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DEAR INSOLVENCY PRACTITIONER Issue 83 – November 2018

*Message from Angela Crossley
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Dear Reader

Attached is a special edition of Dear IP concerning The Insolvency (Amendment) (EU Exit) Regulations 2018.

These draft Regulations deal with the scenario where the UK leaves the EU without a deal on insolvency. Whilst we may now be closer to an agreement with the EU, it has always been the case that as we get nearer to March 2019, preparations for a ‘no deal’ scenario would have to be accelerated. The draft Regulations will ensure the UK insolvency framework will provide maximum continuity and certainty for current insolvency proceedings in the scenario that they need to be relied upon.

This is an affirmative statutory instrument so the Regulations will remain in draft until they have been debated in both Houses of Parliament and will only come into force if a deal is not reached.

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Insolvency Rules, Regulations and Orders

EU Exit statutory instrument (“No Deal”): The Insolvency (Amendment)(EU Exit) Regulations 2018

62) EU Exit statutory instrument (“No Deal”): The Insolvency (Amendment)(EU Exit) Regulations 2018

The Government has made clear that it is in the interests of the UK and the EU that there continues to be an effective framework for resolving cross-border legal disputes, including insolvency, after we leave the EU. However, the Government has a duty to prepare for all eventualities, including ‘no deal’, until we can be certain of the outcome of the negotiations.

Whilst we may now be closer to an agreement with the EU, it has always been the case that as we get nearer to March 2019, preparations for a ‘no deal’ scenario would have to be accelerated. That is why yesterday the Government has laid in draft *The Insolvency (Amendment)(EU Exit) Regulations 2018* (“the Regulations” –

<http://www.legislation.gov.uk/id/ukdsi/2018/9780111174906>.),

which deals with the impact of leaving the EU in a no deal scenario on cross-border and employment rights insolvency cases. As this is an ‘Affirmative’ instrument, the Regulations remain in draft until they are enacted by each House of Parliament. The draft Regulations will ensure the UK insolvency framework will provide maximum continuity and certainty for current insolvency proceedings in the scenario that they need to be relied upon.

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 relation to the Employment Rights Act 1996, Pension Schemes Act 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.
- it also sets out transitional provisions for insolvency proceedings that are opened under the EUIR before Exit day.

Amendments to the EUIR and consequential amendments to insolvency legislation

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 (“COMI”) is located or in which an establishment is located. On exit day the EUIR will become ‘Retained EU law’ due to the European Union (Withdrawal) Act 2018 and will still have effect in the UK. However, the EUIR relies on mutual application by Member States, so in the

event of a no deal scenario it will not be appropriate for the UK to continue to apply it unilaterally in respect of EU and UK insolvency proceedings when the remaining EU Member States will not be compelled to apply it where the UK is concerned.

What the Regulations do

The primary purpose of the Regulations is to modify the retained EUIR and related domestic legislation so that UK insolvency law will operate effectively after exit day. In relation to Scottish Insolvency Legislation the Regulations only apply to reserved areas or areas of cross competency (i.e. company winding-up - with the agreement of Scottish Parliament) purely devolved matters will be covered in a Scottish Statutory Instrument in due course.

The Regulations maintain a modified version of the EUIR's jurisdictional tests ('COMI' and 'Establishment') for the opening of insolvency proceedings, and these tests will sit alongside the UK's domestic provisions on jurisdiction (see Part 1 of the Regulations). However, the EUIR will no longer restrict the opening of proceedings under other UK jurisdictional tests, so it will be possible to open insolvency proceedings under any of the tests set out in our domestic UK law where the debtor is based elsewhere in Europe. Retaining the EUIR jurisdiction tests in this way ensures that the UK courts will continue to have jurisdiction to open insolvency proceedings in appropriate cases. It also provides clarity as to the status of UK insolvency orders in cases where the debtor's COMI is in the UK or the debtor has an establishment here, which will assist foreign courts when assessing whether to recognise those UK orders in their jurisdiction.

The rest of the EUIR, which forms the majority, relies on reciprocity between Member States, and so those provisions are repealed.

The Regulations contain transitional provisions for cases where insolvency proceedings were opened in the United Kingdom before exit day (to which the EUIR applied - see regulations 4 and 5). They provide for the continued application of the existing law to those cases, but as we will no longer be able to rely on EU member States applying the EUIR in dealing with the UK, the Regulations allow the court to override the existing law where it would lead to a different outcome than would occur at present and either the court considers that one or more party to the proceedings would be materially prejudiced or it would be manifestly contrary to public policy to apply the relevant Regulation. In such circumstances, the court is not bound to apply the provisions of the EUIR and can instead make any other order that it thinks fit.

Amendments are made to UK domestic legislation (Parts 2 – 10) 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 reversed by the Regulations.

The Regulations also make an amendment to s.239 of the Insolvency (Northern Ireland) Order 1989 to align the bankruptcy jurisdiction in Northern Ireland with the EUIR (see para 177 of the Schedule).

The impact on insolvency cases

If we leave the EU without a deal on cross-border insolvency, EU countries will be under no obligation to automatically recognise UK insolvency orders. Insolvency practitioners will need to make applications under an EU country's domestic law in order to have UK orders recognised there. Where appropriate insolvency practitioners may wish to take professional advice on the prospects of successfully obtaining recognition for a UK insolvency order in an EU country.

In the same way, EU insolvency proceedings and judgments will no longer be automatically recognised in the UK under the EUIR, but may be recognised following a court application under the UK's Cross-Border Insolvency Regulations.

Amendments to the Employments Rights Act and Pension Schemes Act

The Regulations also make amendments to sections 166 and 183 of the Employment Rights Act 1996, section 123 of the Pension Schemes Act 1993, sections 201 and 228 of the Employment Rights (Northern Ireland) Order 1996, and section 119 of the Pension Schemes (Northern Ireland) Act 1993, which transpose obligations placed on the UK by Directive 2008/94 EC of the European Parliament and the Council regarding the protection of employees in the event of the insolvency of their employer.

The amendments are aimed at ensuring continuity in the operation of these provisions as, although we are leaving the EU, the Government considers that the employment rights previously required by the Directive should be protected. For IPs administering redundancies that result from a UK insolvency, there will be no change in procedure or in the protections available to the affected employees.

What the Regulations do

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. Part 12 amend the transposition of Directive 2008/94 EC in Northern Ireland, which also align the Northern Ireland legislation with the legislation applying to England, Wales and Scotland.

The impact on insolvency cases

In practice, this will not affect the procedure for dealing with claims to the Redundancy Payments Service (RPS). Claims will still be made in the same way, and the RPS will still require the same information from office holders.

Next steps

This is an affirmative statutory instrument so will be debated in both Houses of Parliament before being made.

If we are unable to agree a deal with the EU in respect of cross-border insolvency matters the majority of the Regulations come into force on exit day. Certain amendments to the law in Northern Ireland will come into force on the day after the Regulations are made (see para 177, para 187(c) and Part 12 of the Regulations).

Enquiries regarding this article may be sent to Policy.Unit@insolvency.gsi.gov.uk