

Draft Regulations laid before the Scottish Parliament under paragraph 1(7) of schedule 7 of the European Union (Withdrawal) Act 2018, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2019 No.

**EXITING THE EUROPEAN UNION
INSOLVENCY**

**The Insolvency (EU Exit) (Scotland)
(Amendment) Regulations 2019**

Made - - - - 2019

Coming into force in accordance with regulation 1

The Scottish Ministers make the following Regulations in exercise of the powers conferred by paragraph 1(1) and (3) of schedule 2 and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018⁽¹⁾ and all other powers enabling them to do so.

In accordance with paragraph 1(7) of schedule 7 of that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

Citation and commencement

1. These Regulations may be cited as the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 and come into force on exit day.

PART 1

Amendments to primary legislation

Amendment of the Insolvency Act 1986

2.—(1) The Insolvency Act 1986⁽²⁾ is amended as follows.

(2) In section 51 (power to appoint receiver)—

(a) in subsection (1)(b) omit “other than the United Kingdom”, and

(1) 2018 c.16.

(2) 1986 c.45. Relevant amendments have been made by S.S.I. 2011/140 and S.S.I. 2017/210.

- (b) in subsection (6) at the end of the definition of “the EU Regulation” insert “as that Regulation has effect in the law of the European Union”.

Amendment of the Bankruptcy and Diligence etc. (Scotland) Act 2007

3.—(1) The Bankruptcy and Diligence etc. (Scotland) Act 2007(3) is amended as follows.

(2) In section 45 (effect of floating charge on winding up)—

- (a) omit subsection (2),
- (b) in subsection (7)—
 - (i) omit paragraph (a), and
 - (ii) in paragraph (b), omit “in any other case,” and
- (c) omit subsection (8).

Amendment of the Bankruptcy (Scotland) Act 2016

4.—(1) The Bankruptcy (Scotland) Act 2016(4) is amended as follows.

(2) In section 2 (sequestration of estate of living debtor) omit subsection (1)(b)(ii) and (iii).

(3) In section 5 (sequestration of estate of deceased debtor) omit paragraphs (c) and (d).

(4) In section 6 (sequestration of other estates) omit subsections (3)(b)(i) and (ii), (4)(c)(i) and (ii) and (7)(b)(i) and (ii).

(5) In section 11 (debtor application: provision of information)—

- (a) in subsection (1)(a), for “another member State” substitute “a member State (other than Denmark)”,
- (b) for subsection (1)(b) substitute—
 - “(b) if the debtor’s centre of main interests is situated in a member State (other than Denmark), whether or not the debtor possesses an establishment in the United Kingdom.”,
- (c) in subsection (2)(a), for “another member State” substitute “a member State (other than Denmark)”,
- (d) for subsection (2)(b) substitute—
 - “(b) if the debtor’s centre of main interests was situated in a member State (other than Denmark), whether or not the debtor possessed an establishment in the United Kingdom.”, and

(e) omit subsection (3).

(6) In section 12 (petition for sequestration of estate: provision of information)—

- (a) in subsection (1)(a), for “another member State” substitute “a member State (other than Denmark)”,
- (b) for subsection (1)(b) substitute—
 - “(b) if the debtor’s centre of main interests is situated in a member State (other than Denmark), whether or not the debtor possesses an establishment in the United Kingdom.”, and
- (c) omit subsection (2).

(7) In section 13 (further provisions relating to presentation of petitions)—

(3) 2007 asp 3. Section 45 is not yet in force.

(4) 2016 asp 21. Relevant amendments have been made by S.S.I. 2017/210.

