

EXPLANATORY MEMORANDUM TO
THE INSOLVENCY AMENDMENT (EU 2015/848) REGULATIONS 2017
2017 No. 702

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Insolvency Service and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument makes provision to facilitate the application of Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (“the recast EU Insolvency Regulation”).
- 2.2 The recast EU Insolvency Regulation deals with cross-border jurisdiction, cooperation, recognition and enforcement of insolvency proceedings in the EU. It introduces new procedures for undertakings as an alternative to secondary proceedings and for the coordination of proceedings involving members of a group of companies. This instrument makes amendments to the Insolvency Act 1986 and a number of statutory instruments to ensure that their provisions are consistent with the recast EU Insolvency Regulation.
- 2.3 The changes apply to the three jurisdictions of the United Kingdom and deal with some devolved matters in Scotland and Northern Ireland, by agreement with the Scottish Government and at the request of the Permanent Secretary for the Department of the Economy in Northern Ireland.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The instrument needs to come into force on 26 June, the same day as the recast EU Insolvency Regulation comes into force. The drafting of the instrument has been complex and technically difficult because it covers reserved and devolved insolvency law across three jurisdictions of the United Kingdom. The law is different in each jurisdiction. As a result we have been unable to settle the instrument in time to comply with the 21 day rule. Stakeholders are already aware of the terms of the recast EU Insolvency Regulation which is directly applicable. An information note will be published to coincide with the publication of the instrument outlining the changes made by the instrument to assist insolvency practitioners.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The recast EU Insolvency Regulation on insolvency proceedings comes into force on the 26 June 2017 and replaces Council Regulation (EC) No. 1346/2000 on jurisdiction, cooperation, and the recognition and enforcement of insolvency proceedings (“the original Insolvency Regulation”), which came into force on 31 May 2002. The recast EU Insolvency Regulation does not fundamentally change the nature of the original Regulation but introduces a number of new concepts and widens the scope of the original Insolvency Regulation.
- 4.2 The amendments made by this instrument reflect amendments to current EU procedures, set out processes for new measures introduced by the recast EU Insolvency Regulation (such as undertakings to avoid the opening of secondary proceedings and group coordination proceedings) and make consequential amendments to various legislation.
- 4.3 The text of the Regulations can be found at:
<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848> (2015)
and
<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32000R1346> (2000)
- 4.4 This instrument is made under section 2(2) of the European Communities Act 1972. The Secretary of State has been designated for the purposes of that section in relation to insolvency and retains competence to act in respect of Scotland and Northern Ireland in respect of devolved matters.
- 4.5 Although the instrument does not make the equivalent changes in respect of limited liability partnerships (LLPs) we do not expect this to have a significant impact, if any, given the recast EU Insolvency Regulation applies directly in the UK and the low numbers of EU cross-border insolvencies. (LLPs account for only 1% of overall insolvencies and the numbers which are cross-border insolvencies will be limited). If needs be, Courts would be able to give directions if a LLP with significant cross-border interests goes into insolvency.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom. Amendments, repeals and revocations made by the instrument have the same extent as the enactments which are so amended, repealed or revoked.
- 5.2 The territorial application of this instrument is the United Kingdom.
- 5.3 Insolvency is a partially devolved policy area, other than in Wales. In Scotland, personal insolvency is devolved but corporate insolvency proceedings, such as administration and Company Voluntary Arrangements are reserved. There is shared competence across Westminster and the Scottish Government for winding up, with ‘legal effect’ being reserved and ‘process’ being devolved. The new procedures on group co-ordination and undertakings introduced by the recast EU Insolvency Regulation cut across both reserved and devolved aspects of insolvency legislation. As such this instrument makes changes to devolved areas of corporate insolvency law in Scotland. Under section 57(1) of the Scotland Act 1998 the UK Government retains the power to implement EU obligations for Scotland in devolved areas and this is often used to facilitate UK-wide implementation in areas where competence is mixed.

5.4 This instrument also makes changes to the Insolvency (Northern Ireland) Order 1986. The power to do this is obtained from section 2(2) of the European Communities Act 1972 under which Westminster retains concurrent powers in respect of Northern Ireland.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy has made the following statement regarding Human Rights:

“In my view the provisions of the Insolvency Amendment (EU 2015/848) Regulations 2017 are compatible with the Convention rights.”

