

**EXPLANATORY MEMORANDUM TO**  
**THE INSOLVENCY (AMENDMENT) (EU EXIT) REGULATIONS 2018**  
**2018 No. XXXX**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by Insolvency Service and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.
- 1.3 These Regulations would apply in the unlikely event that no deal is reached on the United Kingdom's withdrawal from, and future relationship with, the EU. We are confident that we will get a deal, and there is already commitment by both sides on the terms of an implementation period. However, we are preparing for all scenarios, including the unlikely outcome that we leave the EU without any deal in March 2019. These Regulations, and this explanatory memorandum, address the scenario in which no deal is reached with the EU and no implementation period is in place following the UK's withdrawal.

**2. Purpose of the instrument**

- 2.1 The SI deals with two discrete policy areas relating to insolvency:
  - It addresses deficiencies that arise in relation to cross-border insolvency, specifically the EU Insolvency Regulation (EU 2015/848) (the "EUIR"); and
  - it addresses the deficiencies created by the UK's exit from the EU in the Employment Rights Act 1996 (the "ERA 1996"), Pension Schemes Act 1993 (the "PSA 1993"), Employment Rights (Northern Ireland) Order 1996, and the Pension Schemes (Northern Ireland) Act 1993 which set out certain guaranteed employee protections that arise on the insolvency of an employer.

**Amendments to the European Insolvency Regulation and consequential amendments to insolvency legislation**

- 2.2 The Insolvency (Amendment) (EU Exit) Regulations 2018 ("the Regulations") repeal part of the retained EUIR and make consequential amendments to insolvency and related legislation in the three jurisdictions of the United Kingdom. The EUIR deals with cross-border jurisdiction, cooperation, recognition and enforcement of insolvency proceedings in the EU. The principal impact of the United Kingdom's exit from the EUIR without a deal on withdrawal or a future relationship would be that restrictions on UK insolvency jurisdiction will be removed and proceedings commenced in the UK would no longer enjoy automatic recognition in EU member States.
- 2.3 The Regulations contain transitional provisions for cases to which the EUIR applied where insolvency proceedings were opened in the United Kingdom before exit day.
- 2.4 Most of the changes previously made to insolvency legislation in 2017 by the Insolvency Amendment (EU 2015/848) Regulations 2017 (SI 2017/702) to facilitate

the application of the EUIR will be revoked by these Regulations. The Regulations maintain a modified version of the EUIR's jurisdictional tests for the opening of insolvency proceedings that will sit alongside the UK's domestic provisions on jurisdiction rules. Those provisions of the EUIR which rely on reciprocity between member States are repealed.

### **Amendments to the Employments Rights Act and Pension Schemes Act**

- 2.5 The Regulations also make amendments to sections 166 and 183 of the Employment Rights Act 1996 ("ERA 1996") and section 123 of the Pension Schemes Act 1993 ("PSA 1993") ("the Acts"), and articles 201 and 228 of the Employment Rights (Northern Ireland) Order 1996 and section 119 of the Pension Schemes (Northern Ireland) Act 1993 ("the NI Orders"), which transpose certain obligations in Directive 2008/94 EC of the European Parliament and the Council on the protection of employees in the event of the insolvency of their employer. The amendments will reflect the fact that as the UK will no longer be recognised as an EU member State, references to member State that become redundant on Exit day will render these domestic legislative provisions inoperable. In relation to Northern Ireland, the Regulations make further amendments to the Employment Rights (Northern Ireland) Order 1996 and the Pension Schemes (Northern Ireland) Act 1993 to align those enactments with corresponding provisions in the Employment Rights Act 1996 and Pension Schemes Act 1993, following amendments made by the Employment Rights Act 1996 and Pension Schemes Act 1993 (Amendment) Regulations 2017 (SI 2017/1205).

