EXPLANATORY MEMORANDUM TO

The Provision of Services (Insolvency Practitioners) Regulations (Northern Ireland) 2009

S.R. 2009 No. 401

1. Introduction

1.1. This Explanatory Memorandum has been prepared by the Department of Enterprise, Trade and Investment to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.

1.2. The Statutory Rule is made under section 2(2) of the European Communities Act 1972 ("the 1972 Act") and by Articles 348A, 349, 351, 352 and 363 of the Insolvency (Northern Ireland) Order 1989. and is subject to the negative resolution procedure.

1.3. The rule is due to come into operation on 28 December 2009.

2. Purpose

2.1. These Regulations amend the Insolvency (Northern Ireland) Order 1989 ("the 1989 Order") and the Insolvency Practitioners Regulations (Northern Ireland) 2006 ("the IP Regs") for the purposes of giving effect to the EC Directive of 12th December 2006 on services in the internal market (2006/123/EC, "the Directive") (Official Journal No. L376/36 27.12.2006) as it relates to the authorisation of insolvency practitioners.

2.2. The Directive, which comes into force on 28 December 2009, establishes general provisions facilitating the exercise of freedom of establishment for service providers and the free movement of services throughout the member states of the EEA.

3. Background

3.1. The basic tenet of the Directive is that in order to establish a genuine internal market for services, it is necessary to abolish any restrictions on the freedom of establishment and the free movement of services which are still enshrined in the laws of certain Member States and which are incompatible with Articles 43 and 49 of the Treaty establishing the European Community.

3.2. The elimination of barriers to the development of service activities between Member States is essential to strengthen the integration of the peoples of Europe and to promote balanced and sustainable economic and social progress.

3.3. The Directive requires that any restrictions which affect the internal market for services shall be systematically dismantled as soon as possible.

3.4. All Member States have an obligation to implement the Services Directive by 28 December 2009. The objective is to help liberalise the service sector within the EU, facilitating trade and further opening the EU service sector to competition.

3.5. Authorisation schemes are one of the most common formalities applied to service providers in Member States and constitute a restriction to the freedom of establishment. For this reason, the Directive provides that Member States must review their existing authorisation schemes to make access to them equally available to all EU nationals.

3.6. Article 5 of the Directive prohibits a requirement for original documentation or certified copies to be provided. Article 8 establishes an obligation for Member States to ensure that all procedures and formalities relating to access to or the exercise of a service activity may be easily completed, at a distance and by electronic means. These Regulations amend the 1989 Order to make provision for insolvency documentation to be received, stored and transmitted by electronic means.

3.7. In relation to the authorisation of insolvency practitioners (IPs), Article 10 of the Directive requires that they can practise throughout the territory of a Member State unless a particular jurisdiction is justified by an overriding reason relating to the public interest in requiring a separate authorisation. Since insolvency legislation in NI mirrors that of GB, there is no justifiable reason relating to the public interest to require IPs to make separate applications for authorisation in both jurisdictions.

3.8. IPs are authorised by Recognised Professional Bodies (RPBs) or by DETI in Northern Ireland and by RPBs or the Secretary of State (SoS) in GB. Authorisations by DETI and the SoS do not entitle the IP to practise in both jurisdictions since these procedures only have effect under the law of each jurisdiction. These Regulations make provision to enable IPs authorised in GB to act legally in that capacity in NI and to enable bodies having established places of business outside the UK to be accredited RPBs in NI.

3.9. This amendment will also have the effect that if an authorisation in one jurisdiction were to be withdrawn, it would automatically no longer hold good in the other.

3.10. Article 11 of the Directive requires that the granting of an authorisation to provide a service must be for an indefinite period, except where the authorisation (a) is automatically renewed, or (b) is subject only to the continued fulfilment of requirements. Article 352 of the 1989 Order and Regulation 10 of the IP Regs had fixed a maximum period of three years for each authorisation granted by the Department. These Regulations make amendments to the 1989 Order and to the IP Regs to remove this restriction to comply with the Directive.

3.11. Article 14 of the Directive requires that access to a service activity in a Member State must not be made subject to criteria such as place of establishment, residence, domicile or principal provision of the service activity. Article 350 of the 1989 Order required that professional bodies had to have an established address in the UK or have members who were residents of Northern Ireland. These Regulations amend Article 350 to remove these restrictions.

3.12. Article 16 of the Directive requires Member States to ensure that authorisation procedures are neither dissuasive, nor unduly complicate or delay the provision of the service.

3.13. Regulation 7 of the IP Regs requires that someone applying to DETI to be an Insolvency Practitioner (IP) for the first time must have 7,000 hours of experience. Given that the applicant must have passed the Joint Insolvency Examination Board exam and therefore has already demonstrated the academic knowledge to be an IP, it is considered that the current requirement is an unjustifiable barrier to service provision. This requirement is being reduced from 7,000 hours to 2,000 hours, which brings it into line with what is currently required by the Insolvency Service in GB.

3.14. Article 23(2) of the Directive concerns service providers already established in one Member State who want to establish in another State. The Member State where a service provider wants to establish must take into account insurance or guarantee requirements to which the provider is already subject in the first State, and may not require the provider to take out any additional insurance or guarantee if the existing insurance or guarantee can be considered equivalent or essentially comparable.

3.15. Schedule 2 to the IP Regs prescribes the security required for the proper performance of the functions of an IP as "a bond in a form approved by the Department." These Regulations amend Schedule 2 to provide a discretion for the Department to accept an alternative form of security for the activities of an IP.

3.16. Whether such an alternative insurance or a guarantee is equivalent or essentially comparable shall be assessed by the Department in the light of its purpose and the cover it provides in terms of insured risk, insured sum or ceiling for the guarantee and any exclusions from the cover.