7. Policy background

What is being done and why

7.1 The recast EU Insolvency Regulation, which comes into force on 26 June 2017, replaces Council Regulation (EC) No. 1346/2000 of 29 May 2000 on jurisdiction, cooperation, and the recognition and enforcement of insolvency proceedings.

7.2 The amendments made by this instrument will ensure that the provisions of a number of enactments relating to procedure in relation to jurisdiction, cooperation, and the recognition and enforcement of insolvency proceedings as between courts in the United Kingdom and courts in other EU Member States, which either presently operate in relation to the original Insolvency Regulation or are new proceedings, are consistent with the provisions of the recast EU Insolvency Regulation.

7.3 In addition to updating references to the previous Regulation, there are three specific areas where we need to legislate to support the recast EU Insolvency Regulation. These are the deferment of dissolution where there are ongoing proceedings in another Member State and the office holder there has not consented to dissolution, the creation of procedures to support new measures in respect of undertakings in lieu of secondary proceedings and procedures for new measures on group co-ordination. (See 7.4 below)

7.4 There are two new measures introduced by the recast EU Insolvency Regulation:

Undertakings

Article 36 of the recast EU Insolvency Regulation allows an office-holder in the main insolvency proceedings to offer an undertaking to creditors in another Member State (local creditors) where assets belonging to the insolvent debtor are located and where secondary insolvency proceedings could be opened (the local jurisdiction). If approved by local creditors, the undertaking restricts the opening of secondary proceedings in that Member State. This is on the basis the undertaking will respect the priority and distribution rules of the law of the local jurisdiction. This provides protection for local creditors and forms the rationale for restricting secondary proceedings which can add cost and delay to the insolvency process and hinder a going concern sale in the main proceedings. Local creditors can, if they wish, challenge the office holder's adherence to the undertaking (if approved), and must do so in the court of the main proceedings.

Article 36, in effect, codifies a practice which has developed in the UK over the past decade, and has been found to save costs and improve the chances of business rescue

in cross-border insolvency cases. This instrument sets out the process by which the undertaking should be approved.

Coordination Proceedings

Chapter 5 (Articles 56 to 77) of the recast EU Insolvency Regulation introduces a range of measures aimed at facilitating coordination of cross-border insolvencies involving multiple companies from the same corporate group. This includes allowing an office-holder in one of the group companies to apply to a Member State court to appoint a coordinator with the purpose of coordinating the various connected proceedings as efficiently as possible. This is a non-binding proceeding so individual office-holders can choose whether or not to participate in the coordination, and even if they do participate, they can depart from the coordinator's plans at any time.

The coordination provisions in this instrument provide a formal framework which should improve the efficiency of proceedings and improve the chances of business rescue, particularly in large multi-national groups which operate across the EU.

Scotland

- 7.5 This instrument makes amendments to legislation relating to corporate insolvency in Scotland in both reserved and devolved areas. In particular in respect of liquidation where competence for insolvency policy is mixed; the legal effect of winding up being reserved to the UK Government and the process being devolved. To avoid users in Scotland having to refer to separate regulations in respect of winding up, Ministers have given consent for this instrument to address matters relating to devolved areas of winding up. In Scotland, court rules are the responsibility of the Lord President of the Court of Session and have been considered by his office.

Northern Ireland

- 7.6 This instrument will, in part, also apply to Northern Ireland where insolvency policy is devolved. The Department for the Economy has given consent for provisions in this instrument to apply in Northern Ireland.

Consolidation

- 7.7 The Insolvency Rules for England and Wales have recently been consolidated into one set of new Rules, The Insolvency (England and Wales) Rules 2016. A similar exercise is under way to consolidate the Insolvency (Scotland) Rules 1986, which are anticipated to come into force in 2018.
- 7.8 No further consolidation of the various enactments amended is planned at this time.

