
EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made in exercise of the powers in section 8(1) of the European Union (Withdrawal) Act 2018 (c. 16) in order to address failures of retained EU law to operate effectively and other deficiencies (in particular under section 8(2)(b) to (d)) arising from the withdrawal of the United Kingdom from the European Union. These Regulations make amendments to legislation in the field of cross-border insolvency. These Regulations also contain minor amendments to the Insolvency (Northern Ireland) Order 1989 and to employment legislation in Northern Ireland bringing that legislation into line with EU law. These amendments are made under section 2(2) of the European Communities Act 1972 (c. 21) (“the ECA”) and come into force on the day after these Regulations are made.

The EU Regulation on insolvency proceedings ((EU) 2015/848) (“the EUIR”) determines in which member State main insolvency proceedings may be opened and provides that decisions opening proceedings are 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, or COMI, 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.

These Regulations address the deficiencies that will arise from the absence of mutual application of the EUIR. It is not appropriate to continue to apply the EUIR unilaterally in respect of EU proceedings when member States will not apply the Regulation to UK proceedings. There is however a saving and transitional provision in regulations 4 and 5 which continues to apply the EUIR, the previous EU insolvency regulation and the associated domestic law where main proceedings have been opened before exit day. The court may decide not to apply these Regulations in the circumstances set out in regulation 5.

Part 1 amends the EUIR. It retains the jurisdictional test based on COMI as an additional test of jurisdiction. The restrictions on opening insolvency proceedings where the COMI is in a member State are removed. The majority of the EUIR, which is based on mutual application between member States, is omitted. This part extends to the whole of the United Kingdom.

Parts 2 and 3 make consequential amendments to the Insolvency Act 1986 (c. 45). These Parts extend to England and Wales and Scotland, with a few exceptions set out in regulation 3(a).

Part 4 amend the Insolvency (England and Wales) Rules 2016. These amendments are consequential on the amendments made to the EUIR by Part 1. These Rules govern the conduct of corporate and personal insolvency proceedings under the Insolvency Act 1986 in England and Wales.

Parts 5 and 6 make further consequential amendments. These include amendments to the Cross-Border Insolvency Regulation 2006 which will apply after exit day to new cross-border proceedings previously within the EUIR. Parts 5 and 6 extend to England and Wales and Scotland.

Part 7 makes consequential amendments to a number of sections of the Insolvency Act 1986 as those sections are in force in Scotland. These sections were amended by the Small Business, Enterprise and Employment Act 2015. Those amendments have been commenced for England and Wales but have not yet been commenced for Scotland. Hence different versions of those sections are in force in England and Wales and in Scotland. Part 7 only applies to Scotland.

Part 8 amends the Insolvency (Scotland) Rules 1986 as they provide for corporate insolvency proceedings in Scotland. These amendments are consequential on the amendments to the EUIR. Part 8 only applies to Scotland.

Part 9 makes amendments to the Insolvency Northern Ireland Order 1989 and the Insolvency Rules (Northern Ireland) 1991 covering both corporate and personal insolvency. These amendments are consequential on the amendments to the EUIR. Paragraph 177 amends the existing law on bankruptcy to provide for jurisdiction where the debtor has an establishment in Northern Ireland. This brings the jurisdictional tests into line with the EUIR. The amendment is made under section 2(2) of the ECA and comes into force the day after the Regulations are made. Part 10 makes a consequential amendment to the Pension Protection Fund (Entry Rules) Regulations (Northern Ireland) 2005 and to the Cross-Border Insolvency Regulations (Northern Ireland) 2007. Parts 9 and 10 only extend to Northern Ireland.

Part 11 makes amendments to the Employment Rights Act 1996 (c. 18) and the Pension Schemes Act 1993 (c. 48). The relevant provisions provide for payment to employees of outstanding sums owed to them in defined circumstances where their employer becomes insolvent. Part 11 applies to England and Wales and Scotland.

Part 12 makes amendments to Articles 201 and 228 of the Employment Rights (Northern Ireland) Order 1996 and section 119 of the Pension Schemes (Northern Ireland) Act 1993 to bring those provisions into line with Directive 2008/94 EC of the European Parliament and the Council on the protection of employees in the event of the insolvency. These provisions provide for payment to employees of certain sums owed to them and unpaid pensions contributions in circumstances where their employer becomes insolvent. These amendments are made under section 2(2) ECA and come into force the day after the Regulations are made. They only extend to Northern Ireland.

Part 13 makes further amendments to Articles 201 and 228 of the Employment Rights (Northern Ireland) Order 1996 and section 119 of the Pension Schemes (Northern Ireland) Act 1993 to ensure those provisions operate effectively after the withdrawal of the United Kingdom from the European Union. These amendments apply to Northern Ireland and are equivalent to those made by Part 11 for England and Wales and Scotland.

In accordance with the Government Better Regulation principles, a proportionate analysis of costs and benefit has been completed. This analysis has found that the overall impact on business will likely be less than £5m per year. An Explanatory Memorandum is also available with these Regulations on www.legislation.gov.uk. Copies have been placed in the Libraries of both Houses of Parliament.