### ***Explanations***

#### *What did any relevant EU law do before exit day?*

- 2.6 Part 1: The EUIR deals with cross-border jurisdiction, cooperation, recognition, and enforcement of insolvency proceedings in the EU. Insolvency proceedings to which the Regulation applies may only be opened in the member State where the centre of main interests is located or in which an establishment is located.
- 2.7 Parts 2, 4, 7, 8 & 9: After the EU Insolvency Regulation was recast and came into force in 2017, amendments were made to the following instruments to facilitate its implementation in the UK. These amendments have been reversed in these Regulations. The Insolvency Act 1986 and the Insolvency (England & Wales) Rules 2016 provide the procedural framework to be followed in the conduct of insolvency proceedings in England and Wales. The Insolvency Act 1986 also includes provisions which apply to corporate insolvency in Scotland, these provisions, along with the Insolvency (Scotland) Rules 1986, set the framework for corporate insolvency in Scotland. Personal insolvency in Scotland is wholly devolved. In Northern Ireland the Insolvency (Northern Ireland) Order 2005 and the Insolvency Rules (Northern Ireland) 1991 apply.
- 2.8 Part 3: The administration procedure was introduced by the Insolvency Act 1986 to provide a company, limited liability partnership (LLP) or partnership with a breathing space to allow a rescue package or more advantageous realisation of assets to be put in place. The regime was subsequently amended by the Enterprise Act 2002, which introduced Schedule B1 of the Insolvency Act 1986. The old regime still exists primarily as the basis for various special administration regimes. Section 8 of the 'old'

Part 2 of the 1986 Act deals with the power of a court to make an administration order and makes reference to Article 3 of the EUIR.

- 2.9 Part 5: The Administration of Insolvent Estates of Deceased Persons Order 1986 provides a framework for applying the Insolvency Act 1986 to the estates of deceased persons, with some modifications.

The Land Registration Rules 2003, rule 171, provides for the registration on the land register of the opening of insolvency proceedings under the EUIR in another member State.

The Civil Proceedings Fees Order 2008 provides the fee framework for civil court procedures and applications. As part of this, a fee is provided for the conversion of UK insolvency proceedings into other kinds of insolvency proceedings under Article 51 of the EU Insolvency Regulation.

- 2.10 Parts 6 & 10: Provisions in The Pension Protection Fund (Entry Rules) Regulations 2005 and The Pension Protection Fund (Entry Rules) Regulations (Northern Ireland) 2005 enable eligible pension schemes with EU-based employers to trigger entry to the pension protection fund in the UK, where the EUIR prevented the making of a winding up order. The Cross Border Insolvency Regulations 2006 and The Cross-Border Insolvency Regulations (Northern Ireland) 2007 give effect to the United Nations model law on cross-border insolvency. This legislation provides a framework for the UK courts to give recognition to foreign insolvency proceedings.

- 2.11 Part 11: The relevant provisions in Part XI and XII of the Employment Rights Act 1996, Part VII of the Pension Schemes Act 1993, articles 201 and 228 of the Employment Rights (Northern Ireland) Order 1996 and section 119 of the Pension Schemes (Northern Ireland) Act 1993, which transpose certain obligations in Directive 2008/94/EC of the European Parliament and the Council on the protection of employees in the event of the insolvency of their employer, provide for a basic level of protection to the former employees of insolvent employers within certain defined circumstances.

- 2.12 Parts 12 & 13: The relevant provisions in the Employment Rights (Northern Ireland) Order 1996 and the Pension Schemes (Northern Ireland) Act 1993 provide the corresponding protection in Northern Ireland for former employees of insolvent employers, transposing the same obligations in Directive 2008/94/EC.

*Why is it being changed?*

***Amendments to the European Insolvency Regulation and consequential amendments to insolvency legislation***

- 2.13 On the UK's exit from the EU, in a no deal scenario, insolvency proceedings commenced in the United Kingdom will no longer enjoy automatic recognition in EU member States. As the EUIR relies heavily on reciprocity between EU member States in order to operate effectively, in a no deal scenario it is not possible to continue the current system unilaterally. The amendments made by these Regulations are therefore needed to repeal the majority of the EUIR from UK law and to revoke previous amendments made to insolvency legislation to facilitate the implementation of the EUIR.