8. Consultation outcome

- 8.1 The Insolvency Service undertook public consultation in 2012, ahead of publication of the draft recast EU Insolvency Regulation, to inform the UK's position in subsequent negotiations to determine its final form. This was followed in 2013 by further consultation used to inform the UK's decision on whether or not to opt into the recast EU Insolvency Regulation in accordance with article 3 of protocol 21 annexed to the Treaty on European Union 2007 and to the Treaty on the Functioning of the European Union 2007.
- 8.2 In 2017 the Insolvency Service undertook targeted consultation with members of the insolvency profession, including insolvency lawyers and insolvency practitioners representing professional associations and the insolvency practitioner trade body, R3,

on the amendments contained in this instrument. Those consulted regularly deal with cross-border insolvency proceedings and are experts in this field.

- 8.3 The Institute of Chartered Accountants for Scotland (ICAS), who are the regulatory body for insolvency practitioners in Scotland, has been consulted regarding the changes to the Insolvency (Scotland) Rules 1986.
- 8.4 This instrument is being made using powers contained in section 2(2) of the European Communities Act 1972 to enable UK wide legislation to be amended. The changes include amendments to the Insolvency (England and Wales) Rules 2016, which form the main procedural framework governing the administration of insolvency proceedings in England and Wales. These Rules were made under section 413 of the Insolvency Act 1986 which requires formal consultation with the Insolvency Rules Committee where changes are made to the Insolvency (England and Wales) Rules 2016. Although this instrument is being made under s2(2) of the European Communities Act 1972, which does not require formal consultation with the Insolvency Rules Committee, the Insolvency Service has undertaken informal consultation with the Insolvency Rules Committee on the amendments made by this instrument, and it is content with the changes. The Insolvency Service has also engaged in discussion and exchange with other government departments, including those responsible for enactments that have been amended by this instrument and with the devolved administrations in Scotland and Northern Ireland.

9. Guidance

- 9.1 The Insolvency Service issues regular bulletins to interested parties. Such bulletins will be used to raise awareness of the new provisions contained in the recast EU Insolvency Regulation and this instrument.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is limited to those that are affected by cross-border insolvency proceedings, particularly where such entities are the subject of the insolvency proceedings or are creditors of the debtor, and those businesses that undertake activities in the insolvency sector, such as insolvency practitioner and legal practices.
- 10.2 The impact on the public sector is divided into two main areas. The Insolvency Service provides a range of services in fulfilment of statutory duties. These include cases in which an official receiver acts as the office-holder in compulsory liquidation and bankruptcy. The impact of the amendments made by this instrument are not forecast to be significant as cases dealt with by official receivers involving cross-border EU elements represent a small percentage of all cases.
- 10.3 The second main impact relates to the public sector as a creditor in insolvency proceedings. The Insolvency Service does not believe the public sector is a creditor in a significant number of cross-border EU insolvency proceedings where the insolvent debtor's centre of main interests is in another Member State. Where the public sector is a creditor in a cross-border EU insolvency proceedings and the insolvent debtor has its centre of main interests in the UK, there may be a benefit in that matters are dealt with more efficiently as a result of the provisions of the recast Insolvency Regulation.

10.4 In accordance with Better Regulation Requirements this measure has been assessed as being low impact, trivial or mechanical and as such does not require an impact assessment to be completed.

11. Regulating small business

11.1 The legislation applies to activities that may be undertaken by small businesses such as legal and insolvency practices but such practices are less likely to deal with cross-border insolvency proceedings so the impact identified should not be significant.

12. Monitoring & review

12.1 The recast EU Insolvency Regulation contains provisions for the European Commission to carry out a review of the application of the Regulation no later than June 2027 and every five years thereafter, as well as other review requirements in relation to specific aspects of cross-border insolvency proceedings. .

12.2 There is no requirement to review primary legislation so no review in relation to the amendments made to the Insolvency Act 1986 is planned. The Insolvency (England and Wales) Rules 2016 contains a review clause which, once triggered, will include the amendments made by this instrument. The Insolvency (Scotland) Rules 1986 are the current subject of a modernisation project expected to come into force in 2018. The amendments made by this instrument will be considered as part of this exercise. There is no requirement to review legislation in Northern Ireland.

13. Contact

13.1 Robert Mak at the Insolvency Service (telephone: 020 7637 1110 or email: robert.mak@insolvency.gsi.gov.uk) can answer any queries regarding the instrument.