4. Matters of Special Interest to the Enterprise, Trade and Investment Committee

4.1. None.

5. Consultation

5.1. A consultation was undertaken across the UK on the requirements of the EU Services Directive by the Department for Business, Innovation and Skills, the results of which were posted on the Department's website in June 2008. The measures proposed to implement the provisions of the Directive have also been the subject of a number of discussions with representatives of Insolvency Practitioners and Recognised Professional Bodies throughout the UK over the past year and no negative feedback has been received from this section of the profession. The Insolvency Service plans to publish the amendments to NI legislation on its website when this Statutory Rule has been made.

6. Position in Great Britain

6.1. The Insolvency Service in GB is making parallel amendments to the equivalent insolvency legislation, to be brought into force by 28 December 2009, to comply with the deadline set by the Directive.

7. Equality Impact

7.1. An equality impact assessment has not been prepared as the proposed Regulations will not have any differential impact in terms of equality.

8. Regulatory Impact

8.1. A full Impact Assessment was completed for the UK on the requirements of the EU Services Directive by the Department for Business Innovation and Skills, the results of which were posted on the Department's website in May 2009.

9. Financial Implications

9.1. The provisions of the Directive are aimed at reducing the burden of administration currently imposed on cross-border service providers, which should result in long term savings for the providers and for the competent authorities.

10. Section 24 of the Northern Ireland Act 1998

10.1. The regulations are considered to be compliant with section 24 of the Northern Ireland Act 1998, in that they are compatible with Community Law and Convention Rights as defined in the Human Rights Act 1998.

11. EU Implications

11.1. These Regulations are made to comply with the provisions of EC Services Directive 2006/123. A Transposition Note is attached to this Explanatory Memorandum at Annex A.

12. Additional Information

12.1. N/A

ANNEX A

The Provision of Services (Insolvency Practitioners) Regulations (Northern Ireland) 2009: Transposition Note

1.1. This Transposition Note explains how The Provision of Services (Insolvency Practitioners) Regulations (Northern Ireland) 2009 ("the Regulations") transpose Directive 2006/123/EC of 12 December 2006 on services in the internal market ("the Directive") as it relates to the authorisation of insolvency practitioners and the regulation of the services they provide.

1.2. The Directive has been incorporated into the European Economic Area (EEA) Co-operation Agreement and accordingly the Regulations apply in relation to the EEA states of Iceland, Liechtenstein and Norway in addition to the EU Member States

1.3. The Provision of Services Regulations 2009 (S.I.2009/3081) (produced by the Department for Business, Innovation and Skills) make general provision implementing the Directive in the UK. In accordance with the statement in that Transposition Note, that further consequential changes will be included in other instruments, these Regulations make provision in existing Northern Ireland insolvency legislation.

1.4. Table 1 seeks to explain how the main elements of the Directive are being transposed, including cross-references to the specific provisions of the Regulations. In no area do these Regulations do more than is necessary to implement the Directive.

Table 1

Article	Objectives	Regulations cross-reference	Implementation
5.3	Obliges Member States, when they require a particular certificate or other document from a provider or recipient, to accept any documentation that makes clear the requirement is satisfied. [Member States may continue to require non-certified translations.]	1(3) and paras 8(4) and 8(7) of the Schedule	Permits an insolvency practitioner to send the document providing security for the proper performance of his functions required by an insolvency practitioner in order to hold office, or a copy of it, to the insolvency practitioner's authorising body. The document or the copy may be sent electronically.
8.1	Requires that all procedures and formalities relating to access to or the exercise of a service activity may be easily completed, at a distance and by electronic means.	1(3), 1(4); paras 8(4), 8(5) and 8(7) of the Schedule	Make provision in the Order for electronic communication.
10.4	Prohibits limiting authorisation to a certain jurisdiction within a Member State unless there is an overriding reason relating to the public interest.	2(2) 2(3) 2(4)	Permits a person authorised to act as the nominee or supervisor of a voluntary arrangement in Great Britain by virtue of membership of a body authorised for that purpose in Great Britain to be authorised so to act in Northern Ireland. Permits an insolvency practitioner authorised by a competent authority in Great Britain to be authorised so to act in Northern Ireland. Removes territorial restrictions relating to membership of recognised professional bodies
11.1	Prohibits Member States from granting an authorisation for a limited period, except in certain circumstances, one of which is where the authorisation is being automatically renewed or is subject to continued fulfilment of requirements.	2(5)	Provides that the period for authorisation to act as an insolvency practitioner is limited to 1 year with further authorisations for one year being granted without further application subject to continued fulfilment of the prescribed requirements.

13.2	Requires that authorisation procedures are not dissuasive or complex, are easily accessible and proportionate	3 and paragraph 3(2) of the Schedule	Reduces the insolvency experience required by persons in the two years preceding applying to the Department for authorisation as an insolvency practitioner (and who have never previously been authorised to act as an insolvency practitioner) from 7,000 hours to 2,000 hours.
23.2	Prohibits Member States from requiring that providers established in their territory take out professional liability insurance or a guarantee if the provider is already covered by equivalent or essentially comparable cover. Allows Member States to require a top-up when equivalence is only partial. Requires Member States to recognise attestations of cover issued by institutions based in other Member States.	3 and paragraph 8 of the Schedule	Provide that professional liability insurance or a guarantee cover, already obtained in another Member State where insolvency practitioners are established, which equates to or is essentially comparable to a bond may be considered as security for the proper performance of the functions required by insolvency practitioners for them to hold office. There is also provision for a supplementary guarantee to remedy partial equivalence.
44	Requires Member States to transpose the Directive into national legislation and practices by 28 December 2009, with a reference to the Directive included	1	Regulation 1 provides that the Regulations come into force on 28 December 2009.