***Amendments to the Employment Rights Act and Pension Schemes Act (and corresponding Northern Ireland legislation)***

- 2.14 On the UK's exit from the EU, the UK will no longer be an EU member State. If the relevant provisions in these Acts and Orders are left unchanged, this would mean some protections for employees of insolvent employers would be reduced where their employer is based in the UK. These Regulations will ensure the same level of protection to the former employees of insolvent employers after the UK exits the EU. In relation to Northern Ireland, further amendments are being made to the Employment Rights (Northern Ireland) Order and the Pension Schemes (Northern Ireland) Act 1993 to align those enactments with the corresponding provisions in the Employment Rights Act 1996 and Pension Schemes Act 1993, as amended by the Employment Rights Act 1996 and Pension Schemes Act 1993 (Amendment) Regulations 2017.

*What will it now do?*

***Amendments to the European Insolvency Regulations and consequential amendments to insolvency legislation***

- 2.15 The primary purpose of this instrument is to retain the EUIR in a form that will operate effectively after Exit day. The Regulations maintain a modified version of the EUIR's jurisdictional tests for the opening of insolvency proceedings that will sit alongside the UK's domestic provisions on jurisdiction rules (Part 1 of the Regulations). The rest of the EUIR, which forms the majority, relies on reciprocity between member States, and so those provisions are repealed.
- 2.16 The amendments to our domestic legislation (Parts 2 – 10) are made to remove references to the EUIR where provisions no longer apply or to update references to the revised jurisdiction test provided by Article 1 of the EUIR. Most of the changes previously made to insolvency legislation in 2017 to facilitate the application of the EUIR will be revoked by the Regulations.
- 2.17 Amendments to the Employment Rights Act, Pension Schemes Act (and corresponding Northern Ireland legislation)
- 2.18 The Regulations (Parts 11 & 13) make amendments to reflect the fact that as the UK will no longer be recognised as an EU member State, references to member State will be redundant. These amendments therefore ensure the relevant provisions of the Acts continue to operate so as to provide employee protections in the same way as before Exit day. The Regulations (Part 12) also align the Northern Ireland legislation with the legislation applying to England, Wales and Scotland.

**3. Matters of special interest to Parliament**

***Matters of special interest to the Joint Committee on Statutory Instruments***

- 3.1 The amendments in Parts 1-11 (apart from paragraph 177 in Part 9) & Schedule 13 are made under section 8 of the European Union (Withdrawal) Act 2018, in order to address deficiencies in the operation of retained EU law. The amendments to the NI Orders in Part 12 are made under section 2(2) of the European Communities Act 1972. There is also an amendment to Article 239 of the Insolvency (Northern Ireland) Order (see paragraph 177) which is made under section 2(2)). This aligns the bankruptcy jurisdiction in Northern Ireland with the EU Insolvency Regulation.

- 3.2 This instrument is subject to the affirmative resolution procedure because amongst other things it amends the power in sections 411 and 412 of the Insolvency Act to make insolvency rules in relation to the amended EUIR.
- 3.3 The instrument needs to come into force should the UK withdraw from the EU without an agreement on that withdrawal or a future relationship with the EU. The drafting of the instrument has been complex and technically difficult given the interaction between the EUIR (and its predecessor) and domestic legislation in the three jurisdictions of the UK. An information note will be published to coincide with the publication of the instrument outlining the changes made by the instrument to assist the insolvency profession.
- 3.4 The territorial application of this instrument varies between provisions.
- 3.5 The powers under which this instrument is made cover the entire United Kingdom (section 24(1) of the Act). The modified version of the EUIR extends to the United Kingdom. The amendments to primary and secondary legislation relating to cross border insolvency extend to England, Wales, Scotland and Northern Ireland in accordance with the extent of the legislation amended.
- 3.6 The amendments to the ERA 1996 and PSA 1993 in Part 11 extend to England, Scotland and Wales only. The amendments to the NI Orders in Part 12 & 13 extend to Northern Ireland.
- 3.7 The basis for the amendments to the EUIR is the lack of reciprocity after exit day. The UK give to insolvency proceedings from member States benefits under the Regulation which those states are no longer giving to our proceedings in their states. However the saving in regulation 4 takes a different line. Insolvency proceedings can last for a long time. In order to promote certainty and avoid additional costs (so far as possible) the instrument continues to apply the existing law where main proceedings have been started in the EU before exit day. That is subject to the practical limitation that the UK can only continue to apply the EUIR within its territory. Where its application requires a member State to continue to apply the EUIR as if the UK were a member State that may or may not occur. For example the UK can unilaterally recognise insolvency judgments from member States but it cannot require member States to recognise insolvency judgments from the UK. It is considered that taking a positive line in applying the EUIR to existing proceedings is the best way to encourage courts in EU states to take a positive approach to UK proceedings.
- 3.8 Regulation 5 contains a safeguard mechanism. This can be exercised on a case by case basis where saving applies. It applies where the continued application of the EUIR in the UK would require us to accept from a member State a prejudicial outcome based on that State not treating the UK as a member State. In such cases the court can decline to apply the EUIR and instead apply other relevant law such as the Cross Border Insolvency Regulations 2006 which provide a discretionary system for recognising and enforcing foreign insolvency judgments.

