislation to identify the deficiencies and the actions required to cure or mitigate the deficiencies.

An explanation of why the change is considered necessary

On exiting the European Union without a deal being agreed the cross-border insolvency procedures would no longer be available. Therefore there would be no formal cooperation mechanisms between UK insolvency practitioners and their counterparts in other EU countries. This could impact on securing and the recovery of overseas assets for the benefit of the creditors. AiB considers that this would not be desirable, particularly for existing and ongoing insolvency cases.

AiB and the Insolvency Service share a common view that there are significant benefits in retaining cross-border insolvency recognition and cooperation where possible.

Scottish Government categorisation of significance of proposals

AiB consider that the proposals should be classified as Category A – the lowest level of scrutiny as they are minor and technical in nature. This rationale for this assessment is based upon the well-precedented approach to dealing with the area of mixed competence as highlighted below. The deficiencies created are clear in this instance. The key consideration is the most effective manner to deal with the contingency arrangements for a No deal Brexit and experience has shown that the proposed approach has minimised the complexity involved.

Impact on devolved areas

The EU Regulation spans a mix of reserved and devolved matters. While personal insolvency is fully devolved (with 3 narrow exceptions), the arrangements for corporate insolvency are very complex (in devolution terms) - with certain areas devolved, some fully reserved and other measures spanning devolved and reserved competence. In particular, winding up in Scotland spans mixed competency with (broadly) general legal effect being reserved and the process being devolved.

Summary of stakeholder engagement/consultation

The main stakeholders are Insolvency Practitioners and in particular their Recognised Professional Bodies. ICAS and R3, the trade association for the insolvency, restructuring, advisory and turnaround professionals have previously indicated support for amending legislation covering corporate insolvency matters to be covered, insofar as possible, in a single instrument laid in the UK Parliament. There has been no formal consultation on the EU Exit proposals and the deficiencies created. However, a working group on corporate insolvency has met frequently over the past two years on the project to modernise the corporate insolvency rules in Scotland and these discussions have touched on the EU Regulation and the most effective approach to deal with these complex areas of cross-competence.

Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation

When the EU rules on cross-border corporate insolvency were first implemented in 2003 it was done entirely on a cross-UK basis, including personal insolvency, in

recognition of the difficulties in proceeding otherwise. Similar provision for cross-border insolvency cases was made on that basis in 2006 under the Insolvency Act 2000 with a Legislative Consent Motion in the Scottish Parliament and also in the implementation of legislative changes in June 2017 related to the commencement of aspects of the EU Regulation (utilising section 57(1) of the Scotland Act 1998). Ministers consider that this approach makes sense for the mixed area of corporate insolvency.

There is currently a separate and significant ongoing exercise being carried out to modernise the rules covering corporate insolvency for Scotland. This is being carried out by the AiB in conjunction with the UK Insolvency Service. Due to cross-competency in the area of winding-up, a Scotland Act Order (2018/174) was sought and passed through both the Scottish and UK Parliaments. This secured the mutual transfer of competence for the purposes of drafting the modernised insolvency rules and enabled the cross-competency area of winding up to be included in an SSI, to be laid in the Scottish Parliament. Future amendments would be possible through instruments laid in either the Scottish Parliament or UK Parliament, subject to the agreement of each administration. There has been good co-operation with the UK Insolvency Service on this work and the approach taken has been welcomed by the main stakeholders.

A Scottish SSI would cover the amendments required for fully devolved aspects in receivership and personal insolvency.

AiB consider that including devolved aspects of corporate insolvency in Scottish Regulations would add greatly to the complexity of the provisions. AiB therefore consider the most effective route in respect of elements that span both devolved and reserved competence is to deal with them in the UK-wide regulations taken forward in parallel by UK Ministers (which will extend to Scotland anyway for wholly reserved aspects such as company administration). Such an approach would mean that the UK SI would cover the necessary aspects of corporate insolvency in relation to the processes of administration, company voluntary arrangement and winding up.

AiB considers that this is an area in which it would be beneficial to take a consistent approach with the rest of the UK to remove doubts in areas which span reserved and devolved competence

Intended laying date of SI

24 October 2018

If the Scottish Parliament will not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?

Please note that the date on which the UK Government proposes to lay these regulations is 24 October 2018. I realise that with the October recess starting on 6 October I am asking for approval within a shorter timescale than the 28 days outlined in our protocol.

Information about any time dependency associated with the proposal

Time dependency is set out above. The timeline for the SI is being driven by the UK Government who have an agreed laying date.

Any significant financial implications?

AiB does not consider that there will be any significant financial implications for the Scottish Government. However, AiB considers that if the deficiencies are not addressed in this manner then cross border insolvency process will be more complex. This will result in more expensive and lengthier insolvency processes, increased court actions in multiple jurisdictions and ultimately far lower returns to the creditors involved.