- (a) in subsection (2), omit paragraph (b)(ii) and (iii),
- (b) in subsection (3), omit paragraph (b)(ii) and (iii), and
- (c) in subsection (4)—
 - (i) after paragraph (b)(i), insert “or”, and
 - (ii) omit paragraph (b)(iii) and (iv).
- (8) Omit sections 14A and 14B(5).
- (9) In section 15 (jurisdiction) omit subsection (9).
- (10) In section 16 (meaning of “apparent insolvency”) omit subsections (1)(d) and (7)(c).
- (11) In section 79(2) (provision supplementary to section 78 and interpretation of Part 5) omit the words “and to section 231”.
- (12) In section 128 (voting and drawing a dividend) omit subsections (4) to (7).
- (13) In section 129 (priority in distribution) omit subsection (8).
- (14) In section 170 (protected trust deeds - documents to be sent to creditors) omit subsection (1)(d)(v).
- (15) Omit sections 190 to 192, 207, 208 and 226.
- (16) In section 228(1) (interpretation)—
 - (a) omit the following definitions—
 - (i) “creditor”,
 - (ii) “main proceedings”,
 - (iii) “member State insolvency practitioner”(6),
 - (iv) “secondary proceedings”(7),
 - (v) “temporary administrator”, and
 - (vi) “territorial proceedings”, and
 - (b) in the definition of “the EU insolvency proceedings regulation” at the end insert “as it forms part of domestic law on and after exit day”.
- (17) Omit section 231 (proceedings under EU insolvency proceedings regulation: modified definition of estate).
- (18) In schedule 5 (information to be included in the sederunt book) omit paragraph 3A(8).

PART 2

Amendments to secondary legislation

Amendment of the Bankruptcy Fees (Scotland) Regulations 2018

- 5.—(1) The Bankruptcy Fees (Scotland) Regulations 2018(9) are amended as follows.
- (2) In regulation 2 omit the definition of “member State insolvency practitioner”.

(5) Sections 14A and 14B were inserted by regulation 4(8) of the Insolvency (Regulation (EU) 2015/848) (Miscellaneous Amendments) (Scotland) Regulations 2017 (S.S.I. 2017/210).

(6) The definition of “member State insolvency practitioner” was inserted by regulation 4(21)(g) of S.S.I. 2017/210.

(7) The definition of “secondary proceedings” was inserted by regulation 4(21)(h) of S.S.I. 2017/210.

(8) Paragraph 3A was inserted by regulation 4(24) of S.S.I. 2017/210.

(9) S.S.I. 2018/127. A relevant amendment has been made by S.S.I. 2017/210.

(3) In Part 2 of the Table of Fees in the schedule (fees for other functions of the Accountant in Bankruptcy) omit item 21 (fee for conversion of a trust deed into sequestration).

Amendment of the Public Services Reform (Insolvency) (Scotland) Order 2016

6. In the Public Services Reform (Insolvency) (Scotland) Order 2016(10) omit article 15(6)(b) and the word “or” immediately preceding it.

Amendment of the Bankruptcy (Scotland) Regulations 2016

7.—(1) The Bankruptcy (Scotland) Regulations 2016(11) are amended as follows.

(2) In schedule 1 (forms), in form 11 (statement of claim by creditor) omit note 4 (particulars of each debt: claim by Member State liquidator).

(3) In schedule 2 (register of insolvencies), section B (protected trust deeds for creditors)—

- (a) after “Regulation (EU) 2015/848” insert “(as it forms part of domestic law on and after exit day)”, and
- (b) omit from “unless the granter” to “within the meaning of the said EU Regulation”.

Amendment of the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016

8.—(1) The Bankruptcy (Applications and Decisions) Scotland Regulations 2016(12) are amended as follows.

(2) Omit regulation 17 (conversion of protected trust deed into bankruptcy).

(3) In the schedule, omit forms 6 (conversion of protected trust deed into bankruptcy: section 190 application) and 7 (conversion of protected trust deed into bankruptcy: section 192 award).

Saving

9.—(1) Nothing in these Regulations affects—

- (a) the application of Council Regulation (EC) 1346/2000(13) to insolvency proceedings which fall within the scope of that Regulation and were opened before 26 June 2017, and
- (b) the saving for the existing law in regulation 9 of the Insolvency (Regulation (EU) 2015/848) (Miscellaneous Amendments) (Scotland) Regulations 2017(14).