#### **4. Extent and Territorial Application.**

- 4.1 The territorial extent of this instrument covers the United Kingdom.
- 4.2 The territorial extent or application of this instrument varies between provisions.
- 4.3 Insolvency law and employment law are not devolved as regards Wales.

- 4.4 Insolvency law is a partially devolved policy area in Scotland where personal insolvency is devolved, but corporate insolvency proceedings, such as administration, and Company Voluntary Arrangements are reserved. There is shared competence between Westminster and the Scottish Government for winding up, with ‘legal effect’ being reserved and ‘process’ being devolved. Employment law is not devolved to Scotland.
- 4.5 Insolvency law and employment law are fully devolved to Northern Ireland. Amendments to the Insolvency (Northern Ireland) Order 1989, Insolvency Rules (Northern Ireland) 1991, Employment Rights (Northern Ireland) Order 1996 and the Pension Schemes (Northern Ireland) Act 1993 are included in this instrument at the request of the Northern Irish Department for the Economy.
- 4.6 Regulations 4 and 5 and Part 1 of the Schedule extend to the whole of the United Kingdom.
- 4.7 Part 2 of the Schedule extends to England and Wales and, in the case of the amendments to sections 1, 106, 120, 124, 146, 201, 205, 247, 251, 388, 411, 422A, 436 and 436A and Schedule B1, also extends to Scotland.
- 4.8 Parts 3, 6 and 11 of the Schedule extend to England, Wales and Scotland. Parts 4 and 5 of the Schedule extend to England and Wales only.
- 4.9 Parts 7 and 8 of the Schedule extend to Scotland only.
- 4.10 Parts 9, 10, 12 and 13 of the Schedule extend to Northern Ireland only.
- 4.11 Amendments, repeals and revocations made by the instrument have the same extent as the enactments which are so amended, repealed or revoked.

## **5. European Convention on Human Rights**

- 5.1 The Minister for Small Business, Consumers and Corporate Responsibility has made the following statement regarding Human Rights:

“In my view the provisions of the Insolvency (Amendment) (EU Exit) Regulations 2018 are compatible with the Convention rights.”

## **6. Legislative Context**

### **Amendments to the European Insolvency Regulations and consequential amendments to insolvency legislation**

- 6.1 The EUIR came into force on the 26 June 2017 and replaced the European Community Insolvency Regulation (1346/2000) which came into force on 31 May 2002.
- 6.2 This instrument makes amendments to the EUIR to deal with deficiencies in retained law relating to cross border insolvencies. The Regulations retain provisions that are beneficial to the United Kingdom and remove those which no longer operate effectively. Amendments are made to the relevant primary and secondary legislation to accommodate these changes, and to ensure our domestic legislation functions effectively after exit. The Insolvency Act 1986 and the Insolvency (England & Wales) Rules 2016 provide the procedural framework to be followed in the conduct of insolvency proceedings in England and Wales. The Insolvency Act 1986 also includes provisions that apply to corporate insolvency in Scotland. These provisions, along with the Insolvency (Scotland) Rules 1986, set the framework for corporate

insolvency in Scotland. Personal insolvency in Scotland is wholly devolved. In Northern Ireland, the Insolvency (Northern Ireland) Order 2005 and the Insolvency Rules (Northern Ireland) 1991 apply.

