EXPLANATORY MEMORANDUM TO

THE INSOLVENCY (AMENDMENT) (EU EXIT) (NO. 2) REGULATIONS 2019

2019 No. [XXXX]

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.

1.3 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. Changes made by these regulations are necessary as a result of the change in exit day from 29 March 2019 to 31 October 2019.

2. Purpose of the instrument

2.1 The Regulations make amendments to the Insolvency (Amendment) (EU Exit) Regulations 2019 which are required as a result of the extension to the UK's exit from the EU.

2.2 The majority of the amendments arise from the introduction of new Scottish Insolvency Rules, which came into force on 6 April 2019, and which the previous SI could not address. Not amending these new rules to take account of EU exit would create uncertainty for businesses and consumers in Scotland, and an inefficient insolvency process – undermining confidence and the UK insolvency regime's reputation.

2.3 Additionally, Article 25 of the EU Insolvency Regulation 2015 (EUIR), which came into force on 26 June 2019, and so could not be revoked by the previous SI, will require revocation so as to be clear that there is no legal obligation to integrate UK insolvency registers with the EU.

Explanations

What did any relevant EU law do before exit day?

2.4 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.

2.5 After the major part of the EUIR came into force in 2017, amendments were made to a number of instruments to facilitate its implementation in the UK. 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 – until 6 April 2019, see below – 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.

2.6 Since the making of the Insolvency (Amendment) (EU Exit) Regulations 2019 the Insolvency (Scotland) Rules 1986 have been replaced with the following new Rules: the Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018 and the Insolvency (Scotland) (Receivership and Winding up) Rules 2018. As the UK presently remains a member of the EU the new Rules refer to EU legislation, currently in force, that will be revoked upon the UK's exit.

2.7 On 26 June 2019 Article 25 of the EUIR came into force. This requires the European Commission to establish a decentralised system for the interconnection of insolvency registers across the EU. The EUIR places a similar duty on member States to ensure that their insolvency registers will have the ability to connect to the system devised by the EU, for which there is currently no deadline, but will begin to be enforced by the Commission in due course.

Why is it being changed?

2.8 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 reciprocation between EU member States in order to operate effectively, in a no deal scenario it is not possible to continue the current system unilaterally. It will not be appropriate to take part in an interconnection of insolvency registers with the EU.

2.9 The amendments made by the earlier Insolvency (Amendment) (EU Exit) Regulations 2019 were 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. The amendments made by the current instrument, the Insolvency (Amendment) (EU Exit) (No. 2) Regulations 2019, are required in order to extend the same policy to the new developments in insolvency law referenced above.

What will it now do?

2.10 The primary effect of this instrument (as with the previous instrument made by Parliament) is to ensure that all of the provisions of the EUIR which rely on reciprocity between member States are repealed from UK law.

2.11 The Insolvency (Amendment) (EU Exit) Regulations 2019 will, upon entering into force on exit day, maintain a modified version of the EUIR's jurisdictional tests for the opening of insolvency proceedings. This will sit alongside the UK's other domestic rules regarding jurisdiction. The remainder of the EUIR relies on reciprocity between member States and will therefore be repealed.

2.12 The current instrument makes the necessary changes to ensure that new insolvency law, entering into force since 29 March 2019, will be amended on exit day in line with the above approach. This includes updating new Scottish insolvency law which came into force on 6 April 2019; and revoking Article 25 of the EUIR, which came into force on 26 June 2019, so as to remove any obligation to connect UK insolvency registers to those of the EU member States.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The amendments are made under section 8 of the European Union (Withdrawal) Act 2018, in order to address deficiencies in the operation of retained EU law.

3.2 This instrument has been brought forward using the affirmative resolution procedure because it amends The Insolvency (Amendment) (EU Exit) Regulations 2019, which were also made using the affirmative procedure.

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. 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 basis for the amendments is the lack of reciprocity after exit day.

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 is 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 the 'legal effect' being reserved and the 'process' being devolved.

4.5 Insolvency law is fully devolved to Northern Ireland.

4.6 Amendments to Article 25 of the modified EUIR extend to the whole of the United Kingdom.

4.7 All other amendments extend to Scotland only.

4.8 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:

5.2 "In my view the provisions of The Insolvency (Amendment) (EU Exit) (No. 2) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

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

6.1 The Insolvency (Amendment) (EU Exit) Regulations 2019 made amendments to the retained EUIR to deal with deficiencies in retained law relating to cross border insolvencies. Those Regulations retained provisions that are beneficial to the United Kingdom and removed those which no longer operate effectively. Amendments were made to the relevant primary and secondary legislation to accommodate these changes, and to ensure our domestic legislation functions effectively after exit. These Regulations update those amendments to take account of subsequent changes to EU law and domestic law.

7. Policy background

What is being done and why?

7.1 The purpose of this instrument is to ensure that the elements 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.

7.2 In the absence of a reciprocal deal with the EU to replicate the current arrangements provided by the EUIR, incorporating the entirety of 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. Furthermore, 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 The previous instrument made by Parliament, the Insolvency (Amendment) (EU Exit) Regulations 2019, implemented this policy in respect of the legislation in force as at 29 March 2019. However, new insolvency legislation has come into force since that date.

7.4 This instrument therefore amends new Scottish legislation to ensure references and other terms related to the EUIR are removed or updated; and ensures that associated legislation reflects the new provisions.

7.5 It also amends legislation for England and Wales to revoke Article 25 of the EUIR, which refers to the connection of insolvency registers across the EU. A requirement to connect the UK registers to those of the EU member States would be inappropriate in the event that the UK leaves the EU without a deal.

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.

9. Consolidation

9.1 N/A

10. Consultation outcome

10.1 As there has been no change to policy from The Insolvency (Amendment) (EU Exit) Regulations 2019, further consultation has not been carried out. Drafting has been carried out in consultation with the devolved administration in Scotland.

11. Guidance

11.1 The Insolvency Service issues regular bulletins to interested parties; 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.

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 firms, 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 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.
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) (No. 2) Regulations 2019 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.

1.4 A previous instrument dealt with this in respect of legislation in force as at 29 March 2019. Further legislation that has come into force since the 29 March 2019 must now be corrected or revoked.

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-paragraphs 7.2 – 7.5.

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.