(2) The amendments made by regulations 2 to 8 do not apply to proceedings opened before exit day.

(3) The time at which proceedings are opened is to be determined in accordance with Article 2(8) of Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings(15).

(10) S.S.I. 2016/141. A relevant amendment has been made by S.S.I. 2017/210.

(11) S.S.I. 2016/397. Relevant amendments have been made by S.S.I. 2017/210.

(12) S.S.I. 2016/295. Relevant amendments have been made by S.S.I. 2017/210.

(13) OJ L 160, 30.06.2000, p.1 as last amended by Council Implementing Regulation (EU) 2016/1792 of 29 September 2016, OJ L 274, 11.10.2016, p.35.

(14) S.S.I. 2017/210.

(15) OJ L 141, 5.06.2015, p.19 as last amended by Regulation (EU) 2017/353 of the European Parliament and of the Council of 15 February 2017 O.J. L 57, 3.3.2017 p.19.

St Andrew's House,
Edinburgh
Date

Name
Authorised to sign by the Scottish Ministers

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations address 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. They include changes consequential on amendments made to the EU Regulation on insolvency proceedings ((EU) 2015/848) (“the EU Regulation”) by the Insolvency (Amendment) (EU Exit) Regulations 2018 (S.I. 2018/[]) (“the UK Regulations”).

The EU Regulation determines in which member State main insolvency proceedings may be opened and provides for decisions opening proceedings 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 (“COMI”) is located. Secondary proceedings may be brought in a state where the debtor has an establishment. The EU Regulation makes other provisions to facilitate the operation of cross-border insolvency proceedings including for co-operation between courts and insolvency practitioners.

The UK Regulations address deficiencies that will arise from the absence of mutual application of the EU Regulation between the UK and the EU member States from exit day. They amend the EU Regulation (as it forms part of domestic law on and after exit day) by repealing the majority of its provisions, which are based on mutual application between member States, and removing the existing restrictions on opening insolvency proceedings where COMI is in a member State. They also make other changes to domestic insolvency law, including to reserved and devolved aspects of Scots insolvency law.

The UK Regulations retain the jurisdictional test based on COMI as an additional ground for jurisdiction to open insolvency proceedings. This applies from exit day in addition to any grounds to open such proceedings which apply in the laws of any part of the UK.

These Regulations address legislative deficiencies arising in the devolved areas of receivership, the effect of floating charges on winding up, bankruptcy and protected trust deeds.

Regulation 2 amends section 51 of the Insolvency Act 1986, which sets out that it is competent for the holder of a floating charge to appoint a receiver over the property of a company where either the Court of Session has jurisdiction to wind up the company, or a court of a member State other than the UK has jurisdiction under the EU Regulation to open insolvency proceedings in respect of the company. The amendments make clear the reference to the EU Regulation is to the EU Regulation as it has effect in the law of the EU (rather than as it is retained in domestic law from exit day), and remove a reference to the UK as an EU member State.

Regulations 3 and 4 make amendments to the Bankruptcy and Diligence etc. (Scotland) Act 2007 and the Bankruptcy (Scotland) Act 2016 (“the 2016 Act”) which are consequential on the amendments to the EU Regulation made by the UK Regulations. The amendments to sections 11 and 12 of the 2016 Act reflect that, under the UK Regulations, the retained jurisdictional test based on COMI will apply where the debtor’s COMI is in a member State of the EU other than Denmark, since Denmark is not a party to the EU Regulation.

Regulations 5 to 8 make amendments to secondary legislation which are consequential on the amendments to the EU Regulation made by the UK Regulations.

Regulation 9 provides that the amendments made by regulations 2 to 8 do not apply to proceedings opened before exit day.

A partial business and regulatory impact assessment was prepared in respect of the Regulations, copies of which can be obtained from the Accountant in Bankruptcy, 1 Pennyburn Road, Kilwinning.

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Draft Legislation: *This is a draft item of legislation. This draft has since been made as a Scottish Statutory Instrument: The Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 No. 94*