### **Amendments to the Employment Rights Act and Pension Schemes Act**

- 6.3 The relevant sections of the ERA 1996 and PSA 1993 provide for payment to employees of certain insolvent employers of defined sums due to them where their employer becomes insolvent within specified circumstances.
- 6.4 The amendments to the Acts are made under section 8 of the European Union (Withdrawal) Act 2018.
- 6.5 Similarly, the Employment Rights (Northern Ireland) Order 1996 and the Pension Schemes (Northern Ireland) Act 1993 apply the same protections as the ERA and PSA in Northern Ireland.
- 6.6 The amendments to the Northern Ireland legislation are made under both section 8 of the European Union (Withdrawal) Act 2018 and section 2(2) of the European Communities Act 1972. The latter power is relied on for the amendments that correspond to those made, in relation to England, Wales and Scotland by the Employment Rights Act 1996 and Pension Schemes Act 1993 (Amendment) Regulations 2017.

## **7. Policy background**

### *What is being done and why?*

#### *Amendments to the European Insolvency Regulation and consequential amendments to insolvency legislation*

- 7.1 The purpose of this instrument 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. It also makes associated consequential amendments to other insolvency-related legislation.
- 7.2 The amendments made by this instrument will ensure that domestic provisions relating to jurisdiction, cooperation, and the recognition and enforcement of cross border insolvency proceedings function appropriately after the UK's exit from the EU. In the absence of a reciprocal deal with the EU to replicate the current arrangements provided by the EUIR, incorporating the EUIR into domestic law in its current form would not be appropriate; it cannot operate properly without the reciprocal application of its provisions between the UK and the states of the EU. Absent such reciprocation it would, for example, create an obligation for the UK to recognise incoming insolvency orders from EU member States, without any reciprocal recognition for UK insolvency proceedings in EU member States. Further while the EUIR would prevent insolvency proceedings being commenced in the UK that competed with proceedings in an EU state, proceedings in the UK would not benefit from the same protection in EU states.
- 7.3 As such, this instrument removes all but the jurisdiction test provided by Article 1 of the EUIR; amends domestic legislation to ensure references and other terms related to the EUIR are removed or updated; and ensures that associated legislation reflects the new provisions. This includes the removal of most of Part 21 of the Insolvency (England and Wales) Rules, which only deals with the EUIR. In doing so, the

instrument reverses the changes that were made for England and Wales, Scotland and Northern Ireland by the Insolvency Amendment (EU 2015/848) Regulations 2017.

#### Jurisdiction

- 7.4 The instrument retains the existing jurisdiction enjoyed in the UK under the EUIR, which will sit alongside the UK's pre-existing jurisdictional tests. If the debtor's centre of main interests is in the UK, if the debtor has an "establishment" in the UK, or if a test set out in existing domestic insolvency law is met, then the UK courts will have jurisdiction to open proceedings. This ensures that there is no narrowing of the UK courts' jurisdiction following the UK's exit from the EU.

#### Northern Ireland

- 7.5 This instrument applies to cross border insolvency legislation which is a transferred matter for Northern Ireland (see paragraph 23 of Schedule 3 to the Northern Ireland Act 1998). The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. With exit day less than one year away, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.

#### ***Amendments to the Employment Rights Act 1996 and Pension Schemes Act 1993***

- 7.6 Sections 166 (Applications for payments) and 182 (Employee's rights on insolvency of employer) of the ERA 1996 and section 123 (Interpretation of Chapter II) of the PSA 1993 provide for payment to employees of certain outstanding sums owed to these employees in circumstances where their employers become insolvent. Under the current provisions in section 183 which define insolvency, the protections extend to the insolvency of employers who are individuals, companies, or limited liability partnerships that become insolvent. These provisions implement the obligations in Directive 2008/94 EC of the European Parliament and the Council on the protection of employees in the event of the insolvency of their employer. The current provisions also define the circumstances and types of collective insolvency proceedings which constitute an insolvency (and therefore give rise to employee protections) by reference to collective proceedings opened under the laws, regulations or administrative procedures of a member State and an authority of a member State empowered to open proceedings to make a determination as to the insolvency status of the relevant employer.
- 7.7 After the UK leaves the EU, these references will no longer apply to the UK, which could prevent vital redundancy payments being made to the former employees of insolvent employers. As such the provisions in this instrument are aimed at correcting this deficiency using the powers in section 8 of the EU (Withdrawal) Act. The amendments introduced by new section 166(8ZA), section 183(4ZA) ERA 1996 and section 123(2ZA) PSA 1993 will ensure that employees of insolvent employers who are not individuals, companies or limited liability partnerships continue to be protected in Great Britain through the types of insolvency proceedings provided for



under the law of any part of the United Kingdom. The Regulations substantially mirror the obligations derived from Directive 2008/94 EC. These will continue to apply to employer insolvencies in member States on exit alongside the Great Britain-specific provisions to ensure the same regime applies. These amended provisions clarify that the same regime applies on, as before, Exit Day.

#### Northern Ireland

- 7.8 This instrument applies to employment legislation which is a transferred matter for Northern Ireland. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. With exit day less than one year away, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.
- 7.9 In addition to the changes necessary to maintain the statute book for exit, the NI Orders require some small amendments made under s2(2) powers to transpose Directive 2008/94 EC of the European Parliament and the Council on the protection of employees in the event of the insolvency of their employer. Currently, articles 201 and 228 of the Employment Rights (Northern Ireland) Order 1996 provide for payment to employees of certain sums due to them from their employer in circumstances where the employer becomes insolvent. Section 119 of the Pension Schemes (Northern Ireland) Act 1993 provides for payment to pension schemes of relevant outstanding employee and employer contributions. All three sections define when an employer becomes insolvent for the purposes of the Orders. These definitions do not encompass all employers that become insolvent, but only those insolvent employers who are companies, limited liability partnerships, or individuals; nor do they cover some types of collective insolvency proceeding in Member States (which are broadly analogous to the UK's administration procedure).
- 7.10 Following a review conducted by the Insolvency Service's Redundancy Payments Service, which administers such payments on behalf of the National Insurance Fund to employees in Great Britain, it was concluded that the definition of an insolvent employer should be expanded to include all insolvent employers in the situations required to be covered under the Directive. The amendments in Part 12 of this instrument mirror changes made to the English, Welsh and Scottish transposition in the Employment Rights Act 1996 and Pension Schemes Act (Amendment) Regulations 2017 to correct this same issue in the ERA 1996 and PSA 1993.

### **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the attached Annex.

## **9. Consolidation**

9.1 N/A

## **10. Consultation outcome**

- 10.1 In order to avoid prejudicing the outcome of exit negotiations with the EU, it has not been possible to conduct a public consultation on the changes made by this instrument. Limited, informal discussions were held with a small group of insolvency professionals, and with the Chief Bankruptcy Registrar and the Chair of the Insolvency Rules Committee, in late 2017 and throughout 2018. These discussions were focussed on the most significant change introduced in this instrument, which is the jurisdiction test for EU cases.
- 10.2 The Insolvency Service has also engaged in discussion and exchange with other government departments, including those responsible for enactments that have been affected or amended by this instrument, and with the devolved administrations in Scotland and Northern Ireland.
- 10.3 No consultation has been undertaken in relation to the amendments to the ERA 1996 and PSA 1993 because the changes will have no effect other than to ensure that already existing protections will continue to function after the UK exits the EU.

## **11. Guidance**

- 11.1 Insolvency Service publications, available on Gov.UK, will be updated to reflect the changes. The Insolvency Service also issue regular bulletins to interested parties, and these will be used to raise awareness of the new provisions and procedural changes at the time of laying.

## **12. Impact**

- 12.1 The impact on business is estimated as less than £5m per year. There is no impact on charities or voluntary bodies.
- 12.2 There is no significant impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because analysis has found that the overall impact on business will likely be less than £5m per year.
- 12.4 Automatic recognition had allowed the UK to have orders recognised in the EU at no cost. The loss of automatic recognition under a no deal scenario will mean that applications will need to be made to EU courts to have orders recognised in cross-border insolvency cases. In the unlikely event no deal is reached on the United Kingdom's withdrawal from, and future relationship with the EU, the direct impact of leaving the European Union on insolvency cases has been estimated at an additional cost of £2.7m, falling upon those UK insolvency cases that have an EU cross-border element. The total cost due to applications has been calculated as the product of case impacts and the cost per application which comes to £2.7 million.
- 12.5 As the UK's insolvency sector relies upon the EUIR to act as a restructuring hub for Europe, this status will be damaged if a deal to continue a similar system cannot be reached. The current size of the cross-border restructuring sector is not known and so this impact cannot be measured with any degree of accuracy using the information currently available to us.

Amendments to the Northern Ireland Employment Orders

12.6 An impact assessment has not been prepared because all employees are already protected by virtue of the direct effect of the Directive. Accordingly, Parts 11, 12 and 13 of these Regulations will have no impact other than to formalise the position and ensure operability ahead of Exit Day.

### **13. Regulating small business**

13.1 The legislation applies to activities that are undertaken by Insolvency Practitioner small businesses.

13.2 However, the EUIR and our existing insolvency legislation does not distinguish between large and small businesses or large and small Insolvency Practitioner businesses, hence that is also the case with these repeals and amendments.

### **14. Monitoring & review**

14.1 The approach to monitoring of this legislation is to monitor the impact of the changes introduced by this instrument on an ongoing basis using information collected from internal systems, published statistics, and regular engagement with affected stakeholder groups.

14.2 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

### **15. Contact**

15.1 Andrew Shore, Assistant Director of Policy at the Insolvency Service (Tel: 020 7637 6587, or e-mail: Policy.Unit@insolvency.gsi.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Dean Beale, Director of Strategy and Change, at the Insolvency Service can confirm that this Explanatory Memorandum meets the required standard.

15.3 Kelly Tolhurst MP at the Department for Business, Energy & Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

# Annex

## Statements under the European Union (Withdrawal) Act 2018

### Part 1

#### Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them.  State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

## **Part 2**

### **Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act**

#### **1. Appropriateness statement**

1.1 The Minister for Small Business, Consumers and Corporate Responsibility has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

1.2 “In my view the Insolvency (Amendment) (EU Exit) Regulations 2018 do no more than is appropriate”.

#### **Amendments to the European Insolvency Regulations**

1.3 The amendments are appropriate because 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 UK insolvency proceedings being restricted or obstructed by an unreciprocated obligation to recognise other countries’ insolvency orders and judgments. This would be in relation to cases where there would otherwise be jurisdiction in the UK, but that jurisdiction would be removed by the EUIR by virtue of the COMI resting in another member State.

#### **Amendments to the Employments Rights Act and Pension Schemes Act**

1.4 The amendments are appropriate because they acknowledge that the UK will no longer be a member State, and are therefore necessary to maintain the protections given to the former employees of insolvency employers. Without these amendments, the protection for employees working for a UK employer would be diminished.

#### **2. Good reasons**

2.1 The Minister for Small Business, Consumers and Corporate Responsibility has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

2.2 “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”. These are outlined in sub-paragraph 7.2 for the insolvency legislation amendments, and sub-paragraph 7.6 for the employment protections legislation amendments.

#### **3. Equalities**

3.1 The Minister for Small Business, Consumers and Corporate Responsibility has made the following statement: “The instrument does 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.

3.2 The Minister for Small Business, Consumers and Corporate Responsibility has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

3.3 “In relation to the instrument, I, Kelly Tolhurst, 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.”

**4. Explanations**

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.